To Be Argued By:
JIM WALDEN
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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

PAUL NICHOLS, GAVIN WAX, GARY GREENBERG,

Petitioners-Appellants,

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

Respondents-Respondents.

CASE NO. 2022-02301

BRIEF FOR PETITIONERS-APPELLANTS

JIM WALDEN
PETER A. DEVLIN
WALDEN MACHT & HARAN LLP
250 Vesey Street, 27th Floor
New York, New York 10281
(212) 335-2030
jwalden@wmhlaw.com
pdevlin@wmhlaw.com

Attorneys for Petitioners-Appellants Paul Nichols and Gary Greenberg

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

Attorney for Petitioner-Appellant Gavin Wax

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STATEMENT OF QUESTIONS PRESENTED

1. The Court of Appeals held in *Harkenrider v. Hochul* that the method used by the Legislature to enact Congressional, Senate, and Assembly district maps violated Article III of the New York Constitution. The Court, however, declined to invalidate the Assembly map "despite its procedural infirmity" because the petitioners in *Harkenrider* did not seek such relief. Is the Assembly map unconstitutional under Article III?

   THE TRIAL COURT DID NOT ANSWER THIS QUESTION.

2. Is a challenge to an apportionment under Article III, Section 5 subject to a judicially created timeliness requirement, which appears nowhere in the text or implementing legislation, and where such a requirement conflicts with the text's unambiguous dictate that an apportionment "shall be subject to review" and an apportionment found to violate Article III "shall be invalid"?

   THE TRIAL COURT INCORRECTLY ANSWERED THIS QUESTION IN THE AFFIRMATIVE.

3. The Petition asserts a claim for declaratory judgment that the Assembly map is unconstitutional and prays for various forms of relief, which could include requiring that a new map created by a special master be used in a special election in 2023 or in subsequent elections starting in 2024. Is the entire Petition barred by the equitable doctrine of laches?

   THE TRIAL COURT INCORRECTLY ANSWERED THIS QUESTION IN THE AFFIRMATIVE.

Petitioners-Appellants Paul Nichols, Gavin Wax, and Gary Greenberg, respectfully submit this Brief in support of their appeal from the Decision and Order of the Supreme Court, New York County (Love, J.) (the "Trial Court"), dated May 25, 2022, denying the Petition.

PRELIMINARY STATEMENT

There is no dispute that Petitioners' constitutional claim is iron-clad. On April 27, 2022, the New York Court of Appeals held that the redistricting procedure used by the Legislature was unconstitutional. *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *9 (N.Y. Apr. 27, 2022). The Court found that the Legislature bypassed critical constitutional safeguards designed to prevent partisan gerrymandering and assure New Yorkers that district maps—which form the foundation of elections for a decade—have been drawn fairly with input from voters and candidates of all sides. *Id.* So, "to guarantee the People's right to a free and fair election," the Court invalidated the Congressional and Senate maps and remanded to the supreme court to "adopt constitutional maps with all due haste." *Id.* at *12–13.

The Assembly map is equally tainted for the same reason. The supreme court in *Harkenrider* already declared the map unconstitutional because "[t]he same faulty process was used for all three maps." Index No. E 2022-0116 CV, slip. op. at 10 (Mar. 31, 2022) (NYSCEF No. 243). The only reason that the Assembly map still stands is because the petitioners in *Harkenrider* did not defend the court's decision

or seek to invalidate the Assembly map. The Court of Appeals therefore found that it "*may not* invalidate the assembly map *despite its procedural infirmity*," even as it invalidated the Senate map because of that infirmity alone. *Harkenrider*, 2022 WL 1236822, at *11 n.15 (emphasis added). Under *Harkenrider*, it is undeniable that the Assembly map is unconstitutional.

Dispositively for the Petition, the Court of Appeals held that the procedure the Legislature used to enact the maps was unconstitutional, and it invalidated the Senate map on that basis alone (and the Congressional map as both procedurally and substantively infirm). *Id.* at *1. The Constitution requires that an apportionment "found to violate the provisions of [Article III] *shall be invalid* in whole or in part." N.Y. Const. Art. III, § 5 (emphasis added). All that remains now is to declare the Assembly map unconstitutional—the central claim of the Petition—and order some further just relief from the Legislature's unconstitutional action.

Yet the Trial Court failed to address the fundamental and glaring issue of the Assembly map's constitutionality. The Trial Court further failed to determine what relief is just and proper to address the Legislature's undisputed violation, even though the Trial Court observed that the remedy "remains an open question." R. 10. Instead, the Trial Court denied the Petition "in its entirety" because (i) it denied Petitioners' emergency motion for a restraining order, and (ii) Petitioners requested that "should this Court deny Petitioners' Order to Show Cause, that the Court enter

a final judgment determining the Petition." R. 15. But Petitioners' emergency motion sought only targeted and limited relief to restrain use of the Assembly map for the 2022 election. And Respondents' opposition relies on (flawed) arguments that apply only to the relief sought regarding the 2022 election.

Although the 2022 election has been harmed, the relief sought in the Petition is not so limited. First and foremost, the Assembly map must be declared unconstitutional, regardless of the form of relief ordered to address the Legislature's unconstitutional gambit. The Trial Court erroneously treated Petitioners' emergency motion as dispositive to the entire Petition, ruling *sub silentio* on the constitutionality of the Assembly map. The Trial Court also failed to consider the full scope of possible relief that was requested in the Petition. Such relief can include adopting a new Assembly map for future elections while allowing it to be used (regrettably) for the 2022 election—as the Court of Appeals and numerous courts have done when district lines are invalidated close to an election, and as Respondents themselves urged the Court of Appeals to do in *Harkenrider*.

This Court should reverse and declare the Assembly map unconstitutional. This Court should further order all just and necessary relief. A court has great flexibility to craft an appropriate remedy. Because the unconstitutional Assembly map will compromise the 2022 elections, Petitioners have diligently sought to adopt a new Assembly map in time for the 2022 election, requesting—within days of the

Court of Appeals' decision in *Harkenrider*—the same procedure undertaken for the Congressional and Senate maps. There is still time, and the present emergency is Respondents' fault alone. But to the extent relief for the 2022 election is no longer feasible or otherwise barred, this Court should order that a new Assembly map be adopted for a 2023 special election or the 2024 regular election. The 2022 election is not the only one impacted: elections for the next decade (until the next redistricting cycle) will suffer the same constitutional injury.

Absent relief, an unconstitutional map will stand for a generation. No court should tolerate this illegality. No court should refuse every remedy. The Court of Appeals ruled that all district maps bypassed a critical constitutional procedure designed to safeguard elections from partisan manipulation and instill voter confidence in our democracy. The Congressional and Senate maps have already been invalidated, as the Constitution requires. The Assembly map—drawn by the Legislature in circumvention of constitutionally required procedure—is unfair to voters and candidates and undermines the integrity of the election.

NATURE OF THE ACTION

I. New Yorkers amend the Constitution, adopting redistricting reforms to fight gerrymandering and extreme partisanship

Defining the boundaries of voting districts—and thus including or excluding certain communities, neighborhoods, and individuals—has tremendous political ramifications. R. 24. For that reason, parties have historically vied for control over

the process of defining those boundaries. This power struggle has been and remains subject to political exploitation and abuse: in a word, gerrymandering.

Gerrymandering is the political manipulation of voting district boundaries to serve nakedly partisan ends—shuffling minority party votes into uncompetitive majority-dominant districts (where the minority votes are meaningless); dividing and conquering powerful communities and neighborhoods; and stacking majority-party blocks to flip or secure districts that are considered too "competitive" by the majority party. R. 24. Gerrymandering is vote rigging to ensure dominance by incumbents or a political party. It erodes democratic norms, as it effectively predetermines the outcomes of elections, disenfranchising voters while representative bodies gravitate towards extreme partisanship.

In 2014, New Yorkers amended the Constitution "in response to criticism of the scourge of hyper-partisanship." *Harkenrider*, 2022 WL 1236822, at *7. The 2014 reforms seek to promote citizen participation, fair representation, and confidence in elections, ushering in "a new era of bipartisanship and transparency." *Id.* at *2. The reforms created an "*exclusive* method of redistricting" and an independent and bipartisan redistricting commission (the "IRC"). *Id.* at *8. The reforms give the IRC "a substantial and constitutionally required role in the map drawing process" as a "precondition to redistricting legislation." *Id.* This process was "carefully crafted to guarantee that redistricting maps have their origin in the

collective and transparent work product of a bipartisan commission that is constitutionally required to pursue consensus to draw district lines." *Id.* at *7.

The "scourge of hyper-partisanship" is now rippling through the United States. With redistricting after the 2020 Census well underway, state legislatures across the nation are drawing rigged maps to disenfranchise voters. Political leaders are abusing their public offices to give one party an insurmountable advantage in elections. This has been well-documented by journalists and subject to numerous legal challenges.[1] If gerrymandered maps are left to stand, voters will stop participating in the democratic process: they will not vote; they will be unengaged and apathetic; and the quality of representation will degrade. Sadly, and regrettably, New York—which holds itself out as a bastion of democracy—has also transgressed into shortsighted gamesmanship.

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[1] *See, e.g.*, Nick Corasaniti & Reid J. Epstein, *As Both Parties Gerrymander Furiously, State Courts Block the Way*, N.Y. Times (Apr. 4, 2022), https://www.nytimes.com/2022/04/02/us/politics/congressional-maps-gerrymandering-midterms.html; Marjorie Hershey, *How This Cycle of Redistricting is Making Gerrymandered Congressional Districts Even Safer and Undermining Majority Rule*, Conversation (Jan. 25, 2022), https://theconversation.com/how-this-cycle-of-redistricting-is-making-gerrymandered-congressional-districts-even-safer-and-undermining-majority-rule-173103; *Legally Rigging Elections?*, Week (Dec. 5, 2021), https://theweek.com/election/1007682/legally-rigging-elections; David Pepper, *Republicans Are Quietly Rigging Election Maps to Ensure Permanent Rule*, Guardian (Nov. 28, 2021), https://www.theguardian.com/commentisfree/2021/nov/28/republicans-are-quietly-rigging-election-maps-to-ensure-permanent-rule.

The New York courts are the only vanguard—the final backstop—to protect voters and non-incumbent challengers. They have been victimized by an Assembly map that was designed to protect incumbents and gain anti-democratic advantages, undermining the integrity of the election.

II. The Legislature violates the 2014 constitutional reforms

With the 2014 constitutional reforms, New York was poised to set an example for the rest of the country, but the Legislature had other ideas. Rather than follow the constitutionally mandated procedure, the Legislature enacted its own Congressional, Senate, and Assembly maps without input from the IRC or public. R. 28–30. In the Senate, the maps were passed by the majority Democratic caucus on a party-line vote. R. 919. In the Assembly, the Congressional map was passed by the majority Democratic caucus in a party-line vote, and the Senate and Assembly maps were passed with two-thirds of Republicans voting against them. R. 919.

The Court of Appeals has already invalidated the Congressional and Senate maps by finding that they were drawn in violation of the constitutional procedure and, with respect to the Congressional map only, drawn with an impermissible partisan purpose. R. 31–32. The procedure itself, as discussed above, is critical to the legitimacy of the elections. To further illustrate, consider Congressional District 11 covering Staten Island—a stark example of how redistricting can be manipulated to favor one party over another. R. 25. Before 2022, Staten Island—traditionally

Republican and considered a community of interest—was part of a Congressional district that covered Staten Island and adjacent southern portions of Brooklyn (as Staten Island itself was not large enough to comprise an entire district). But the new 2022 district map stretched the district into northwest Brooklyn, pulling in liberal populations and giving Democrats a chance to flip the seat.

Consider, too, how the Legislature abused redistricting to favor incumbents over primary challengers. Here, the Assembly map was the prize. Huge Ma, for example, was an Assembly candidate in Queens who won significant grassroots support after he built a website that helped residents find vaccinations for COVID-19, earning him the affectionate moniker of "VaxDaddy." But Mr. Ma had to drop out of the race because under the redrawn Assembly map his residence was outside the district in which he was running.[2] R. 929–30. Mr. Ma was challenging incumbent Catherine Nolan in the 37th District, who, according to the New York Times, is "a high-ranking Democrat who has served for nearly four decades."[3] The

[2] Mr. Ma announced on Twitter: "After deliberating with my team, I've decided that the best course of action at this moment is to suspend my State Assembly campaign. When I started this campaign, I dreamed of representing my childhood home. This week, my home was redrawn well outside of the new District 37. While I currently feel a great sense of disappointment, I remain open to representing my community in the future. I am best positioned at this moment to help New York continue its road to recovery as a private citizen." @hugeforassembly, Twitter (Feb. 4, 2022, 4:03 PM), https://twitter.com/hugeforassembly/status/1489706142766972930?s=20&t=m-PSUPXZEL-2nxmAOiuLhg.

[3] Luis Ferré-Sadurni & Grace Ashford, *How Democrats' New Maps Could Shape N.Y. Politics for Years to Come*, N.Y. Times (Feb. 14, 2022), https://www.nytimes.com/2022/02/14/nyregion/redistricting-gerrymandering-albany-ny.html.

Times reported that "[t]he new lines for her district carved out parts of the Long Island City waterfront where some of her most likely challengers, including Mr. Ma, reside." Had the Legislature followed the constitutionally required process, it would have been unable to engineer an Assembly map to protect incumbents; and New Yorkers would have faith that the map was fair and their voices were heard.[4]

The Legislature also drew the Assembly map for other anti-democratic advantages. For example, District 61 was redrawn to wind from Staten Island to Manhattan, picking up four persons on a houseboat in Brooklyn. R. 949. Because each Brooklyn district elects two party leaders, these four individuals will elect two leaders in the Democratic primary, adding two more to the 42 leaders representing neighboring Brooklyn districts that are as large as 44,000 Democratic voters.

Respondents have been defending the Assembly map with gusto—even after the Court of Appeals held that they are unconstitutional—because a rigged Assembly map protects the incumbent candidates in power and secures other anti-democratic advantages, which was the very goal from the start.

After the map was redrawn, Assembly Member Nolan dropped out of the race for medical reasons, yet Mr. Ma still cannot run there.

[4] Sam Fein was a primary challenger in the 108th District against Democratic incumbent John McDonald. Mr. Fein dropped from the race when his residence was drawn outside of the district. Mr. Fein announced on Twitter: "I am disappointed that I can no longer run in the redrawn 108th Assembly District. When the new Assembly district lines were released, I found out that I am no longer in the 108th District." @samfein518, Twitter (Feb. 8, 2022, 2:18 PM), https://twitter.com/samfein518/status/1491129314368442369?s=20&t=ccOkKfX74DFWaSgFfC0jfg.

III. The Court of Appeals holds that the method used to adopt new district maps in 2022 was unconstitutional

The same day the Governor signed the maps into law, a group of New Yorkers filed a special proceeding in the Supreme Court, Steuben County (the "Steuben Court") challenging the constitutionality of the Congressional and Senate maps. The *Harkenrider* petitioners claimed that the maps (1) were the product of a constitutionally defective process and (2) were unconstitutional partisan gerrymanders. R. 31. On March 31, 2022, following a bench trial, the Steuben Court voided the Congressional and Senate maps, holding, *inter alia*, that the Legislature had failed to follow the necessary constitutional procedure. R. 31. Of particular relevance here, the Steuben Court also voided the Assembly map because "[t]he same faulty process was used for all three maps" and "[t]herefore new maps will need to be prepared for the Assembly Districts as well." Index No. E 2022-0116 CV, slip. op. at 14 (Sup. Ct. Mar. 31, 2022) (NYSCEF No. 243). On appeal, the Fourth Department vacated the Steuben Court's holding that the Senate and Assembly maps were procedurally defective and therefore void. No. 22-00506, 2022 WL 1193180, at *3 (4th Dep't Apr. 21, 2022).

Six days after the Fourth Department's decision, on April 27, 2022, the New York Court of Appeals reversed, reinstating the Steuben Court's decision that "the legislature and the IRC deviated from the constitutionally mandated procedure" and so the Congressional, Senate, and Assembly maps were all defective. *Harkenrider*,

2022 WL 1236822, at *5. "[T]here can be no question," the Court of Appeals found, "that the drafters of the 2014 constitutional amendments and the voters of this state intended compliance with the IRC process to be a constitutionally required precondition to the legislature's enactment of redistricting legislation." *Id.* at *9. Indeed, "no one disputes" that the IRC and Legislature had "failed to follow the procedure commanded by the State Constitution." *Id.* at *1.

Consequently, two days after the Court of Appeals remanded back to the Supreme Court, the Steuben Court moved the Congressional and Senate primaries to August 23; scheduled a public hearing for input on new maps for May 6; set a deadline for the Special Master to produce new, proposed maps on May 16; and, after public comment on the Special Master's proposed maps, set a deadline to issue final nonpartisan maps on May 20. R. 33.

The Steuben Court issued new Congressional and Senate maps on May 20 as planned. To further illustrate the invidious effect of bypassing the constitutional process, the new Congressional map diverges sharply from the Legislature's prior unconstitutional map. The new map has districts that are more compact, competitive, and, according to a senior fellow at the New York Law School Census and Redistricting Institute, "reflect more communities and counties kept intact." R. 209. The new map thus rewrites the competitive dynamics of Statewide races—who will run, and who will appear on the ballot.

IV. Petitioners Wax and Greenberg move to intervene in Steuben County to invalidate the Assembly map

Within a week of the Court of Appeals decision, Petitioners Wax and Greenberg moved to intervene before the Steuben Court. Their petitions sought to invalidate the infirm Assembly map. R. 37. On May 11, however, the Steuben Court denied the intervening petitions as untimely, notwithstanding the Court of Appeals' refusal of Respondents' "invitation" just two weeks earlier "to subject the People of this state to an election conducted pursuant to an unconstitutional reapportionment." *Harkenrider*, 2022 WL 1236822, at *11.

Although the Steuben Court denied intervention, "[n]othing" in the decision, the court concluded, was "meant to prevent either [Petitioners Wax or Greenberg] from pursuing a separate action to challenge the Assembly maps." Index No. E 2022-0116 CV, slip. op. at 4 (May 11, 2022) (NYSCEF No. 522).

V. Petitioners commence this special proceeding, and the Trial Court denies the Petition in its entirety

Within days of the denial of intervention, Petitioners commenced a special proceeding in the Supreme Court, New York County (Love, J.). The Petition fills the gap from *Harkenrider* by seeking to invalidate the Assembly map: "Petitioners ask this Court to apply the Court of Appeals' analysis of State Respondents' unconstitutional redistricting process to the State Assembly legislation and declare

the constitutional infirmity of the Assembly map—as the Steuben Court in *Harkenrider* did once already on March 31, 2022." R. 20.

In particular, the Petition requests the following relief: (1) declaring the Assembly map void, (2) appointing a special master to adopt a new, compliant Assembly map, (3) moving state and local primaries to August 23 or September 13, 2022, (4) reopening ballot-access petition periods for independent and primary candidates, (5) enjoining any other state laws or vacating any acts of the Board of Elections that would interfere with relief, and (6) awarding any such other and further relief as the court deems just and proper. R. 47–48.

The Trial Court denied the Petition on May 25, 2022. Contrary to the plain language of the Court of Appeals' decision in *Harkenrider*, the Trial Court held that "[n]othing in the Court of Appeals' decision [in *Harkenrider*] was directed at the validity of the assembly map." R. 10. The Trial Court also held that Petitioners had failed to timely intervene in *Harkenrider*, failed to file the plenary action fast enough (despite doing so within four days of the Steuben Court's invitation to do so), and were barred by the equitable doctrine of laches. R. 10–12.

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Following the Trial Court's Decision and Order, Petitioners sought a direct appeal to the Court of Appeals under CPLR 5601(b)(2). The Court of Appeals held

that jurisdiction did not lie because "questions other than the constitutional validity of a statutory provision are involved" and transferred the appeal to this Court.

ARGUMENT

This appeal is straightforward. The Court of Appeals has already found that the Assembly map is unconstitutional, and the plain text of the Constitution requires that it be invalidated. This Court should order all just relief, including, if necessary, allowing the infirm map to remain for the 2022 election while ordering a new map for a future election. The Trial Court denied the entire Petition without ruling on the Petition's claim—the constitutionality of the Assembly map. It did so based on an erroneous pre-assessment of the merits. And it did so based on timeliness requirements that are inapplicable under constitutional law, that were incorrectly applied to the 2022 election, and that are inapplicable to relief beyond 2022.

I. The Assembly map is unconstitutional and must be invalidated

Respondents have not once attempted to argue that the Assembly map is constitutional. They cannot. The Court of Appeals held that the Legislature violated the exclusive and carefully designed constitutional procedure for redistricting by unilaterally redrawing district lines. *Harkenrider*, 2022 WL 1236822, at *11 & n.15. 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 *Harkenrider* had not challenged the Assembly map in their petition

or defended the Steuben Court's *sua sponte* decision on appeal. *Id.* Nonetheless, the Court of Appeals made clear that the same rationale—and the same ruling—necessarily applies to the Assembly map, as all three maps were enacted using the same unconstitutional procedure. *Id.* The Court of Appeals thus effectively invited a challenge to the Assembly map. Not only is *Harkenrider* binding precedent, but Respondents—all parties to *Harkenrider*—are also collaterally estopped 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 . . . .").

Because a violation of Article III has been found—indeed, *the same violation that led the Court of Appeals to invalidate the Senate map*—the Constitution dictates that the Assembly map "*shall*" also be invalid. N.Y. Const. Art. III, § 5 (emphasis added). This leaves only one route for this Court: to declare the Assembly map void. Indeed, in other provisions of Article III, the Court of Appeals emphasized the use of "shall" in holding that the Article III procedure was a mandatory precondition to adopting new maps. *See Harkenrider*, 2022 WL 1236822, at *6 ("The plain language of Article III, § 4 dictates that the IRC '*shall* prepare' and '*shall* submit' to the legislature a redistricting plan with implementing legislation . . . .").

Rather than apply the unequivocal holding of *Harkenrider*, the Trial Court found that "[n]othing in the Court of Appeals' decision was directed at the validity

of the assembly map." R. 10. This Court should reverse on the constitutional question. The only remaining question is what further relief should be granted.

II. This Court should craft appropriate further relief

The Court of Appeals held—clearly and unequivocally—that judicial intervention is necessary. Because the constitutional deadline for the IRC and Legislature's roles in redistricting have passed, the Legislature's unconstitutional maps are "incapable of a legislative cure." *Id.* at *12. The Court of Appeals therefore remanded the matter to the Steuben Court to craft and adopt redistricting maps in a court-supervised process, as authorized by Article III, Section 4(e). *Id.* Judicial oversight, the Court of Appeals explained, is required "to safeguard the constitutionally protected right of New Yorkers to a fair election." *Id.* at *1.

Respondent Heastie has asserted that the Assembly map should remain in place for the 2022 election *and* this entire decade until the next redistricting cycle. This position is shocking. Only a month ago, the Court of Appeals remanded for speedy proceedings to adopt new Congressional and Senate maps for the 2022 election, rejecting Respondents' request to delay a remedy. Yet, at oral argument on Petitioners Wax's and Greenberg's motions to intervene before the Steuben Court, Respondent Heastie asserted that not only should the Assembly map be used for 2022, but it should also be used for all elections for the next ten years:

> 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.

R. 135–36 (emphasis added).

In oral argument on the Petition, Respondent Heastie went even further, inviting the Trial Court to "ratify" the Assembly map for the next decade:

> [COUNSEL]: . . . the solution to the procedural infirmity . . . is simply to take the map that was enacted by the representatives of the people of the State of New York, not imposed by a judge elected by a small portion of the state population, but rather by the representatives who are elected by all 20 million of us, take that map and impose it, and say, this will be the map for the next ten years, and adopt it and ratify it.

R. 989. The Trial Court correctly recognized Respondent Heastie's position as untenable. R. 1011. An unvetted and perfunctory process to redraw the Assembly map would do nothing to dispel the shadow over Assembly elections and all other

elections (including for judicial positions) that flow from the Assembly district lines. Indeed, as Todd Valentine, Co-Executive of the New York State Board of Elections stated, Assembly districts have a unique impact on "New York's election infrastructure" and follow-through to several other elected offices, including judicial ones. Affidavit of Todd D. Valentine ¶¶ 13–19, *Harkenrider v. Hochul*, Index No. E 2022-0116 CV (May 9, 2022) (NYSCEF No. 430). Thus, the constitutional harm, if unremedied, will cast a pall of suspicion over thousands of elected officials for years to come, including for judicial races.

Respondent Heastie also fundamentally misstates where the "will of the people" lies. He simply ignores the fact that the procedure used by the Legislature is *directly contrary* to the constitutional text adopted by New York voters, the very purpose and plain meaning of which was to *prohibit* the Legislature from acting as it did. *Harkenrider*, 2022 WL 1236822, at *7–8.

The only relevant question, therefore, is the *remedy* for the constitutional violation. Courts have broad and flexible powers to create a remedy. *See People of the State of N.Y. ex rel. Thorpe v. Clark*, 62 A.D.2d 216, 228–29 (2d Dep't 1978) ("[T]he court has the inherent power to fashion an adequate remedy . . . ."). Indeed, the Petition requested "such other and further relief as this Court may deem just and proper." R. 48. Citing the difficulties for the 2022 election, the Trial Court failed

to consider potential other remedies for the unconstitutional Assembly map. This Court should recognize—and award as is just—the range of available options.

Petitioners' primary request is plain: this Court, after declaring the Assembly map unconstitutional and void, should appoint a special master to redraw the Assembly map, move state and local elections to August 23 or September 13, 2022, and open ballot-access petition periods for designating and nominating petitions. Whatever burden exists because of the impending election is the fault of the Legislature for scheming, as it did, to embrace illegality for partisan purposes, then failing to prepare any contingency even after the Steuben Court voided the Assembly map two months ago. Failing to grant a remedy rewards bad behavior, and thus encourages similar brazen acts in the future.

Alternatively, this Court should order either (1) that a special election in 2023 on the newly adopted Assembly map be held, or (2) that the new Assembly map be used in the next regular election in 2024. In *Harkenrider*, Respondents themselves urged the Court of Appeals to take this exact remedial approach and "defer[] any remedy for a future election." 2022 WL 1236822, at *12; *see also* Brief for Respondent-Appellant Speaker of the Assembly Carl Heastie at 60–62, *Harkenrider v. Hochul*, No. CAE 22-00506 (4th Dep't Apr. 21, 2022) (NYSCEF No. 31 ("[T]he Constitution does not require replacement maps to become effective at any particular time."). Indeed, the Court of Appeals has allowed elections to go forward on illegal

maps when necessary while ordering later relief. *See, e.g.*, *Badillo v. Katz*, 32 N.Y.2d 825, 827 (1973) (declining to enjoin election while ordering a new reapportionment plan to come into effect later); *Honig v. Bd. of Supervisors of Rensselaer Cnty.*, 31 A.D.2d 989 (3d Dep't), *aff'd*, 24 N.Y.2d 861 (1969) (upcoming election allowed to go forward on infirm map "as a temporary and interim measure); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) ("If a [redistricting] plan is found to be unlawful long before the next scheduled election, a court may defer any injunctive relief until the case is completed.").

Although Petitioners do not concede that all is lost for the 2022 elections, this Court could limit the remedy to later elections if it must.

III. The Petition is neither untimely nor barred by laches

A redistricting challenge brought under Article III, Section 5 has no timeliness requirement. Unlike CPLR 1012 on intervention, which requires a "timely" motion, neither the Constitution nor the enabling statute imposes such a requirement. Rather, both the Constitution and implementing statute require that an apportionment by the legislature "*shall be subject to review*" by the supreme court. N.Y. Const. Art. III, § 5 (emphasis added); N.Y. Unconsolidated Laws § 4221 (emphasis added). And the Constitution requires that voting-district maps "*found to violate the provisions of [Article III] shall be invalid in whole or in part*." N.Y. Const. Art. III, § 5 (emphasis added). The Legislature could have drafted a statute of limitations or

other requirement for a reapportionment challenge. *See Matter of ISCA Enters. v. City of New York*, 77 N.Y.2d 688, 696 (1991) (applying two-year statutory limitation period to constitutional challenge to foreclosure proceeding). It did not do so.

The Constitution must be interpreted according to its ordinary meaning. *See Harkenrider*, 2022 WL 1236822, at *5 ("In construing the language of the Constitution as in construing the language of a statute, . . . we look for the intention of the People and give to the language used its ordinary meaning." (quotation and alteration omitted)). Yet, the Trial Court imposed a timeliness requirement that has no basis in the text of the Constitution, and that the Legislature saw fit to exclude.

Further, a timeliness requirement fundamentally undercuts an essential purpose of the 2014 amendments—to prioritize reapportionment challenges. The Constitution requires that reapportionment challenges be decided on an expedited basis (within 60 days). N.Y. Const. art. III, § 5. It requires that out-of-session courts reconvene to hear those challenges. *Id.* And it requires those courts to prioritize the challenge over all other matters. *Id.* The *voters*, who, in a solemn but unmuted voice, commanded their elected officials to amend the Constitution—would not have commanded courts to prioritize reapportionment challenges only to have them slapped away when wrong-doers (like the Legislature here) invoke equity behind crocodile tears. *See People of the State of N. Y. v. Tremaine*, 281 N.Y. 1, 10 (1939) (absurd readings of the Constitution should be avoided). The imperative for

reapportionment challenges makes sense: so that a remedy can be ordered for the immediate, next election to what the plain text and the Court of Appeals recognize as a grave harm and threat. But a timeliness requirement makes none: an infirm district map means ten years of unconstitutional elections and corrosion of democratic norms.

Relatedly, the Trial Court held that the Petition was barred by the doctrine of laches. For the reasons above, the doctrine of laches does not apply to a reapportionment challenge. But even if it did, the Petition should not be denied "in its entirety," as the Trial Court ruled. Laches is an equitable doctrine that bars a claim if there is unreasonable and inexcusable delay in bringing the claim *and* prejudice caused by the delay. *Saratoga Cnty. Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003); *Nassau Cnty. v. Metro. Transp. Auth.*, 99 A.D.3d 617 (1st Dep't 2012). Laches is inapt for three reasons.

First, it is axiomatic that equitable relief may not be sought by a party with unclean hands. *Levy v. Braverman*, 24 A.D.2d 430 (1st Dep't 1965). Here, Respondents willfully violated the Constitution for purely partisan ends. As Heastie's counsel himself conceded in oral argument before the Trial Court, "those who seek equity must do equity." R. 969. Respondents have not done equity: they have acted, and are acting, in a manner that fundamentally violates the law and undermines public confidence in our elections—confidence which is already

hanging by the frayed strand of a thread, in light of recent events. This should deprive them of any ability to seek equity.

Second, Petitioners did not delay in bringing their claim, let alone the "lengthy neglect or omission" that a court must find. *Saratoga Cnty.*, 100 N.Y.2d at 816. The doctrine of laches applies only to "unreasonable and inexcusable delay"—a standard the Trial Court failed to apply. *Nassau Cnty.*, 99 A.D.3d at 617 (quoting *Dante v. 310 Assocs.*, 121 A.D.2d 332, 334 (1st Dep't 1986)). When the *Harkenrider* petitioners filed their action in early February, the Steuben Court began expeditiously considering issues which bore on the entire redistricting process. The court declared all maps, including the Assembly map, void just two months later on March 31. Petitioners had no reason to seek to intervene in *Harkenrider* or bring a separate proceeding that could risk creating a split of authority. The issues were being decided. It was not until the Court of Appeals issued its decision on April 27, 2022, that Petitioners had any reason to act. And Petitioners Wax and Greenberg did so within days and have been vigorously pursuing their claim since.

Third, there is no prejudice from voiding the Assembly map now and holding a special election in 2023 or regular election in 2024 on a new map drawn by a special master.[5] The Trial Court's *entire basis* for finding prejudice rested on the

[5] Respondents have also asserted statute of limitations, standing, necessary parties, and other arguments directed at the Petition's request to open new ballot-access designating and nominating petition periods for the 2022 elections. These arguments are frivolous. They are premised on a

Petition's request to move the 2022 primary and enact a new map in time for that primary. The Trial Court erred, however, in foreclosing a remedy that would apply only to subsequent elections. Even if laches bars one request for relief, it does not necessarily bar all others. *See Dwyer by Dwyer v. Mazzola*, 171 A.D.2d 726, 727 (2d Dep't 1991) (observing that laches "operates as a bar *to the remedy*" (emphasis added)). Thus, to the extent laches bars a remedy for the 2022 election, it cannot bar a remedy for all the elections to come, where no prejudice can be asserted.

The Trial Court relied on *Matter of Cantrell v. Hayduk*, 45 N.Y.2d 925 (1978) in reaching its decision on laches. The petitioners in *Cantrell* challenged placing a local law on a ballot; but they did not bring their challenge until a month before the election after the petitioners themselves had participated in substantial debate over the law, imposing a "well nigh impossible burden upon respondents." *Id.* at 927. Here, there is no "impossible burden" on Respondents. This Court has considerable

misunderstanding of the Petition: that the Petition seeks to invalidate specific candidate petitions. Not so, as Petitioners have repeatedly explained. The Petition requests that a ballot-access petition period be reopened—without necessarily invalidating any petitions. Only petitions which become invalid under state law because of redrawn district lines would be impacted. Further, this Court could order that all petitions remain valid and simply allow current or new candidates to circulate petitions. This is the same relief that was sought and ultimately granted in Steuben County. Order, *Harkenrider v. Hochul*, Index No. E 2022-0116 CV (May 11, 2022) (NYSCEF No. 524).

Should this Court defer a remedy to a 2023 special election or the 2024 regular election, all Respondents' technical arguments also fall away. Respondents did not make these arguments in the *Harkenrider* proceeding because, as they have repeatedly asserted, the ballot-access petition periods were still open, and no ballots had been certified. With a 2023 or 2024 election, the petition periods have not even begun, so there would be no impact on completed petitions.

options for crafting a feasible and just remedy—including allowing the 2022 election to proceed while ordering that a new map be used in a 2023 or 2024 election.

Respondents have relied on *Schulz v. State*, 81 N.Y.2d 336 (1993), to support their untimeliness argument, but that case is inapt. There, the petitioners brought a constitutional claim to unwind hundreds of millions of dollars of bonds that had been issued to investors to finance public projects. *Id.* at 344. They brought their claim eleven months after the laws had passed, after bonds were issued, and commitments had been made to counterparties and investors. *Id.* at 348. Unwinding these complex transactions would have wrought havoc: "the impossibility of putting genies back in their bottles springs to the imagination." *Id.* The Court held that laches barred the petitioners' claim because the state would incur enormous financial and reputational harm if it had to unwind the transactions—greater than the "constitutional transgression itself"—and, as such, "constitutional challenges *to public financing*" should be "undertaken reasonably promptly." *Id.* at 348–49 (emphasis added).

Schulz—a decision expressly warning about delay in challenging public finance laws—is far afield from seeking a remedy for current or *future* elections, and especially elections that have not yet been held. Even for the current election, the Trial Court took no testimony and held no hearing on the alleged "burden" of redrawing the Assembly map in a constitutional manner for an August or September primary election. The Trial Court's conclusion that fixing the 2022 elections "is

bewildering to even contemplate and is an impossibility" has no evidentiary foundation, and was, moreover, premised on the erroneous conclusion that the Assembly map was not clearly and unequivocally unconstitutional. R. 13. Any such burden is a result of Respondents' actions, not Petitioners' purported delay; as such, laches is inapt to the current election.

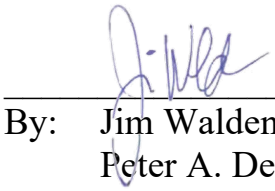
Respondents *do not and cannot* resist the fundamental point—the Assembly map is constitutionally infirm and, for that reason, cannot serve as the basis for Assembly elections for the next decade until the next redistricting cycle.

CONCLUSION

For the reasons given, this Court should declare the Assembly map unconstitutional and order a just and appropriate remedy.

Dated: New York, New York
June 1, 2022

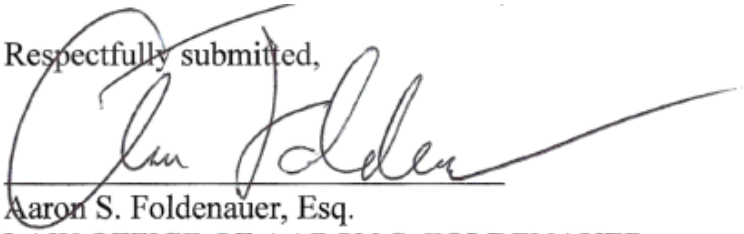
Respectfully submitted,



By: Jim Walden
Peter A. Devlin
WALDEN MACHT & HARAN LLP
250 Vesey Street, 27th Floor
New York, NY 10281
Tel: (212) 335-2030

Attorneys for Petitioners-Appellants Paul Nichols and Gary Greenberg

Respectfully submitted,



Aaron S. Foldenauer, Esq.
LAW OFFICE OF AARON S. FOLDENAUER
30 Wall Street, 8th Floor
New York, NY 10005
Telephone: (212) 961-6505
Email: aaron@nyelectionlaw.com

Attorney for Petitioner-Appellant Gavin Wax

APPELLATE DIVISION – FIRST DEPARTMENT
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Dated: New York, New York
June 1, 2022

STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

Paul Nichols, Gavin Wax, Gary Greenberg,
Petitioners-Appellants,

—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, New York State Legislative Task Force on Demographic Research and Reapportionment,
Respondents-Respondents.

New York County Clerk's Index No. 154213/22

Appellate Division Case No. 2022-02301

1. The index number of the case is 154213/22.

2. The full names of the original parties are as set forth above. There has been no change in the parties.

3. The action was commenced in Supreme Court, New York County.

4. This action was commenced on May 15, 2022, by filing of the instant Petition. The motion to dismiss of Respondent Heastie was served on May 22, 2022; the answer of Respondent Hochul was served on May 23, 2022; and the motion to dismiss of Respondent Stewart-Cousins was served on May 23, 2022.

5. The nature and object of the action is a constitutional challenge to the legislative reapportionment of Assembly districts enacted on February 3, 2022.

6. This appeal is from a decision and order of the Honorable Laurence L. Love entered on May 25, 2022, in favor of respondents against petitioners, which denied the instant petition and petitioners' order to show cause for a temporary restraining order.

7. The appeal is on a full reproduced record.