

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

PAUL NICHOLS, GAVIN WAX, GARY GREENBERG,

Petitioners-Appellants,

—against—

CASE NO.

2022-02301

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.

RECORD ON APPEAL VOLUME I OF II (Pages 1 to 500)

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Statement Pursuant to CPLR 5531

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.

Petitioners' Notice of Appeal, dated May 25, 2022

[pp. 2 - 4]

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INDEX NO. 154213/2022

NYSCEF DOC. NO. 93

RECEIVED NYSCEF: 05/25/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORKPAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG

Petitioners,

Index No. 154213/2022

v.

NOTICE OF APPEALGOVERNOR KATHY HOCHUL, SENATE
MAJORITY LEADER AND PRESIDENT PRO
TEMPORE OF THE SENATE ANDREA STEWART-
COUSINS, SPEAKER OF THE ASSEMBLY CARL
HEASTIE, NEW YORK STATE BOARD OF
ELECTIONS, and THE NEW YORK STATE
LEGISLATIVE TASK FORCE ON DEMOGRAPHIC
RESEARCH AND REAPPORTIONMENT,

Respondents.

PLEASE TAKE NOTICE that Petitioners Paul Nichols, Gavin Wax, and Gary Greenberg, pursuant to CPLR § 5601(b)(2), hereby appeal to the New York Court of Appeals from the Decision and Order of the Supreme Court of the State of New York, New York County (Love, J.), dated May 25, 2022, duly entered in the Clerk's Office of the Supreme Court on the same date, *see* NYSCEF No. 91, and attached hereto as Exhibit A, finally determining and denying in its entirety the Petition, which Petition sought to invalidate the State Assembly map passed by the Legislature and signed by the Governor on February 3, 2022, *see* 2021–2022 N.Y. Reg. Sess. Leg. Bills A.9040-A and A.9168, on the ground that the Legislature violated the exclusive method for redistricting provided in Article III, Section 4(b) of the New York Constitution. *See Harkenrider v. Hochul*, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022).

Dated: New York, NY
May 25, 2022

Respectfully submitted,

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**Decision and Order of the Honorable Laurence Love Appealed From, dated
May 25, 2022, with Notice of Entry, dated May 25, 2022
[pp. 5 - 18]**

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NYSCEF DOC. NO. 91

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/25/2022

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

PRESENT: HON. LAURENCE LOVE PART 63M

Justice

-----X

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.

-----X

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

**DECISION + ORDER ON
MOTION**

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 sponte* 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)

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)

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)

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

CHECK ONE:

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CASE DISPOSED

☐

GRANTED

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DENIED

☐

NON-FINAL DISPOSITION

GRANTED IN PART

☐

OTHER

LAURENCE LOVE, J.S.C.

FILED: NEW YORK COUNTY CLERK 05/27/2022 11:54 AM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 91

RECEIVED NYSCEF: 05/25/2022

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

☐

REFERENCE

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

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG

Petitioners,

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

Respondents.

Index No. 154213/2022

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within Decision/Order is a true copy of a Decision/Order
entered by the Clerk of the Court of the Supreme Court, New York County on May 25, 2022.

Dated: New York, NY
May 25, 2022

WALDEN MACHT & HARAN LLP

By:

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*Attorneys for Petitioners Paul Nichols and Gary
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FILED: NEW YORK COUNTY CLERK 05/25/2022 03:29 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 92

RECEIVED NYSCEF: 05/25/2022

LAW OFFICE OF AARON S. FOLDENAUERBy: /s/ Aaron S. Foldenauer

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Attorney for Petitioner Gavin Wax

TO: All Counsel on record via NYSCEF

Petitioner's Petition, dated May 15, 2022
[pp. 19 - 49]

FILED: NEW YORK COUNTY CLERK 05/15/2022 10:34 PM

NYSCEF DOC. NO. 1

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/15/2022

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

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG

Petitioners,

Index No. _____

v.

PETITION

GOVERNOR KATHY HOCHUL, SENATE
MAJORITY LEADER AND PRESIDENT PRO
TEMPORE OF THE SENATE ANDREA STEWART-
COUSINS, SPEAKER OF THE ASSEMBLY CARL
HEASTIE, NEW YORK STATE BOARD OF
ELECTIONS, and THE NEW YORK STATE
LEGISLATIVE TASK FORCE ON DEMOGRAPHIC
RESEARCH AND REAPPORTIONMENT,

Respondents.

Petitioners, by and through their attorneys, allege as follows:

PRELIMINARY STATEMENT

1. This is a special proceeding for declaratory and injunctive relief in connection with (1) the redistricting of Congressional, State Senate, and State Assembly districts following the 2020 Census, and (2) the upcoming 2022 primary and general elections.

2. Petitioners' right to relief is simple and straightforward. On April 27, 2022, the New York Court of Appeals held that the procedure followed by the New York Legislature in adopting the Congressional and State Senate district maps was unconstitutional. *Harkenrider v. Hochul* ("*Harkenrider III*"), No. 60, 2022 WL 1236822, at *9 (N.Y. Apr. 27, 2022). The Court of Appeals further held that the Congressional map was an unconstitutional partisan gerrymander. *Id.* at *11. Therefore, "**to guarantee the People's right to a free and fair election,**" the Court of Appeals invalidated the Congressional and Senate maps and remanded to the Supreme Court to "**adopt constitutional maps with all due haste**" and "**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.” *Id.* at *12–13.

3. The same constitutional violation that resulted in the invalidated Senate and congressional district lines also resulted in unconstitutional Assembly lines, which the Supreme Court Steuben County *sua sponte* declared to be “**void and unusable.**” *See Harkenrider v. Hochul* (“*Harkenrider I*”), Index No. E 2022-0116 CV, NYSCEF No. [243](#) (Decision & Order), at 10 (Mar. 31, 2022) (“**The court would note that not only are the Congressional District Maps and Senate District Maps void but the Assembly District Maps are void *ab initio* as well. The same faulty process was used for all three maps. Therefore new maps will need to be prepared for the Assembly Districts as well.**”).

4. However, because the petitioners in that case inexplicably did not seek to invalidate the 2022 State Assembly redistricting legislation (either in the initial petition or on appeal), the Court of Appeals found that it “**may not invalidate the assembly map *despite its procedural infirmity.***” *Id.* at *11 n.15. Moreover, the petitioners (again, inexplicably) sought only partial relief on remand as to the invalidated Congressional and State Senate maps.

5. ***This Petition bridges that gap.*** 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 Supreme Court in *Harkenrider* did once already on March 31, 2022.

6. With respect to the unconstitutional Congressional and State Senate maps, the Court of Appeals held that the proper remedy was for the Supreme Court, with the aid of a neutral redistricting expert, serving as special master, to oversee the Congressional and Senate

redistricting. Petitioners seek the same remedy with respect to the Assembly map. This Court should appoint the same Special Master and proceed on the Assembly map “with all due haste.” *Id.* at *12. Petitioners are proceeding by temporary restraining order and order to show cause because time to fix the Assembly map is rapidly diminishing. **But it is not too late.**

7. Petitioners also seek to move all state and local primaries to either August 23—the date when the Congressional and State Senate primaries have already been scheduled—or September 13—the date when state and local primaries have historically been held. Moving the primaries will streamline election administration and reduce voter confusion while giving the Board of Elections additional time to administer constitutional elections. The alternative is to “**subject the People of this state to an election conducted pursuant to an unconstitutional reapportionment.**” *Id.* at *11.

8. Petitioners thus further request that the Court develop a schedule, as the Court of Appeals instructed, for impacted election deadlines and administrative milestones. *See id.* at *12. In particular, the petition periods for party candidates to obtain signatures for access to the primary ballot should be reopened with sufficient time for current and potential candidates to gather the requisite designating petition signatures. Moreover, independent candidates should be given sufficient time to collect nominating signatures for the general election. Because voting district membership affects whether someone petitions to become a candidate, whose signatures count, what candidates appear on a ballot, and the actual votes cast in a district, the constitutional infirmity of the Congressional, Senate, and Assembly maps carry through to such important elements of the elections that also warrant a remedy.

9. Fast-tracking the remedial phase of this action, to redeem the Assembly and other primary elections that have been stained by State Respondents’ unconstitutional power-grab is

necessary to fully vindicate Petitioners' and voters' constitutional rights and restore faith in New York's elections.

10. The New York Constitution guarantees Petitioners neutral and non-partisan district maps and elections. Petitioners ask this Court to deliver on that guarantee of representative democracy by invalidating State Respondents' illegal attempt to bypass the constitutionally mandated process. This process is critical to ensuring citizens of New York have confidence in their elected representatives, and it is critical to reigning in a Legislature incentivized to carve up New York voters to serve its own partisan interests.

PARTIES

11. Paul Nichols is a registered, eligible, and active voter in the State of New York, residing in Queens, New York County. Petitioner Nichols was a primary Democratic candidate for Governor until he was excluded from the ballot because his petition signatures were invalidated upon challenge to the New York State Board of Elections.

12. Gavin Wax is a registered, eligible, and active voter in the State of New York, residing in Manhattan, New York County. Petitioner Wax is the President of the New York Young Republican Club.

13. Gary Greenberg is a registered, eligible, and active voter in the State of New York, residing in New Baltimore, Greene County. Petitioner Greenberg ran for a State Senate seat in 2020 in District 46. With the redrawing of district maps for Congress, State Senate, and, as Petitioners request, State Assembly, Petitioner Greenberg is a potential candidate for each.

14. Respondent Kathy Hochul is the Governor of the State of New York. She is being sued in her official capacity.

15. Respondent Andrea Stewart-Cousins is the New York State Senate Majority Leader and President *Pro Tempore* of the New York State Senate, representing the 35th Senate District.

Majority Leader Stewart-Cousins has offices in Albany and at 28 Wells Avenue, Building #3, 5th Floor, Yonkers, NY 10701. She is being sued in her official capacity.

16. Respondent Carl E. Heastie is the Speaker of the New York State Assembly, representing the 83rd Assembly District. Speaker Heastie has offices in Albany and at 1446 East Gun Hill Road, Bronx, NY 10469. He is being sued in his official capacity.

17. Respondent New York State Board of Elections is an Executive Department agency vested with the authority and responsibility for the administration and enforcement of the laws relating to election in the State of New York. It has its principal place of business at 40 North Pearl Street, Suite 5, Albany, NY 12207.

18. Respondent New York State Legislative Task Force on Demographic Research and Reapportionment (“LATFOR”) was established by the Legislature in 1978 pursuant to New York Legislative Law § 83-m with the responsibility to prepare and formulate reapportionment plans to the Legislature following each decennial census. LATFOR’s principal place of business is located at 250 Broadway, Suite 2100, New York, NY 10007.

JURISDICTION AND VENUE

19. The Court has jurisdiction over this Petition under Article III, Section 5 of the New York Constitution, Unconsolidated Laws § 4221, and CPLR 3001.

20. Article III, Section 5 provides that “[a]n apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe.” N.Y. Const. art. III, § 5.

21. Unconsolidated Laws § 4221 provides that “[a]n apportionment by the legislature shall be subject to review by the supreme court at the suit of any citizen, upon the petition of any citizen to the supreme court where any such petitioner resides and upon such service thereof upon the attorney-general, the president of the senate, the speaker of the assembly and the governor, as

a justice of the supreme court may direct.” N.Y. Unconsol. Law § 4221; *see also id.* § 4225 (“No limitation of the time for commencing an action shall affect any proceeding hereinbefore mentioned . . .”).

22. Venue is proper in this County under Unconsolidated Laws § 4221, which authorizes the filing of a petition challenging “[a]n apportionment by the legislature” in “the supreme court where any such petitioner resides.” Venue is also proper under Article III, Section 5 of the New York Constitution and CPLR § 503(a).

FACTUAL BACKGROUND

I. The “Scourge” of Gerrymandering

23. Defining the boundaries of voting districts—and thus including or excluding certain communities and neighborhoods—has tremendous political ramifications. For that reason, parties have historically vied for control over the process of defining those boundaries, and this power struggle has been—and remains to this day—subject to political manipulation and abuse.

24. 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.

25. Minority votes become practically meaningless because they are not cast in competitive races. The power to make the map becomes the power to pick which party candidate will win each electoral district.

26. In short, gerrymandering is effectively **vote rigging**, using manipulated district lines to ensure dominance by incumbents or candidates favored by the majority party. In this way, gerrymandering is patently anti-democratic.

27. As one author succinctly explained:

Once a decade, every state redraws its electoral districts, determining which people will be represented by each politician. In many states, this means that politicians gather behind computer screens to figure out how they can manipulate the lines to box out their competition and maximize the power of their political party. While an increasing number of states employ independent commissions to draw district lines, the large majority still lack safeguards to prevent partisan favoritism in the redistricting process—also known as partisan gerrymandering.¹

28. Consider, for example, Staten Island and the redistricting in 2022 of Congressional District 11. 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 with the new 2022 district map, Congressional District 11 stretches into northwest Brooklyn, pulling in liberal populations and giving Democrats a chance to win the seat.

29. **“The core principle of republican government” is “that the voters should choose their representatives, not the other way around.”** *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, 576 U.S. 787, 824 (2015). But this principle is negated when political parties in power, like State Respondents here, foist on the minority party and the electorate illegal voting district maps.

30. As the Supreme Court in *Harkenrider* aptly described when it struck down the maps at issue in this Petition, gerrymandering is a **“scourge”** that infects our democratic process and the health of the Republic. *Harkenrider I*, NYSCEF No. [243](#) (Decision & Order), at 2.

¹ Alex Tausanovitch, *The Impact of Partisan Gerrymandering*, Ctr. Am. Progress (Oct. 1, 2019), <https://www.americanprogress.org/article/impact-partisan-gerrymandering/>.

II. The People Amend the Constitution and Adopt Redistricting Reforms

31. In 2014, the citizens of New York amended the Constitution to combat political manipulation and gerrymandering of voting districts.

32. These amendments, and implementing statutes, created an independent redistricting commission (the “IRC”), as well as an **“exclusive method of redistricting”** Congressional, State Senate, and State Assembly districts. *Harkenrider III* 2022 WL 1236822, at *2, *5, *8; N.Y. Const. art. III, § 4(b).

33. This constitutionally mandated method was designed to limit legislative gamesmanship—so that no single party could steer the redistricting process to its own ends. *Harkenrider III*, 2022 WL 1236822, at *2.

34. It was designed to promote citizen participation, fair representation, and, ultimately, confidence in the outcome of elections, thereby ushering in **“a new era of bipartisanship and transparency.”** *Id.*

35. Sadly, State Respondents intentionally created an elaborate subterfuge to eviscerate the will of the voters and assure the majority party’s stranglehold on the legislature, denuding the role of the IRC.

36. The IRC is comprised of ten members. Eight of the members are appointed by the majority and minority leaders of the Senate and Assembly. The eight members then appoint the remaining two members.

37. This bipartisan group is **“constitutionally required to pursue consensus to draw redistricting lines”** and follow a transparent process that engages the public as it crafts new maps to propose to the Legislature. *Id.* at *7.

38. Critically, the 2014 constitutional reforms constrain the Legislature’s power to bypass the IRC.

39. The reforms require the Legislature to consider and vote on the maps proposed by the IRC. After the IRC drafts maps and holds public hearings, the IRC must submit a first set of maps to the Legislature by January 15 of the second year following the Census. *Id.* at *5 (citing N.Y. Const. art. III, § 4(b)).

40. If either the Legislature or Governor reject the maps, the IRC must revise and submit new maps to the Legislature within 15 days, but no later than February 28. *Id.* The Legislature must then consider and vote on this second set of maps. *Id.*

41. Only in the event the Legislature *votes down the second set of IRC maps*—which it must do in an “up or down” vote (*i.e.*, without making modification)—does the New York Constitution permit the Legislature to undertake amending the IRC’s proposed maps and ultimately enact its own district maps. N.Y. Const. art. III, § 4(b); N.Y. Legis. Law § 93(1); *see Harkenrider III*, 2022 WL 1236822, at *2.

42. The IRC process was thus “**crafted to guarantee that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission.**” *Harkenrider III*, 2022 WL 1236822, at *7.

43. The process ensures that the IRC—a bipartisan group independent from the Legislature—has “**a substantial and constitutionally required role in the map drawing process**” as a “**precondition to redistricting legislation.**” *Id.* at *8.

44. Once the constitutional deadline has passed for the IRC to submit a second redistricting plan (as it has here), the *only* alternative to the carefully crafted process set forth in Article III § 4 is “**court intervention following a violation of the law.**” *Id.* at *8, *12.

45. To that end, the New York Constitution and State statute empower “**any citizen**” to enforce the 2014 amendments, expressly conferring standing on any citizen of New York to

bring an action to challenge the Legislature's enacted maps as either procedurally or substantively defective. *Id.* at *4 (quoting N.Y. Const. art. III, § 5, and N.Y. Unconsolidated Laws § 4221).

46. The Legislature's maps are procedurally defective where, as set forth above, the IRC fails to present a plan to the Legislature, or the Legislature fails to consider and vote on such a plan. *Id.* at *9.

47. The Legislature's maps are substantively defective where they have been drawn with an intent or motive **"to 'discourage competition' or 'favor or disfavor incumbents or other particular candidates or political parties.'"** *Id.* at *10 (quoting N.Y. Const. art. III, § 4(c)(5)).

48. Either defect renders the Legislature's maps unconstitutional, necessitating judicial intervention and remedy pursuant to Article III § 4. *Id.* at *11-12.

III. The IRC and Legislature Attempt to Evade the 2014 Constitutional Reforms

49. As alleged above, every ten years, New York must redraw its legislative districts to account for population changes reported in the Federal Census. *Harkenrider III*, 2022 WL 1236822, at *7 (citing N.Y. Const. art. III, § 4).

50. The State's prior redistricting occurred in 2012, after the 2010 Census.

51. Ten years later, now in 2022, new maps are constitutionally mandated. *Id.* Naturally, population changes occurred in the State of New York between 2012 and 2022. For example, as reported by the 2020 Census, released on April 26, 2021, New York's resident population increased by more than 4 percent, or 823,147 residents, since 2010—enough new voters to change the outcomes of multiple races.

52. After the 2020 Census was released, Democratic and Republican leaders in the New York Legislature appointed their respective delegations to the IRC, and the IRC commenced drafting new district maps to account for the population change reported in the 2020 Census.

53. As required by the Constitution, the IRC held public meetings across the State throughout 2021 to hear public testimony about draft maps and the redistricting process.² N.Y. Const. art. III, § 4(c).

54. After nine meetings, the IRC released initial map drafts on September 15, 2021.

55. Through October and November, the IRC held fourteen more public hearings on the draft maps and redistricting process. It also solicited written comments from the public, where stakeholders and voters voiced further concerns and suggestions.³

56. During that time, eschewing the will of voters, the Legislature tried, but failed, to enact a constitutional amendment in November 2021 that would have created an end-run around the IRC process created by the 2014 reforms. *Harkenrider I*, NYSCEF No. [243](#) (Decision & Order), at 7.

57. Under this failed amendment, the Legislature would have been able to create its own redistricting plan should the IRC submit no map for consideration and vote, effectively removing the IRC and associated public participation from the map-drawing process.

58. Unsurprisingly, New York citizens voted down the Legislature's craven amendment, which was intended to protect favored candidates and incumbents.

59. Undaunted, the Legislature and the Governor, just three weeks later, enacted a statute that gave the Legislature the *same* powers as its failed constitutional amendment to bypass the Article III § 4 process. (This statute would go on to be struck down by the Court of Appeals

² See N.Y. State Independent Redistricting Comm'n, *Meetings*, NYIRC, <https://www.nyirc.gov/meetings> (last visited May 2, 2022).

³ See N.Y. State Independent Redistricting Comm'n, *Submissions*, NYIRC, <https://www.nyirc.gov/submissions> (last visited May 2, 2022).

as “**unconstitutional to the extent that it permits the legislature to avoid a central requirement of the reform amendments.**” *Harkenrider III*, 2022 WL 1236822, at *9.)

60. The IRC pressed forward. It held its last public hearing on December 5, 2021, and the final deadline for public comment on draft maps was December 6.

61. With public hearings and comments closed, the IRC members began negotiations amongst themselves to finalize a set of maps to submit to the Legislature. But the IRC members were unable to reach an agreement or consensus.

62. On January 3, 2022, the Democratic delegation and their appointee voted for one redistricting plan, and the Republican delegation and their appointee voted for another. *Id.* at *2.

63. The Legislature received both plans from the IRC and voted upon them without amendment, rejecting both without public input. *Id.* It notified the IRC of its rejection on January 10, 2022. *Id.*

64. Consequently, under Article III § 4(b) of the New York Constitution, the IRC was *required* to draft a new redistricting plan to submit to the Legislature within 15 days, by January 25, 2022. And the Legislature was *required* to review and vote on this second plan.

65. Rather than submit a new plan, the IRC informed the Legislature that it was again deadlocked and would not send a second set of maps to the Legislature for review or a vote. *Id.* The January 25 deadline passed without the IRC submitting any new maps, or the Legislature voting on such maps, as was constitutionally required. *Id.*

66. Instead, over the next week, the Democrat-controlled Legislature drafted and enacted its own set of maps—along a party-line vote without public input—thereby effectuating a partisan redistricting of Congressional, State Senate, and State Assembly districts. *Id.*

67. Sadly, despite the undeniable (and now declared) infirmity, Democratic Governor Hochul signed these maps into law on February 3, 2022. *See* 2021–2022 N.Y. Reg. Sess. Leg. Bills A.9040- A and A.9168.

IV. The Court of Appeals Holds That the 2022 District Maps Are Unconstitutional

68. The same day the Governor signed the maps into law, a group of New York citizens filed a special proceeding in the Supreme Court of the County of Steuben challenging the constitutionality of the Congressional and (after amending their petition) Senate maps. *See Harkenrider I*, NYSCEF No. [18](#) (Amended Petition).

69. The *Harkenrider* petitioners claimed that the maps (1) were the product of a constitutionally defective process, and (2) were unconstitutional partisan gerrymanders.

70. On March 31, 2022, following a bench trial and extensive expert testimony, the Supreme Court voided the Congressional and Senate maps, holding that the IRC and Legislature had failed to follow the necessary constitutional procedure for submitting and reviewing a second set of redistricting plans when the Legislature rejected the IRC’s first redistricting plan.

71. The Supreme Court further held that the Congressional maps had been drawn with impermissible political bias—*i.e.*, were gerrymandered—and were void for that reason as well. *See Harkenrider I*, NYSCEF No. [243](#) (Decision & Order), at 14.

72. Of particular relevance here, the Supreme Court 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.” *Id.* at 10.

73. On appeal, the Fourth Department vacated the Supreme Court’s holding that the Senate and Assembly maps were procedurally defective and therefore void. *Harkenrider v. Hochul*, No. 22-00506, 2022 WL 1193180, at *3 (4th Dep’t Apr. 21, 2022) (“*Harkenrider II*”).

74. The Fourth Department’s decision was quickly overturned.

75. Six days later, on April 27, 2022, the New York Court of Appeals reversed the Fourth Department, reinstating the Supreme 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 III*, 2022 WL 1236822, at *5.

76. “[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.

77. The Court of Appeals found that the Assembly map suffered from the same **“procedural infirmity”** as the Congressional and Senate maps. *Id.* at *11 n.15.

78. However, the Court of Appeals declined to *sua sponte* invalidate the Assembly map because the petitioners had neither sought such relief nor appealed the Fourth Department’s vacatur of the Supreme Court’s voiding of the Assembly map. *Id.* at *11 n.15.

79. In short, the Assembly map is clearly void, and a declaration to that effect depends on nothing more than the institution of this action, thus finally giving full effect to the 2014 constitutional amendments.

V. The Court of Appeals Remands to the Supreme Court to Oversee Redistricting and Order Other Necessary Relief

80. The constitutional deadline for the IRC to submit a second redistricting plan has passed. Consequently, the Legislature’s unconstitutional maps are **“incapable of a legislative cure.”** *Harkenrider III*, 2022 WL 1236822, at *12.

81. The Court of Appeals therefore remanded the matter to the Supreme Court to craft and adopt redistricting maps in a court-supervised process, as authorized by Article III, § 4(e) of the New York Constitution. *Id.*

82. Judicial oversight, the Court of Appeals explained, is **“required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election.”** *Id.* at *1.

83. The Supreme Court was directed to adopt a redistricting plan **“with the assistance of a neutral expert, designated a special master, following submissions from the parties, the legislature, and any interested stakeholders who wish to be heard.”** *Id.* at *12.

84. The Court of Appeals rejected the state respondents’ request to defer a remedy until after the 2022 election cycle. *Harkenrider III*, 2022 WL 1236822, at *12. The Court of Appeals was **“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.”** *Id.* at *12.

85. Consequently, two days after the Court of Appeals decision, the Supreme Court on **April 29, 2022**, moved the Congressional and State Senate primaries to August 23; it scheduled a public hearing for input on new maps with the Special Master it had appointed during the pendency of the appeals for five business days later on **May 6**; it set a deadline for the Special Master to produce new, proposed maps six business days later on **May 16**; and, after public comment on the Special Master’s proposed maps, final nonpartisan maps will be issued four business days later on

May 20.⁴ *See Harkenrider I*, NYSCEF Nos. [296](#) (Second Amended Order), [301](#) (Preliminary Order).

86. The Supreme Court, however, did not grant critical relief relating to the Assembly map, the candidate petitioning periods, or primary elections. No party sought such relief.

87. *First*, the Supreme Court did not void the unconstitutional Assembly map or order that a new map be drawn.

88. *Second*, the Supreme Court did not move the Assembly or Statewide primaries, notwithstanding that those primaries are based on unconstitutional maps.

89. It is necessary to move the Assembly primary, just as it was for the Congressional and Senate primaries, to implement a new map and make room for associated election deadlines.

90. It is also necessary to move the primary election for Statewide office. The Statewide primary is tainted because candidates for Statewide office must obtain petition signatures from 50% of Congressional districts—which the Court of Appeals held were both procedurally and substantively unconstitutional—to appear on the primary ballot.

91. *Third*, and relatedly, the Supreme Court has only opened new designating and independent nominating petition periods for Congressional and State Senate offices, leaving party and independent candidates for Statewide, State Assembly, and local offices without recourse. *See Harkenrider I*, NYSCEF No. [524](#) (Order).

92. To appear on a primary ballot, a candidate for Statewide, Congressional, State Senate, State Assembly, and local offices must obtain signatures from voters who meet specific district residency requirements. *See* N.Y. Elec. Law § 6-134.

⁴ The Supreme Court appointed Dr. Jonathan Cervas as Special Master. He will complete most of his work on May 16. This Court should also appoint Dr. Cervas, who now has expertise and should be able to craft a new Assembly map—just one map—on an even shorter timeline.

93. Once maps are redrawn, signatures that candidates have obtained may no longer comply with state law and will thus be invalid. Problematically, such signatures will likely reflect support from voters that are *no longer in the candidate's district*.

94. Further, candidates who were excluded in the now-closed designating petitioning periods for Statewide and State Assembly offices will be eligible to seek signatures from new voters who are within their district after maps are redrawn. Candidates' calculus as to whether to run for office may change as the competitive dynamics of a district change.

95. The last day to file designating petitions for candidates seeking to appear on a primary ballot for the June 28, 2022, primary was April 7, 2022. *See* Devlin Affirmation Ex. 1. On May 4, 2022, the State Board of Elections certified certain primary ballots.⁵

96. Candidates for Statewide and State Assembly offices who did not complete the designating petitioning process with unconstitutional district maps in place have been excluded from the ballot and will have no opportunity to obtain new signatures based on constitutional maps.

97. If the petition period is not reopened, then primary ballots will reflect a slate of candidates that were beneficiaries of an unconstitutional gerrymander and redistricting process with petition signatures that are no longer valid. Furthermore, potential candidates who were excluded under the unconstitutional district maps will have no chance to seek office.

98. For example, Petitioner Nichols's signatures were invalidated for his gubernatorial primary run on the Democratic ticket. Once a constitutional Congressional map is adopted, he will have no opportunity to circulate designating petitions to obtain ballot access as a Democrat. If a designating petition period were reopened for Statewide races, as it should be (which would likely

⁵ *See* N.Y. State Board of Elections, Certification for the June 28, 2022 Primary Election (May 4, 2022), <https://www.elections.ny.gov/NYSBOE/Elections/2022/Primary/Jun282022PrimaryCertification.pdf>.

require moving the primary to August 23 or September 13), Petitioner Nichols would seek to run again as a Democratic candidate for Governor. Nichols Affirmation ¶¶ 2-3, 7.

99. Typically, candidates have approximately twenty-eight business days to collect and file designating petitions. *See* Devlin Affirmation Ex. 1.

100. Likewise, candidates running on an independent ballot line must obtain petition signatures from signatories who meet specific district-based residency requirements in order to appear on the general election ballot. *See* N.Y. Elec. Law § 6-138.

101. If this period is not appropriately extended, candidates currently collecting signatures may unwittingly obtain signatures that will be rendered invalid once maps are redrawn and will not have enough time to obtain new signatures. The current process is interfering with their ability to obtain a third-party ballot line to advance their respective candidacies.

102. For example, Petitioner Nichols intends to circulate an independent nominating petition to appear on the general election ballot as a third-party candidate for Governor but the current process is interfering with his ability to appear as a third-party candidate. If he cannot secure a third-party line either, voters who support him will not be able to vote for him this election cycle. Nichols Affirmation ¶¶ 4-6.

103. Further, candidates who, once seeing the redrawn maps, would decide to run as an independent may not have enough time to collect petitions.

104. Typically, candidates have approximately thirty business days to collect and file independent nominating petitions. *See* Devlin Affirmation Ex. 1.

105. These three components of relief—voiding the State Assembly map, enjoining state and local primary elections, and adopting appropriate designating and independent nominating petition periods—are necessary to remedy the Legislature’s brazen constitutional violations.

VI. Petitioners Wax and Greenberg Move to Intervene in the *Harkenrider* Action

106. Within a week of the Court of Appeals' decision, Petitioners Wax and Greenberg separately moved by order to show cause to intervene in *Harkenrider* under CPLR 1012 and 1013.

107. Petitioners Wax and Greenberg sought to be heard on their claims that the Assembly map was unconstitutional and on their requests for complete relief to the constitutional violations of the Legislature and thus fill the gap left by the current petitioners.

108. No party disputed that the Assembly map was unconstitutional. That fact was effectively conceded at oral argument by counsel for Respondent Heastie:

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.

Devlin Affirmation Ex. 2, at 65:19-66:1.

109. Of course, counsel was wrong. The Court of Appeals did not have any opportunity to invalidate the Assembly map; it found that “*we may not invalidate the assembly map despite its procedural infirmity*” because “*petitioners neither sought invalidation of the 2022 state*

assembly redistricting legislation in their pleadings nor challenge[d] in this Court the Appellate Division’s vacatur of the relief granted by Supreme Court.” *Harkenrider III*, 2022 WL 1236822, at *11 n.15 (emphasis added).

110. While there is no question that the Assembly map is unconstitutional, all parties opposed intervention, and on May 11, the Supreme Court denied Petitioner Wax’s and Greenberg’s motions as “untimely” and because “to permit them to intervene at this time would be extremely burdensome to the court and existing parties.” *Harkenrider I*, NYSCEF No. [522](#) (Decision & Order), at 4.

111. The Supreme Court “agree[d] with the potential intervenors Greenberg and Wax that the Assembly maps were unconstitutional in the manner they were enacted.” *Id.* at 3. The Supreme Court also “agree[d] that the current petitions and Petitioners do not adequately represent the interests of Greenberg and Wax when it comes to challenging the Assembly District maps.” *Id.*

112. But the Supreme Court dismissed their motions as untimely because “it was clear from the Petition and Amended Petition [filed in early to mid-February] that the Assembly Districts were not being challenged.” *Id.* at 2.

113. The Supreme Court observed that “if a separate action can be maintained then the intervenors rights are not affected by a decision in this case,” and that “permitting intervention could substantially affect the rights of the Petitioners in that it could and likely would result in new maps not being enacted in time for a primary this year. Such a result would impact the Congressional and State Senate maps that should be in place by May 20th. Since the court has received no potential maps with regard to new Assembly District lines it would most assuredly mean that new maps could not be in place by May 20th.” *Id.* at 3.

114. But “[n]othing in this Decision and order,” the Supreme Court concluded, “is meant to prevent either [Petitioners Greenberg or Wax] from pursuing a separate action to challenge the Assembly maps.” *Id.*

VII. The New York State Board of Elections Neglects to Address Unconstitutional District Maps and Unlawfully Certifies and Mails Certain Primary Ballots

115. Over a month ago, on March 31, State Respondents, including the Board of Elections, learned that Congressional, State Senate, and State Assembly maps would potentially need to be replaced when the Supreme Court in *Harkenrider* declared all three unconstitutional.

116. Further, the Board of Elections knew that moving the primary elections would likely be necessary if new maps were to be adopted.

117. Indeed, just prior to the March 31 decision, the parties in *Harkenrider* submitted supplemental briefing on the issue of remedy and changing election dates and deadlines.

118. In an affidavit submitted with this briefing, Co-Executive Director Valentine of the Board of Elections expressly contemplated the possibility of “**a court-ordered August 23, 2022, Congressional and State Senate primary,**” where “**the ballot access process could be adjusted to be completed no later than June 2, 2022, and the primary held August 23, 2022, this would provide the same 82 days that currently exist in under law for June 28, 2022 primary. This would allow time for the boards to certify the primary ballot and send any military and overseas ballots by July 8, 2022.**” *Harkenrider I*, NYSCEF No. [239](#) (Valentine Affidavit), ¶ 8.

119. But the Board of Elections apparently did nothing to plan for that eventuality for any of the races. They came up with no contingencies to implement new maps and ensure the State could administer an election complying with the Constitution.

120. The Board of Elections apparently only mobilized *after* the Supreme Court ordered on April 29, 2022, that the Congressional and State Senate primaries be moved to August 23. Co-

Executive Director Valentine stated (rather opaquely) in an affidavit opposing Petitioner Wax's and Greenberg's motions to intervene that the Board of Elections and local boards of elections **"have been aware of this change for some time now"**—referring to the **"August congressional and State Senate primaries ordered by [the Supreme Court]"**—and **"have been preparing for those offices to be contested at an August primary."** *Harkenrider I*, NYSCEF No. [430](#) (Valentine Affidavit), ¶ 8.

121. The Board of Elections' delay is astounding. The Supreme Court had held on March 31 that all maps were unconstitutional, the Fourth Department's had held on April 21 that the Congressional map was unconstitutional, and the Court of Appeals had held on April 27 that all maps were unconstitutional while stating that moving the primaries to August will **"likely be necessary."** *Harkenrider III*, 2022 WL 1236822, at *12

122. Rather than create solutions to the unconstitutional district maps, the Board of Elections has perpetuated an unconstitutional status quo through delay and apathy.

123. Not only that, but the Board of Elections has taken affirmative steps without authority to entrench that unconstitutional status quo.

124. On May 4, the Board of Elections certified certain primary election ballots for Assembly and Statewide office, and on or around May 13, the Board of Elections mailed the same primary ballots to military and overseas voters.⁶ It did this knowing the ballots are based on unconstitutional maps. And it has offered no authority for ignoring constitutional requirements.

⁶ See N.Y. State Board of Elections, *Certification for the June 28, 2022 Primary Election* (May 4, 2022), <https://www.elections.ny.gov/NYSBOE/Elections/2022/Primary/Jun282022PrimaryCertification.pdf>; *Harkenrider I*, NYSCEF No. [430](#) (Valentine Affidavit), ¶¶ 10-11; *Harkenrider I*, NYSCEF No. [435](#) (Executive Respondents' Opposition to Intervention), at 11.

VIII. The Board of Elections Fails to Justify Why It Cannot Administer an Election that Passes Constitutional Muster

125. State Respondents have repeatedly argued in *Harkenrider I* since March that it would be “**virtually impossible**” or “[im]practicable” to hold elections if the unconstitutional maps are replaced for the 2022 primary. NYSCEF No. [234](#) (Petitioners’ Supplement Brief Addressing Remedies), at 7; NYSCEF No. [233](#) (Hecker Affirmation), ¶ 14.

126. Notwithstanding these earlier pronouncements, the parties and the Supreme Court are now proceeding apace with the Special Master to replace the Congressional and Senate maps.

127. New York has extensive experience with adjusting election deadlines and primaries and is ably capable of doing so again.

128. As Co-Executive Director Valentine averred, “**as recently as 2020 executive orders have altered the [ballot access] process at the eleventh hour to address exigent circumstances, then due to a global pandemic.**” *Harkenrider I*, NYSCEF No. [239](#) (Valentine Affidavit), ¶ 4.

129. The “**exigent circumstances**” today, by contrast, are State Respondents’ own fault, and they should not be allowed to waltz into the 2022 elections without fixing their grave errors.

130. There is a simple solution: hold the federal Congressional primary on August 23 and state and local primaries on either August 23 or the second Tuesday of September, which is the 13th.

131. This solution has historical precedent. In 2012, 2014, 2016, and 2018, the federal primary election was held in June and state and local primaries were held in September.

132. Yet, today, the Board of Elections protests that moving another primary would create “**additional, potentially unbearable burdens on the State’s election system.**” *Harkenrider I*, NYSCEF No. [430](#) (Valentine Affidavit), ¶ 8.

133. What the Board of Elections does not say is that it is impossible. They do not explain why they “**have no practical solutions**” for the “**additional burden[s]**” and “**logistical hurdles**.” *Id.* ¶¶ 19, 27. Whatever burdens there may be, moving the dates back and consolidating all the state races on a single primary day will both ease those burdens and, much more importantly, reduce voter confusion and ensure that the constitutional injury to voters that the Court of Appeals sought to avoid—“**subject[ing] the People of this state to an election conducted pursuant to an unconstitutional reapportionment**”—is avoided. *Harkenrider III*, 2022 WL 1236822, at *11.

134. Indeed, the Attorney General stated at the *Harkenrider* trial that holding two primaries would carry “**major risks**.” Devlin Affirmation Ex. 3, at 126:4.

135. It appears the Board of Elections has not even tried to come up with solutions.

136. This is unacceptable. New York is at risk of holding unconstitutional elections and undermining voters’ confidence in our political system and government.

137. Just as the Court of Appeals in *Harkenrider III* found no good reason to delay a remedy for the unconstitutional Congressional and State Senate maps, there is no good reason to delay a remedy to the unconstitutional Assembly map, Statewide primary, or petitioning periods.

138. This Court should follow the clear mandate of the Court of Appeals.

139. *First*, this Court should void the 2022 State Assembly map.

140. The IRC and Legislature indisputably failed to comply with Article III, § 4(b) of the New York Constitution—enacting, as the Court of Appeals held, an Assembly map with a fatal constitutional defect that undermines the goals of the 2014 amendments.

141. The only option here is for this Court to declare the unconstitutional Assembly map void and adopt a new one while making necessary arrangements for the 2022 election cycle.

142. *Second*, this Court should move all state and local primaries to August 23 or September 13 (while leaving the Congressional primary on August 23 as currently scheduled).⁷

143. If August 23 does not present enough time, then moving state and local primaries to September would merely put them on a date where they have been held in past years and give the Board of Elections ample time to implement new maps and move associated milestones.

144. *Third*, this Court should open sufficient petition periods for current and potential party and independent candidates to obtain access to primary and general election ballots.⁸

145. As alleged above, some candidates have been unfairly excluded and others will be placed on ballots notwithstanding invalid signatures. Potential new candidates may wish to run for office after finding themselves in a redrawn district where they are now competitive and can obtain signatures that they could not have before. Potential candidates who had considered running on a party ticket may choose instead to run as an independent, and vice-versa.⁹

⁷ The Congressional primary election is subject to a federal requirement to mail military and overseas ballots 45 days before an election. *See* 52 USC § 20302 (The Uniformed and Overseas Citizens Absentee Voting Act). As such, the Congressional primary should remain on August 23; but this federal statutory requirement does not apply to state and local elections.

⁸ Respondents have argued in *Harkenrider I* that Petitioner Greenberg lacks standing to seek relief as to petition signatures and period. *See* NYSCEF No. [435](#) (Executive Respondents' Opposition to Intervention), at 5-6; NYSCEF No. [467](#) (Respondent Heastie's Opposition to Intervention), at 15. Petitioners' standing to seek relief as to designating and nominating petitions is grounded in their broad standing recognized by the Court of Appeals for "**any citizen**" to "**seek judicial review of a legislative act establishing electoral districts**" and associated relief, including "**the completion of the petitioning process.**" *Harkenrider III*, 2022 WL 1236822, at *4, 12. Respondents' argument in their oppositions to intervention the issue of independent nominating petitions is not ripe is equally frivolous: candidates are currently gathering signatures and must file them before May 31—that amount of time is insufficient and presently hindering candidates' ability to marshal the requisite support to earn an independent ballot line, as Congressional and State Senate maps will not be released until May 20, and a State Assembly map has not been redrawn. Any statute of limitations argument regarding challenging designating petitions is also irrelevant—Petitioners are not challenging specific designating petition signatures.

⁹ In this way, the Legislature's unconstitutional redistricting has harmed voters' and candidates' interests in fair and accurate representation. As alleged above, to appear on a ballot, candidates must collect signatures from voters who meet certain residency requirements under state law. The redrawing of district lines makes it likely that many of these signatures will no longer meet statutory requirements. Unless the

146. This Court does not have to restart the entire process—it need only allow existing candidates to cure invalid signatures once maps are redrawn and grant new candidates another chance to obtain the requisite signatures based on constitutionally compliant districts.

147. As Co-Executive Direct Valentine averred in March in *Harkenrider I*: **“Candidates adjusted to such changes in the past for prior redistricting changes due to court orders, and there is no real reason candidates and election officials cannot be similarly responsive to necessary changes in response to this Court’s remedial decisions.”** *Harkenrider I*, NYSCEF No. [239](#) (Valentine Affidavit), ¶ 5.

* * *

148. The Supreme Court Steuben County has granted partial relief on Petitioners’ constitutional claims. The Congressional and State Senate maps are currently being redrawn and will be completed on May 20, 2022, and their primaries have been moved to August 23, 2022. The Supreme Court has also adopted designating and independent nominating petition periods and procedures for Congressional and State Senate candidates.¹⁰

periods for collecting such signatures are reopened or extended, candidates who do *not* have the requisite signatures (which reflects a level of support within their relevant political unit for eligibility to appear on a ballot) will nonetheless be allowed to run for office. Further, potential candidates who decided not to run under the constitutionally defective maps—because they lacked the requisite support or found themselves uncompetitive—will be harmed. They will be denied the opportunity to seek election where—once the maps are redrawn—they are now competitive candidates for office. As a result, voters will be deprived of a fair and accurate slate of candidates in the 2022 election cycle, as well as proper representation for years to come. This affects all offices: Statewide, Congressional, State Senate, State Assembly, and local.

It is critical for this Court to ensure that candidates in the 2022 election cycle reflect the interests of their actual constituencies. Because some persons who may have chosen not to step forward as candidates based on the existing, unconstitutional maps—believing themselves to be uncompetitive—and because some candidates may have invalid signatures but still be able to cure them, this Court should open a sufficient petition period for Statewide, Congressional, State Senate, State Assembly, and local offices and adopt any other necessary remedial measures. There will be ample time for candidates to circulate petitions if this Court adopts an August 23 or September 13 primary date for state and local offices.

¹⁰ Petitioners do not concede that the petition periods ordered by the Supreme Court Steuben County are adequate and reserve their right to request different petition periods should the political calendar need to be changed to make the relief sought herein effective.

149. Petitioners ask this Court to complete the Court of Appeals' mandate and grant full relief. **"Prompt judicial intervention is both necessary and appropriate to guarantee the People's right to a free and fair election."** *Harkenrider III*, 2022 WL 1236822, at *12.

FIRST CAUSE OF ACTION

Failure to Follow Constitutional Procedures for Redistricting Congressional, State Senate, and State Assembly District Maps (N.Y. Const. art. III, § 4(b))

150. Petitioners incorporate each of the foregoing paragraphs as if fully set forth herein.

151. Every ten years, New York must reapportion districts **"to account for population shifts"** reported in the Federal Census. *Harkenrider III*, 2022 WL 1236822, at *1.

152. Article III, § 4(e) of the New York Constitution provides that **"[t]he process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article shall govern redistricting in this state."** N.Y. Const. art. III, § 4(e).

153. Article III, § 4(b) requires that, should the Legislature **"fail to approve the legislation implementing the first redistricting plan"** prepared by the IRC, the IRC then **"shall prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan,"** and that **"[s]uch legislation shall be voted upon, without amendment."** N.Y. Const. art. III, § 4(b).

154. Only then, after rejecting a second redistricting plan, or, after the Governor vetoes such plan, may the Legislature **"introduce"** its own **"implementing legislation"** along with **"any amendments"** that comply with Article III, Section 4. N.Y. Const. art. III, § 4(b).

155. After the Legislature rejected the first-round maps introduced by the IRC, and the IRC did not adopt and introduce second-round maps to the Legislature within 15 days, the Legislature was left with no maps to act on within the scope of its limited constitutional role.

156. As a result, the Legislature did not consider a second map from the IRC, which mandatory consideration was required before the Legislature was constitutionally permitted to adopt its own Congressional map. N.Y. Const. art. III, § 4(b).

157. On February 3, 2022, several voters of New York challenged the constitutionality of this process, and, on April 27, 2022, the Court of Appeals held that the procedure used by the IRC and Legislature was unconstitutional. *Harkenrider III*, 2022 WL 1236822, at *11.

158. The State Constitution “**requires expedited judicial review of redistricting challenges . . . and authorizes the judiciary to ‘order the adoption of, or changes to, a redistricting plan’ in the absence of a constitutionally-viable legislative plan.**” *Id.* at *2 (citing NY Const, art III, § 4(e) then quoting *id.* § 4(e)).

159. Further, “**judicial oversight is required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election.**” *Id.* at *1.

160. “[I]n 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.” *Id.* at *12.

161. The *Harkenrider* petitioners have sought only partial relief to the unconstitutional apportionment of Congressional, State Senate, and State Assembly district maps and failed to fully vindicate the rights of Petitioners and New York voters.

SECOND CAUSE OF ACTION**Declaratory Judgment – Invalidate State Assembly Map
(CPLR § 3001)**

162. Petitioners incorporate each of the foregoing paragraphs as if fully set forth herein.

163. Petitioners seek a declaratory judgment from the Court “**as to the rights and other legal relations of the parties,**” CPLR § 3001, regarding the constitutionality of the Assembly map (“2022 State Assembly map”). *See* 2021–2022 N.Y. Reg. Sess. Leg. Bills A.9040-A and A.9168.

164. This issue is ripe for judicial review.

165. If this constitutional question is not resolved, neither Petitioners, State Respondents, nor the citizens of New York will have adequate guidance regarding the propriety of the enacted maps, in preparation for impending elections, which will be left in limbo following the Court of Appeals decision in *Harkenrider*.

166. If this constitutional question is not promptly resolved, it will be too late to do so without threatening the integrity of upcoming elections, leaving the voters of New York with an indisputably unconstitutional map in the elections.

167. This Court should enter judgment declaring that the 2022 State Assembly map violates the New York Constitution and is therefore void *ab initio*.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for relief as follows:

First, declaring pursuant to CPLR § 3001 that the 2022 State 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;

Second, appointing a special master to adopt a legally compliant State Assembly map;

Third, enjoining Respondents to adjourn the primary election date for state and local elections to August 23, 2022, or, alternatively, September 13, 2022;

Fourth, 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;

Fifth, 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;

Sixth, awarding Petitioners reasonable attorneys' fees and costs; and

Seventh, awarding such other and further relief as this Court may deem just and proper.

Dated: New York, NY
May 15, 2022

Respectfully submitted,

WALDEN MACHT & HARAN LLP

By: /s/ Jim Walden

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Attorney for Petitioner Gavin Wax

**Petitioners' [Proposed] Order to Show Cause Regarding Petition
and Emergency Motion for a Temporary Restraining Order
[pp. 50 - 53]**

At ____ Part ____ of the Supreme Court of the State
of New York, held in and for the County of New
York at the Courthouse, 60 Centre Street, New
York, NY on the ____ day of May, 2022

PRESENT:

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG

Petitioners,

Index No. _____

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

Respondents.

**[PROPOSED] ORDER TO
SHOW CAUSE REGARDING
PETITIONERS' PETITION
AND EMERGENCY MOTION
FOR A TEMPORARY
RESTRAINING ORDER**

WHEREAS, Petitioner Paul Nichols, a resident and registered voter of Queens County and candidate for Governor of New York State; Petitioner Gavin Wax, a resident and registered voter of New York County; and Petitioner Gary Greenberg, a resident and registered voter of Greene County and potential candidate for Congressional or State office, by their undersigned counsel, pursuant to Article III, section 5 of the New York Constitution, Unconsolidated Laws § 4221 (L 1911, ch. 773, § 1), and CPLR § 3001, commenced this CPLR Art. 4 special proceeding by filing a Petition to challenge an apportionment;

UPON the reading and filing of the annexed Petition, the Affirmation of Paul Nichols, the Affidavit of Gavin Wax, the Affidavit of Gary Greenberg, the Affirmation of Peter A. Devlin and the exhibits annexed thereto, the accompanying Memorandum of Law, and all of the pleadings and

proceedings heretofore had herein;

LET Respondents or their counsel show cause before this Court, at IAS Part ____, Room ____, at the Courthouse located at 60 Centre Street, New York, NY on the ____ day of May, 2022, at 9:30 a.m., or as soon thereafter as counsel can be heard, why Judgment should not be made and entered pursuant to CPLR § 411 and CPLR § 3001:

1. Declaring pursuant to CPLR § 3001 that the 2022 State 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;
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;
6. Awarding Petitioners reasonable attorneys’ fees and costs; and

7. Awarding such other and further relief as this Court may deem just and proper.

SUFFICIENT CAUSE APPEARING THEREFORE, IT IS FURTHER ORDERED

that, pending hearing and determination of the within Petition:

1. Respondents are hereby enjoined from using the 2022 State Assembly map in administering the 2022 primary and general elections; and
2. The Court will appoint a special master to begin proceedings to evaluate and draft a State Assembly map for the 2022 primary and general elections.

SUFFICIENT CAUSE APPEARING THEREFORE,

IT IS ORDERED, that service of a copy of this Order to Show Cause and the papers upon which it is based, upon the Respondents and anyone else required to receive service pursuant to Unconsolidated Laws § 4221, in the same manner as a summons, on or before the ____ day of May, 2022, shall be deemed good and sufficient service;

ORDERED, that service upon the following persons, by email, at the following addresses, shall be deemed good and sufficient service of the temporary restraining order contained herein pending hearing and determination of the Petition: Governor Kathy Hochul (heather.mckay@ag.ny.gov, matthew.brown@ag.ny.gov); Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins (agoldenberg@chwllp.com, jcuti@chwllp.com, areiter@chwllp.com, dmullkoff@chwllp.com, checker@chwllp.com, hgregorio@chwllp.com); Speaker of the Assembly Carl Heastie (dchill@graubard.com, jlessem@graubard.com, ereich@graubard.com, cbucki@phillipslytle.com, ssalcedo@phillipslytle.com, rvalentine@phillipslytle.com); New York State Board of Elections (brian.quail@elections.ny.gov, Kimberly.Galvin@elections.ny.gov);

ORDERED, that any party appearing in this matter shall appear via NYSCEF and serve

and file papers in electronically via NYSCEF absent good cause shown;

ORDERED, that answering papers, if any, shall be served by NYSCEF upon Petitioners' counsel at least ____ days before the time at which the Petition is noticed to be heard; and

ORDERED, that reply papers, if any, shall be served by NYSCEF upon Respondents' counsel at least ____ days before the time at which the Petition shall be heard by email at the addresses given above.

DATED: New York, New York
May ____, 2022

ENTER:

Hon.

**Petitioners' Memorandum of Law in Support of Emergency Motion
by Order to Show Cause for a Temporary Restraining Order,
dated May 15, 2022
[pp. 54 - 65]**

FILED: NEW YORK COUNTY CLERK 05/15/2022 10:34 PM

NYSCEF DOC. NO. 3

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/15/2022

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

PAUL NICHOLS, GAVIN WAX, GARY
GREENBERG,

Petitioners,

Index No. _____

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

Respondents.

**PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION
BY ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER**

WALDEN MACHT & HARAN LLP
250 Vesey Street, 27th Floor
New York, NY 10281
(212) 335-2030

Of Counsel:

Jim Walden (jwalden@wmhlaw.com)

Peter A. Devlin (pdevlin@wmhlaw.com)

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Greenberg*

LAW OFFICE OF AARON S. FOLDENAUER
30 Wall Street, 8th Floor
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(212) 961-6505

Of Counsel:

Aaron S. Foldenauer (aaron@nyelectionlaw.com)

Attorney for Petitioner Gavin Wax

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Paul Nichols, Gavin Wax, and Gary Greenberg (“Petitioners”), by their undersigned counsel, submit this Memorandum of Law in support of their Emergency Motion by Order to Show Cause for a Temporary Restraining Order.

PRELIMINARY STATEMENT

On April 27, 2022, the Court of Appeals held that the procedure the Legislature used to enact Congressional, State Senate, and State Assembly district maps violated the New York Constitution. *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *11 & n.15 (N.Y. Apr. 27, 2022). 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 that action, inexplicably, had not challenged the Assembly map in their petition. *Id.* And, even after the Supreme Court in that action ruled *sua sponte* that the Assembly map was “**void and unusable,**”¹ the petitioners refused to defend the holding on appeal. *Id.* at *11 n.15. Nonetheless, the Court of Appeals made clear that the same rationale—and the same ruling—necessarily applies to the Assembly map, since all three maps were enacted using the same unconstitutional procedure. *Id.* The Court of Appeals thus effectively invited a challenge to the Assembly map. Petitioners bring that challenge now.

The interim relief now sought by Petitioners flows directly from the Court of Appeals’ decision. Petitioners request that this Court restrain Respondents from using the unconstitutional Assembly map for the 2022 election process until the Court can make a decision on the ultimate relief sought in the Petition. Petitioners’ claim is indisputably meritorious. In light of the clarity of the rulings from the Steuben County Supreme Court and the Court of Appeals, Respondents

¹ Decision & Order at 10, NYSCEF No. [243](#), *Harkenrider v. Hochul*, Index No. E 2022-0116 CV (Mar. 31, 2022) (hereinafter “*Harkenrider I*”).

cannot, *and we suspect will not*, dispute the unconstitutionality of the Assembly maps. But this Court will likely witness their craven and desperate attempt—for their own political gain—to force voters into the exact harm the Court of Appeals decried: to **“subject the People of this state to an election conducted pursuant to an unconstitutional reapportionment.”** *Id.* at *11.

Without interim relief, Respondents will continue to entrench the unconstitutional Assembly map, making it more and more difficult to untangle from the election process in time to hold primary and general elections. Petitioner Greenberg and Petitioner Wax originally moved to intervene in Steuben County. Greenberg Affidavit ¶ 4; Wax Affidavit ¶ 6. All parties opposed their motions, and the Supreme Court denied them as untimely and burdensome to the court and parties in that case. *See* Petition ¶¶ 106–14. The Supreme Court was clear, however, that it **“agree[d] with the potential intervenors Greenberg and Wax that the Assembly maps were unconstitutional in the manner they were enacted”; “agree[d] that the current petitions and Petitioners do not adequately represent the interests of Greenberg and Wax when it comes to challenging the Assembly District maps”; and “[n]othing in this Decision and order,”** the Supreme Court concluded, **“is meant to prevent either [Petitioners Greenberg or Wax] from pursuing a separate action to challenge the Assembly maps.”**²

Respondents have known that they may need to replace the Assembly map for well over a month and yet they have done nothing to fix the map, adjust the elections process, or otherwise prepare a contingency plan. Instead, Respondents have misdirected by unjustifiably complaining about the difficulty of changing the election calendar and certified ballots and opposed the motions. *See* Petition ¶¶ 125–36. But the Court of Appeals clearly held that complying with the Constitution trumps administrative challenges—while **“cognizant of the logistical difficulties involved in**

² *Harkenrider I*, Decision & Order at 4, NYSCEF No. [522](#).

preparing for and executing an election,” the Court of Appeals rejected the notion that there was **“no choice but to allow the 2022 primary election to proceed on unconstitutionally enacted”** maps. *Harkenrider III*, 2022 WL 1236822, at *12.

Petitioners therefore further request that this Court appoint a special master to begin the process of drawing a State Assembly map. The Court of Appeals held that in the present circumstances—when the deadline has passed for the Legislature to cure the procedural problems it caused—the proper remedy is for the Supreme Court, with the aid of a neutral redistricting expert, serving as special master, to oversee redistricting. *Id.* at *11. Proceedings to redraw the Congressional and State Senate maps are underway in Steuben County and are scheduled to conclude on May 20. Petitioners seek interim relief to ensure that the same remedy for the Assembly map remains possible: to restrain Respondents’ from further entrenching the Assembly map and appoint a special master to begin the process of adopting a constitutionally compliant Assembly map.³ The proceeding in Steuben County will have taken only fifteen business days to gather public input and adopt *two* final district maps. *See* Petition ¶ 85. There is no reason a special master proceeding here for a single district map cannot take less.

For races other than Congressional and State Senate, the primary elections—including State Assembly primaries—are currently set for June 28, 2022. On remand, the Supreme Court in *Harkenrider* moved Congressional and State Senate primaries to August 23. Thus, among the ultimate relief Petitioners will seek is for the Court to enjoin the holding of state and local primary elections to August 23 or—as in prior years—the second Tuesday of September (which is the

³ The Special Master in *Harkenrider*, Dr. Jonathan Cervas, will substantially complete his work by May 16. Petitioners respectfully propose appointing Dr. Cervas as Special Master here. Because Dr. Cervas is currently serving as Special Master in the Supreme Court Steuben County, Petitioners did not believe it would be appropriate to contact him before commencing this Special Proceeding. However, Petitioners are prepared to immediately seek Dr. Cervas’s availability and request his appointment.

13th). Enjoining the primaries will create ample breathing room for the New York State Board of Elections and local boards of elections to administer elections that comply with the strict and clear demands of the Constitution.

ARGUMENT

The purpose of interim relief is twofold: preserve the status quo and protect the efficacy of a final judgment until there can be a full hearing on the merits, which, in this Special Proceeding, must be concluded expeditiously. *Pamela Equities Corp. v. 270 Park Ave. Café Corp.*, 62 A.D.3d 620, 621 (1st Dep’t 2009); *Bd. of Managers of 235 E. 22nd St. Condo. v. Lavy Corp.*, 233 A.D.2d 158, 161 (1st Dep’t 1996). Petitioners must demonstrate (1) likelihood of success on the merits, (2) irreparable injury if the relief is not granted, and (3) balancing of the equities weighs in Petitioners’ favor. *Pamela*, 62 A.D.3d at 620; *see also IHG Mgmt. (Maryland) LLC v. W. 44th St. Hotel LLC*, 163 A.D.3d 413, 414 (1st Dep’t 2018).

Petitioners’ request for interim relief easily meets all three requirements.

I. PETITIONERS ARE ASSURED TO SUCCEED ON THE MERITS

Petitioners are likely to succeed on the merits. Respondents have already litigated the same issue here in trial and appellate proceedings in *Harkenrider*; that is, whether the Legislature followed the constitutionally mandated process when it enacted the Congressional, State Senate, and State Assembly maps. And Respondents lost on that issue.

As discussed above, the Court of Appeals held that the maps—including the Assembly map—are procedurally unconstitutional and must be remedied through judicial intervention. *See* Petition ¶¶ 68–79. Respondents are now issue precluded 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.**”). The only question remaining for Petitioners’ claims is what *relief* should

be granted. But that question is irrelevant to whether interim relief is warranted now. *See Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988) (holding that plaintiffs can succeed on the merits by showing that the challenged regulations were unconstitutional).

The first factor tips strongly in Petitioners' favor.

II. WITHOUT INTERIM RELIEF, PETITIONERS WILL SUFFER IRREPARABLE HARM OF A CONSTITUTIONAL DIMENSION

With each step Respondents take towards administering primary and general elections using the unconstitutional Assembly map, Petitioners suffer irreparable harm and risk receiving no relief on their unquestionably meritorious claims. 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.

Surely recognizing this fact, Respondents have tried to run out the clock. Rather than try to fix the constitutional defect, Respondents have used every litigation tactic possible to protect the ultimate prize from their willing constitutional violation: a partisan-infected Assembly map. In slavish service to this goal, their response is galling. Respondents are not only responsible for the infirm maps; they are responsible for the emergency New Yorkers now find themselves in. Respondents knew over a month ago, on March 31, that the Assembly map may need to be replaced when the Supreme Court in *Harkenrider* court declared it void. But Respondents have done nothing to plan or prepare for replacing the Assembly map. *See* Petition ¶¶ 115–22.

Instead, Respondents have argued since March that nothing can be done before the 2022 election, ignoring the very reason why the Constitution created an expedited proceeding—so something *could* be done. *See id.* ¶¶ 125–36. Even in late April, when the Court of Appeals heard this same argument from Respondents, it still “**reject[ed] [their] invitation to subject the People of this state to an election conducted pursuant to an unconstitutional reapportionment.**”

Harkenrider III, 2022 WL 1236822, at *11. At the proceeding in Steuben County, counsel for Respondent Heastie went even farther, declaring that voters would have to suffer under this unconstitutional map for ten years until the next reapportionment:

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.

Devlin Affirmation Ex. 1, at 65:19-66:1.

Notwithstanding the Court of Appeals' warning, Respondents certified primary ballots for certain Assembly and Statewide races on May 4 and mailed them to military and overseas voters by May 13, even though their authority to prepare ballots based on unconstitutional maps does not exist in the law. *See* Petition ¶¶ 123–24. Respondents will now likely say that the certification and mailing of ballots stops them from changing the Assembly map. This Court should expect more from the State's public servants.

The Legislature—obviously motivated to rig the upcoming election—could have asked to extend the primary dates for all elections but chose not to. Instead, New York currently intends to

hold some primary elections, including for Assembly seats, on June 28. *See* “[N.Y. Moves Some Primaries to August After a Judge Tosses Maps](#)” (Associated Press April 29, 2022), appearing in Lockport-Union Sun & Journal). If the Court does not restrain Respondents from using the Assembly map to administer the elections, Petitioners will be irreparably harmed because officials will be selected pursuant to an unconstitutional election.

III. THE BALANCE OF EQUITIES WEIGHS HEAVILY IN PETITIONERS’ FAVOR

The Court of Appeals has already balanced the competing equities at stake here. It found as a matter of constitutional law that when given the choice between fixing unconstitutional maps or leaving the election timetable undisturbed, the former trumps the latter: “**Prompt judicial intervention is both necessary and appropriate to guarantee the People’s right to a free and fair election.**” *Harkenrider III*, 2022 WL 1236822, at *12; *see* Petition ¶¶ 80–84.

The 2014 constitutional reforms created a specific redistricting procedure that Respondents should not be allowed to evade by stonewalling voters. In that procedure, an independent commission plays a central role meant to curb partisan gerrymandering and gamesmanship by the political party holding power. *See* Petition ¶¶ 24–34. To that end, that process was designed to promote citizen participation, fair representation, and confidence in our public institutions. *See id.* ¶¶ 35–45. The “burden[s]” and “hurdles” which Respondents complain of, as a matter of law, do not weigh against the prospect of holding an election where district lines have not been carefully vetted through a neutral and nonpartisan process. *See id.* ¶¶ 132–33.

CONCLUSION

For the reasons given, the Court should grant Petitioners’ request for a temporary restraining order to enjoin Respondents from using the State Assembly map in the 2022 elections. Petitioners further request that the Court seek to appoint Dr. Jonathan Cervas, or another qualified

individual, as Special Master to develop a legally compliant Assembly map. The Court should grant further relief as it deems just and proper.

Dated: New York, NY
May 15, 2022

Respectfully submitted,

WALDEN MACHT & HARAN LLP

By: /s/ Jim Walden

Jim Walden
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250 Vesey Street, 27th Floor
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*Attorneys for Petitioners Paul Nichols and Gary
Greenberg*

LAW OFFICE OF AARON S. FOLDENAUER

By: /s/ Aaron S. Foldenauer

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aaron@nyelectionlaw.com

Attorney for Petitioner Gavin Wax

CERTIFICATE OF WORD COUNT COMPLIANCE

As an attorney at Walden Macht & Haran LLP, I hereby certify that this memorandum of law is in compliance with Commercial Division Rule 17. The foregoing document was prepared using Microsoft Word, and the document contains 2,268 words as calculated by the application's word counting function.

Dated: New York, New York
May 15, 2022

/s/

Jim Walden

Jim Walden

**Affirmation of Peter A. Devlin, for Petitioners Paul Nichols
and Gary Greenberg, in Support of Petition and Emergency Motion
by Order to Show Cause for a Temporary Restraining Order, dated
May 15, 2022
[pp. 66 - 68]**

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NYSCEF DOC. NO. 4

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/16/2022

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

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG

Petitioners,

Index No. _____

v.

**AFFIRMATION OF
PETER DEVLIN**

GOVERNOR KATHY HOCHUL, SENATE
MAJORITY LEADER AND PRESIDENT PRO
TEMPORE OF THE SENATE ANDREA
STEWART-COUSINS, SPEAKER OF THE
ASSEMBLY CARL HEASTIE, NEW YORK
STATE BOARD OF ELECTIONS, and THE
NEW YORK STATE LEGISLATIVE TASK
FORCE ON DEMOGRAPHIC RESEARCH
AND REAPPORTIONMENT,

Respondents.

PETER A. DEVLIN, an attorney licensed to practice in the State of New York, affirms
under penalty of perjury:

1. I am an Associate at the law firm of Walden Macht & Haran, LLP, 250 Vesey Street, 27th Floor, New York, New York 10281, counsel for Petitioners Paul Nichols and Gary Greenberg in this CPLR Art. 4 special proceeding.
2. I submit this Affirmation in support of the Petition and accompanying proposed Order to Show Cause filed to commence a special proceeding pursuant to Article III § 5 of the New York Constitution, Unconsolidated Laws § 4221, and CPLR § 3001.
3. Attached hereto as Exhibit 1 is a true and correct copy of the 2022 Political Calendar published by the New York State Board of Elections.
4. Attached hereto as Exhibit 2 is a true and correct copy of the transcript of a hearing held on May 10, 2022, in *Harkenrider v. Hochul*, Index No. E 2022-0116 CV (Sup. Ct.

Steuben Cnty.) (“*Harkenrider I*”), on Petitioner Greenberg’s and Petitioner Wax’s motions by order to show cause to intervene in the proceeding.

5. Attached hereto as Exhibit 3 is a true and correct copy of excerpts of the transcript of special proceedings held on March 3, 2022, in *Harkenrider I*.

6. Pursuant to Part 54 Rules ¶ 54 and 22 N.Y.C.R.R. 202.7(f) and 202.8-c, I have provided Respondents’ counsel notice by electronic mail of Petitioners’ application for a temporary restraining order, along with copies of all supporting papers, to afford counsel the opportunity to appear in response and contest this application.¹ Notice was sent to counsel whom Petitioners understand to represent Respondents and who have appeared via NYCSEF in *Harkenrider I* at the addresses listed for electronic service thereto:

- a. Governor Kathy Hochul (heather.mckay@ag.ny.gov, matthew.brown@ag.ny.gov); Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins (agoldenberg@chwllp.com, jcuti@chwllp.com, areiter@chwllp.com, dmullkoff@chwllp.com, checker@chwllp.com, hgregorio@chwllp.com); Speaker of the Assembly Carl Heastie (dchill@graubard.com, jlessem@graubard.com, ereich@graubard.com, cbucki@phillipslytle.com, ssalcedo@phillipslytle.com, rvalentine@phillipslytle.com); New York State Board of Elections (brian.quail@elections.ny.gov, Kimberly.Galvin@elections.ny.gov).

¹ Respondent New York State Legislative Task Force on Demographic Research and Reapportionment (“LATFOR”) did not appear in *Harkenrider I*. Petitioners do not seek a temporary restraining order against Respondent LATFOR and have not sent LATFOR notice of this application.

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NYSCEF DOC. NO. 4

RECEIVED NYSCEF: 05/16/2022

7. Attached hereto as Exhibit 4 is a true and correct copy of this notice (without attachments).

Dated: New York, New York
May 15, 2022


Peter A. Devlin

FILED: NEW YORK COUNTY CLERK 05/15/2022 10:34 PM

NYSCF
DO NOT REPLY TO THIS E-MAIL
ALBANY, NEW YORK 12207 (518) 474-6220
For TDD/TTY, call the NYS Relay 711
www.elections.ny.gov

Primary Election
June 28, 2022

General Election
November 8, 2022

**** Please be aware that since this is a re-districting year this calendar is subject to change by the Legislature and should be used advisedly. ****

FILING REQUIREMENTS: All certificates and petitions of designation or nomination, certificates of acceptance or declination of such designations or nominations, certificates of authorization for such designations or nominations, certificates of disqualification, certificates of substitution for such designations or nominations and objections and specifications of objections to such certificates and petitions required to be filed with the State Board of Elections or a board of elections outside of the city of New York shall be deemed timely filed and accepted for filing if sent by mail or overnight delivery service, in an envelope postmarked or showing receipt by the overnight delivery service prior to midnight of the last day of filing, and received no later than two business days after the last day to file such certificates, petitions, objections or specifications. Failure of the post office or authorized overnight delivery service to deliver any such petition, certificate, or objection to such board of elections outside the city of New York no later than two business days after the last day to file such certificates, petitions, objections, or specifications shall be a fatal defect per NY Election Law § 1-106.

All papers required to be filed, unless otherwise provided, shall be filed between the hours of 9 AM – 5 PM. If the last day for filing shall fall on a Saturday, Sunday or legal holiday, the next business day shall become the last day for filing. NYEL § 1-106

Within NYC: all such certificates, petitions and specifications of objections required to be filed with the board of elections of the city of New York must be actually received on or before the last day to file. The New York City Board of Elections is open for the receipt of such petitions, certificates and objections until midnight on the last day to file.

PRIMARY ELECTION DATES	
June 28	Primary Election § 8-100(1)(a)
June 18 – 26	Days of Early Voting for the Primary Election. § 8-600(1)
Feb 1	Certification of offices to be filed at 2022 General Election by SBOE and CBOE. § 4-106 (1&2)
Feb 28	PARTY CALLS: Last day for State & County party chairs to file a statement of party positions to be filed at the Primary Election. § 2-120(1)

CERTIFICATION OF PRIMARY	
May 4	Certification of primary ballot by SBOE of designations filed in its office. § 4-110
May 5	Certification of primary ballot by CBOE of designations filed in its office. § 4-114

CANVASS OF PRIMARY RESULTS	
July 11	Canvass of Primary returns by County Board of Elections. § 9-200(1)
July 11	Verifiable Audit of Voting Systems. § 9-211(1)
July 18	Recanvass of Primary returns. § 9-208(1)

GENERAL ELECTION DATES	
Nov 8	General Election. § 8-100(1)(c)
Oct 29 – Nov 6	Days of Early Voting for the General Election. § 8-600(1)

CERTIFICATION OF GENERAL ELECTION BALLOT	
Sept 14	Certification of general election ballot by SBOE of nominations filed in its office. § 4-112(1)
Sept 15	Certification of general election ballot by CBOE of nominations and questions; CBOEs. § 4-114

CANVASS OF GENERAL ELECTION RESULTS	
Nov 23	Recanvass of General Election returns to occur no later than Nov. 23. § 9-208(1)
Nov 23	Verifiable Audit of Voting Systems to occur no later than Nov. 23. § 9-211(1)
Dec 2	Certification and transmission of Canvass of General Election returns by County Board of Elections. § 9-214(1)
Dec 15	Last day for State Board of Canvassers meet to certify General Election. § 9-216(2)

DESIGNATING PETITIONS FOR PRIMARY	
Mar 1	First day for signing designating petitions. § 6-134(4)
Apr 4-7	Dates for filing designating petitions. § 6-158(1)
Apr 11	Last day to authorize designations. § 6-120(3)
Apr 11	Last day to accept or decline designations. § 6-158(2)
Apr 15	Last day to fill a vacancy after a declination. § 6-158(3)
Apr 19	Last day to file authorization of substitution after declination of a designation. § 6-120(3)

PARTY NOMINATION OTHER THAN PRIMARY	
Feb 8 – Mar 1	Dates for holding state committee meeting to nominate candidates for statewide office. § 6-104(6)
Mar 1	First day to hold a town caucus. § 6-108
July 8	Last day to decline all party nominations after primary loss. § 6-146(6)
July 12	Last day to fill vacancy after declination by primary loser. § 6-158(3)
July 18	Last day to file authorization of substitution after declination by primary loser. § 6-120(3)
July 28	Last day for filing nominations made at a town or village caucus or by a party committee. § 6-158(6)
July 28	Last day to file certificates of nomination to fill vacancies created pursuant to § 6-116, § 6-104 & § 6-158(6)
Aug 1	Last day to accept or decline a nomination for office made based on § 6-116 & § 6-158(7)
Aug 1	Last day to file authorization of nomination made based on § 6-116. § 6-120(3)
Aug 5	Last day to fill a vacancy after a declination made based on § 6-116. § 6-158(8)

INDEPENDENT PETITIONS	
April 19	First day for signing nominating petitions. § 6-138(4)
May 24-31	Dates for filing independent nominating petitions. § 6-158(9)
June 3	Last day to accept or decline a nomination. § 6-158(11)
June 6	Last day to fill vacancy after a declination. § 6-158(12)
July 1	Last day to decline after acceptance if nominee loses party primary. § 6-158(11)

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OPPORTUNITY TO BALLOT PETITIONS	
Mar 22	First day for signing OTB petitions. § 6-164
April 14	Last day to file OTB petitions. § 6-158(4)
April 21	Last day to file an OTB petition if there has been a declination by a designated candidate. § 6-158(4)

JUDICIAL DISTRICT CONVENTIONS	
Minutes of a convention must be filed within 72 hours of adjournment. § 6-158(6)	
Aug 4 – 10	Dates for holding judicial conventions. § 6-158(5)
Aug 11	Last day to file certificates of nominations. § 6-158(6)
Aug 15	Last day to decline nomination. § 6-158(7)
Aug 19	Last day to fill vacancy after a declination. § 6-158(8)

SIGNATURE REQUIREMENTS FOR DESIGNATING AND OPPORTUNITY TO BALLOT PETITIONS § 6-136

5% of the active enrolled voters of the political party in the political unit or the following, whichever is less:

For any office to be filed by all the voters of:
The entire state15,000
(with at least 100 or 5% of enrolled voters from each of one-half of the congressional districts)

*New York City7,500
*Any county or borough of NYC4,000
*A municipal court district within NYC1,500
*Any city council district within NYC900
Cities/counties having more than 250,000 inhabitants2,000
Cities/counties having more than 25,000 but not more than 250,000 inhabitants1,000
Any city, county, councilmanic or county legislative districts in any city other than NYC500
Any congressional district1,250
Any state senatorial district1,000
Any assembly district500
Any county legislative district500

any political subdivision contained within another political subdivision, except as herein provided, requirement is not to exceed the number required for the larger subdivision; a political subdivision containing more than one assembly district, county or other political subdivision, requirement is not to exceed the aggregate of the signatures required for the subdivision or parts of subdivision so contained.

*NOTE: Section 1057-b of the New York City Charter supersedes New York Election Law signature requirements for Designating and OTB petitions and independent nominating petitions with respect to certain NY city offices.

<p>1% of the total number of votes excluding blank and void cast for the office of governor at the last gubernatorial election in the political unit for any office to be voted for by all the voters of the entire state.....45,000 (with at least 500 or 1% of enrolled voters from each of one-half of the congressional districts)</p> <p>5% of the total number of votes excluding blank and void cast for the office of governor at the last gubernatorial election in the political unit except that not more than 3,500 signatures shall be required on a petition for an office to be filled in any political subdivision outside the City of New York, and not more than the following for any office to be voted for by all the voters of:</p> <p>Any county or portion thereof outside NYC.....1,500 *New York City.....7,500 *Any county or borough or any two counties or boroughs within New York City.....4,000 Any municipal court district.....3,000 *Any city council district within NYC.....2,700 Any congressional district.....3,500 Any state senatorial district.....3,000 Any assembly district.....1,500</p> <p>Any political subdivision contained within another political subdivision, except as herein provided, requirement is not to exceed the number for the larger subdivision.</p> <p>*NOTE: Section 1057-b of the New York City Charter supersedes New York Election Law signature requirements for Designating and OTB petitions and Independent nominating petitions with respect to certain NY City offices.</p>	
<p align="center">VOTER REGISTRATION FOR PRIMARY</p>	
Feb 21	<p>List of Registered Voters: Such lists shall be published before the twenty-first day of February. \$ 5-604</p>
June 3	<p>Mail Registration for Primary: Last day to postmark application for primary; last day it must be received by board of elections is June 8. \$5-210(3)</p>
June 3	<p>In person registration for Primary: Last day application must be received by board of elections to be eligible to vote in primary election. \$95-210, \$-211, \$-212</p>
June 8	<p>Changes of address for Primary received by this date must be processed. \$5-208(3)</p>
<p align="center">CHANGE OF ENROLLMENT</p>	
Feb 14	<p>A change of enrollment rec'd by the BOE not later than Feb. 14th or after July 5th is effective immediately. Any change of enrollment made between Feb 15-July 5th, shall be effective July 5th. \$5-304(3)</p>

VOTER REGISTRATION FOR GENERAL	
Oct 14	Mail Registration for General: Last day to postmark application for general election; it must also be received by board of elections by Oct. 19. \$5-210(3)
Oct 14	In person registration for General: Last day application must be received by board of elections to be eligible to vote in general election. If honorably discharged from the military or have become a naturalized citizen after October 14 th , you may register in person at the county board of elections office up until October 29 th . \$85-210, 5-211, 5-212
Oct 19	Changes of address for General received by this date must be processed. \$5-208(3)
ABSENTEE VOTING FOR PRIMARY	
June 13	Last day for board of elections to RECEIVE application, letter, telefax, other written instrument or absentee portal request for ballot. \$8-400(2)(c).
June 27	Last day to apply in person for primary ballot. \$8-400(2)(c)
June 28	Last day to postmark primary election ballot. Must be received by the county board no later than July 5 th . \$8-412(1)
June 28	Last day to deliver primary ballot in person to your county board or any poll site in your county, by close of polls. \$8-412(1)
MILITARY/SPECIAL FEDERAL VOTERS FOR PRIMARY	
May 13	Deadline to transmit ballots to eligible Military/Special Federal/UCOCAVA Voters. \$10-108(1) & \$11-204(4)
June 3	Last day for a board of elections to receive application for Military/Special Federal/UCOCAVA absentee ballot for primary if not previously registered. \$10-106(5) & \$11-202(1)(a)
June 21	Last day for a board of elections to receive application for Military/Special Federal/UCOCAVA absentee ballot for primary if already registered. \$10-108(5) & \$11-202(1)(b)
June 27	Last day to apply personally for Military ballot for primary if previously registered. \$10-106(5)
June 28	Last day to postmark Military/Special Federal/UCOCAVA ballot for primary. Date by which it must be received by the board of elections is July 5 th . \$10-114(1) & \$11-212

	th Last day to deliver general election ballot in person to your county board or any poll site in your county, by close of polls on election day. §8-412(1)
	/UOCAVA voters. §10-
	Special Federal//UOCAVA
	(5)
	itee neral if already registered. §10-
	/UOCAVA ballot for general. Date by st
	-
	proposition,

CAMPAIGN FINANCIAL DISCLOSURE	
PRIMARY ELECTION \$14-108(1)	
32 Day Pre-Primary	May 27
11 Day Pre-Primary	June 17
10 Day Post-Primary	July 15
	9 NYCRR 6200.2(a)
24 Hour Notice \$14-108(2)	June 14 through June 27
GENERAL ELECTION \$14-108(1)	
32 Day Pre-General	October 7
11 Day Pre-General	October 28
27 Day Post-General	December 5
24 Hour Notice \$14-108(2)	October 25 through November 7

GENERAL ELECTION §14-108(1)	
32 Day Pre-General	October 7
11 Day Pre-General	October 28
27 Day Post-General	December 5
24 Hour Notice §14-108(2)	October 25 through November 7

Periodic Reports §14-108(1)
January 18 th
July 15 th

Additional Independent Expenditure Reporting		Primary: May 29 through June 27 General: October 9 through November 7 Refer to §14-107(4)(a)(i); (b)
24 Hour Notice	§14-107(4) (a) (iii); (b)	
Weekly Notice		

CONTRIBUTION LIMITS FOR LOCAL OFFICES	
Apr 15	Last day to calculate and post local limits to CBOE website and send to SBOE. \$14-114(11)

Designation of Polling Places	
March 15	Last day to designate polling places for each election district for ensuing year §4-104
May 1	Last day to designate early voting sites for the general election. 9 NYCRR 6211.1(a)
May 1	Last day to file early voting Communication Plan with SBOE. 9 NYCRR 6211.7(c)
May 13	Last day to designate early voting sites for primaries and special elections. 9 NYCRR 6211.1(a)

Revised: April 1, 2022

**** Please be aware that since this is a re-districting year this calendar is subject to change by the Legislature and should be used advisedly. ****

**Exhibit 2 to Devlin Affirmation-
Transcript of Hearing, in Harkenrider v. Hochul, Index No.
E2022-0116 CV (Sup. Ct. Steuben Cty.) ("Harkenrider I"), dated
May 10, 2022
[pp. 71 - 156]**

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RECEIVED NYSCEF: 05/15/2022

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF STEUBEN

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TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE      :
CANNING, PATRICIA CLARINO, GEORGE              :
DOOHER, JR., STEPHEN EVANS, LINDA FANTON,       :
JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY,     :
ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS    : Index No(s).
AND MARIANNE VOLANTE,                          : E2022-0116CV
                                           Petitioners,
                                           :
                                           -vs-
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       : SPECIAL
CARL HEASTIE, NEW YORK STATE BOARD OF         : PROCEEDINGS -
ELECTIONS, AND THE NEW YORK STATE              : MOTION
LEGISLATIVE TASK FORCE ON DEMOGRAPHIC          :
RESEARCH AND REAPPORTIONMENT,                 :
                                           Defendants.
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Steuben County Courthouse
Bath, New York
May 10, 2022

BEFORE: HON. PATRICK F. McALLISTER
Acting Supreme Court Justice

APPEARANCES: KEYSER MALONEY & WINNER, LLP
By: GEORGE WINNER, JR., ESQ.
Attorneys for Petitioners

OFFICE OF THE NYS ATTORNEY GENERAL
By: HEATHER L. McKAY, ESQ. (virtual-Teams)
Assistant Attorneys General for
Governor & Lt. Governor

CUTI HECKER WANG, LLP
By: ERIC HECKER, ESQ. (virtual-Teams)
Attorneys for Senate Majority

PHILIPS LYTLE, LLP
By: CRAIG R. BUCKI, ESQ.
Attorneys for Speaker of the Assembly

*ELIZABETH M. DAVIS, RPR
Senior Court Reporter*

APPEARANCES (continued):

GRAUBARD MILLER

By: C. DANIEL CHILL, ESQ. (virtual-Teams)
ELAINE M. REICH, ESQ. (virtual-Teams)
Attorneys for Assembly Majority

NEW YORK STATE BOARD OF ELECTIONS

By: BRIAN L. QUAIL, ESQ. (virtual-Teams)
Attorney for NYS BOARD OF ELECTIONS

LAW OFFICE OF AARON S. FOLDENAUER

By: AARON S. FOLDENAUER, ESQ.
Attorneys for Gavin Wax

JAMES M. OSTROWSKI, ESQ.

Attorney for Benjamin Carlisle,
Emin Egriu, Michael Rakebrandt,
Jonathan Howe, Howard Rabin

WALDEN MACHT & HARAN, LLP

By: JAMES WALDEN, ESQ.
PETER A. DEVLIN, ESQ.
Attorneys for Gary Greenberg

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1 THE COURT: Good morning. All right. This is
2 the matter of Harkenrider, et al. versus Hochul, et al.
3 Just before we start, a word on mask policy. The New
4 York State Courts require that everyone in the courtroom
10:03:48 5 wear their masks due to COVID, and that includes even
6 when you're speaking at the microphone; the whole time.
7 Once you get outside the courtroom, the county, that's
8 the county's space, and they don't require a mask at
9 this time, just so you know, okay?

10:04:06 10 All right. Do we have the stream sound on so
11 everyone can hear?

12 MS. BAREFOOT: That's correct, Judge.

13 THE COURT: All right. Are there any
14 potential intervenor parties present? I'm not talking
10:04:18 15 about the attorneys yet, just the parties themselves.

16 MR. WALDEN: Your Honor, Mr. Greenberg is on
17 the web cam.

18 THE COURT: On the Teams link?

19 MR. WALDEN: Yes, sir.

10:04:30 20 THE COURT: Who's that?

21 MR. WALDEN: Gary Greenberg.

22 THE COURT: Gary Greenberg is present? Can
23 you hear me, Mr. Greenberg?

24 MS. BAREFOOT: I muted his microphone because
10:04:37 25 there was background.

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1 THE COURT: All right. Mr. Greenberg is
2 present. Any others that we know of? Sir?

3 MR. OSTROWSKI: Mr. Carlisle is an intervenor.
4 He's decided not to come in because of the mask issue.
10:04:49 5 And Mr. Egriu is on his way and should be here shortly.
6 He will be in the courtroom.

7 THE COURT: All right. Are you asking for us
8 to hold off until he gets here?

9 MR. OSTROWSKI: No, your Honor. Just
10 responding to your question.

11 THE COURT: I appreciate it.

12 MR. OSTROWSKI: James Ostrowski, I apologize,
13 from Buffalo, New York.

14 THE COURT: For attorneys, let's start with
10:05:19 15 who's representing Gavin Wax; is it Mr. Foldenauer?

16 MR. FOLDENAUER: Yes, your Honor. Aaron
17 Foldenauer.

18 THE COURT: All right. Thank you,
19 Mr. Foldenauer.

10:05:27 20 MS. BAREFOOT: Just so you're aware, when
21 they're speaking back there, the microphones may not
22 pick them up.

23 THE COURT: All right. Not yet,
24 Mr. Foldenauer. Just trying to get the attorneys on the
10:05:36 25 record here.

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1 Who's representing the candidate, potential
2 intervenors, starting with Mr. Carlisle?

3 MR. OSTROWSKI: James Ostrowski, your Honor.

4 THE COURT: Thank you, Mr. Ostrowski. Who's
10:05:49 5 representing Gary Greenberg?

6 MR. WALDEN: Jim Walden and Pete Devlin, your
7 Honor.

8 THE COURT: Thank you, Mr. Walden. Who is
9 here on behalf of Petitioners?

10:06:02 10 MR. WINNER: George Winner, Keyser, Maloney &
11 Winner.

12 THE COURT: Thank you, Mr. Winner. On behalf
13 of the Governor today?

14 MS. MCKAY: Heather McKay of the Attorney
10:06:18 15 General's Office. Good morning, your Honor.

16 THE COURT: Good morning. And thank you,
17 Ms. McKay.

18 Today, representing the senate majority
19 leader?

10:06:26 20 MR. HECKER: Good morning, your Honor. Eric
21 Hecker from Cuti Hecker Wang.

22 THE COURT: Thank you, Mr. Hecker.

23 Representing Speaker of the Assembly?

24 MR. BUCKI: Good morning, your Honor. Craig
10:06:36 25 Bucki from Phillips Lytle in Buffalo representing

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1 Assembly Speaker Heastie. And I believe on Teams we
2 have my co-counsel from Graubard Miller, C. Daniel Chill
3 and Elaine Reich.

4 THE COURT: Thank you, Mr. Bucki.

10:06:51 5 Is there anyone I've missed? Anybody here on
6 behalf of the board of elections; no?

7 MR. QUAIL: Brian Quail on behalf of the New
8 York State Board of Elections.

9 THE COURT: Can we turn his sound up? Thank
10:07:07 10 you, Mr. Quail.

11 MS. BAREFOOT: I can't turn the sound up.

12 Mr. Quail, you may need to speak louder or get
13 closer to your mic when you need to speak, okay?

14 THE COURT: Can you hear me, Mr. Quail?

10:07:22 15 MR. QUAIL: Yes, your Honor, I can hear you.

16 THE COURT: All right. I will ask you to
17 speak into that mic, when I call upon you, a little
18 closer.

19 All right. So, we're here on three motions to
10:07:32 20 intervene. I'm going to start in the order that the
21 matters were filed. That starts with Gavin Wax's motion
22 to intervene. Mr. Foldenauer, would you like to be
23 heard?

24 MR. FOLDENAUER: I would, your Honor.

10:07:45 25 THE COURT: Please step forward.

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1 MR. FOLDENAUER: Good morning, and may it
2 please the court. Aaron Foldenauer on behalf of
3 Proposed Intervenor Gavin Wax.

4 Everyone, your Honor, in this courtroom and
10:08:04 5 everyone watching and participating on the live stream
6 knows that the assembly map is unconstitutional pursuant
7 to the April 27th court of appeals opinion. In the
8 voluminous filings that were submitted in this matter,
9 including all of those that were submitted around 3:30
10:08:23 10 yesterday, no one has argued otherwise. This court can
11 and should act.

12 For some odd reason, the very members of the
13 political class who caused the problem are here today to
14 argue that there is no cure. What this comes down to is
10:08:46 15 delay by design where the political class was hoping
16 that there was no time for judicial intervention. In
17 other words, their argument is that we have to leave the
18 unconstitutional law in place because we've run out of
19 time. But that's only because the state legislature
10:09:08 20 waited until the last minute to break the law.

21 THE COURT: Well, let me ask you this, I mean,
22 didn't Mr. Wax know about this back in February and
23 couldn't he have filed then? Is there a timeliness
24 argument here?

10:09:24 25 MR. FOLDENAUER: Mr. Wax was generally aware

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1 of the litigation, and he understood that the assembly
2 maps were part of the case as reflected in your Honor's
3 order on March 31st, which invalidated the assembly
4 maps, and thus there was no reason for Mr. Wax to act at
10:09:42 5 that time.

6 In fact, I believe it was Mr. Heastie's
7 counsel that attacks a number of Tweets by Mr. Wax, and
8 in none of those tweets does Mr. Wax say that he knew
9 the assembly maps weren't part of the case. And indeed,
10:09:55 10 there was every reason to believe they were part of the
11 case because given your Honor's decision on March 31st.
12 It was really only on appeal, and this is a copy of a
13 cover sheet of the petitioner's brief, where petitioners
14 failed to even defend this court's decision, which sua
10:10:18 15 sponte struck down the assembly maps. And so, in other
16 words, petitioners dropped the issue on appeal, and
17 that's something that, of course, Mr. Wax would not have
18 known about, did not know about.

19 THE COURT: Are you saying Mr. Wax didn't know
10:10:32 20 about when this matter started that the assembly maps
21 weren't being challenged?

22 MR. FOLDENAUER: He did not know. There's no
23 evidence in the record that he knew the assembly maps
24 were being challenged. And again, they've been widely
10:10:45 25 discussed in the case and ruled on, in fact. And it

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1 certainly did, of course, become widely know when the
2 Court of Appeals ruled on, April 27th, on all of the
3 procedural issues upholding basically this court's
4 decision on March 31st. And within days, within two
10:11:09 5 business days, four calendar days, depending how you
6 count, Mr. Wax filed his motion to intervene. So, we do
7 believe that this is timely, and it's appropriate to be
8 heard. And I would ask the court even -- to consider
9 that even if Mr. Wax could have intervened earlier,
10:11:27 10 given the unconstitutional nature of these maps, the
11 assembly map, the court should take a look at that and
12 correct the clear constitutional problem here that no
13 one has submitted.

14 And I would add this, your Honor. In I
10:11:43 15 believe it was the executive respondent's papers filed
16 yesterday, they made a rightness argument with respect
17 to the independent nominating petition process. They
18 said that some of the other intervenors that are here
19 today are here too soon to argue over the independent
10:12:01 20 nominating petition process, which is very odd because
21 that process is set to wind up at the end of this month.

22 So, in other words, there's always arguments
23 too late, too soon, when you're moving to intervene.
24 And Mr. Gavin, we would submit, is here on time, and the
10:12:22 25 court has time to right this wrong, which gets into the

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1 other timeliness point.

2 THE COURT: Well, that's my question. You say
3 I've got time to right the wrong. I'm not so sure
4 you're right in that. I think we're chancing having no
10:12:40 5 maps to go forward on for an election. And I'm
6 including the congressional and state senate in that.

7 If you hitch your wagon to this case, I mean,
8 I've been at this now over two months just on the state
9 senate and congressional maps. If I were to rule in
10:12:57 10 your client's favor, I assume there's going to be
11 appeals up through. If that takes another two months,
12 there's a whole lot of things that have to happen at the
13 board of elections in order to make this fly and make
14 this comport with the law. And I'm worried that that's
10:13:16 15 not going to happen. And my question to you is don't
16 you have an independent right to file an action separate
17 from this one.

18 MR. FOLDENAUER: One could always file an
19 independent action, but, of course, this court has heard
10:13:33 20 arguments about the various maps that are in play.
21 Unfortunately, the Appellate Division didn't allow this
22 court to start the process of redrawing maps until, I
23 believe it was April 18th, when Dr. Cervas was appointed
24 and this court was allowed to begin drafting the
10:13:49 25 congressional maps only. But then, of course, very

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1 recently this court has folded in the state senate maps
2 as part of the process. The maps are not due to be
3 finalized until ten days from now. And the court can
4 now easily also fold in the assembly maps into the
10:14:06 5 process.

6 Many of the considerations for redrawing the
7 maps apply across all three maps. For example, this
8 court had a lengthy hearing on Friday talking about
9 communities of interest. Those considerations apply
10:14:26 10 equally to all three maps. All of the data is in
11 Dr. Cervas' computer. Of course, there has been
12 hearings, of course, that the independent redistricting
13 commission has heard. There have been proposals and
14 counterproposals. The considerations are here for the
10:14:43 15 assembly maps also to be folded in. And you -- and one
16 knows that, want to scrape the bottom of the barrel,
17 when we heard on Friday considerations of sports teams
18 and where sports teams are located and how that may or
19 may not -- and I would argue should not -- play into
10:15:01 20 consideration of the maps, but point being there's been
21 ample opportunity for the public to be heard and for
22 maps to be redone here.

23 And furthermore, all parties should be ready
24 to submit proposed maps. This court could allow parties
10:15:18 25 to submit proposed maps -- proposed assembly maps, later

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1 this week. This court could give parties an opportunity
2 to be heard. Dr. Cervas could then submit proposed maps
3 as scheduled, including the assembly map, on Monday the
4 16th, and then we have until next Friday to finalize
10:15:37 5 those maps.

6 Now, I do, your Honor, want to address the
7 affidavit that came from the board of elections. And
8 again, for some odd reason, we have all sides of the
9 political class opposing correcting the assembly map at
10:15:54 10 issue. And I would like to emphasize that the board of
11 elections is a partisan institution that's controlled by
12 both parties. You have two co-chairs of the board of
13 elections, two other commissioners, two co-executive
14 directors, and they're basically appointed by --
10:16:14 15 suggested by the political parties and then appointed by
16 the Governor. And Nelson Mandela famously said that it
17 always seems impossible until it's done. And if you do
18 a careful -- if you take a careful look, your Honor, at
19 the affidavit, the board of elections never even says
10:16:32 20 it's impossible to redraw the assembly maps. They just
21 say that it would cause additional, I believe
22 quote-unquote, hurdles is the word that they use. The
23 board of elections is already preparing for the June
24 28th primary. And this would, in fact, give them an
10:16:50 25 extra eight weeks to get it right.

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1 Now, one of the main arguments that the board
2 of elections make is that they have to quote-unquote
3 throw away military ballots that are due to be sent out
4 on Friday. Now, of course, throwing away ballots, a
10:17:06 5 small number of ballots, is not a huge deal in and of
6 itself, but, in fact, it's actually not true. The board
7 elections all the time has candidates' names on the
8 ballot where votes are not counted.

9 One of my clients, in 2019, he was running for
10:17:24 10 public advocate, his name was Mike Zumbluskas. His name
11 went out on a military ballot, and then after that
12 point, he was thrown off the ballot by the board of
13 elections. And so what happened was when those ballots
14 came back, any votes for him simply were not counted.

10:17:42 15 It happened to another one my clients this year, Tamika
16 Mapp, in Assembly District 68. She made the ballot in a
17 special election. She was on the ballot on election
18 day, but because she was thrown off the ballot after --
19 after the ballots were printed, any votes for her simply
10:18:00 20 were not counted. So, in fact -- excuse me, your Honor?

21 THE COURT: Well, I'm just saying, I'm -- I've
22 read all the papers here. The board of elections is
23 saying much more than -- I mean, the primary is already
24 certified for the June 28th. The -- in three days, the
10:18:21 25 military and overseas ballots are supposed to go out.

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1 They certified the assembly candidates, the primary
2 ballots have been certified. They're working on the
3 computers for the elections. Judicial delegates would
4 be affected by this as well as Democratic party's state
10:18:42 5 committee because they're all done from the assembly
6 district, as far as the delegates and the judges. I
7 mean, so they're -- I can see they're very concerned.
8 I'm not sure this can work if I were to grant your
9 request.

10:18:56 10 MR. FOLDENAUER: A few points on that, your
11 Honor. The board of elections may have certified the
12 assembly candidates that are under its control. In
13 other words, that would be -- that would be districts
14 where they span across more than one county and the
10:19:13 15 board of elections can certify that. I do a lot of my
16 practice in New York City. I am not aware of the New
17 York City Board of Elections certifying any candidates.
18 In fact, I was just in court late last week over various
19 election challenges, and I have another one coming up on
10:19:30 20 Wednesday, tomorrow, in Suffolk County. So, in fact,
21 challenges are still not -- are still ongoing. All of
22 the candidates are not certified, in fact, and I think
23 the board of elections would have to concede that.

24 And you're right, your Honor. You're right
10:19:49 25 that changing the assembly district would have

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1 ripple-down effects on other races such as judicial
2 delegates and district leaders in New York City, among
3 other things, which is why it's so important that this
4 court act now to correct the unconstitutional maps we
10:20:11 5 have here given the broad impact. Again, the strategy
6 of the political class --

7 THE COURT: But they're procedurally
8 unconstitutional, correct? So, my question is you've
9 got roughly, if I remember correctly, about 13
10:20:29 10 Republican assembly members that voted for the maps.
11 So, here we are, and I'm just wondering, are we just
12 spinning our wheels, because I could declare, you know,
13 procedurally unconstitutional and then replace it with
14 the map that's already out there and been enacted
10:20:49 15 bipartisanly.

16 MR. FOLDENAUER: We don't know why the
17 Republican -- why those 15 Republicans voted in favor of
18 those maps, but the fact of the matter is that they were
19 not allowed to pass those maps into the law. I can tell
10:21:05 20 you, as an election law practitioner, that we were
21 surprised when all of a sudden new maps were posted in
22 mid to late January, and then all of a sudden they were
23 signed into law a couple of days later. That's not the
24 process that was set forth in the constitution by virtue
10:21:22 25 of the 2014 amendments.

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1 The Court of Appeals stated that there is a
2 procedural infirmity here and simply could not
3 technically reach the issue of the assembly maps and
4 their constitutionality because of their procedural
10:21:41 5 technicality here. And it does make you wonder why
6 we're here and why the maps weren't challenged and why
7 the issue was dropped on appeal. The issue of this
8 court's decision to sua sponte reject the assembly maps,
9 that could have been briefed. And the bottom line is
10:22:01 10 that it wasn't, and it should.

11 Now, the board of elections has protested
12 before this court before. I believe it was on March 21,
13 2022, e-filing number 236. The board of elections
14 revealed a parade of horrors of what would happen if
10:22:22 15 the court were to strike down the maps as
16 unconstitutional. But then the court did just that just
17 over a week later. And then, of course, the Court of
18 Appeals acted on April 27th, which again, is why these
19 constitutional issues must be addressed. And again,
10:22:39 20 sure that there are down ballot implications, but here
21 there is time.

22 Now, if the board of elections wants to
23 propose another solution, they could. Now, remember, it
24 was only -- it was just until 2019 a reform was passed
10:22:53 25 that we had primaries the second week of -- the second

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1 Tuesday of September. So, of course, that's an option
2 as well. Now, we believe that there is plenty of time
3 to get the maps right by August 23rd, but there are
4 options available to this court that are --

10:23:15 5 THE COURT: Are you suggesting a third primary
6 date?

7 MR. FOLDENAUER: I'm not, your Honor. I'm
8 just saying there are different options available to you
9 to get this right. I think it can be done on August
10:23:25 10 23rd, but --

11 THE COURT: How do you answer petitioners'
12 argument that they're prejudiced, they didn't get to
13 have discovery? If you had brought the action three
14 months ago, two to three months ago, they would have had
10:23:42 15 the opportunity for discovery, and now that's long since
16 passed.

17 MR. FOLDENAUER: Discovery isn't necessary
18 here because the only argument that Mr. Wax is making is
19 the procedural unconstitutionality argument. We're not
10:23:57 20 making any arguments based on other sort of potential
21 constitutional problems. So, I don't think there's a
22 need for any discovery here. And again, the court can
23 act quite quickly. Practically, you know, we believe
24 that it is not too late at all for this court to hear
10:24:25 25 this action.

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1 THE COURT: Well, didn't Justice Lindley at
2 the Appellate Division Fourth Department refuse to allow
3 candidates to intervene? He said it was too late. And
4 that was weeks ago.

10:24:39 5 MR. FOLDENAUER: I think he did say that, but
6 then the Appellate Division was reversed. And the Court
7 of Appeals then --

8 THE COURT: Well, not on that ground, though,
9 right?

10:24:47 10 MR. FOLDENAUER: Well, there wasn't an appeal
11 of that -- of that decision. But the Appellate Division
12 made its decision and the Court of Appeals reversed
13 them. And the Court of Appeals -- the Court of Appeals
14 stated at the end of its opinion, I believe it was
10:25:03 15 somewhere around page 30, that it wanted parties to
16 quote-unquote promptly offer submissions concerning new
17 maps and these issues. And then, of course, Gavin Wax
18 comes into court just a few days later over the weekend
19 to intervene so that this court can address the issue.

10:25:28 20 And interestingly, we haven't heard any
21 proposals from any of the other parties to this action
22 as to what they would do. They seem to be happy just
23 proceeding with unconstitutional assembly maps in
24 contravention of what the Court of Appeals indicated
10:25:48 25 were, again, unconstitutional.

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1 THE COURT: If Mr. Wax were allowed to
2 intervene, and we go down that road, and for some reason
3 you can't -- you don't have the time to make this work,
4 what happens with the election? An election at large?

10:26:09 5 MR. FOLDENAUER: Your Honor, I think there is
6 time to make it work. Again, you know, if you look
7 at -- looking at the schedule for drawing the maps, we
8 have another ten days. Parties can be asked to make
9 submissions later this week. And the assembly maps can
10:26:29 10 be proposed, redrawn. The considerations concerning
11 drawing the maps are before you.

12 And the court is right. There are -- there is
13 this assembly map that was passed, even though it's
14 unconstitutional. And there are other proposals already
10:26:46 15 out there. There is ample time for people to be heard
16 and the maps to be redrawn.

17 THE COURT: Anything further, Mr. Foldenauer?

18 MR. FOLDENAUER: Just really briefly, one
19 party did make a service argument. We believe that is
10:27:05 20 baseless. We submitted an order to show cause to the
21 court, which the court filled in and signed. That was
22 submitted to the court. All of the other documents were
23 served via NYSCEF. The documents were served on all
24 parties, and we even hired a process server to deliver
10:27:29 25 the documents in person to the Attorney General's office

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1 in Rochester. Thank you very much, your Honor.

2 THE COURT: Thank you, Mr. Foldenauer.

3 Mr. Ostrowski, on behalf of the candidate
4 petitioners to intervene.

10:27:49 5 MR. OSTROWSKI: Thank you, your Honor. Your
6 Honor, I represent -- I want to list the candidates very
7 quickly. Ben Carlisle is here. He is a conscientious
8 objector of wearing masks. He's outside. Mr. Egriu is
9 in the courtroom, candidate for congress. They're both
10:28:03 10 Democratic candidates who already filed their petitions.
11 And then we have three Libertarian Independent
12 nomination candidates: Michael Rakebrandt, Congress 2nd
13 District; Jonathan Howe, Congress 14th District; Howard
14 Rabin, Esquire, Congress 1st District. They may be on
10:28:24 15 the call.

16 We have no quarrel with anything the court has
17 done. We have no quarrel with anything the petitioners
18 have done. We have no quarrel that has any relevance to
19 anything with what the respondents have done because
10:28:37 20 that -- they've already -- the court has already ruled
21 against them. We're not intervening on the merits;
22 we're intervening on the remedies, so it's perfectly --
23 this is the remedy phase. There was no reason to
24 intervene earlier.

10:28:49 25 When it was clear the decision was filed with

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1 the court, we filed in five days. We filed because it
2 was the rights of our candidates, and I think there's
3 many others similarly situated. We don't purport to
4 represent them, but I think there's a lot of interests
10:29:07 5 out there that had to be taken into account. There
6 wasn't clear guidance as to what happens to their
7 campaigns. So, Mr. Carlisle, he already got signatures,
8 your Honor. They were filed. He personally got 900 --
9 approximately 900 signatures. Mr. Egriu expended scarce
10:29:28 10 funds that can never be replaced to get on the ballot
11 for congress. And then the three independent
12 candidates, they're out in the field while this is going
13 on, and apparently running for districts that no longer
14 exist, so it was our belief that we have no criticism of
10:29:45 15 anybody in the case, and obviously not the court, but
16 the interests of these people needed to be represented.
17 That's why they're here. We want to make sure that
18 they're heard in the remedy phase, that they have a
19 right to designate any petitions, they have a right to
10:29:58 20 independent nominating petitions.

21 If those periods are reduced given all the
22 complications the court is dealing with, there should be
23 some compensation in that regard by reducing the
24 signature requirements and also because they've already
10:30:10 25 expended resources that can never be replaced.

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1 Mr. Carlisle cannot get -- he's an attorney; he can't
2 get that time back. Mr. Egriu can't get that money
3 back. All resources are scarce, your Honor, as you
4 know. There's no really -- there's no persuasive
10:30:29 5 reason. And the papers, there's barely any opposition,
6 but the arguments that were made were really not very
7 persuasive.

8 We're not going to interfere with anything,
9 not going to slow anything down. We just want to
10:30:40 10 represent the interests of these five people and really
11 all the other candidates out there because what this
12 case is all about at the end of the day is
13 competitiveness. Who's delivering the competitiveness?
14 It's Mr. Carlisle, it's Mr. Egriu, and the three
10:30:55 15 Libertarian candidates. So, let's not forget their
16 interest. Let's make sure that in any remedy that's
17 fashioned the law bends over backwards. They're at no
18 fault in this at all. This is the fault of the
19 respondents.

10:31:06 20 THE COURT: Are your clients mainly concerned
21 with the signatures they've already gathered and whether
22 they're going to count or not or what is their --

23 MR. OSTROWSKI: Well, there's a lot of gray
24 areas, your Honor. It seems to me the maps have been
10:31:19 25 voided, the Court of Appeals decision indicates there's

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1 going to be another petitioning process so they're going
2 to have to start over. So, from that point of view, I
3 think the fair remedy -- excuse me, your Honor, I don't
4 tolerate masks well. I get short of breath; I
10:31:34 5 apologize.

6 THE COURT: Take your time.

7 MR. OSTROWSKI: I think the proper remedy --
8 and the court has vast powers to remedy constitutional
9 violation. Nobody is saying to the contrary, and
10:31:42 10 certainly not us. This court has the power, the
11 equitable power, to go in and fashion a remedy and say
12 your campaigns were disrupted, you expended all these
13 resources through no fault of your own, we're going to
14 compensate you by reducing the signature requirement
10:31:59 15 that would allow them to competitively get on the ballot
16 with the resources that they have left in their tank.

17 But really, your Honor, we basically want to
18 be heard on all these issues, whatever proposals are
19 made, what the court purposes or other parties propose,
10:32:13 20 we'd like to be able to just file a short statement.
21 You read my -- I don't kill a lot of trees, your Honor.
22 I'm short and sweet, solo practitioner. Everything is
23 produced by me, so I'm not going to overburden the
24 court. I just want to be heard on the interest of these
10:32:27 25 five people who are the competitive -- they are the

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1 competitive edge of New York elections. They are the
2 ones actually giving people a choice; not an abstract
3 choice, but a --

4 THE COURT: But the same questions I asked
10:32:39 5 Mr. Foldenauer sort of apply to everybody that wishes to
6 intervene here. How do you address those?

7 MR. OSTROWSKI: There was no reason to
8 intervene. We had no problem with -- our clients
9 believe that gerrymandering is a gross evil. They're
10:32:54 10 Independents, your Honor. They're the ones that usually
11 are the victims of gerrymandering. So, they had no
12 quarrel with anybody that -- no quarrel with the court,
13 no quarrel with the petitioners. No quarrel with the
14 respondents other than the fact the respondents have
10:33:10 15 already lost the case. We only want to intervene on the
16 remedy phase. All we want to do is be heard, and the
17 court will decide accordingly. I think it's a very
18 small ask, your Honor.

19 THE COURT: Anything further, Mr. Ostrowski?

10:33:23 20 MR. OSTROWSKI: No. I could go on, but I
21 think you've gotten my argument. Thank you, your Honor.

22 THE COURT: Thank you.

23 MR. OSTROWSKI: Appreciate it.

24 THE COURT: Appreciate it. All right. On
10:33:30 25 behalf of Gary Greenberg, Mr. Walden?

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1 MR. WALDEN: Thank you, Judge. This is my
2 first time appearing before you, so thank you very much
3 for having me. Judge, just to set the tone for my
4 remarks, I'm going to have a very short introduction
10:33:43 5 because I think that in the proceedings so far a little
6 bit of the context is missing, and I'd like to fill that
7 in. And then I'm going to spend most of my argument
8 dealing exactly with what you've asked the other two
9 about, the timeliness issue, because I do think that of
10:33:57 10 all the issues that are raised it's the most serious
11 that's been raised. There are a number of other issues
12 that from my perspective are akin to throwing spaghetti
13 against the wall. If your Honor is at all inclined to
14 consider things like the petitioning candidates issue,
10:34:12 15 the service issue, the joinder issue where they're
16 proposing that we're supposed to join a thousand
17 candidates, even though they didn't -- they waived that
18 argument with respect to the senate and the
19 congressional districts and now they're raising it for
10:34:27 20 the first time, we're happy to make a very short
21 submission by Friday morning of five pages and not more.
22 And I'm going to focus on the issues that I think,
23 through your questioning, you care about.

24 THE COURT: Thank you.

10:34:38 25 MR. WALDEN: Your Honor, as I was reading

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1 these hyper technical arguments that really have nothing
2 to do with intervention, I thought about the bigger
3 picture, your Honor. And I thought, you know, it's not
4 a secret that Americans are worrying about our democracy
10:34:51 5 and that election integrity is one of the critical
6 things that people are concerned about. The Pew
7 Research Center did a study in 2018 where they found
8 that in 1958 Americans had a 75 percent confidence
9 integral in their government. And by 2017, it had
10:35:11 10 fallen below 20 percent. And why is that, your Honor?
11 It is because Americans no longer trust the political
12 class to protect the integrity of our democracy.

13 And with a bit of irony, your Honor, I thought
14 about all of the arguments that were made by the
10:35:30 15 petitioners, which surprised me, and the respondents,
16 which did not surprise me. And I thought well, maybe
17 this is one example of bipartisanship because the one
18 thing Republicans and Democrats can seem to agree on is
19 keeping Mr. Greenberg out of this case. But, your
10:35:47 20 Honor, respectfully, they're wrong.

21 Mr. Greenberg should be allowed to intervene
22 in this case, and to explain why, I'd like to develop
23 this context by quoting this court's wisdom. In your
24 opinion, your Honor, you said words that I hope every
10:36:00 25 New Yorker reads: The people of the state of New York

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1 have spoken clearly. First, in the 2014 constitutional
2 amendment, not only did the people include language to
3 prevent gerrymandering, they also set forth the process
4 to attain bipartisan redistricting maps through the IRC.
10:36:18 5 The people of the state of New York again spoke loudly
6 when they soundly voted down the proposed 2021
7 constitutional amendment that would have granted
8 authority for the legislature to bypass the IRC
9 redistricting process, which is exactly what they did.
10:36:32 10 And they did it even though in the opinion you gave them
11 opportunity to correct their mistake, and they didn't
12 want to do it. And so your Honor found, I think
13 completely appropriately, that not only were the senate
14 and the congressional maps invalid, but the court found
10:36:49 15 that the same faulty process was used for all three
16 maps; therefore, new maps will need to be prepared for
17 the assembly districts as well.

18 So, I read with great interest, your Honor,
19 the board of election's affidavit. And what it does not
10:37:01 20 do is to offer any candor to this court about this
21 central fact. Between the date of your opinion, March
22 31st, and the date of the Court of Appeals decision a
23 month later on April 27th, the board of elections
24 couldn't possibly have known what the outcome was going
10:37:17 25 to be. They would have had to have assumed, as all of

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1 the local parties and the implements of the election
2 system would have had to have assumed, that the Court of
3 Appeals might have seen it differently and might have
4 agreed with your perspective, your Honor, and agreed
10:37:32 5 with you that the assembly maps could have been thrown
6 out or should have been thrown out, too. The Court of
7 Appeals chose not to do that because of a circumstance
8 that has never been explained. And I'm going to talk
9 about it in a minute, your Honor, when I get to the
10:37:45 10 timeliness issue, because this is an important issue.

11 Why? Why is it that before this court the
12 petitioners never challenged the assembly maps? Why is
13 it that for the first time on appeal did they declare
14 not only were they weren't challenging but they agreed
10:38:03 15 with the assembly maps? Why did they not defend this
16 court's principled decision as the guardians of our
17 democracy, as our elected officials? Why did they not
18 defend it? We're going to get to that in a second, your
19 Honor. But the Court of Appeals not only embraced but
10:38:24 20 fully embraced, your reasoning putting aside the
21 technicality of the assembly districts when they said
22 nearly a half century ago we wrote that the constitution
23 is the voice of the people speaking in their sovereign
24 capacity and must be heeded. And in that regard, they
10:38:39 25 said there's a fundamental principle to conclude that a

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1 legislative apportionment cannot stand as a valid
2 exercise of discretionary power by the legislature when
3 it is -- when it is manifest that the constitutional
4 provisions have been disregarded because any other
10:38:55 5 determination by the courts might result in the
6 constitutional standards being broken down and wholly
7 disregarded. That's binding precedent. And the Court
8 of Appeals refused to permit the legislative misconduct
9 that arose here to quote subject the people of this
10:39:13 10 state to an election conducted pursuant to an
11 unconstitutional reapportionment.

12 Your Honor must have read those words with a
13 great deal of pride. Certainly, I felt it for the
14 court, because you made a determination that the
10:39:27 15 assembly maps were not just unconstitutional, they were
16 void and not useable. Not useable, that was what this
17 court found.

18 And all Mr. Greenberg is trying to do, his
19 primary form of relief, is to give the court the vehicle
10:39:44 20 to vindicate the rights of the people that have not been
21 spoken about so far in this proceeding, the voters, to
22 restore election integrity. And there are procedural
23 hurdles, your Honor, but despite what all of the other
24 parties are saying, it is not impossible. And I'll show
10:40:00 25 you that's it not impossible.

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1 But, your Honor, just to end my introductory
2 remarks, the Court of Appeals also very clearly talked
3 about why this matters. And it doesn't just matter what
4 you do here in this case substantively, and we're not
10:40:18 5 even at the substance yet. Everyone wants to go to the
6 substance, wants to go to the merits, but that's not why
7 we're here. We're just here as to whether or not we're
8 going to be able to intervene.

9 Burden isn't an issue with respect to an
10:40:31 10 intervention application. Ninety percent of the papers
11 were about burden. All of the affidavits were about
12 burden. Burden is irrelevant here. It is whether or
13 not we are going to cause undue delay, which we are not.
14 There's no evidence that they put forth in this record
10:40:48 15 whatsoever that would support a finding of undue delay
16 that affects -- that prejudices their rights in the
17 proceeding. They're talking about burden. We're
18 talking apples and oranges.

19 But to conclude the context, your Honor, this
10:41:03 20 is why it matters not just for political gerrymandering.
21 The Court of Appeals, again, binding precedent, as your
22 Honor knows, delaying a remedy in this election cycle,
23 permitting an election to go forward on unconstitutional
24 maps, which is just as true for the assembly maps as it
10:41:20 25 is for the others, I don't need to tell your Honor that,

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1 would set a troubling precedent for future cases raising
2 similar partisan gerrymandering claims as well as other
3 types of challenges such as racial gerrymandering
4 claims. So, whatever we do here, your Honor, it's going
10:41:38 5 to have consequences beyond the political world because
6 it will be precedent.

7 THE COURT: How are you going to make that
8 fit, Mr. Walden? You're saying there's time, there's
9 time.

10 MR. WALDEN: There is time.

11 THE COURT: Are you aware of all the things
12 the board of elections has to do?

13 MR. WALDEN: Yes, your Honor, I am. I've read
14 the papers very carefully. And what -- again, I am not
10:41:58 15 going to conclude, as Mr. Foldenauer did, that the BOE
16 is just a bunch of partisan people. I don't know them.
17 I've looked them all up, they seem like people of good
18 conscience. But, your Honor, you have been hearing
19 since the very start of this case impossible,
10:42:16 20 impossible, impossible. And then the board of elections
21 goes to Judge Kaplan in the southern district of New
22 York and says oh, well, you know, forget about what we
23 said to the judge, we have time. We've heard Speaker
24 Heastie saying this from the beginning it's impossible,
10:42:30 25 it's impossible.

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1 Guess what; your Honor did it anyway with
2 respect to the senate and the congressional and the
3 assembly maps. And the Court of Appeals agreed. And
4 the whole point of the Court of Appeals decision is if
10:42:42 5 our politicians are going to monkey around with the
6 constitution, the courts have complete power to change
7 all statutory deadlines. You have the power, as
8 Mr. Foldenauer suggested.

9 And I agree whole-heartedly with the position
10:43:00 10 that the attorney general took before your Honor in this
11 case, a fundamental and important principle that no one
12 is talking about anymore. The Attorney General of the
13 State of New York's position was multiple primaries of
14 any kind cause great risks. Great risks to who? To the
10:43:18 15 voters, your Honor. The voters, because it's going to
16 double or triple, depending on how many there are, the
17 cost of the election. It's going to cause voter
18 confusion because people -- we're already trying to get
19 people to come to the poll in greater numbers, and now
10:43:34 20 they can't keep track of who's -- what races are even
21 up. And it's going to cause lower voter turnout, which
22 is bad for democracy. We all know it.

23 I could quote politicians and thinkers from
24 every side of the aisle, and everyone agrees that those
10:43:51 25 three things are things that should be avoided. And in

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1 this case, there cannot be, and I suggest to you will
2 not be any of the people that are opposing our
3 intervention say that it's the fault of anyone other
4 than the legislature for doing this knowingly and
10:44:04 5 willfully in the first place.

6 And so, your Honor, I'm now going to get to
7 the point that you've made, which is why are we here.
8 Are we here really to talk about the burden and the
9 schedule? Not really. I would love to talk to you
10:44:18 10 about it because unlike what I think you're going to
11 hear, which is a parade of horrors, it's like as we've
12 seen in affidavit and testimony time and time again,
13 can't be done, can't be done. I think that there is a
14 way. And I think that if your Honor ordered the parties
10:44:31 15 to meet and confer, whether they agreed or they didn't
16 agree, and simply ignore all of the statutory deadlines
17 and come up with a schedule that has a single primary
18 for every single race and all of the other incremental
19 steps that need to be done, this election could happen
10:44:49 20 with constitutional maps and a process that while
21 imperfect is better than the very ill the Court of
22 Appeals directed everyone to avoid, which is forcing an
23 election with unconstitutional maps. The Court of
24 Appeals could not have been clearer on that point.

10:45:06 25 And so, intervention. Let's address the

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1 questions that your Honor asked, because they're fair
2 questions. But let me make one point first, your Honor.
3 Of all the argument that you saw in these dozens and
4 dozens and dozens of pages, there were certainly
10:45:24 5 arguments about timeliness. But you know what there
6 wasn't? There wasn't case law. No one talked about
7 what the law says. No one talked about what the Fourth
8 Department has held in cases that have precedential
9 value because the Fourth Department explained their
10:45:41 10 reasoning.

11 But it's not just the Fourth Department, your
12 Honor. There is, amazing, unanimity among all of the
13 departments about four basic principles. Principle
14 number one: If there is a party that has a real and
10:45:55 15 substantial interest in the outcome of the case, putting
16 aside any other issue, the law is clear the courts
17 should weigh strongly in favor of granting intervention.

18 Again, we'll get to the merits. I'd love to
19 stay here and talk about the merits. We've asked for
10:46:12 20 preliminary injunction to stop the military ballots; in
21 part, to stop the alleged harm of them being printed and
22 then thrown out, but that's number one.

23 Number two: Who bears the burden of opposing
24 the opposition? They do. They have to show that there
10:46:30 25 is undue prejudice in the proceeding which will

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1 prejudice their rights. They cite not a single case.
2 Because we've looked, your Honor. We haven't found one.
3 It doesn't exist because it's not consistent with the
4 law. The whole purpose of mandatory intervention is
10:46:52 5 that unless that person is going to come in and drag
6 their feet or raise new claims or take some other sort
7 of position that's going to prejudice rights, they
8 haven't carried their burden, and we should be allowed
9 to intervene.

10:47:08 10 THE COURT: But timeliness is a reason even to
11 deny mandatory intervention, isn't it?

12 MR. WALDEN: It is, your Honor. Timeliness
13 is, and I'm going to get there right after I get through
14 these four core principles, your Honor, because I
10:47:21 15 listened to you. And I'm a lawyer that loves the law.
16 So, I love the case law, and I love these questions.

17 So, the third principle, very quickly, your
18 Honor, is what seems to drive each of the decisions that
19 I'm going to talk about is the gravity of the harm,
10:47:34 20 right, that -- because intervention focuses primarily on
21 timeliness, as you said, but also then, assuming you
22 have a timely petition, if there's a real and
23 substantial interest, you let the person in unless
24 there's a compelling showing that there's going to be an
10:47:54 25 undue delay that will prejudice rights in the

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1 proceeding. No one's articulated. Look through the
2 affidavits.

3 THE COURT: Well, they didn't cite case law,
4 but I think they articulated that --

10:48:03 5 MR. WALDEN: The only --

6 THE COURT: -- the burden on the board of
7 elections, and that it's going to lead to no elections
8 on the maps including the congressional and state
9 senate.

10:48:15 10 MR. WALDEN: I agree with you, your Honor,
11 that that's the argument that they made. What does that
12 have to do with intervention? That has to do with
13 whether or not we have -- you should grant relief at the
14 end, assuming that they're -- we're in the case.

10:48:27 15 THE COURT: Well, it has to do with prejudice
16 to the petitioners.

17 MR. WALDEN: But it's not prejudice -- if you
18 let us intervene, right, this is why I think burden --
19 it's almost like saying -- if there was a case that said
10:48:39 20 if you assume that the intervenors are right on the law
21 and that they should win and that would cause a burden
22 on one of the parties, wouldn't prejudice their rights
23 other than it will create a burden, that's a reason not
24 to let them intervene. That's not what the law is, your
10:48:57 25 Honor. The law is prejudice to rights in the

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1 proceeding. So, they're talking about burden because
2 they're trying to -- what's the word for the magical
3 term for -- like bait and switch.

4 THE COURT: Circumvent?

10:49:13 5 MR. WALDEN: Circumvent, but there's a pithier
6 expression that was better rhetoric. In any event, your
7 Honor, it's apples and oranges compared to what your
8 Honor has to decide here today, which is just whether or
9 not you're going to grant Mr. Greenberg and the other
10:49:26 10 petitioners a right to be heard. And if we lose, we
11 lose, right? Then there's no burden on them, right?
12 You let us in, we make our arguments, which we're
13 prepared to make tomorrow. I will stay here overnight
14 and attend a proceeding, and we can argue the merits of
10:49:42 15 our petition tomorrow, your Honor. And if you decide
16 that nope, I'm not changing the assembly maps, okay,
17 you've given us our day in court, and we would be very
18 grateful, and they have no burden whatsoever.

19 THE COURT: You're saying you're not going to
10:49:54 20 appeal that decision up and up and up, and then all of a
21 sudden we're out of time, and we can't have any
22 elections on the maps that --

23 MR. WALDEN: Well, your Honor -- well, first
24 of all, I just want to be practical about this, your
10:50:06 25 Honor. I don't know whether we're going to appeal or

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1 not because I don't know what's going to happen. I
2 didn't even talk to my client about that, but who's the
3 one that has been delaying this through endless appeals?
4 That's -- I couldn't think of a better expression than
10:50:18 5 Mr. Foldenauer's of delay by design. They're trying to
6 force the court system into a position where it's like
7 okay, we have to relent. We have to relent to some
8 amount of unconstitutionality.

9 And who is loses it, your Honor? They win,
10:50:31 10 right; that's what they want. And we're going to get to
11 that, because I want to get into the timeliness issue.
12 They win, the voters lose. They win, the candidates
13 that should be on the ballot that they've excluded,
14 right, lose. That can't be our democracy, your Honor.

10:50:48 15 Nobody in this state who's following this
16 proceeding -- and, your Honor, to your credit, I think
17 that the opinion that you wrote was -- I can't imagine
18 there are many lawyers in the state that didn't read
19 that opinion, and many ordinary people, too. Everyone
10:51:02 20 is watching this, your Honor. This is -- this will
21 become not only a bedrock test of the strength of our
22 democracy, but for all of the people nationwide who are
23 hearing voter suppression, voter suppression, voter
24 suppression, and all -- a lot of those cries are coming
10:51:21 25 from democratically controlled states. For the nation

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1 to see that the New York Court System is going to put
2 its imprimatura on a substantively defective
3 unconstitutional map because they're running an
4 intentional game of delay, no one is going to listen to
10:51:40 5 anyone from New York preach about voter rigging ever
6 again. So, the consequences of this, your Honor, are
7 extraordinarily significant. So, the gravity of the
8 harm, there could not be a more invasive and destructive
9 circumstance in the context of an election than vote
10:52:03 10 rigging, and that's exactly what happened here.

11 And your Honor has made a distinction, and I
12 think back, it's been years and years and years since I
13 studied the difference between substantive due process
14 and procedural due process, but I remember this Blackman
10:52:18 15 opinion about the difficulty of determining the two,
16 that there are areas where there's a lot of overlap.
17 Now, when they say -- I'm sorry, your Honor, just need
18 water.

19 THE COURT: That's fine.

10:52:28 20 MR. WALDEN: -- the maps are procedurally
21 defective, they're procedurally defective, what are they
22 trying to do? They're trying to make it seem like it's
23 not a big deal. They're trying to make it seem like
24 it's really just procedural. Why was the procedure put
10:52:38 25 there? Why did the voters insist on putting the

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1 procedure there? Why did the legislature itself,
2 through the process to amend the constitution, put the
3 procedure there? It is to restore integrity in the
4 elections and to prevent manipulations, whether it
10:52:57 5 qualifies as gerrymandering in every single line draw or
6 not.

7 And, your Honor, to be clear, these maps not
8 only violate the process of the constitution, but also
9 violate the notion that if the legislature is going to
10:53:12 10 go to the point of drawing its own maps, right, they
11 couldn't have done that here because the IRC didn't
12 submit a second set, but they did it anyway. They can't
13 change any one by more than two percent, and they did it
14 here and in many districts. And for those voters, it
10:53:29 15 matters because when the special master, who I have an
16 enormous amount of respect for, looks at the detail and,
17 as Common Cause and many of the other good government
18 groups have, I think what they're going to see is that
19 there were line draws to intentionally exclude
10:53:43 20 candidates and move candidates from Assembly District A
21 to Assembly District B. And that's just not right.
22 That's anti-democratic. And it's a circumstance where
23 people are putting party over country and over the New
24 York State Constitution.

10:53:58 25 THE COURT: You had 13 assembly members vote

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1 for that.

2 MR. WALDEN: We're going to get to that in a
3 second, your Honor. So, the fourth -- so, I'm done with
4 the general intervention. I'm going to cover the
10:54:12 5 statute -- the CPL requirements super quickly, your
6 Honor, because you know them like the back of your hand.
7 I'm sure you know them better than I do.

8 So you've got mandatory and you've got
9 permissive, right? What we have to show is pretty
10:54:24 10 clear, right? For mandatory, if there is a statute that
11 gives someone a right, done, it's over, unless the other
12 side can show a delay in prejudice to their rights in
13 this proceeding. If we're not being adequately -- if
14 our client is not being adequately represented and if
10:54:41 15 he's going to be bound by the judgment, we're done
16 unless they can show the same thing.

17 And for permissive, it's an even easier test:
18 Is there a similar set of fact and law. Clearly, there
19 is no credible argument that these things don't apply.
10:54:56 20 So this all comes down to two things and two things
21 alone, as you, not surprisingly, astutely put your
22 finger on, right? Timeliness and whether they have
23 actually carried their burden of proof by offering
24 burden as a result of final relief that is not at issue
10:55:13 25 here, right? That's -- they're trying to distract you.

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1 They're trying to get you to watch the hand here and
2 they're producing the ball hand. Slight of hand; that's
3 what I was trying to refer to.

4 So, let me get to the timeliness issues, your
10:55:27 5 Honor. What they did not talk about, which is really
6 surprising to me, your Honor, because I take my duties
7 to the court very seriously, very seriously. And I
8 believe when there's adverse authority, you cite it, you
9 explain it, you distinguish it, but you don't just not
10:55:43 10 talk about it. And here, your Honor, there is plenty of
11 authority on the timeliness issue because there are
12 three governing principles in almost every case
13 including the Fourth Department cases that actually
14 explain why they're keeping people out or letting people
10:55:59 15 in.

16 Number one is there's no specific time limit,
17 right, it's a sua generous case by case determination.
18 Number two, it is not a mechanical measure of time. And
19 number three, courts in this department and across the
10:56:14 20 state have allowed people to intervene in circumstances
21 that are much more delayed, where the rights at stake
22 are much less serious than in this case. Let me give
23 you some examples. So, there's a Second Department case
24 from 2010 called *FLB v. Tycoon*.

25 If you need any spellings, I'll give them to

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1 you afterwards.

2 THE COURT: Cite?

3 MR. WALDEN: I was just getting to that, your
4 Honor. 73 -- and we can put this in our 5-pager, if
10:56:45 5 it's helpful, your Honor. 73 AD3d 719. It's a -- it
6 was a claim over ownership to real property. The court
7 allowed intervention after judgment in that case. After
8 judgment. After the case was over. Courts have allowed
9 intervention after settlement agreements have been
10:57:05 10 reached by parties after the litigation has already
11 concluded. One of the controlling cases is *Romeo v.*
12 *Department of Education*. It was a dispute over a
13 district where children were going to be eligible to go
14 to school in two different districts, and the DOE didn't
10:57:23 15 want them to go to one of the districts.

16 DOE, by the way -- I'm sorry; the district was
17 not a party. So, the argument that's been put to you
18 that in order to be bound under CPLR 1012(a)(2) that the
19 test is *res judicata*, it's not. That's not true. In
10:57:48 20 that case, in the *Romeo* case, the court allowed the
21 districting, even though the district wasn't a party,
22 and even though in the opinion it says it won't be bound
23 by *res judicata*, the reason it let the district in after
24 a settlement was because the district, as a result of
10:58:04 25 the order, was going to have to issue an order with

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1 respect to the kids even though it had a right to sue
2 separately. It could have initiated, as you know, it's
3 own Article 78. It could have filed its own suit, and
4 the court still let the district in after the
10:58:19 5 settlement.

6 After an appeal. *Triangle v. National Bank of*
7 *New York*, 62 AD2d 1017, Second Department 1978 after
8 appeal.

9 After multiple appeals. *Jones v. Town of*
10:58:36 10 *Carroll*, 158 AD3d 1325, Fourth Department 2018. That
11 case concerned the validity of a permit law, and even
12 though there had been litigation that had been going on
13 for four years, the petitioner -- or the intervenor in
14 that case had notice of, for various reasons that are
10:58:56 15 explained in this relatively short opinion, the court
16 approved intervention.

17 So, the timeliness issue, your Honor, when you
18 actually look at the case law, is not a terribly
19 compelling argument. They -- what they do is they cite
10:59:11 20 two cases that are completely distinguishable, both of
21 which -- one of which was a chemical company that had
22 notice of a four-year litigation during the litigation,
23 at the tail end of the litigation, there was a
24 settlement. A year after the settlement, there was -- I
10:59:31 25 can't remember what the next step was, but there was

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1 something else, and three weeks after that third thing,
2 then the chemical company finally intervened. And the
3 court said no, we're not letting you do that, that's
4 ridiculous. They essentially found that it was
10:59:44 5 manipulative.

6 THE COURT: But I'm looking at timeliness in
7 this case in the sense of whether we're going to be able
8 to hold an election on the state senate and the
9 congressional. If your client is allowed to intervene,
11:00:00 10 we may end up with an election at large is what I'm
11 worried about.

12 MR. WALDEN: And what I'd ask your Honor to
13 consider, and obviously, your Honor, I -- unfortunately,
14 I'm wrong as often as I'm right, right? But I own it.
11:00:13 15 But on this point, your Honor, I don't think I'm wrong.
16 I think this burden issue in the context of our
17 intervention motion is a red herring, because -- we'll
18 get to the burden issue, and when we have a chance to
19 actually, in a very expeditious way -- and I have some
11:00:33 20 suggested innovations for the court that will force the
21 parties to make it easy on the court, because everyone,
22 especially the parties to this litigation -- and when I
23 say the parties, I mean mostly the respondents -- are
24 putting too much weight on your shoulders, your Honor.
11:00:48 25 They should be able to give the court a schedule that

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1 gets us here even if that schedule moves all of the
2 primaries to September. All of them.

3 THE COURT: To what; September?

4 MR. WALDEN: I'm sorry, your Honor?

11:01:05 5 THE COURT: To what; September, did you say?

6 MR. WALDEN: The first Tuesday in September.

7 I'm sorry, your Honor, I don't have the date. But there
8 is enough time. They'll say oh, there's burden, it's
9 really hard, it's going to -- it's not going to be hard
11:01:18 10 as running two primaries on the voters. It's not going
11 to be more -- it's going to be less expensive for the
12 tax dollars, which it's not like the board of elections
13 has an unlimited fisc.

14 THE COURT: Are you saying I have the power to
11:01:36 15 move the governor's election to September?

16 MR. WALDEN: I think the Court of Appeals is
17 clear that whatever needs to be moved in terms of
18 statutory deadlines or constitutional deadlines that are
19 inconsistent with the constitutional violation that has
11:01:54 20 occurred in this case, your Honor has the power to do
21 it.

22 So, I'm not suggesting that that's the only
23 approach, your Honor. I'm suggesting to you that the
24 parties are making it too hard on the court. I mean,
11:02:04 25 honestly, your Honor, part of what I hope you will

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1 consider in light of the issues that I've raised on the
2 integrity of the election and confidence in the election
3 and a desire from everyone at least to what they say
4 publicly when they're not in smoke-filled rooms, right,
11:02:24 5 to have elections that aren't rigged by political
6 influence is to deter these people from ever doing it
7 again.

8 If you give them the assembly maps, they are
9 going -- there is going to be celebrations across Albany
11:02:40 10 by Democrats and Republicans because they knew they
11 weren't going to win everything, they just wanted to win
12 one thing: the assembly maps. That's why they didn't
13 file. That's why they didn't contest them. That's why
14 they went to the Fourth Department and said we're good
11:02:56 15 with the assembly maps, right? That's the real
16 machination here, your Honor. That's the real fraud in
17 a sense.

18 And now I want to get to why my client decided
19 to file when he did. So, obviously, when you had the
11:03:14 20 case, your Honor, he had great confidence that you were
21 going to get to the right decision. And he thought, you
22 know, there must be some reason that the assembly maps
23 are different. There wasn't that much information.
24 There wasn't briefing out there.

11:03:26 25 The trial happened very quickly. Then your

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1 Honor in time -- I can't even understand, your Honor,
2 honestly, how you did it so quickly. But in very short
3 order, you issued a very comprehensive opinion that the
4 assembly maps were just as rigged as the other maps.
11:03:41 5 And you not only said they were unconstitutional, you
6 said they were void and you said they were not useable.
7 And that language, your Honor, I think, reverberated and
8 my client felt confidence.
9 And then the appeal came and the respondents
11:03:57 10 didn't defend your decision. And moreover, as
11 Mr. Foldenauer held up that brief, that's the brief that
12 did it, I think, they revealed something important, your
13 Honor. They revealed that there was a political deal
14 worked out, that there was a political deal that
11:04:16 15 involved a quid pro quo. That's what Mr. Greenberg
16 started hearing when that brief was filed. He started
17 hearing these rumors that there was a deal worked out
18 between the Democrats and the Republicans to give the
19 Republicans something in return for leaving the assembly
11:04:31 20 districts alone. And then after the Court of Appeals
21 came out, in that footnote that essentially, from our
22 perspective, invited intervention, then Mr. Greenberg
23 finally heard it from someone who had a direct
24 conversation, someone he trusted, and someone that he
11:04:47 25 believed.

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1 And my client is not a popular guy, your
2 Honor. I don't understand that, because he literally
3 invested hundreds of thousands of his own money to pass
4 a bill to protect the survivors of sexual violence
11:05:03 5 against kids. Like, I can't imagine someone, as a
6 survivor himself, that decided he was going to do that
7 for the children of this state. And why is he a rogue,
8 why is he called a crackpot by the *New York Post*?
9 Because he won't play the game, because he won't go
11:05:24 10 along with the political establishment.

11 And when he heard confirmation -- and, your
12 Honor, I invite you to ask the question directly of
13 counsel in this case whether or not there was any sort
14 of benefit given from the Democrats to the Republicans
11:05:39 15 to cause the petitioners to not pursue the assembly and
16 to not defend a decision that your Honor reached in good
17 conscience, because you care about more -- it's
18 exponentially more about the rule of law than you do
19 about this -- what has become political blood sport with
11:06:04 20 zero integrity.

21 And if this court ultimately -- and now I'm
22 getting to the merits, because everybody wants to get to
23 the merits. We talked about the deadlines and the
24 difficulties and the burdens, but if the ending of this
11:06:16 25 story is that these people won the thing that they

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1 mattered -- that mattered most to them because they
2 succeeded in delay by design, how could anyone have
3 confidence in the integrity of New York's electoral
4 system?

11:06:33 5 And so, your Honor, sometimes People like to
6 make things complicated when they're really very simple.
7 And I read the *Daily News* op ed from today, and they
8 read something that I think just makes this magically
9 simple, and I'd like to read it to your Honor: The
11:06:48 10 people passed a constitutional amendment. It was
11 violated. The maps must go.

12 I'm telling you very clearly where we want the
13 merits to go, but now I'm going to get back to what
14 we're supposed to be arguing about here, your Honor,
11:07:02 15 which is just whether or not we're going to have a seat
16 at the table. And the timeliness issue, while it is the
17 most credible issue that they raised in a lot of
18 incredible issues, a lot of issues that have zero merit
19 and are simply misdirection, the timeliness issue does
11:07:17 20 not -- the law does not support their position for the
21 reasons that I've described.

22 And so, your Honor, in closing, I'm sorry that
23 I took longer than I expected. Please, please, your
24 Honor, use your discretion to let my client be heard
11:07:32 25 before this honorable court. That's all we're asking in

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1 this application. But I promise, I'm making a promise
2 to your Honor, and I do not do this lightly, that no
3 matter what my other caseload, this is going to be my
4 first priority. I'm going to make sure everything
11:07:48 5 happens on time, and I'm going to do as much as I can to
6 relieve the burden on the court so that you can have a
7 quicker resolution, because I believe, Judge, that if
8 you force all of these people to get in a room and
9 produce a schedule for you that is achievable and abides
11:08:03 10 as many of the deadlines as possible and moves the
11 deadlines that need to be moved, that we can get to a
12 free and fair election, which is not only the bedrock of
13 our democracy, but without it, we're lost. Thank you.

14 THE COURT: Thank you, Mr. Walden.
11:08:25 15 Mr. Winner, on behalf of the petitioners?

16 MR. WINNER: Thank you, your Honor. I'll be
17 very brief. Your Honor, the issue is pretty simple.
18 We're dealing about this particular case, and this
19 particular case, the petitioners would clearly be
11:08:46 20 prejudiced in the event that the timeliness is violated
21 with respect to the provisions of CPLR 1012 (a)(2) and
22 1013.

23 THE COURT: How prejudiced?
24 MR. WINNER: Well, we're prejudiced because
11:08:59 25 there may be some impediment to moving forward with an

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1 orderly election on constitutional maps that are now in
2 the process of being drawn by a special master in such
3 that we don't know what the output would be. And
4 listening to the board of elections, and as you have
11:09:19 5 indicated, they're showing some significant difficulties
6 with the potential of complying with a new intervention
7 and potential delay, appeals, and whatever that would be
8 caused by the intervention at this point by the assembly
9 challenges.

11:09:40 10 So, to that extent, your Honor, we don't think
11 the Court of Appeals set forth in their footnote that
12 we -- that they do not invalidate the maps of the
13 assembly, and that they weren't challenged, and that the
14 original petition was brought by us on February 3rd
11:10:03 15 without a challenge to the assembly maps. The Appellate
16 Division reversed your decision, invalidated your
17 determination, which we believe was accurate, that the
18 procedure was violated, but then again, the timeliness
19 on any of those periods of time, the proposed
11:10:23 20 interventions could have occurred.

21 THE COURT: You don't argue that the assembly
22 maps are procedurally defective?

23 MR. WINNER: Oh, of course, we do. We agree
24 with your original decision that that was the case, but
11:10:34 25 any citizen at this point is free to bring a challenge

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1 to those maps. But we do not believe in this particular
2 proceeding that any challenge to the assembly maps is
3 timely.

4 THE COURT: Was there a deal worked out
11:10:50 5 between the Democrats and Republicans, to your
6 knowledge, on the assembly maps?

7 MR. WINNER: Well, there may have been a deal
8 worked out in the passage of the maps by the assembly --
9 by the Democrats and the Republicans. I'm not aware of
11:11:02 10 that. But it was, of course, our determination not to
11 challenge the assembly maps because they were adopted of
12 bipartisan map.

13 THE COURT: You're not aware of any agreement
14 after the fact, after the maps were --

11:11:14 15 MR. WINNER: Certainly not.

16 THE COURT: -- adopted?

17 MR. WINNER: Certainly not, your Honor.

18 THE COURT: Anything further, Mr. Winner?

19 MR. WINNER: No, your Honor, thank you.

11:11:19 20 THE COURT: Thank you. Who would like to go
21 first, Governor or Senate Majority Leader?

22 Ms. McKay, would you like to go first?

23 MS. MCKAY: Sure; I'm happy to.

24 THE COURT: Very good; go ahead.

11:11:39 25 MS. MCKAY: Heather McKay of the New York

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1 State Attorney General's Office on behalf of the
2 Governor. As all the parties in this months-ongoing
3 special proceeding agree, the three intervening motions
4 should be denied. We've articulated the reasons in our
11:11:58 5 briefing. The legislative respondents articulated some
6 of the same, as well as others, in which we would join.

7 Very briefly, because I know that your Honor
8 carefully reads our submissions, I can address some of
9 the points in particular that were raised today. The
11:12:19 10 main reason why these should be denied is that the
11 motions are untimely. With respect to the arguments for
12 invalidating the assembly maps at this late stage, I
13 would first say that it's ironic that Mr. Foldenauer
14 claims it is the legislature or some combination of
11:12:43 15 respondents that are somehow responsible for the delay,
16 for claiming that because we exercised our right to
17 appeal, which is hardly surprising. Your Honor
18 acknowledged that the ultimate determination as to the
19 validity of the maps would obviously be done by the
11:13:04 20 highest-up court in this state. The delays, despite
21 what Mr. Foldenauer and Mr. Walden want to say, is their
22 own. It has nothing to do with any of the respondents
23 in this case.

24 Essentially, at this point, the analysis is
11:13:25 25 extremely simple. Petitioners' amended petition could

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1 not have been clearer that they were not challenging the
2 assembly map. It's -- that's exactly where it was
3 spelled out. There's two footnotes in particular that
4 we cite in our papers where they specifically spelled
11:13:48 5 out any one of the readers that the attorneys are
6 describing in this case, members of the public who might
7 have wanted to challenge those maps, and the proposed
8 intervenors decided to sit and rest on their morals and
9 did not do it. So, they really can't claim that the
11:14:10 10 appeal process is where that was borne out. It was
11 expressly spelled out in a publicly filed document
12 months ago. It is also very telling that all of the
13 parties that have actually been litigating this case for
14 months now agree that the intervenors are too late.
11:14:33 15 This includes petitioners, this includes the state board
16 of elections, which has declined to weigh in previously
17 in this case given their bipartisan nature.

18 There were so many inflammatory claims that
19 were made during Mr. Foldenauer's speaking that I'm not
11:14:53 20 sure I can address them all. But one of the main ones
21 is that it seems necessary to set the record straight,
22 even though I'm sure that your Honor is well aware that
23 there is no substantive gerrymandering of the assembly
24 maps. Everyone knows that.

11:15:13 25 We do know why Republican members voted for

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1 the assembly maps. They told us in their sworn
2 affidavits they believed the maps were fair. So, I
3 believe there was a reference to we don't know why they
4 signed it. We do. We have sworn statements about that.

11:15:35 5 And I want to correct one other factual
6 inaccuracy. New York City has sent certification to the
7 state board on May 4th. I believe the SBOE can confirm
8 that they certified the New York State races.

9 THE COURT: Anything -- I'm sorry, McKay.

11:15:56 10 MS. McKAY: Go ahead, your Honor.

11 THE COURT: No, that's okay. Go ahead.

12 MS. McKAY: Okay; thank you. With respect to
13 the case law that was just cited by -- on behalf of on
14 Greenberg, those cases are completely in opposite. The
11:16:10 15 reality is this case is very -- it's hard to find
16 particularly analogous case law, because none of those
17 are special proceedings with constitutional time limits
18 that we've all been familiar with since the beginning of
19 this case in terms of 60 days for a decision. We have
11:16:31 20 an extremely limited time period. A day in this case is
21 mainly -- is basically equivalent to a month or more in
22 a regular case.

23 Your Honor asked him how he -- you would
24 possibly have the ability to change other state-wide
11:16:48 25 races, and he completely ducked that question. Making

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1 it too hard for you, he didn't want to give you any
2 legal basis upon which for you to do what he's
3 suggesting, which would be to utterly upset the election
4 process without any legal basis and change every single
11:17:08 5 election so that there's one election -- or one date,
6 that that's not going to be possible. And he's not
7 provided you with any effective legal analysis for why
8 or how you would be able to do that as a member of the
9 judiciary.

11:17:27 10 Our papers also talk about standing. I don't
11 want to belabor that point, but it is really important,
12 especially as to motion number 13, because Greenberg is
13 not an aggrieved candidate or a chairman of any party or
14 a person who has filed timely objections. We do stand
11:17:52 15 by the fact that any challenge to any independent
16 nominating petitions is not right. I believe there's
17 petitions that say -- make us use that argument against
18 us. That's a very reasonable argument with respect to
19 that particular claim for relief as to independent
11:18:12 20 nominating petitions as your Honor's advisory opinion on
21 it acknowledge those are not yet due, and they won't be
22 due until after the maps have been -- the new maps have
23 been put into place. That has nothing to do with Wax's
24 challenge to the assembly maps whatsoever. Those are
11:18:31 25 completely different claims for completely different

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1 relief.

2 And then the proposed intervenors have not
3 satisfied any of the mandatory intervenor requirements.

4 And I am privy of the petition, and the discretionary
11:18:48 5 determination should be denied regardless. I mean,
6 they've made so much of the prejudice point, but your
7 Honor can decide to exercise in his discretion not to
8 allow the intervenor even because of undue delay. I
9 don't think that there is a way to argue with a straight
11:19:09 10 face here that the intervenors would not cause undue
11 delay in this case.

12 And the state board's affidavit from Todd
13 Valentine is very telling. Proposed intervenors haven't
14 been here through this whole process like we have, and
11:19:26 15 it's really clear because they don't seem to understand
16 the significance of that affidavit. To date, there was
17 never a united position taken by the state board. When
18 we presented Connolly's affidavit, the petitioners
19 provided a higher affidavit from Mr. Valentine. They
11:19:46 20 were speaking for themselves based on their expertise in
21 the field. This affidavit is the first time that the
22 state board is speaking as a united bipartisan whole.
23 And we've reached the point now where everyone agrees it
24 would be absurd to risk the election to redo a map that
11:20:06 25 has absolutely no problem in substance.

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1 And regarding motion number 12 argued by
2 Attorney Ostrowski, I would ask how their interests are
3 not already represented by the existing parties. The
4 executive respondents have argued unfairness and
11:20:29 5 concerns on behalf of voters and candidates regarding
6 upsetting the ongoing election all along. And more
7 recently, the state board has been communicating with
8 the court about what is needed given the decisions
9 issued in order to ensure the candidates have sufficient
11:20:49 10 time and the local boards have sufficient time to ensure
11 that these elections move forward and effectively.

12 Our final points are just that the statute of
13 limitations has run on challenging designating
14 petitions, and then Latches applies for many of those
11:21:09 15 same reasons regarding timing. And finally, the
16 proposed intervenors' request would have an absolute
17 ripple effect. The assembly races will hold up multiple
18 other races including those for judicial offices. There
19 are just abundant reasons why the delay here would be
11:21:32 20 absolutely undue and carry risks that everyone now
21 agrees are not worth it. Thank you.

22 THE COURT: Thank you, Ms. McKay.

23 Senate Majority Leader, Mr. Hecker?

24 MR. HECKER: Thank you, your Honor. As we
11:21:51 25 indicated in a letter I submitted yesterday, we are

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1 joining in the arguments that Ms. McKay Mr. Bucki made
2 on behalf of the executive respondents and the assembly,
3 and I will defer to them.

4 THE COURT: All right. Thank you. Speaker of
11:22:07 5 the assembly, Mr. Bucki.

6 MR. BUCKI: May it please the court, Craig
7 Bucki on behalf of Assembly Speaker Heastie. I
8 appreciate the civics lecture that we had today from
9 Mr. Walden and Mr. Foldenauer. The problem is this
11:22:50 10 isn't a social studies class. This is a court of law.
11 And under the law, there are certain standards that need
12 to be satisfied in order for folks like Mr. Wax and
13 Mr. Greenberg to be able to intervene.

14 And so what I'd like to do is cut through all
11:23:11 15 of the proselytizing from Mr. Walden and Mr. Foldenauer
16 about how they and their clients are such vanguards of
17 democracy. Spare me. I want to cut through all of the
18 really irresponsible statements made, particularly by
19 Mr. Walden, for which he offers no proof and no evidence
11:23:34 20 making up out of whole cloth some kind of assertion that
21 there was some kind of backroom deal. If you're going
22 to say that there was some kind of quid pro quo between
23 Republicans and Democrats and the State Assembly, you
24 better have some evidence. And Mr. Walden doesn't offer
11:23:52 25 any. And so to make that kind of assertion about

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1 elected officials who take an oath to uphold the
2 Constitution of the United States and the Constitution
3 of the State of New York, that is particularly
4 irresponsible and unbecoming of an officer of the court.

11:24:12 5 Where I'd like to start is with the standard
6 for intervention. And the standard for intervention is
7 clear. Started with both CPLR 1012 and CPLR 1013. Both
8 those provisions begin with the same three words: upon
9 timely motion. And it's funny that Mr. Walden comes up
11:24:41 10 here and starts citing cases to this court about what it
11 means for a motion to intervene to be timely. Funny
12 thing is, he didn't cite any of those cases in his
13 papers because his papers cited no law. He just thought
14 he was going to march in here and say the assembly map
11:25:01 15 is unconstitutional, therefore, my client,
16 Mr. Greenberg, should be able to intervene.

17 What we actually did is we did our research.
18 And we offered a very detailed memorandum of law
19 explaining why these motions are not timely. And now,
11:25:17 20 belatedly, Mr. Walden, realizing his error, comes up
21 here and offers all kinds of law to the court that he
22 never had -- he never briefed even though he had the
23 opportunity. And we would submit that that's too little
24 too late.

11:25:30 25 But let's focus on the standard of upon timely

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1 motion. And really, our argument about timeliness boils
2 down to a simple question: Where have they been? Where
3 was Mr. Greenberg in February and in March and in April?
4 Where was Mr. Wax in February and March and April when
11:25:59 5 petitioners' counsel, the senate's counsel, the
6 Governor's counsel, us as counsel for the assembly and
7 for the speaker, we were doing all these motions, all
8 these briefing. This is my seventh day in Bath since
9 February for proceedings in this matter. And I've been
11:26:17 10 happy to be here, and Bath has been a great place to
11 come to, and it's been very good to me. But this has
12 taken up a lot of time, and all of the counsel have been
13 working very hard to assert their clients' position.
14 We had argument on motions, we had a trial.
11:26:36 15 We had an appeal that was fast-tracked by the Fourth
16 Department. We had to file papers with the New York
17 Court of Appeals on a Saturday at noon and then a Sunday
18 at noon. I've never had that kind of schedule before.
19 And we went from a decision at the Fourth Department on
11:26:51 20 a Thursday to arguing at the Court of Appeals on a
21 Tuesday. I assure you, your Honor, all the counsel for
22 all the parties have been working very hard on this
23 matter, and we have been giving it our full attention.
24 While all this has been going on, where have been --
11:27:10 25 where was Mr. Greenberg and where was Mr. Wax? I can

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1 tell you what they've been doing. They've been tweeting
2 prolifically about this case. And that's why we've
3 provided, as Exhibits A and B to my affirmation, copies
4 of some of those tweets.

11:27:28 5 THE COURT: I saw it.

6 MR. BUCKI: And your Honor is well aware about
7 Mr. Wax's fighting words calling Republican legislators
8 weak and pathetic, cowards, all these guys care about is
9 keeping their pension. And that applies to Assemblyman
11:27:45 10 Barclay, the minority leader, Assemblyman Palmesano, the
11 representative from LATFOR, and all 14 individuals from
12 the Republican conference in the assembly who voted in
13 favor of these maps because they are fair, as they have
14 said in the affidavits provided to this court.

11:28:03 15 And meanwhile, Mr. Greenberg likewise started
16 tweeting on February 3rd. And what's particularly
17 notable about Mr. Greenberg's tweets is it's clear from
18 the tweets he was watching the proceedings before your
19 Honor. He was tweeting about your Honor. He was
11:28:20 20 tweeting about the attorneys. He posted a copy of the
21 pleadings in this case on Twitter. So, if he posted a
22 copy of the pleadings, and if the pleadings made clear
23 in a footnote that there was no challenge to the
24 assembly map, how could he say that he did not know that
11:28:40 25 there was no challenge to the assembly map?

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1 He and Mr. Wax had ample opportunity to seek
2 to intervene in this case. They had access to NYSCEF,
3 they knew what was going on. They could read the
4 pleadings and see what was being challenged and what
11:28:59 5 wasn't. And instead, your Honor, what they did is they
6 sat on their rights. And there's a maxim in the law
7 that says those who seek equity must do equity. And
8 that's what the Fourth Department has said, and the
9 Court of Appeals has said. So, if they want the
11:29:17 10 equitable relief of invalidating the proposed assembly
11 maps that have been enacted, then it was incumbent upon
12 them to do equity themselves and to come before this
13 court, if not in February, then certainly in March
14 before this court entered a final judgment.

11:29:35 15 And, in fact, Mr. Wax said in a Twitter
16 mention on March 31st: Someone tried to tell me there
17 was no lawsuit as it pertained to the assembly lines.
18 So Mr. Wax knew that that, in fact, was the case, and
19 yet they were nowhere to be seen, nowhere to be heard.
11:29:55 20 And so, really, for them to come in and claim that
21 somehow they're fighting for democracy, well, if they
22 really were fighting for democracy they would have
23 intervened in February. They would have intervened in
24 March. They would have intervened in April.

11:30:09 25 Why are they here in May? Because they sensed

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1 an opportunity for publicity. Mr. Greenberg gave his
2 exclusive last week to the *New York Daily News* saying
3 I'm going to challenge the assembly maps. And Mr.
4 Walden, giving an interview to the *New York Law Journal*
11:30:28 5 back on May 4th: We're going to invalidate the assembly
6 maps. He was so busy giving media spots and trying to
7 build his brand that he forgot to serve the order to
8 show cause in the manner that was required by this court
9 right in the order. And so for that reason alone, the
11:30:46 10 motion to intervene is defective and needs to be denied.
11 So we would submit that with respect to timeliness,
12 there was ample opportunity, and Mr. Wax and
13 Mr. Greenberg squandered it, and they did not take
14 advantage. And that is the first reason why the motion
11:31:03 15 to intervene should be denied.

16 THE COURT: What do you suggest the court do,
17 though? I mean, yes, you've got 13 that -- 13 assembly
18 members that you attached affidavits for that say they
19 think it's fair, but procedurally, I don't think you
11:31:18 20 disagree that, you know, the ruling is that the assembly
21 maps are defective procedurally. So, what's the answer
22 here? Do you just let those go for the next ten years?

23 MR. BUCKI: Yes. And here's the reason why.
24 Because the New York Court of Appeals had an opportunity
11:31:36 25 when we were there about two weeks ago to invalidate the

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1 assembly maps if they wanted. So what happened is your
2 Honor invalidated the assembly maps. At the Fourth
3 Department, we argued that the assembly maps should not
4 have been invalidated because they were not challenged.
11:31:53 5 And, in fact, the Fourth Department agreed with us and,
6 in fact, all five justices on the panel agreed with us.
7 So, it was before the Court of Appeals when we undertook
8 that appeal about two weeks ago. If the Court of
9 Appeals was of the view that the assembly maps should be
11:32:09 10 invalidated, the Court of Appeals could have done that
11 at that time, and it pointedly chose not to. And I
12 commend the court to footnote number 15, which --

13 THE COURT: But they said because it hadn't
14 been challenged.

11:32:23 15 MR. BUCKI: Because it hadn't been challenged.

16 THE COURT: Now it is, or they want to get it
17 to challenge.

18 MR. BUCKI: And the thing is, constitutional
19 violations go by the wayside all the time because they
11:32:33 20 are not timely challenged. And a good example is the
21 *Scaringe* case that is cited by the New York State Board
22 of Elections in the companion affidavits of Kristin
23 Stavisky and Todd Valentine. And that was a case about
24 a person who did not satisfy the requirements with
11:32:52 25 respect to residency under the constitution for running

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1 for state legislature. And it was clear that that
2 person did not satisfy the requirements. But what did
3 the Third Department decide? Notwithstanding that there
4 was a constitutional violation, that it was too late to
11:33:11 5 remedy. Because if that's not going to be the result,
6 then statutes of limitation have no meaning, then the
7 doctrine of Laches has no meaning, then any kind of
8 cause of action can never be stale at any time.

9 So, another good example from the land use
11:33:30 10 context. There's a reason why Article 78 proceedings
11 have a four-month or sometimes even shorter statute of
12 limitations: because government action needs to be
13 challenged promptly. Litigants need to get the benefit
14 of certainty as to what their rights are going to be
11:33:48 15 vis-a-vis actions that are taken by the government. And
16 so that's why, on a land use application, a zoning
17 variance, a rezoning, if there's a challenge made a few
18 years down the line or even well past 30 days or four
19 months, depending upon the statute of limitations, even
11:34:07 20 if there's a substantive infirmity, the case goes out
21 the window because of untimeliness. And this is no
22 different a circumstance here.

23 And so what I also think is worth noting on
24 the issue of timeliness concerning the election is we've
11:34:26 25 had a lot of discussion about the affidavits that are

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1 offered by the State Board of Elections, and there has
2 been discussion by Mr. Walden in his presentation that
3 oh, the state board of elections talked about all kinds
4 of a parade of horrors that would happen if the
11:34:42 5 congressional map were invalidated, if the senate map
6 were invalidated, and yet those were invalidated anyway.

7 The key difference is that when that parade of
8 horrors was talked about by Tom Connolly, the Director
9 of Operations at the State Board of Elections, there
11:35:03 10 was, on several occasions, a responding affidavit from
11 Todd Valentine, the Republican Co-Executive Director at
12 the State Board of Elections, that, frankly, disputed
13 those characterizations and said not true; we can
14 satisfy new time frames. We can have a congressional
11:35:25 15 map and a state senate map that are invalidated, and we
16 can still run an election in time for this particular
17 year.

18 So, up until now, there has been, concededly,
19 a difference of opinion between the Democrats and the
11:35:40 20 Republicans with respect to timing. But here, your
21 Honor, the Democrats and the Republicans are speaking
22 with one voice and one accord. Mr. Valentine and his
23 counterpart, Ms. Stavisky, basically offered the same
24 affidavit talking about all of the unprecedented strain,
11:36:04 25 the unbearable burdens if the assembly maps were

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1 invalidated, the fact that assembly races have already
2 been certified, ballots are being printed, voting
3 machines are being tested for compatibility, new ballots
4 would be needed for a deadline that's only three days
11:36:20 5 away, supply chain issues with respect to getting paper.

6 And what I think really cannot be lost in all
7 of this, the issue of being able to conduct the
8 conventions to nominate candidates for New York State
9 Supreme Court. Because, under the law, those are
11:36:37 10 supposed to take place in a time period from August 4th
11 through August 10th. And so, if you have a primary on
12 August 23rd, you are past the time for holding those
13 conventions. How are you going to have candidates for
14 state supreme court?

11:36:54 15 And Mr. Walden says well, it used to be that
16 we had primaries in assembly districts and primaries for
17 judicial delegates in September. And that's true, but
18 that goes back to the times before there were strict
19 federal requirements with respect to shipping out
11:37:12 20 ballots to people overseas and people in the military.
21 That's the entire reason why we don't have primaries in
22 September anymore. And so, given that that deadline is
23 September 23rd for doing that for the November 8th
24 election, how is it possible to have a primary in
11:37:30 25 September and then to wait to certify those elections

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1 and then have a judicial delegate convention and then
2 have to print the ballots with the candidates for state
3 supreme court on it? There really isn't going to be
4 enough time. And that's why the Democrats the
11:37:46 5 Republicans at the state board of elections are unified
6 in saying to this court there simply is not enough time.
7 And I think that cannot be overestimated, the importance
8 of the fact that there is unanimity on both sides of the
9 political aisles, which, in these polarized times, it
11:38:06 10 isn't often that you get agreement from Democrats and
11 Republicans on much of anything, and here we do have
12 agreement from them on that point.

13 Setting aside the issue of timeliness, I also
14 think it cannot be underestimated the fact that the
11:38:24 15 proposed intervenor pleadings are simply deficient for a
16 whole host of reasons. First of all, the issue that the
17 order to show causes were not served in compliance with
18 this court's order. And we've briefed that, and we
19 stand on our papers on that point.

11:38:42 20 But then, in addition, as we see from the *New*
21 *York Law Journal* article, the interview with Mr. Walden
22 last week, he said that his goal in this lawsuit is,
23 quote, full and complete relief that New Yorkers
24 deserve. Well, first of all, if there's a need for full
11:39:03 25 and complete relief, where were they in February, March

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1 and April to give full and complete relief; but we'll
2 set that aside. But further, he said that he wants to,
3 quote, invalidate petitions submitted by existing
4 candidates for any office, for any petition containing
11:39:22 5 signatories who fall outside the newly drawn districts.
6 And he says he wants to, quote, reopen a petitioning
7 period for every race.

8 And so the question I ask, since Mr. Walden
9 claims to be such a vanguard of civil rights, is what
11:39:41 10 about the rights of the candidates who already filed
11 their petitions from April 4th through April 7th? We're
12 talking about candidates for a whole host of offices
13 statewide. So, this would be candidates for state
14 assembly, candidates for judicial delegate, candidates
11:39:58 15 for alternate delegate, candidates for New York State
16 Democratic Committee, candidates for party district
17 leader in New York City, and candidates for all of these
18 precinct level county committee positions whereby you
19 need to live in the assembly district in order to be
11:40:16 20 able to run, because the assembly districts really are
21 the building blocks upon which elections are run in New
22 York State. Once the assembly districts are set, then
23 if there need to be any alterations to the precincts,
24 then those alterations can be made and the voters are
11:40:37 25 sorted out based upon the precincts where they live and

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1 ultimately based upon the assembly districts where they
2 live. And so, allowing them to intervene at this late
3 date, all of that sorting process that's been going on
4 since February would have to be done all over again.

11:40:57 5 And furthermore, you have a whole host,
6 thousands, of candidates throughout the state, some
7 unopposed, many unopposed, and some not, who think that
8 they're all set, that they want to run for district
9 leader, they're set, their petitions are valid. They
11:41:13 10 want to run for -- be a judicial delegate, their
11 petitions are valid. They want to run for a position on
12 the county committee, petitions are filed, those
13 petitions are valid.

14 And so now what Mr. Greenberg and Mr. Wax
11:41:27 15 propose is to be able to intervene without any of these
16 candidates having a place at the table. They want to
17 talk about having a place at the table, Mr. Greenberg
18 and Mr. Wax, what about the thousands of candidates
19 whose candidacies they want to invalidate? They don't
11:41:43 20 have a place at the table, because they're not named in
21 the proposed petitions. And I would submit to try to
22 name all of those people at this late date is virtually
23 impossible. What they would have to do is go to the
24 state board of elections and get a list of all the
11:41:57 25 candidacies that are certified out of the state board

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1 and then go to each and every one of the 58 other local
2 boards of elections, one in New York City and 57 in the
3 other counties, and get a list of all the candidacies
4 that are validated by those particular boards of
11:42:13 5 elections. And all of those people have a right to be
6 heard and are necessary parties to this proceeding,
7 because if the assembly lines go down, then all of those
8 people and their candidacies would be inequitably
9 affected by the judgment.

11:42:29 10 And this is the case -- Mr. Walden wants to
11 talk about doing research, we did our research. Matter
12 of *Masich v. Ward*, from the Fourth Department. And, in
13 fact, that case was cited with approval in the *Minew*
14 case, M-i-n-e-w, from Onondaga County Supreme Court last
11:42:46 15 year. And that was a case that involved certificates of
16 authorization for the Working Families party. And what
17 happened there was there were objectants who wanted to
18 invalidate selected candidacies, but not the candidacies
19 of everybody whose names appeared on the certificate.

11:43:08 20 The courts said well, the problem is if there's
21 invalidity as to one candidate or some subset of the
22 candidates, there's invalidity as to the authorizations
23 for all of the candidates, and that's why they are all
24 necessary parties. And likewise, all those candidates
11:43:26 25 for assembly, judicial delegate, alternate delegate, New

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1 York City district leader, New York State Democratic
2 Committee, party positions in the county committees, all
3 of those individuals are necessary parties and they're
4 not here. Who's concerned about their rights? Clearly,
11:43:42 5 Mr. Walden and Mr. Foldenauer particularly aren't. And
6 we would submit that for that reason alone these
7 intervention motions should be given no countenance.
8 Notwithstanding the fact that also Mr. Wax and
9 Mr. Greenberg don't have standing to bring these
11:44:02 10 proceedings.

11 What differentiated the challenge that was
12 made by Petitioners back in February is that at that
13 time there were no candidates for congress. There were
14 no candidates for state senate. And, in fact, those
11:44:18 15 proceedings were brought on February 3rd, and so anyone
16 who then was collecting petitions for congress and
17 senate starting on March 1st, they had to know based
18 upon record notice from the lawsuit being on the books
19 that they were getting signatures but there was a chance
11:44:38 20 that the congressional lines and the senate lines were
21 going to be invalidated, and that's exactly what
22 happened. But with respect to the candidates for
23 assembly and all of these other offices for which the
24 units of election are based upon assembly districts,
11:44:53 25 there was no challenge to the assembly maps and so that

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1 was not something they had to worry about because no
2 challenge was brought.

3 And if Mr. Wax and Mr. Greenberg had, in fact,
4 brought a challenge, then we would have been talking
11:45:05 5 about a very different story. And so, when they filed
6 their petitions on April 7th, there was a two-week
7 window in which proceedings challenging their
8 designations could have been brought. And so that
9 two-week window ended April 21st, and we are well past
11:45:25 10 that and the statute of limitations has been blown. And
11 that also goes to the issue not only of the merits, but
12 also the timeliness and why the intervention should be
13 denied.

14 And why do Mr. Wax and Mr. Greenberg lack
11:45:37 15 standing? Election Law Section 16-102 says who has
16 standing: aggrieved candidates, party political chairs,
17 and objectors. We haven't seen any evidence at all that
18 Mr. Wax or Mr. Greenberg made any objection at any board
19 of elections to any candidacy on the basis of a claimed
11:45:59 20 unconstitutionality of the assembly district lines.

21 And so for all of these reasons, we would
22 submit that the proper thing to do would be to deny
23 intervention and to validate the assembly district map
24 because notwithstanding the civics lecture we got, which
11:46:18 25 I appreciate, there are standards that need to be

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1 satisfied on a motion to intervene, and in the eyes of
2 the law, certain procedural requirements need to be met
3 in any election case. There is no timeliness, the
4 procedural requirements have not been met, and for all
11:46:35 5 those reasons, intervention should be denied.

6 THE COURT: Thank you, Mr. Bucki.

7 Mr. Quail, can you hear me?

8 MR. QUAIL: Yes, your Honor, I can hear you.
9 Can you hear me?

11:46:46 10 THE COURT: Soft. I'm going to ask you to
11 maybe get up a little closer to the microphone because
12 it is hard to hear you. Would you like to be heard?

13 MR. QUAIL: Very, very briefly, your Honor. I
14 just would like to say that the situation that we find
11:47:01 15 ourselves in is that time keeps slipping into the
16 future. The other parties have made the arguments in
17 association with what the timing issues are. The board
18 of elections as a united bipartisan body stands behind
19 the affidavits that have been filed in this matter, and
11:47:24 20 as your Honor is also well aware, the state board of
21 elections has an application pending in the northern
22 district of New York before Justice Sharpe on the issue
23 of the August 23rd primary. We're waiting determination
24 on that application.

11:47:42 25 And, your Honor, the other factual point I

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1 would just like to make is that New York City did send
2 its candidates for assembly and other candidates to the
3 New York State Board of Elections. And while there may
4 be a smattering of ballot access litigation cases still
11:48:02 5 pending, the ballot access processes administratively at
6 boards of elections have concluded.

7 THE COURT: Thank you, Mr. Quail.

8 Are you asking for more time, Mr. Walden?

9 MR. WALDEN: I was not going to strain the
11:48:18 10 court's patience. I was going to ask for three minutes.

11 THE COURT: I'm going to take -- I assume
12 that's going -- I'll do it, but I'm going to take a
13 break first. We'll come back. Everybody will have two
14 minutes to wind up, and I'll give everybody a chance.
11:48:32 15 Two minutes, okay?

16 MR. WALDEN: Thank you.

17 THE COURT: We're adjourned for ten.

18 THE COURT DEPUTY: Court is in recess.

19 *(The Court recessed; reconvened.)*

11:58:55 20 THE COURT: We're going to give two minutes
21 apiece and fairly strict on that two minutes. My clerk
22 is going to keep time. Let's start with Gavin Wax,
23 Mr. Foldenauer.

24 MR. FOLDENAUER: Thank you, your Honor.
11:59:11 25 Again, Aaron Foldenauer for Gavin Wax. I did hear

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1 Petitioners' counsel kind of admit a few minutes ago
2 that, quote, there may have been a deal worked out
3 between the Republicans and the Democrats. And again,
4 Mr. Wax's position is that it's appalling that both
11:59:27 5 Republicans and Democrats are failing to stand up for --
6 to have constitutional lines.

7 And I would note that for some odd reason the
8 Republican affidavits were not attached to Petitioners'
9 brief, but rather were attached to Carl Heastie's brief,
11:59:46 10 thus lending some credence that Democrats and
11 Republicans were working together against these --
12 against having constitutional lines.

13 I also heard petitioners' counsel being unable
14 to identify prejudice here if the map is redrawn. In
12:00:01 15 fact, if the assembly map is redrawn, then all
16 candidates will be in the same boat. All candidates
17 running will be on equal footing. There is indeed no
18 prejudice.

19 I also heard Mr. Quail from the board of
12:00:14 20 elections admit that there still is valid access
21 litigation that will effect who appears on the ballot.
22 The ballot has not been finalized. In fact, a client of
23 mine was in touch with the board of elections yesterday
24 in New York City about how his name will appear on the
12:00:33 25 ballot.

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1 I was also shocked to hear counsel for the
2 Speaker say that the unconstitutional assembly map
3 should stand for the next ten years, which, again,
4 reiterates my point that the court should act now.

12:00:49 5 As I may have mentioned earlier, Nelson
6 Mandela said it always seems impossible until it's done.
7 The BOE affidavits in none of the submissions say that
8 it's impossible or not possible. And this action is not
9 about the BOE's convenience. As an election attorney, I
12:01:06 10 thought I was going to get the summer off. But very few
11 people in politics now are going to get the summer off.
12 The lines should be fixed, and we're respectfully asking
13 the court to act. Thank you for your consideration,
14 your Honor.

12:01:19 15 THE COURT: Thank you, Mr. Foldenauer.

16 Mr. Ostrowski on behalf of the candidate
17 petitioners.

18 MR. OSTROWSKI: Thank you, your Honor. Your
19 Honor, we were timely. We got into court three business
12:01:32 20 days after the final decision on the merits, which we
21 had no problem with the merits whatsoever. We're only
22 on the remedy phase, and only because, at that point,
23 reading all three decisions, it wasn't clear what the
24 remedies were going to be, so we got in in three
12:01:48 25 business days.

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1 There's no prejudice because the issues that
2 we addressed in our petition or proposed pleading have
3 been not -- were not addressed in the petition or by the
4 petitioners and have not been addressed by the
12:02:00 5 respondents. So there's absolutely no prejudice.

6 Cleaning up the record a bit, I don't believe
7 the state board has opposed our motions. And there may
8 be another party that did not either. I just want to
9 make that clear.

12:02:13 10 So, finally, the question why won't the
11 existing parties adequately represent us. I've already
12 answered it. The petition is silent on this, and I
13 don't think we -- the respondents, the ones who have
14 been found guilty of violating the constitution, have
12:02:32 15 stated no interest at all in any of the issues we
16 raised, so that's really an absurd question. Thank you,
17 your Honor.

18 THE COURT: Thank you, Mr. Ostrowski.
19 Mr. Walden.

12:02:42 20 MR. WALDEN: Thank you, your Honor. I can't
21 see your signs; my eyes are terrible, so I'm going to
22 keep track on my own if you don't mind. Double check
23 me.

24 Your Honor, I'm going to first talk about a
12:02:52 25 liability for all of them. None of them even engaged on

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1 the difference between prejudice and burden; just left
2 it all alone. So you can assume that we're right on
3 that.

4 With respect to Ms. McKay's arguments, she
12:03:04 5 said we were not being good stewards to you because we
6 didn't offer a schedule. We'll do it. We think we
7 should do it with all the parties and force them to the
8 table, but if they won't do it, we will.

9 She said there's no authority for changing
12:03:17 10 deadlines. She should read the Court of Appeals
11 decision. Inherent in every one of those election law
12 cases where there's a constitutional infirmity, there's
13 a corresponding ability for the court to change any and
14 all deadlines including rendering decisions about things
12:03:29 15 that are now inconsistent constitutionally.

16 Third, she talks about the board of elections
17 and talks a lot, as others did, about a unified
18 affidavit. No specifics in any of those affidavits as
19 to why it's impossible. It's not. But more important,
12:03:45 20 no understanding of why that matters here when we're
21 talking about prejudices as opposed to burden.

22 Mr. Bucki, he's right. We can leave here, if
23 you deny us access to this proceeding, and file
24 elsewhere. Is that really what they want? They want a
12:03:58 25 TRO in Green County or in Staten Island or any of the

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1 places I've gotten calls from people; that's going to
2 make the election happen sooner and more reliable?
3 That's why we came here, your Honor. We could have done
4 that. That would have been great gamesmanship. We
12:04:12 5 didn't do that. We came to you because we knew that you
6 had the expertise and could do it the most quickly. We
7 put more burden on you, and I'm sorry, your Honor, but
8 we did that in service to election integrity.

9 Secondly, Speaker Heastie, his position is
12:04:28 10 incredible. Not only will there be an unconstitutional
11 election for the assembly and all the corresponding
12 elections now, it's going to be generational
13 unconstitutionality. That's what they're inviting the
14 court to do. That shows you the depth of the cynicism.
12:04:46 15 The fact that not once did he talk -- did Mr. Heastie
16 talk -- his counsel talk about election integrity, I
17 think, speaks volumes, your Honor. If you don't let us
18 in, they win. That's what they wanted from day one.
19 Thank you.

12:04:59 20 THE COURT: Thank you, Mr. Walden.

21 Ms. McKay? I'm sorry; petitioners first.

22 Mr. Winner.

23 MR. WINNER: Thank you, your Honor. Briefly,
24 I just want to reiterate that the possibility of a deal
12:05:16 25 is not only silly, but it's absolutely outrageous. I

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1 would imagine that Mr. Bucki and Mr. Hecker and the
2 counsel for the Governor would be rather offended by any
3 kind of thought that somehow we were colluding with them
4 with regard to the results that we've been able to
12:05:36 5 achieve here in this case. So, to that extent, I just
6 find that contention to be offensive. There's certainly
7 no deal between us and the respondents with regard to
8 this -- operation of this case.

9 As far as the bipartisan -- not challenging
12:05:52 10 the assembly maps, we did not challenge the assembly
11 maps because we did not believe that we could meet our
12 constitutional burden that they were a violation of the
13 2014 amendments by virtue of the fact that they have
14 now, the affidavits have been submitted, be constituted
12:06:10 15 to be fair by a number of assembly Republicans that
16 voted for them. So, we did not want to prejudice our
17 case with regard to what we determined to be clearly
18 unconstitutional maps in the senate and the congress.
19 And although your Honor did not hold for us with regard
12:06:24 20 to the senate violation, we certainly were successful
21 with regard to the congressional, and your Honor's
22 decision was ultimately upheld by the Court of Appeals
23 to your credit. So, to that extent, your Honor, we
24 believe that the -- these intervention motions are
12:06:44 25 clearly untimely and certainly ought to be not agreed to

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1 by the court.

2 THE COURT: Thank you, Mr. Winner.

3 Ms. McKay, on behalf of the Governor?

4 MS. MCKAY: Other than imploring with your

12:06:56 5 Honor that you not entertain any of the conspiracy

6 theories that have been presented to you today, we have

7 nothing further.

8 THE COURT: Thank you. Mr. Hecker, on behalf

9 of the Senate Majority Leader?

12:07:08 10 MR. HECKER: Nothing additional to add, your

11 Honor.

12 THE COURT: Thank you, Mr. Hecker. On behalf

13 of the Speaker of the Assembly, Mr. Bucki?

14 MR. BUCKI: A few points in response, your

12:07:25 15 Honor. First of all, Mr. Foldenauer, I believe the word

16 he used was appalling that it was the Speaker who

17 offered the affidavits from a variety of Republican

18 members of the state assembly in which they stated that

19 the maps are fair. I would submit there's nothing

12:07:43 20 appalling about that at all because these are the

21 Speaker's colleagues, and he strives to have a good

22 professional relationship with them. And one of the

23 concerns that your Honor addressed in the March 31st

24 decision and order was about the importance of

12:07:57 25 bipartisanship. I can't think of anything more that

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1 would signify bipartisanship better than the fact that
2 you have Democrats and Republicans working together
3 whereby the Speaker was pleased to offer these
4 affidavits from his Republican colleagues in which they
12:08:12 5 state their views that the assembly map was fair.

6 And for Mr. Foldenauer to say it's so
7 astounding that we would say the assembly maps should
8 remain in place for the next ten years, it's no more
9 astounding than the circumstance that happens when a
12:08:28 10 variety of other government actions for whatever reason
11 happened to go unchallenged and the statute of
12 limitations happens to expire. This happens all the
13 time. And that's why we have statutes of limitations
14 under the law.

12:08:41 15 And I would submit that the real reason why
16 Mr. Wax and Mr. Greenberg decided to come to this court
17 was that they were concerned about the statute of
18 limitations issue because if they were to try to
19 commence a brand-new case in another county, then that
12:08:59 20 was going to be the first argument we were going to make
21 on a motion to dismiss. And personally, I think they
22 were trying to circumvent that and that's why they came
23 to Steuben County for strategic reasons rather than out
24 of any fealty for good government.

12:09:13 25 And with respect to election integrity, I

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1 agree that election integrity is important. Election
2 integrity means following the rules of the road that
3 have been set up for elections, and that includes
4 statute of limitations, naming necessary parties, making
12:09:28 5 sure that anybody who brings a challenge has standing,
6 and the whole host of reasons why intervention should be
7 denied.

8 THE COURT: Thank you, Mr. Bucki. Mr. Quail?

9 MR. QUAIL: Nothing further, your Honor.

12:09:40 10 THE COURT: All right; thank you. I'm going
11 to reserve decision. I'll get a decision out as soon as
12 possible. Thank you. Thank you all.

13 *(The proceedings concluded.)*

14 Certified to be a true and accurate transcript.

15 

16 _____
17 Elizabeth M. Davis, RPR

18 Official Court Reporter

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**Exhibit 3 to Devlin Affirmation-
Excerpts of Transcript of Special Proceedings,
in Harkenrider I., dated March 3, 2022
[pp. 157 - 172]**

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

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1 STATE OF NEW YORK COUNTY OF STEUBEN
2 SUPREME COURT
3 -----X
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Hall of Justice
Bath, New York
March 3, 2022

BEFORE:

HON. PATRICK F MCALLISTER
Acting Supreme Court Justice

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REPORTED BY:

LAURA BLISS POWER
Official Court Reporter

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

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

16 *(No indication.)*

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

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

22 THE COURT: Thank you, Mr. Moskowitz.

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

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

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

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

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

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

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

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

25 Now, I do not think that the Court will

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

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

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

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

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

25 If the remedy is ordered this year altering

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

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

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

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

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

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

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

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Harkenrider et al v. Hochul et al

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

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

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Harkenrider et al v. Hochul et al

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

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

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Harkenrider et al v. Hochul et al

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

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

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

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

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

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

Harkenrider et al v. Hochul et al

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

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

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

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

18 MS. MCKAY: Thank you, your Honor.

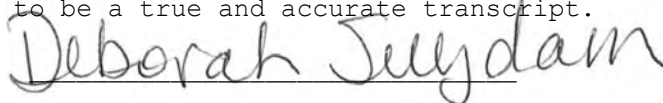
19 THE COURT: Thank you.

20 MR. TSEYTLIN: Thank you, your Honor.

21 MR. HECKER: Thank you, your Honor.

22 MR. BUCKI: Thank you, your Honor.

23 Certified to be a true and accurate transcript.

24 

25 Deborah Suydam
Official Court Reporter

**Exhibit 4 to Devlin Affirmation-
Notice by Electronic Mail of Petitioners' Application for
a Temporary Restraining Order**

FILED: NEW YORK COUNTY CLERK 05/15/2022 10:34 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 8

RECEIVED NYSCEF: 05/15/2022

From: [Peter A. Devlin](#)
To: ["heather.mckay@ag.ny.gov"](#); ["matthew.brown@ag.ny.gov"](#); ["agoldenberg@chwllp.com"](#); ["jcuti@chwllp.com"](#); ["areiter@chwllp.com"](#); ["dmulkoff@chwllp.com"](#); [Eric Hecker](#); ["hgregorio@chwllp.com"](#); ["dchill@graubard.com"](#); ["jlessem@graubard.com"](#); ["ereich@graubard.com"](#); ["cbucki@phillipslytle.com"](#); ["ssalcedo@phillipslytle.com"](#); ["rvalentine@phillipslytle.com"](#); ["brian.quail@elections.ny.gov"](#); ["Kimberly.Galvin@elections.ny.gov"](#)
Cc: [Jim Walden](#); ["Aaron Foldenauer"](#)
Subject: Petition and Emergency Motion for Temporary Restraining Order
Date: Sunday, May 15, 2022 9:08:00 PM
Attachments: [Petition and Emergency Motion for Temporary Restraining Order.zip](#)

Counsel:

Paul Nichols, Gavin Wax, and Gary Greenberg (the "Petitioners"), by and through their attorneys, have commenced a special proceeding by order to show cause in the Supreme Court of the State of New York for New York County against Respondents whom you represent in *Harkenrider v. Hochul*, Index No. E 2022-0116 CV. Petitioners have filed an emergency motion for a temporary restraining order. Petitioners hereby provide you with a copy of the Petition, Petitioners' emergency motion for a temporary restraining order, and all accompanying papers. Petitioners will seek to be heard at the Court's earliest convenience.

The following papers are attached here:

- * Petition, dated May 15, 2022.
- * [Proposed] Order to Show Cause Regarding Petitioners' Petition and Emergency Motion for a Temporary Restraining Order.
- * Memorandum of Law in Support of Emergency Motion by Order to Show Cause for a Temporary Restraining Order.
- * Affirmation of Petitioner Paul Nichols, dated May 15, 2022.
- * Affidavit of Petitioner Gavin Wax, dated May 15, 2022.
- * Affidavit of Petitioner Gary Greenberg, dated May 15, 2022.
- * Affirmation of Peter Devlin, dated May 15, 2022, and exhibits attached thereto.

Sincerely,

Peter A. Devlin (*he/him*)

Walden Macht & Haran LLP

250 Vesey Street, 27th Floor

New York, New York 10281

O: (212) 335-2388

C: (215) 279-2749

pdevlin@wmhlaw.com

www.wmhlaw.com

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**Affidavit of Paul Nichols in Support of Petition and Emergency
Motion by Order to Show Cause for a Temporary Restraining Order,
sworn to May 16, 2022
[pp. 174 - 175]**

FILED: NEW YORK COUNTY CLERK 05/15/2022 10:34 PM

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INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/16/2022

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

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG,

Petitioners,

Index No. _____

v.

**AFFIDAVIT OF
PAUL NICHOLS**

GOVERNOR KATHY HOCHUL, SENATE
MAJORITY LEADER AND PRESIDENT PRO
TEMPORE OF THE SENATE ANDREA
STEWART-COUSINS, SPEAKER OF THE
ASSEMBLY CARL HEASTIE, NEW YORK
STATE BOARD OF ELECTIONS, and THE NEW
YORK STATE LEGISLATIVE TASK FORCE ON
DEMOGRAPHIC RESEARCH AND
REAPPORTIONMENT,

Respondents.

STATE OF NEW YORK)

ss.:

COUNTY OF QUEENS)

PAUL NICHOLS, being duly sworn, deposes and says:

1. I am a citizen of the State of New York residing in Queens County. I am registered to vote in the State of New York.

2. I am a candidate for Governor of the State of New York.

3. I previously circulated and filed a designating petition with the New York State Board of Elections in an attempt to qualify to appear on the ballot as a candidate for Governor in the upcoming Democratic primary election, currently scheduled to be held on June 28, 2022. However, the Board of Elections removed me from the ballot after determining that my designating petition contained invalid signatures.

4. I intend to circulate an independent nominating petition so that I can appear on the

ballot as a third-party candidate for Governor of the State of New York in the November 8, 2022, general election.

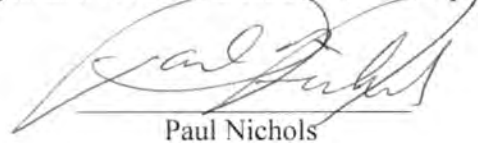
5. The redistricting process, and the ongoing litigation related thereto, has interfered with my ability to circulate petitions to appear as a candidate on a third-party line in the November 8, 2022, general election.

6. Further, the redistricting process, along with the previously held unconstitutionally drawn congressional district lines, impeded my ability to properly review and challenge the congressional district requirements of the statewide petitions to ensure that statewide candidates fulfilled their legal requirements with constitutionally drawn congressional districts.

7. If I do not secure a third-party line in connection with my candidacy for Governor, then I will not be on the ballot at all. If I do not make the ballot, registered voters in the State of New York who support me will not be able to vote for me at any time this election cycle.

8. If, moreover, the designating petition period is reopened, I intend to obtain new signatures and file a new designating petition with the Board of Elections to qualify to appear on the primary ballot for Governor in the Democratic primary election.

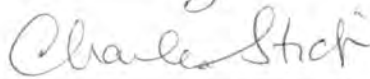
9. I bring this action so that my rights as a voter and a candidate will be protected.



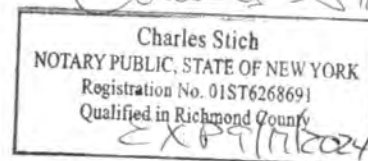
Paul Nichols

Sworn to and subscribed before me

this 16th day of May 2022.



A Notary Public



**Affidavit of Gavin Wax in Support of Petition and Emergency Motion
by Order to Show Cause for a Temporary Restraining Order,
sworn to May 15, 2022
[pp. 176 - 177]**

FILED: NEW YORK COUNTY CLERK 05/15/2022 10:34 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 10

RECEIVED NYSCEF: 05/15/2022

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

**PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG,**

Petitioners,

Index No. _____

v.

**AFFIDAVIT OF
GAVIN WAX**

**GOVERNOR KATHY HOCHUL, SENATE
MAJORITY LEADER AND PRESIDENT PRO
TEMPORE OF THE SENATE ANDREA
STEWART-COUSINS, SPEAKER OF THE
ASSEMBLY CARL HEASTIE, NEW YORK
STATE BOARD OF ELECTIONS, and THE NEW
YORK STATE LEGISLATIVE TASK FORCE ON
DEMOGRAPHIC RESEARCH AND
REAPPORTIONMENT,**

Respondents.

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

GAVIN WAX, being duly sworn, depose and state the following:

1. I am a citizen of the State of New York, residing at 1229 First Avenue, Apt. 11, New York, NY 10065 in New York County. I am registered to vote in the State of New York.
2. I bring this action so that my rights as a voter and a candidate will be protected and am moving by Order to Show Cause because election deadlines are fast approaching.
3. I am the President of the New York Young Republican Club. In addition to my political advocacy on behalf of Republican-related causes, I am a supporter of the ability of so-called "third parties" to organize in the State of New York and for candidates to seek third-party ballot lines in general elections. Our polarized, tribal political culture is broken, and I firmly believe that more voices deserve to be heard.

4. The entire redistricting process and the ongoing litigation has interfered with the ability of candidates for office to circulate petitions which would enable them to secure a third-party ballot line in a general election.

5. On April 27, 2022, the Court of Appeals issued a decision which concluded that the New York State Assembly map was subject to a procedurally unconstitutional process, although the Court of Appeals was unable to reach the constitutional issue related to the State Assembly Map because of a procedural technicality.

6. Earlier this month, I filed a motion to intervene in the related litigation in Steuben County Supreme Court, seeking to invalidate the State Assembly Map based on the Court of Appeals' decision. Even though the Supreme Court denied my request to intervene on timeliness grounds, the Supreme Court agreed that the State Assembly Map is unconstitutional and stated that an individual such as myself could file an action in another court, if I so desired.

7. Accordingly, I am commencing this action to request, among other things, (a) that the State Assembly Map be invalidated; (b) that a Special Master be engaged by this Court so that a proper State Assembly Map be redrawn; and (c) that the 2022 elections for New York State Assembly be held only when a proper, constitutional map is in place.



Gavin Wax

STATE OF NEW YORK
COUNTY OF NEW YORK

Sworn to and subscribed before me

this 15TH day of MAY 2022.


A Notary Public

MARY SARAGOUSSI
Notary Public, State of New York
NO. 01SA6262738
Qualified in Kings County
Certificate filed in New York County
Commission Expires 05/29/2024



**Affidavit of Gary Greenberg in Support of Petition and Emergency
Motion by Order to Show Cause for a Temporary Restraining Order,
sworn to May 16, 2022
[pp. 178 - 179]**

FILED: NEW YORK COUNTY CLERK 05/15/2022 10:34 PM

NYSCEF DOC. NO. 11

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/16/2022

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

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG

Petitioners,

Index No. _____

v.

**AFFIDAVIT OF
GARY GREENBERG**

GOVERNOR KATHY HOCHUL, SENATE
MAJORITY LEADER AND PRESIDENT PRO
TEMPORE OF THE SENATE ANDREA
STEWART-COUSINS, SPEAKER OF THE
ASSEMBLY CARL HEASTIE, NEW YORK
STATE BOARD OF ELECTIONS, and THE NEW
YORK STATE LEGISLATIVE TASK FORCE ON
DEMOGRAPHIC RESEARCH AND
REAPPORTIONMENT,

Respondents.

STATE OF NEW YORK)

ss.:

COUNTY OF GREENE)

GARY GREENBERG, being duly sworn, deposes and says:

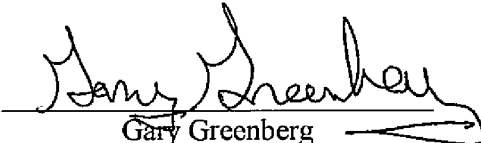
1. I am a citizen of the State of New York and a registered voter residing in New Baltimore, which is located in Greene County. I am a former New York state political candidate, who may in the future run again for office.

2. I make this Affidavit, based upon my personal knowledge, in support of the Petition and accompanying motion by Order to Show Cause.

3. I am moving by Order to Show Cause so that the relief sought in the Order to Show Cause and the proposed Petition can be pursued expeditiously in view of the upcoming electoral deadlines. Those deadlines include the current June 28, 2022, primary election date for the Statewide and State Assembly offices and other associated deadlines.

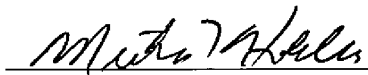
4. I previously sought to intervene in the *Harkenrider* proceedings in the Supreme Court of Steuben County because (1) the petitioners in that case are not adequately protecting my rights or those of the People of New York to have the State Assembly election conducted based on electoral (re)districting adopted in the constitutionally prescribed manner rather than the unconstitutional manner invalidated by the Court of Appeals, and (2) I believed it would be the most efficient path to relief rather than filing my own lawsuit in Greene County.

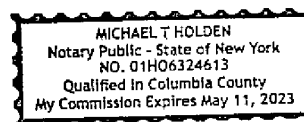
5. The Supreme Court of Steuben County, however, denied my motion on timeliness grounds. The Supreme Court agreed that the State Assembly map is unconstitutional and stated that I could file an original action in a different court to pursue my rights. I am therefore filing this action now to invalidate the State Assembly map and commence proceedings with a nonpartisan Special Master to adopt a new map, and to ensure that candidates and potential candidates, such as myself, can collect the necessary petition signatures to appear on a ballot.


Gary Greenberg

Sworn to and subscribed before me

this 16th day of May 2022.


A Notary Public



Request for Judicial Intervention, dated May 15, 2022

[pp. 180 - 181]

FILED: NEW YORK COUNTY CLERK 05/15/2022 10:34 PM

NYSCEF DOC. NO. 12

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/15/2022

UCS-840
(rev. 02/01/2022)

REQUEST FOR JUDICIAL INTERVENTION

Supreme COURT, COUNTY OF New York

Index No: _____ Date Index Issued: _____

For Court Use Only:

CAPTION

Enter the complete case caption. Do not use et al or et ano. If more space is needed, attach a caption rider sheet.

Paul Nichols, Gavin Wax, Gary Greenberg

Plaintiff(s)/Petitioner(s)

-against-

Governor Kathy Hochul, Senate Majority Leader 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

Defendant(s)/Respondent(s)

NATURE OF ACTION OR PROCEEDING:

Check only one box and specify where indicated.

COMMERCIAL

- ☐ Business Entity (includes corporations, partnerships, LLCs, LLPs, etc.)
☐ Contract
☐ Insurance (where insurance company is a party, except arbitration)
☐ UCC (includes sales and negotiable instruments)
☐ Other Commercial (specify): _____

NOTE: For Commercial Division assignment requests pursuant to 22 NYCRR 202.70(d), complete and attach the **COMMERCIAL DIVISION RJL ADDENDUM (UCS-840C)**.

TORTS

- ☐ Asbestos
☐ Child Victims Act
☐ Environmental (specify): _____
☐ Medical, Dental or Podiatric Malpractice
☐ Motor Vehicle
☐ Products Liability (specify): _____
☐ Other Negligence (specify): _____
☐ Other Professional Malpractice (specify): _____
☐ Other Tort (specify): _____

SPECIAL PROCEEDINGS

- ☐ Child-Parent Security Act (specify): ☐ Assisted Reproduction ☐ Surrogacy Agreement
☐ CPLR Article 75 - Arbitration [see **NOTE** in **COMMERCIAL** section]
☐ CPLR Article 78 - Proceeding against a Body or Officer
☐ Election Law
☐ Extreme Risk Protection Order
☐ MHL Article 9.60 - Kendra's Law
☐ MHL Article 10 - Sex Offender Confinement (specify): ☐ Initial ☐ Review
☐ MHL Article 81 (Guardianship)
☐ Other Mental Hygiene (specify): _____
☒ Other Special Proceeding (specify): CPLR Article 4

MATRIMONIAL

- ☐ Contested
NOTE: If there are children under the age of 18, complete and attach the **MATRIMONIAL RJL Addendum (UCS-840M)**.
 For Uncontested Matrimonial actions, use the Uncontested Divorce RJL (**UD-13**).

REAL PROPERTY Specify how many properties the application includes: _____

- ☐ Condemnation
☐ Mortgage Foreclosure (specify): ☐ Residential ☐ Commercial

Property Address: _____

NOTE: For Mortgage Foreclosure actions involving a one to four-family, owner-occupied residential property or owner-occupied condominium, complete and attach the **FORECLOSURE RJL ADDENDUM (UCS-840F)**.

Partition

NOTE: Complete and attach the **PARTITION RJL ADDENDUM (UCS-840P)**.

- ☐ Tax Certiorari (specify): Section: _____ Block: _____ Lot: _____
☐ Tax Foreclosure
☐ Other Real Property (specify): _____

OTHER MATTERS

- ☐ Certificate of Incorporation/Dissolution [see **NOTE** in **COMMERCIAL** section]
☐ Emergency Medical Treatment
☐ Habeas Corpus
☐ Local Court Appeal
☐ Mechanic's Lien
☐ Name Change/Sex Designation Change
☐ Pistol Permit Revocation Hearing
☐ Sale or Finance of Religious/Not-for-Profit Property
☐ Other (specify): _____

STATUS OF ACTION OR PROCEEDING

Answer YES or NO for every question and enter additional information where indicated.

YES NO

- Has a summons and complaint or summons with notice been filed? ☐ YES ☒ NO If yes, date filed: _____
 Has a summons and complaint or summons with notice been served? ☐ YES ☒ NO If yes, date served: _____
 Is this action/proceeding being filed post-judgment? ☐ YES ☒ NO If yes, judgment date: _____

NATURE OF JUDICIAL INTERVENTION

Check one box only and enter additional information where indicated.

- ☐ Infant's Compromise
☐ Extreme Risk Protection Order Application
☐ Note of Issue/Certificate of Readiness
☐ Notice of Medical, Dental or Podiatric Malpractice
☐ Notice of Motion
☐ Notice of Petition
☒ Order to Show Cause
☐ Other Ex Parte Application
☐ Partition Settlement Conference
☐ Poor Person Application
☐ Request for Preliminary Conference
☐ Residential Mortgage Foreclosure Settlement Conference
☐ Writ of Habeas Corpus
☐ Other (specify): _____

Date Issue Joined: _____

Relief Requested: _____

Relief Requested: _____

Relief Requested: Injunction/Restraining Order

Relief Requested: _____

Return Date: _____

Return Date: _____

Return Date: _____

FILED: NEW YORK COUNTY CLERK 05/15/2022 10:34 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 12

RECEIVED NYSCEF: 05/15/2022

RELATED CASES List any related actions. For Matrimonial cases, list any related criminal or Family Court cases. If none, leave blank. If additional space is required, complete and attach the RJI Addendum (UCS-840A) .				
Case Title	Index/Case Number	Court	Judge (if assigned)	Relationship to instant case
Tim Harkenrider et al v. Governor Kathy Hochul ...	E2022-0116CV	Steuben County Supreme Court	Patrick F Mcallister	Proposed Intervenor

PARTIES For parties without an attorney, check the "Un-Rep" box and enter the party's address, phone number and email in the space provided. If additional space is required, complete and attach the RJI Addendum (UCS-840A) .				
Un-Rep	Parties <small>List parties in same order as listed in the caption and indicate roles (e.g., plaintiff, defendant, 3rd party plaintiff, etc.)</small>	Attorneys and Unrepresented Litigants <small>For represented parties, provide attorney's name, firm name, address, phone and email. For unrepresented parties, provide party's address, phone and email.</small>	Issue Joined <small>For each defendant, indicate if issue has been joined.</small>	Insurance Carriers <small>For each defendant, indicate insurance carrier, if applicable.</small>
<input type="checkbox"/>	Name: Nichols, Paul Role(s): Plaintiff/Petitioner	JAMES WALDEN, Walden Macht & Haran LLP, 1 Battery Park Plaza 34th Fl, New York, NY 10004, 2123352031, jwalden@wmhlaw.com	<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
<input type="checkbox"/>	Name: Wax, Gavin Role(s): Plaintiff/Petitioner	JAMES WALDEN, Walden Macht & Haran LLP, 1 Battery Park Plaza 34th Fl, New York, NY 10004, 2123352031, jwalden@wmhlaw.com	<input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
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<input type="checkbox"/>	Name: Role(s):		<input type="checkbox"/> YES <input type="checkbox"/> NO	

I AFFIRM UNDER THE PENALTY OF PERJURY THAT, UPON INFORMATION AND BELIEF, THERE ARE NO OTHER RELATED ACTIONS OR PROCEEDINGS, EXCEPT AS NOTED ABOVE, NOR HAS A REQUEST FOR JUDICIAL INTERVENTION BEEN PREVIOUSLY FILED IN THIS ACTION OR PROCEEDING.

Dated: 05/15/2022

JAMES WALDEN

Signature

2505642

JAMES WALDEN

Print Name

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Request for Judicial Intervention Addendum

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INDEX NO. 154213/2022

NYSCEF DOC. NO. 13

RECEIVED NYSCEF: 05/15/2022

Request for Judicial Intervention Addendum

UCS-840A (7/2012)

Supreme COURT, COUNTY OF New York

Index No:**For use when additional space is needed to provide party or related case information.****PARTIES:** For parties without an attorney, check "Un-Rep" box AND enter party address, phone number and e-mail address in "Attorneys" space.

Un-Rep	Parties	Attorneys and Unrepresented Litigants	Issue Joined	Insurance Carriers
<input checked="" type="checkbox"/>	List parties in same order as listed in the caption and indicate roles (e.g., plaintiff, defendant, 3 rd party plaintiff, etc.) Name: New York State Legislative Task Force on Demographic Research and Reapportionment Role(s): Defendant/Respondent	For represented parties, provide attorney's name, firm name, address, phone and email. For unrepresented parties, provide party's address, phone and email. 250 Broadway, Suite 2100, New York, NY 10007	For each defendant, indicate if issue has been joined. <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	For each defendant, indicate insurance carrier, if applicable.

RELATED CASES: List any related actions. For Matrimonial actions, include any related criminal and/or Family Court cases.

Case Title	Index/Case Number	Court	Judge (if assigned)	Relationship to instant case
Tim Harkenrider et al v. Governor Kathy Hochul et al	E2022-0116CV	Steuben County Supreme Court	Patrick F Mcallister	Proposed Intervenor

**Letter from Aaron Suggs re: Opposition to Signing Proposed OTSC,
dated May 16, 2022
[pp. 183 - 184]**

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May 16, 2022

VIA NYSCEF

Re: Nichols v NYSBOE, et al. Index Number 154213/2022
Opposition to Signing Proposed OTSC

The New York State Board of Elections opposes the issuance of the proposed Order to Show Cause (OTSC) in this matter (ECF# 2).

The petitioners come in well after the eleventh hour and now attempt to cause chaos in contests for which none of the petitioners are seeking office.

The proposed OTSC contains two TRO provisions that are both inappropriate and should be stricken.

CPLR 6313(a) precludes the ex parte issuance of a temporary restraining order against a public officer, board, or municipal corporation of the State to restrain the performance of statutory duties.

From the perspective of the unfolding June 28, 2022 primary election, the provision providing “[r]espondents are hereby enjoined from using the 2022 State Assembly map in administering the 2022 primary and general elections,” would prevent ballots containing Assembly primaries from being issued. As these ballots contain other offices or positions with primaries for a party, it would restrain those ballots from being issued as well.

Moreover, boards of elections are substantially along in preparations for the June primary and stopping those activities – ballot printing preparations, etc. – would materially threaten the unfolding of the June primary election.

As of Friday, upon information and belief, every Board of Elections has issued ballots to military voters.

To the extent the court does sign an OTSC in this matter, it is requested that the Court strike the TRO provisions.

Very truly yours,

s/

Aaron Suggs

**Respondent Speaker of the Assembly Carl Heastie's Memorandum
of Law in Opposition to Petitioners' Motion for a Temporary
Restraining Order, dated May 17, 2022
[pp. 185 - 206]**

FILED: NEW YORK COUNTY CLERK 05/17/2022 10:36 AM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 15

RECEIVED NYSCEF: 05/17/2022

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NEW YORK

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG,

Petitioners,

Index No. 154213/2022

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

Respondents.

**MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR A
TEMPORARY RESTRAINING ORDER**

Respectfully submitted,

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Respondent Carl Heastie, Speaker of the New York State Assembly (the “Speaker”), respectfully opposes Petitioners’ motion for a temporary restraining order (“TRO”) (Dkt. No. 2).¹

PRELIMINARY STATEMENT

On February 3, 2022, the Legislature enacted the Assembly district map to govern New York for the next 10 years. L.2022, c. 14, § 1. Yet only now, over three months later, do Petitioners bring this proceeding to invalidate that map. Boards of Elections have prepared for the June 28 primary for months; primary ballots have been finalized, printed, and mailed to military members; and candidates have already collected petition signatures, spent money, and built campaigns. All the while, Petitioners remained on the sidelines as others challenged only the Congressional and State Senate maps.

Petitioners’ pending motion for a TRO should be denied out of hand. Under CPLR 6313(a), this Court cannot grant a TRO “against a public officer [or] board ... to restrain the performance of statutory duties.” Yet that is exactly what Petitioners ask this Court to do — they seek to enjoin the New York State Board of Elections and this State’s 58 local Boards of Elections (none of which is a party to this proceeding) from conducting the June primaries, which they must do under the Election Law.

Even absent this statutory bar, however, Petitioners’ egregious delay should not be rewarded — especially not at the expense of secure, orderly 2022 elections. The motion for a TRO should be denied.

¹ “Dkt. No.” and any associated page citations refer to document and page numbers assigned by NYSCEF in this proceeding. The Speaker’s counsel offers this memorandum of law for the limited purpose of opposing Petitioners’ TRO application, and the Speaker does not waive the CPLR’s requirement of service upon him of the Petition, any accompanying documents, and any Order to Show Cause this Court may enter.

STATEMENT OF FACTS**A. The *Harkenrider* Lawsuit begins in February 2022, and the Court of Appeals renders its decision in April**

On February 3, 2022, the New York State Legislature enacted redistricting maps for the State Assembly, the State Senate, and Congress. L.2022, c. 13 & 14. Later that day, Tim Harkenrider and others commenced *Matter of Harkenrider v. Hochul* (Index No. E2022-0116CV), a special proceeding in Steuben County Supreme Court (the “*Harkenrider* Petitioners” and the “*Harkenrider* Lawsuit”). Their petition challenged only the Congressional map (Steuben Dkt. No. 1).² Then, on February 8, the *Harkenrider* Petitioners filed an amended petition adding a challenge to the State Senate map (Steuben Dkt. No. 18). The amended petition affirmatively disavowed any challenge to the Assembly map (*id.* at No. 5 nn. 6-7).

Petitioners challenged the Congressional and State Senate maps on two grounds. Substantively, they argued the two maps violated the State Constitution’s ban on partisan gerrymandering (Steuben Dkt. No. 25, at pp. 17-56). Procedurally, they argued that because the State’s Independent Redistricting Commission had deadlocked and failed to submit a second set of proposed maps to the Legislature, the Legislature lacked authority to enact maps of its own (*id.* at pp. 9-14).

Proceedings continued in Steuben County Supreme Court for nearly two months. On March 31, 2022, the Court invalidated the State Senate map on procedural grounds only, and the Congressional map on both procedural and substantive grounds

² “Steuben Dkt. No.” and any associated page citations refer to the document and page numbers assigned by the NYSCEF system in the Supreme Court proceedings of *Matter of Harkenrider v. Hochul*, Steuben County Index No. E2022-0116CV.

(Steuben Dkt. No. 243). *Sua sponte*, it also invalidated the Assembly map on procedural grounds only (*id.* at p. 17).

About three weeks later, the Fourth Department affirmed in part and reversed in part. *Matter of Harkenrider v. Hochul*, 2022 WL 1193180 (4th Dep’t Apr. 21, 2022).

Beforehand, various Congressional members, candidates for office, and voters moved before the Fourth Department to intervene. In opposition, the *Harkenrider* Petitioners argued the motion was “patently untimely” (Steuben Dkt. No. 462, at ¶ 6). The Fourth Department denied the motion (Fourth Dep’t Dkt. No. 41).³

The Court of Appeals rendered its decision on April 27, about one week after the Fourth Department’s decision on the merits. *Matter of Harkenrider v. Hochul*, __ N.Y.3d __, 2022 WL 1236822 (April 27, 2022). Like Supreme Court, the Court of Appeals invalidated the State Senate map on procedural grounds only, and it invalidated the Congressional map on both procedural and substantive grounds. *Id.* at *1. The Court declined, however, to invalidate the Assembly map, which no one had challenged. *Id.* at *11 n.15. It ordered Supreme Court, with the assistance of Special Master Jonathan Cervas, to draw remedial State Senate and Congressional maps for the 2022 elections. Supreme Court set a deadline of May 20 to finalize those maps (Steuben Dkt. No. 291).

B. Petitioners’ motions — filed on May 1 and 3, 2022 — to intervene in the *Harkenrider* Lawsuit are denied as untimely

After the Court of Appeals issued its decision, Petitioner Gavin Wax moved on May 1 to intervene in the *Harkenrider* Lawsuit (Steuben Dkt. No. 317). Petitioner Gary Greenberg did the same two days later (Steuben Dkt. No. 347). Both sought to invalidate

³ “Fourth Dep’t Dkt. No.” refers to the document number assigned by the NYSCEF system on the Appellate Division docket for *Matter of Harkenrider v. Hochul*, Fourth Department Index No. CAE 22-00506.

the Assembly map and to enjoin use of the map for the 2022 elections (Steuben Dkt. No. 317, at p. 3; Steuben Dkt. No. 347, at p. 4).

Steuben County Supreme Court denied the motions as untimely. Among other things, Supreme Court noted that: (1) “[i]t was clear from the Petition and Amended Petition that the Assembly Districts were not being challenged”; (2) “both Greenberg and Wax were aware of this pending action shortly after it was commenced in February”; and (3) because the 2022 election cycle was well underway, “[t]o permit intervention [at] this time would create total confusion” (Steuben Dkt. No. 520, at pp. 2-4). Neither Mr. Wax nor Mr. Greenberg has appealed.

C. Ballots for the June primaries are finalized and mailed by May 13, 2022, and Petitioners later commence this special proceeding seeking to “adjourn” those primaries

While the *Harkenrider* Lawsuit proceeded, preparations for the 2022 elections continued. The general elections for Congress, the State Senate, the State Assembly, and other elected positions are November 8, 2022 (Steuben Dkt. No. 6). Under Federal and State law, general-election ballots must be mailed to military voters by September 23, 2022 (*id.*). Before general-election ballots can be finalized and mailed, primary elections need to take place. Those were all scheduled by law for June 28 (*id.*). But due to the Court of Appeals’ decision, Supreme Court moved the Congressional and State Senate primaries from June 28 to August 23, 2022 (Steuben Dkt. No. 301). All other primaries, including the Assembly primaries, remain scheduled for June 28.

In accordance with Federal and State law, ballots for the June 28 primaries were finalized and mailed to military voters by May 13, 2022 (Dkt. No. 14; Steuben Dkt. No. 6). Petitioners commenced this special proceeding on May 15 (Dkt. No. 1).

The Petition requests a declaration that the Assembly map is procedurally unconstitutional (Dkt. No. 1, at p. 29), but makes no allegation that the map is somehow substantively unfair or a partisan gerrymander.. It also seeks to “adjourn” next month’s primaries for all “state and local elections” to late August or mid-September (*id.* at p. 30). Further, the Petition seeks to invalidate the candidacies of everyone who has qualified for primary elections for “Statewide, Congressional, State Assembly, State Senate, and local offices” (*id.*). If Petitioners prevail, those thousands of candidates would need to “obtain new designating petition signatures or run independently” (*id.*).

ARGUMENT

POINT I

THE MOTION MUST BE DENIED UNDER CPLR 6313(a)

“No temporary restraining order may be granted ... against a public officer, board, or municipal corporation of the state to restrain the performance of statutory duties.” CPLR 6313(a). Yet that is what Petitioners seek — a TRO that would “suspend[] or enjoin[] the operation of any ... state laws, or vacat[e] any certifications or other official acts ... of the New York State Board of Elections or other governmental body” (Dkt. No. 1, at p. 30), and thereby prohibit boards of elections from undertaking their statutory duties associated with administering the June 28 primary elections. *See, e.g.*, N.Y. ELEC. LAW §§ 7-207 (requiring Boards of Elections to prepare voting machines in advance of the primary election), 8-406 (requiring Boards of Elections to deliver ballots to qualified absentee voters), 10-108 (same with respect to military voters), 11-204 (same with respect to overseas voters). For that reason alone, the motion must be denied.

Further, if this Court grants Petitioners a preliminary injunction (which it should not), Petitioners must “give an undertaking” sufficient to cover “all damages and costs which may be sustained by reason of the injunction.” CPLR 6312(b). Such undertaking here would likely total in the millions of dollars — if the June 28 primaries are enjoined, the New York State Board of Elections and the State’s 58 local Boards of Elections (one for New York City, and one for each county outside New York City) would need to pay employee compensation and procure additional supplies in a frantic effort to prepare for a new date for conducting primary races that the Boards have already certified, and for which they have already finalized and sent ballots to voters.

POINT II

THE TRO FACTORS WEIGH AGAINST GRANTING THE MOTION

Even if a TRO is theoretically available here (it is not), Petitioners are not entitled to one. A TRO is appropriate only if Petitioners demonstrate a likelihood of success on the merits, that they would suffer irreparable and imminent injury absent a TRO, and that the equities balance in their favor. *Mabry v. Neighborhood Defender Serv., Inc.*, 88 A.D.3d 505, 505 (1st Dep’t 2011). Here, Petitioners fail on all three fronts.

A. Petitioners are unlikely to succeed on the merits

Petitioners assert the April 27 Court of Appeals decision guarantees them a victory on the merits (Dkt. No. 3, at p. 7). Not so. The Court of Appeals never suggested that, no matter the circumstances, any challenge to the Assembly map would succeed. And here, Petitioners seek to do much more than what the *Harkenrider* Petitioners did — these Petitioners seek belatedly to invalidate the candidacies of thousands of candidates who have already qualified for the primary ballot, weeks after the time for challenging those

candidacies has expired. Under these circumstances, additional requirements must be met, and Petitioners have not met them.

1. The doctrine of laches bars Petitioners' claim

Laches is an equitable doctrine. It bars a claim if two elements are satisfied: 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). “[D]elays of even under a year have been held sufficient to establish laches.” *Matter of Schulz v. State of New York*, 81 N.Y.2d 336, 348 (1993) (delay of 11 months); *accord*, *Matter of Cantrell v. Hayduk*, 45 N.Y.2d 925, 927 (1978) (*per curiam*) (delay of two months).

In *Schulz*, for example, citizens challenged the constitutionality of a public-finance law. 81 N.Y.2d at 342. They initiated the lawsuit within a year after the law’s enactment. *Id.* at 347. But in the interim, the State sold bonds, sold property, and completed other transactions under the law. *Id.* at 348. The Court of Appeals determined that invalidating the law would require nullifying those transactions, which would be akin to “putting genies back in their bottles.” *Id.* The plaintiffs’ failure to bring their claim sooner, combined with the resulting prejudice to “society in general,” required dismissal of the claim under the laches doctrine. *Id.* at 348, 350.

Similarly here, Petitioners’ egregious delay in bringing this proceeding threatens to cause unprecedented prejudice. Candidates for the Assembly and many other elected positions have already collected ballot-access signatures and have qualified for the June primaries. Ballots for those primaries are finalized; “every Board of Elections has issued ballots to military voters” (Dkt. No. 14, p. 1). And Steuben County Supreme Court determined that, to proceed with even somewhat orderly primaries on August 23, remedial

Congressional and State Senate maps must be finalized by May 20. That deadline is now impossible to meet with respect to the Assembly map.

2. Petitioners failed to name necessary parties

Under CPLR 1001(a), “[p]ersons ... who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.” Necessary parties must be joined through proper service, and “[n]onjoinder of a [necessary] party ... is a ground for dismissal of an action.” CPLR 1003; *accord, Am. Transit Ins. Co. v. Carillo*, 307 A.D.2d 220, 220 (1st Dep’t 2003).

This requirement especially applies in election cases. When a petitioner seeks to remove a candidate from a primary ballot, the candidate “might be inequitably affected by a judgment,” is a necessary party, and must be served. On point is *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). There, a voter sued to invalidate a certificate that filled certain delegate vacancies at the Republican judicial-nominating convention. *Id.* at *1. But he failed to join all the judicial delegates named in the certificate. *Id.* at *3. Supreme Court held that those delegates were necessary parties and, because of the non-joinder, dismissed the lawsuit. *Id.* The First Department affirmed. 197 A.D.3d 1025. Other Courts throughout the State have reached analogous conclusions. *See, e.g., Matter of Masich v. Ward*, 65 A.D.3d 817, 817 (4th Dep’t 2009); *Matter of Castracan v. Colavita*, 173 A.D.2d 924, 925 (3d Dep’t 1991) (*per curiam*); *Matter of Minew v. Levine*, 2021 WL 1775369, at *3 (Sup. Ct. Onondaga County Apr. 30, 2021).

Replacing the Assembly map, as Petitioners seek to do, would create even more upheaval than replacing the Congressional and State Senate maps. The reason is that

Assembly districts, unlike Congressional and State Senate districts, are the foundation of a variety of public offices and party positions in New York’s political infrastructure, for which designations were made and primary elections are scheduled to take place this year. In March and April, designating petitions were collected and filed with Boards of Elections throughout New York State on behalf of candidates for:

- each political party’s precinct-level county committee representatives, who need not live in the precinct they hope to represent, but “must reside in the assembly district containing the election district in which the member is elected” (*Matter of Gordon v. Monahan*, 89 A.D.2d 1030, 1031 (3d Dep’t 1982) (citing N.Y. ELEC. LAW § 2-104(1));
- representatives to the New York State Democratic Committee, for which Assembly districts are the “[u]nit of representation,”⁴ such that aspiring members of the State Committee must reside in “the county in which the [Assembly district] ... is contained” (N.Y. ELEC. LAW §§ 2-102(1), (3));
- each political party’s New York City district leaders, who seek office by Assembly district in each county that comprises the City (*id.* § 2-110(2)); and
- delegates and alternate delegates to State Supreme Court judicial-nominating conventions, who also are elected “from each Assembly district” (*id.* § 6-124; *accord*, *Johnson v. Lomenzo*, 20 N.Y.2d 783, 783 (1967)).

Hence, by applying to annul the Assembly district lines enacted in February 2022, Petitioners look to invalidate the otherwise valid and/or certified designations of

⁴ See New York State Democratic Party Rules, p. 3 (Steuben County Dkt. No. 465).

thousands of candidates throughout New York State who seek public office or party positions for which their eligibility depends upon running and obtaining a sufficient number of signatures within a particular Assembly district. These include candidates for State Assembly, representatives to county party committees and the New York State Democratic Committee, party District Leaders in New York City, and delegates and alternate delegates to State Supreme Court judicial nominating conventions. All these candidates are necessary parties to this proceeding, because a judgment invalidating the Assembly district lines under which they qualified for the ballot would also invalidate their designations, or at least require them to obtain a new round of signatures on designating petitions, and thereby leave those candidates “inequitably affected[.]” CPLR 1001(a). The New York State Board of Elections and the 58 local Boards of Elections are also necessary parties, because they are the administrative agencies that accepted those candidates’ designating petitions for filing and would be responsible for invalidating them upon any annulment of the Assembly district lines enacted in February 2022. *Matter of Flynn v. Orsini*, 286 A.D.2d 568, 568 (4th Dep’t 2001); *Gagliardo v. Colascione*, 153 A.D.2d 710, 710 (2d Dep’t 1989). Absent those necessary parties, Petitioners’ claim fails as a matter of law.

3. Petitioners lack standing

The Election Law delineates three categories of people who may challenge the “designation of any candidate for any public office”: a citizen who previously filed an objection with a board of elections; an aggrieved, rival candidate; or the chairperson of a party committee. N.Y. ELEC. LAW § 16-102(1). Petitioners are not rival candidates⁵ or the

⁵ Mr. Nichols allegedly intends to run for Governor, but that does not make him an aggrieved, rival candidate for purposes of the Assembly map. See *Matter of Cocco v. Moreira-Brown*, 230 A.D.2d 952 (3d Dep’t 1996) (holding that petitioner was not an “aggrieved candidate” for standing purposes because she was not “a candidate for the office in question”).

chairpersons of a party committee. And they do not claim to have filed objections to any designating petitions, so they cannot bring their challenge as citizen-objectors. *See Matter of Korman v. N.Y. State Bd. of Elections*, 137 A.D.3d 1474, 1475-76 (3d Dep’t 2016) (holding that petitioners lacked standing as citizen-objectors due to their noncompliance with objection requirements). Therefore, Petitioners lack standing and cannot succeed on the merits.

4. The statute of limitations has expired

The Election Law also provides that a “proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition.” N.Y. ELEC. LAW § 16-102(2). The last day to file designating petitions for the primaries for State Assembly, county party committee, New York State Democratic Committee, party District Leader in New York City, and delegate and alternate delegate to State Supreme Court judicial nominating conventions was April 7, 2022 (Steuben Dkt. No. 6) — well over 14 days before Petitioners commenced this special proceeding on May 15. Consequently, the Petition is time-barred.

Because determining the limitations period “for a particular declaratory judgment action” requires “examin[ing] the substance of that action to identify the relationship out of which the claim arises and the relief sought,” it is irrelevant that Petitioners have not framed this special proceeding as a challenge to the candidates’ designating petitions. *Solnick v. Whalen*, 49 N.Y.2d 224, 229 (1980); *see also Matter of Ciotti v. Westchester County Bd. of Elections*, 109 A.D.3d 988, 989 (2d Dep’t 2013) (“[n]otwithstanding the characterization of this proceeding as one pursuant to CPLR Article 78 ... this proceeding is governed by the statute of limitations set forth in Election Law § 16-102(2)”; *Olma v. Dale*, 306 A.D.2d 905, 905-06 (4th Dep’t 2003) (holding that plaintiff could not

evade the 14-day statute of limitations by framing his claim as a declaratory-judgment action seeking to remove a candidate's name from the ballot); *Scaringe v. Ackerman*, 119 A.D.2d 327, 329-330 (3d Dep't 1986) (granting a motion to dismiss when petitioners failed to properly bring a claim under § 16-102 within the statutory time limit). Election Law § 16-102 limits the time in which proceedings regarding petitions can be brought, and that Petitioners bring constitutional claims is not enough, alone, to keep those claims alive—"[a] constitutional claim can become time-barred just as any other claim can." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983); *see also County of Chemung v. Shah*, 28 N.Y.3d 244, 262-63 (2016).

While couched as a challenge to the Assembly district lines enacted in February 2022, a judgment for Petitioners would invalidate or inequitably effect thousands of candidate designations throughout New York State. Hence, the requirements of New York Election Law § 16-102 apply (*accord, Matter of N.Y. State Cmte. of Independence Party v. N.Y. State Bd. of Elections*, 87 A.D.3d 806, 809-10 (3d Dep't 2011)), and this special proceeding is time-barred because it began more than 14 days after the last day for filing designating petitions that were to be collected in Assembly districts in New York State. N.Y. ELEC. LAW § 16-102(2).

B. Petitioners fail to articulate concrete harm they will suffer if their motion is denied

Petitioners do not challenge the substantive fairness of the Assembly map, which was enacted with bipartisan support. Aside from their meaningless bluster about "Faustian bargains" (Dkt. No. 3, at p. 8), they fail to identify concrete harm they would suffer if the 2022 elections proceed under a fair map. Indeed, even if they get their wish — an Assembly map drawn by a special master — it is unclear why or whether that map would

differ from the map enacted by the Legislature. Petitioners have not demonstrated harm, yet alone irreparable harm.

C. The balance of the equities weighs heavily against granting the motion

As explained above, Petitioners' delay in bringing this action is egregious. The *Harkenrider* Lawsuit received heavy media coverage starting the day it was filed on February 3. To confirm that the *Harkenrider* Petitioners did not challenge the Assembly map, all anyone had to do was access the NYSCEF docket, at no cost, and skim their pleadings.

Petitioners, in particular, cannot claim ignorance. Mr. Greenberg is a "former New York state political candidate, who may in the future run again for State office" (Steuben Dkt. No. 348, ¶ 1). Mr. Wax is "a New York-based conservative political activist, commentator, and columnist," president of the New York Young Republican Club, and a contributor to One America News and other media outlets.⁶ And Mr. Nichols alleges he is running for Governor (Dkt. No. 1, ¶ 102). All of them were surely aware in February of the *Harkenrider* Lawsuit, the 2022 redistricting, or both.

In fact, although they didn't bother bringing a special proceeding until now, Mr. Greenberg and Mr. Wax did find time to tweet prodigiously about New York's redistricting and this special proceeding during the past several months. On February 3, for instance, Mr. Greenberg retweeted an image of the Petition in the *Harkenrider* Lawsuit (Steuben Dkt. No. 461, at p. 2). He tweeted or retweeted about redistricting, the *Harkenrider* Lawsuit, or both at least four additional times that day, eight additional times that month, and eight times in March — including a play-by-play of oral arguments that took place in

⁶ Gavin Wax, <https://www.gavinwax.com/> (last accessed May 17, 2022).

Steuben County Supreme Court on March 3, 2022 (*id.* at pp. 15-16). Mr. Wax was paying attention as well. In a February 3 Twitter post, he asked why “Republicans [are] so weak in New York” because “apparently 15 GOP members of the Assembly voted in favor of the Democrats [sic] gerrymandering proposal” (Steuben Dkt. No. 460, at p. 2). He tweeted a picture of the Steuben County Supreme Court’s March 31 Order (which originally invalidated the enacted Congressional and State Senate district maps) the day it was issued (*id.* at p. 4). He even asked his Twitter followers to “Please clap!” for his proposed “fair and just map”—which was solid red except for a blue handgun shooting bullets into a blue Albany (*id.* at p. 6).

Simply put, Petitioners have no excuse for failing to commence this special proceeding in February or March. “It is an ancient maxim that he who comes to equity must come with clean hands.” *Amarant v. D’Antonio*, 197 A.D.2d 432, 434 (1st Dep’t 1993). Hence, when “a litigant has himself been guilty of inequitable conduct with reference to the subject matter” of the litigation, “a court of equity will refuse him affirmative aid.” *Levy v. Braverman*, 24 A.D.2d 430, 430 (1st Dep’t 1965). *Accord, Sync Realty Grp. v. Rotterdam Ventures, Inc.*, 63 A.D.3d 1429, 1431 (3d Dep’t 2009) (finding the balance of equities does not favor a party that knowingly contributes to its own harm); *De Candido v. Young Stars, Inc.*, 10 A.D.2d 922 (1st Dep’t 1960) (denying temporary restraining order on account of plaintiff’s laches and unclean hands). Here, Petitioners sat on their rights for months while the *Harkenrider* Lawsuit was litigated. Their egregious delay tips the equities against issuing a TRO.

On the other side of the scale, denying the motion would not create the dystopia Petitioners portray. For instance, they deride the Assembly map as “partisan-

infected” (Dkt. No. 3, at p. 8) without acknowledging a critical fact: the enacted Assembly map is a fair map that received bipartisan support. It passed the Assembly by an overwhelming vote of 118 to 29, including 14 Republican votes in favor. All those 14 Republicans, approximating one third of the Assembly Republican conference, have made affidavits in which they assert the Assembly map is fair (Steuben Dkt. Nos. 444-59). No wonder, then, that the *Harkenrider* Petitioners did not challenge the Assembly map.

Petitioners assert the Court of Appeals “already balanced the competing equities at stake here” (Dkt. No. 3, at p. 10), but that is not true. The Court ordered remedial Congressional and State Senate district maps for the 2022 elections, rather than waiting for the 2024 elections, because the *Harkenrider* Petitioners “commenced [that] proceeding on the same day” the maps were enacted. *Harkenrider*, 2022 WL 1236822, at *12 n.18. In contrast, Petitioners here slept on their rights for three months before bringing this special proceeding. And since the Court’s April 27 decision, June primary ballots have been finalized and mailed, making an immediate Assembly redistricting impossible.

In short, this time-barred proceeding, brought by Petitioners who lack standing and fail to name thousands of necessary parties, is not likely to succeed on the merits. Petitioners fail to articulate any harm that could surpass the harm their proposed invalidation of ballot certifications and suspension of the entire primary election only six weeks away would cause candidates, the State, and the voting public. And the balance of the equities favors Respondents. This Court should not issue a TRO.

CONCLUSION

Petitioners’ motion for a temporary restraining order should be denied.

FILED: NEW YORK COUNTY CLERK 05/17/2022 10:36 AM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 15

RECEIVED NYSCEF: 05/17/2022

Dated: New York, New York
May 17, 2022

GRAUBARD MILLER

By: /s/ C. Daniel Chill

C. Daniel Chill

Elaine Reich

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Dated: Buffalo, New York
May 17, 2022

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CERTIFICATE OF COMPLIANCE WITH 22 N.Y.C.R.R. § 202.8-b

This memorandum of law complies with 22 N.Y.C.R.R. § 202.8-b because it contains 4,401 words, excluding the caption, table of contents, table of authorities, and signature block. The word count was generated by the word-processing system used to prepare this document.

Dated: Buffalo, New York
May 17, 2022

PHILLIPS LYTLE LLP

By: 

Craig R. Bucki
Steven B. Salcedo
Rebecca A. Valentine

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**Supplemental Affirmation of Peter A. Devlin, for Petitioners
Paul Nichols and Gary Greenberg, in Further Support of Petition
and Emergency Motion by Order to Show Cause for a Temporary
Restraining Order, dated May 17, 2022
[pp. 207 - 210]**

FILED: NEW YORK COUNTY CLERK 05/17/2022 11:00 AM

NYSCEF DOC. NO. 16

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/17/2022

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

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG

Petitioners,

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

Respondents.

Index No. 154213/2022

**SUPPLEMENTAL
AFFIRMATION OF
PETER DEVLIN**

PETER A. DEVLIN, an attorney licensed to practice in the State of New York, affirms
under penalty of perjury:

1. I am an Associate at the law firm of Walden Macht & Haran, LLP, 250 Vesey
Street, 27th Floor, New York, New York 10281, counsel for Petitioners Paul Nichols and Gary
Greenberg in this CPLR Art. 4 special proceeding.

2. I submit this Supplemental Affirmation in further support of the Petition and
accompanying proposed Order to Show Cause and motion for a temporary restraining order filed
on May 15, 2022, to inform the Court of late-breaking developments in related proceedings before
the Steuben County Supreme Court in *Harkenrider v. Hochul*, Index No. E 2022-0116 CV.

3. Yesterday, Special Master Cervas released proposed Congressional and State
Senate district maps. The Steuben County Court will hear public comment and adopt final maps
on May 20th. In particular, the proposed Congressional map proves that new designating and

nominating petitioning periods for Statewide candidates must be opened if New York is to hold fair and lawful elections.

4. Attached hereto as Exhibit A and Exhibit B are true and correct copies of the Special Master's proposed Congressional and State Senate district maps, respectively.

5. The composition of Congressional districts is key to a candidate's campaign strategy and decision to run. Statewide candidates must gather signatures from 50% of Congressional districts to earn a spot on primary or general election ballots. *See* Petition, NYSCEF No. 1 ¶¶ 90–99; N.Y. Election Law §§ 6-136(1); 6-142(1).

6. If a candidate cannot find support from voters in at least half of Congressional districts, that candidate will not qualify for the ballot. Congressional districts thus directly impact whom voters can choose in Statewide elections and who will eventually represent the people of New York. *See* Petition ¶ 145 & n.9.

7. In March and early April, candidates—like Petitioner Nichols—circulated designating petitions in Congressional districts that the Court of Appeals has since held are unconstitutional. The Court of Appeals found that the Legislature bypassed mandatory constitutional safeguards against gerrymandering and drew a gerrymandered partisan map.¹

8. Candidates—like Petitioner Nichols—who did not qualify for ballot access (or chose not to run) may be seeking a third-party line on the general ballot but lack sufficient time, or they may wish to circulate new designating petitions but lack an open petition period. *See* Nichols Aff., NYSCEF No. 2 ¶¶ 4–5, 8. Moreover, candidates on the current ballot for the June 28th Statewide primary may no longer have gathered the requisite signatures, *i.e.*, voter support, under state law to still qualify for the ballot.

¹ *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *9 (N.Y. Apr. 27, 2022).

9. The new Congressional map diverges sharply from the Legislature’s 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 in tact.”² The new map thus rewrites the competitive dynamics of Statewide races—who will run and who will appear on the ballot.

10. The Steuben County Court has ordered that a 20-day designating petition period be opened for Congressional and State Senate races, beginning May 21st and ending June 10th, and the Steuben County Court has also ordered that a six-week independent nominating period be opened for those same races, beginning May 21st and ending July 5th.

11. Attached hereto as Exhibit C is a true and correct copy of the Steuben County Court’s Order dated May 11, 2022.

12. Statewide races have also gone through upheaval because of the Legislature’s unconstitutional acts and must also be accounted for in the remedy. *See* Nichols Aff. ¶¶ 5–6. But none has been provided.

13. The New York State Board of Elections (“BOE”) will no doubt object to opening designating petition periods, claiming they lack sufficient time. But New York’s boards of elections can be adept when they want to be.

14. Co-Executive Director Todd Valentine stated in *Harkenrider* that candidates have “adjusted” to “prior redistricting changes due to court orders” and to “executive orders [that] have altered the process at the eleventh hour to address exigent circumstances.” Moreover, as Valentine stated, boards of elections are capable of “translating new district boundaries into their voter

² Luke Parsnow & Kate Lisa, *Special Master Releases New Draft New York Congressional Maps*, *Spectrum News* (May 16, 2022), <https://spectrumlocalnews.com/nys/central-ny/politics/2022/05/16/special-master-releases-new-new-york-congressional-maps>.

registration systems . . . in less than a month's time" and "county boards have ably made [changes to poll sites] in the recent past in response to court orders" *See also* Petition ¶¶ 125–36.

15. Attached hereto as Exhibit D is a true and correct copy of the Affidavit of Todd D. Valentine dated March 22, 2022.

16. Petitioners have offered a straightforward solution that both redresses the constitutional injury and provides practical relief to the BOE: hold Statewide primaries on August 23rd or September 13th (and, for that matter, all state and local primaries, should relief be granted on the State Assembly map). *See* Petition ¶¶ 98, 130–31. With those dates, the BOE cannot complain that a new petitioning period would be impossible.

17. Respectfully, this Court should open new petitioning periods for Statewide races.

18. I have provided Respondents' counsel notice by electronic mail of this Supplemental Affirmation and the exhibits attached thereto in the same manner set forth in paragraph 6 of the Affirmation of Peter Devlin dated May 15, 2022.

Dated: New York, New York
May 17, 2022


Peter A. Devlin

**Exhibit A to Devlin Affirmation-
Special Master Proposed NY Congressional Map**

FILED: NEW YORK COUNTY CLERK 05/17/2022 11:00 AM

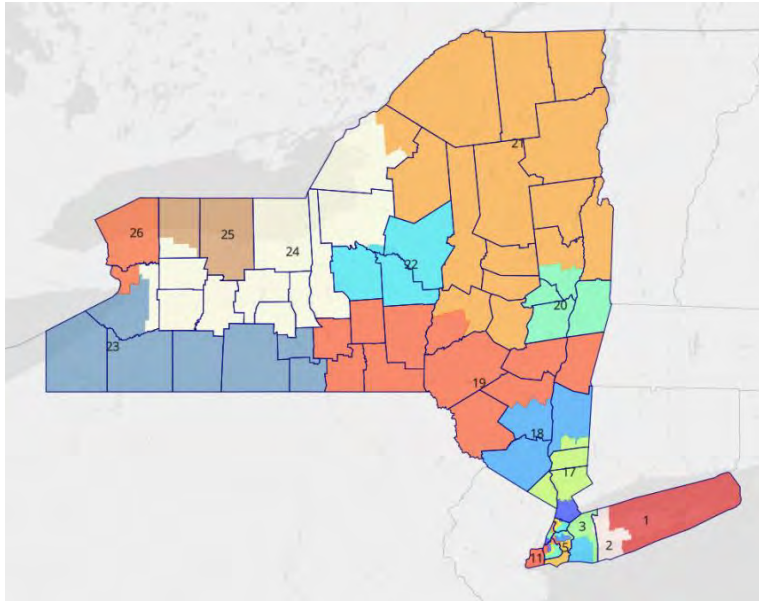
INDEXNO.E2642101262V

NYSCEF DOC. NO. 543

RECEIVED NYSCEF: 05/18/2022

Special Master Proposed NY Congressional Map

Jonathan Cervas, Carnegie Mellon University



View Here: <https://davesredistricting.org/join/22a818db-e3bd-4246-95eb-381c48802da1>

	Special Master Proposal	Legislative Proposal
Number of Counties Split	15	34
Total Number of County Splits	26	56
Reock Compactness	40	32
Polsby-Popper Compactness	34	25
Competitive Districts ¹	8	3
For splits, lower is better. For compactness and competitive districts, higher numbers are better.		

¹ As measured using the 2016/2020 Presidential election PVI on DRA; districts between 45% and 55%.

**Exhibit B to Devlin Affirmation-
Special Master Proposed NY Senate Map**

FILED: NEW YORK COUNTY CLERK 05/17/2022 08:13:00 AM

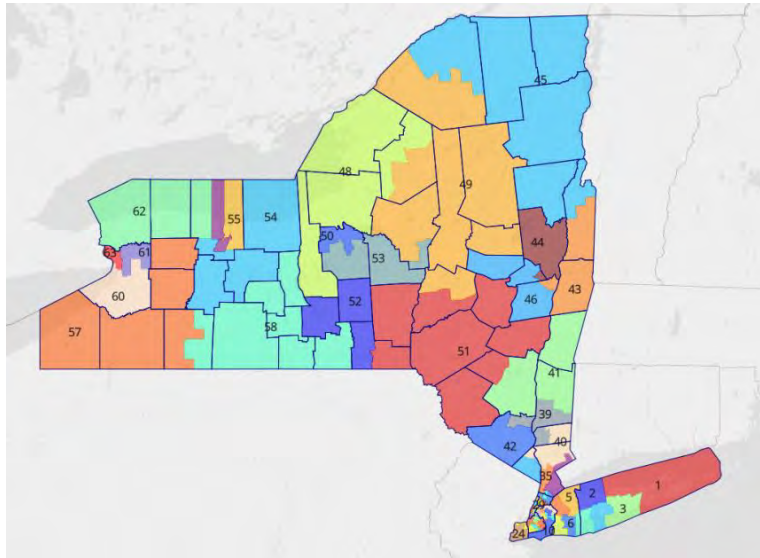
INDEX NO. E2642101262V

NYSCEF DOC. NO. 580

RECEIVED NYSCEF: 05/18/2022

Special Master Proposed NY Senate Map

Jonathan Cervas, Carnegie Mellon University



View Here: <https://davesredistricting.org/join/ad0a597f-d50c-4f44-85be-34c926cd7bf3>

	Special Master Proposal	Legislative Proposal
Number of Counties Split	25	30
Total Number of County Splits	66	71
Reock Compactness	38.9	34.8
Polsby-Popper Compactness	34	27.7
Competitive Districts ¹	15	6
For splits, lower is better. For compactness and competitive districts, higher numbers are better.		

Senate district numbers are provisional and based on an attempt to match the 2012-2020 map numbering as closely as possible. Because of relative population loss, two districts have been shifted and there are necessary changes throughout the state to reflect the population changes.

¹ As measured using the 2016/2020 Presidential election PVI on DRA; districts between 45% and 55%.

**Exhibit C to Devlin Affirmation-
Order of the Honorable Patrick F. McAllister,
in Harkenrider I., dated May 11, 2022
[pp. 213 - 217]**

FILED: NEWBURK COUNTY CLERK 05/11/2022 01:40 PM

INDEX NO. E2022-0116CV

NYSCEF DOC. NO. 524

RECEIVED NYSCEF: 05/17/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

TIM HARKENRIDER, GUY C. BROUGHT,
LAWRENCE CANNING, PATRICIA CLARINO,
GEORGE DOOHER, JR., STEPHEN EVANS,
LINDA FANTON, JERRY FISHMAN, JAY FRANTZ,
LAWRENCE GARVEY, ALAN NEPHEW,
SUSAN ROWLEY, JOSEPHINE THOMAS,
AND MARIANNE VIOLANTE,

Index No.
E2022-0116CV

Petitioners,

ORDER

-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,

Respondents.

PRESENT: *Hon Patrick F. McAllister*
Acting Supreme Court Justice

The Court of Appeals Remittitur in this matter directed the record of the proceedings of the Court of Appeals be remitted to this Court "there to be proceeded upon according to law." The Court of Appeals provided "[w]e 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 congressional 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 Citizen Absentee Voting Act..." In accordance with that command, to facilitate the orderly unfolding of elections for State Senate and Members of the United States House of Representative, on Constitutionally sound maps

changes to the political calendar and certain nominating and designating processes must be provided for. On May 10, 2022, the United States Federal District Court for the Northern District of New York (Judge Gary Sharpe) ordered an August 23, 2022 primary for Member of the United States House of Representatives from New York "to accommodate New York's congressional redistricting process" provided that such election and the subsequent General Election shall be fully compliant with federal laws, in particular those related to military and overseas voters. Dates and methods recommended herein are recommended by the New York State Board of Elections.

NOW, therefore, upon consideration of all papers and proceedings heretofore had herein, and after due deliberations it is

ORDERED that ballot access for the August 23, 2022 primary elections for State Senate and offices or party positions elected by Congressional Districts, including the public office of Member of House of Representatives and members of any party state committee elected by Congressional District, shall be by the following methods, which are not mutually exclusive:

(1) *Ballot Access Method One: Candidates who previously qualified for ballot access for the June 28, 2022 primary:*

State Senate Districts. A person duly designated for nomination at the June 28, 2022 primary for the office of New York State Senator, whose petition was valid at the board of elections or by determination of a court of competent jurisdiction, shall be deemed to have been likewise duly designated by the same party for the office of State Senator at the August 23, 2022 primary election in any Senate District for which they are constitutionally and legally eligible to run, to be specified by such candidate in a signed writing filed with the appropriate board of elections no later than May 31, 2022. No new acceptance or authorization shall be required. The State Board of Elections shall set forth the elements that must be contained in such writing no later than May 15, 2022 and shall conspicuously post the same on their web site. In addition, the State Board of Elections shall advise all county boards of election of the elements that must be contained therein.

Congressional Districts. A person duly designated for nomination at the June 28, 2022 primary for the office of Member of Congress, in any district, whose petition was valid at the board of elections or by determination of a court of competent jurisdiction, shall be deemed to have been likewise duly designated by the same party for the office of Member of Congress at the August 23, 2022 primary election in any one Congressional District, to be specified by such candidate in a signed writing filed with the appropriate board of elections no later than May 31, 2022. No new acceptance or authorization shall be required. The State Board of Elections shall set forth the elements that must be contained in such writing no later than May 15, 2022 and shall conspicuously post the same on their web site. In addition, the State Board of Elections shall advise all county boards of election of the elements that must be contained therein.

(2) *Ballot Access Method Two: Party Designating petitioning (and opportunity to ballot petitioning) for any candidate eligible to seek the aforesaid offices or positions, shall occur in accordance with law such that the maximum number of signatures required on any such*

designating petition for a State Senate District shall be 850 and for a Congressional District shall be 1,062, or 4.25% of the number of enrolled members of the party in such district, whichever is less. The requirements of valid acceptances and authorizations shall apply..

ORDERED that the following political calendar dates shall apply for the primary election to be held on August 23, 2022, for State Senate and offices or party positions elected by Congressional Districts, with all filings required to be made at the appropriate board of elections with no filings permitted by mail except to the extent that any mailed filing is actually received by the last date allowed.:

BALLOT ACCESS METHOD ONE: PRIOR CANDIDATE QUALIFICATION	
5/31/22	Last day to file Certificate to use Prior Petition specifying district
6/3/2022	Last day to decline designation
6/6/2022	Last day to file a substitution after a declination
6/10/2022	Last day to authorize substitution

BALLOT ACCESS METHOD TWO: DESIGNATING PETITIONING		
5/21/22	First day to sign	1 day after the district lines are finalized and published.
6/8-6/10	Filing Period	18-20 days after First day to sign Designating Petition
6/13/22	Last day to accept or decline nomination	3 days after last day to file Designating Petition
6/13/22	Last Day to Authorize	3 days after last day to file Designating Petition
6/15/22	Last day to file substitution to fill vacancy created by a declination	2 days after last day to decline Designating Petition
Rolling	General Objections	3 Days after Designating Petition is filed

6/15/22	Specific Objections	5 Days after last day to file Designating Petition (fixed date)
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ORDERED that the following political calendar dates shall apply to the independent nominating process for Member of Congress and New York State Senate, for the November 8, 2022 General Election for State Senate and Member of New York State House of Representatives, with the signature requirements provided for by current law to be unchanged, as follows, with all filings required to be made at the appropriate board of elections with no filings permitted by mail except to the extent that any mailed filings is actually received by the last date allowed:

5/21/22	First day to sign	1 day after the district lines are finalized and published.
6/27-7/5	Filing Period and Last Day to Sign	Final week of six week period (6-138 (4)) with added day owing to July 4
7/11/22	Last day to accept or decline nomination	3 days after last day to file rolls to Monday
7/12/22	Last day to file substitution to fill vacancy created by a declination	6 days after last day to file
rolling	General Objections	3 days after petition is filed
7/11/22	Specific Objections	5 days after last day to file petition

ORDERED that time frames for the August 23 primary applicable to absentee ballots, certification of the elections, voter registration cutoffs, campaign financial disclosure and early voting and transmission of military and overseas ballots shall be as provided for by current law as measured from the date of the August 23, 2022 primary election;


ORDERED that the State Board of Elections shall post a full calendar of dates on the New York State Board of Elections web site no later than May 21, 2022;

ORDERED this court will entertain any applications from the New York State Board of Elections for any further or additional accommodations required to ensure political calendar

compliance and actual transmission of ballot requirements, with all provisions of federal law related to transmission of military and overseas ballots;

ORDERED that nothing herein shall be construed to prevent the New York State Legislature from providing for an August 23, 2022 UOCAVA compliant election calendar and ballot access schema by statute in lieu of this *Order* but that in the absence of such a legislatively adopted plan this *Order* is necessary to effectuate the remedial Constitutional imperative to conduct State Senate and Congressional elections on district lines that are Constitutional.

Dated: May 11, 2022


Hon. Robert F. McCallister A.J.S.C.

**Exhibit D to Devlin Affirmation-
Affidavit of Todd D. Valentine, in Harkenrider I.,
sworn to March 22, 2022
[pp. 218 - 221]**

FILED: NEWBURGH COUNTY CLERK 0852272022011280PMM

INDEXED: E2022-0116CV

NYSCEF DOC. NO. 289

RECEIVED NYSCEF: 05/22/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

-----X

TIM HARKENRIDER, GUY C. BROUGHT,
LAWRENCE CANNING, PATRICIA CLARINO,
GEORGE DOOHER, JR., STEPHEN EVANS, LINDA
FANTON, JERRY FISHMAN, JAY FRANTZ,
LAWRENCE GARVEY, ALAN NEPHEW, SUSAN
ROWLEY, JOSEPHINE THOMAS, and MARIANNE
VIOLANTE,

Index No. E2022-0116CV

**AFFIDAVIT OF TODD D.
VALENTINE**

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,

Respondents.

-----X

TODD D. VALENTINE, being duly sworn, says under penalty of perjury as follows:

1. I serve as Co-Executive Director for the New York State Board of Elections ("State Board"). I have held this position since 2008. From 1997 to 2008, I was Special Counsel at the State Board of Elections. I am familiar with state requirements and county board of elections' practices regarding redistricting, election procedures, election district creation, ballot creation, absentee voting, poll sites and poll worker training and assignment. I am fully familiar with the facts and circumstances set forth herein.

2. I make this affidavit in my personal capacity and based upon my extensive election experience to describe the ability for the county boards to run a court ordered primary election for

Congressional or State Senatorial district lines in 2022, and to respond to the affidavit of Thomas Connolly, submitted by Respondents on March 21, 2022, *see* NYSCEF No. 236, and if called to testify under oath, I could and would testify to the following facts.

Ballot Access Is Underway

3. The district boundaries for the offices of Members of the United States House of Representatives and New York State Senator (“Legislative Offices”) for the primary on June 28, 2022, and general election on November 8, 2022, were enacted into law on February 3, 2022, as Chapters 13 through 16 of the Laws of 2022.

4. While ballot access for the current 2022 lines is underway, as recently as 2020 executive orders have altered the process at the eleventh hour to address exigent circumstances, then due to a global pandemic. For instance, petition time periods and signature requirements were reduced by executive order of the governor during the recent pandemic.

5. Candidates adjusted to such changes in the past for prior redistricting changes due to court orders, and there is no real reason candidates and election officials cannot be similarly responsive to necessary changes in response to this Court’s remedial decisions.

Redistricting Process For Boards Of Elections

6. With a court order to change the congressional and senate districts lines, New York’s 58 boards of elections will have sufficient time to apply new district lines in their jurisdiction to their voter records.

7. When the new lines became effective on February 3, 2022, New York’s boards of elections turned their full attention to translating the new district boundaries into their voter registration systems. This work was largely but not completely done by March 1, 2022, showing that this process can be completed in less than a month’s time.

The Political Calendar And Change In Primary Dates

8. For a court-ordered August 23, 2022, Congressional and State Senate primary, the ballot access process could be adjusted to be completed no later than June 2, 2022, and the primary held August 23, 2022, this would provide the same 82 days that currently exist in under law for June 28, 2022 primary. This would allow time for the boards to certify the primary ballot and send any military and overseas ballots by July 8, 2022.

9. This would occur while county boards are running the June 28, 2022 primary. Since most ballot access is done at the State Board level for congressional and state senate offices impact on county boards would be minimized.

10. Indeed, although Mr. Connolly contends that “New York is not a top-down state in terms of its voter registration system,” NYSCEF No. 236 ¶ 15, that is largely irrelevant in terms of the election administration issues that would apply to moving back the 2022 primary to accommodate new maps ordered by this Court.

11. County boards would have time to plan for any added or alternative primary date. In some instances, a new, additional primary would require finding poll sites available on the new date as well as early voting sites that would be available for nine days in the lead up to the election and scheduling of poll workers to the additional primary, but county boards have ably made such changes in the recent past in response to court orders, and nothing would preclude them from doing so here.

12. As recently as 2018, New York had held a federal primary in June pursuant to a federal court order and a separate state primary in September for four election cycles.

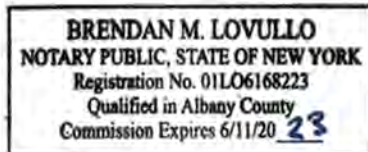
13. Moving a primary to August 23, 2022, would allow sufficient time for state and county boards to certify the election by September 15, 2022, and print and send out military and overseas ballots by the federally required 45th day before the general election, September 23, 2022.

14. A change in primary would afford the necessary time for county boards to run a second primary election this year. As noted above, this has been the State's practice until 2018.



TODD D. VALENTINE

Sworn before me
on this 22 day of March, 2022


NOTARY PUBLIC

Recusal Order, dated May 17, 2022

FILED: NEW YORK COUNTY CLERK 05/18/2022 10:35 AM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 21

RECEIVED NYSCEF: 05/18/2022

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**PRESENT: HON. *W. Franc Peray*
Justice
-----XPART 23

PAUL NICHOLS, GAVIN WAX, GARY GREENBERG,

INDEX NO. 154213/2022

Plaintiff,

MOTION DATE 5/17/2022

- v -

MOTION SEQ. NO. 001GOVERNOR 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 REAPPORTIONMENTDefendant.
-----X

I am recusing myself for the following reason: One of the parties is a personal family friend.

This matter and Motion Seq. No. 001 are remitted to the General Clerk's Office for reassignment
to another Justice.

DATE: 5/17/2022

WD
, JSC**REASSIGNMENT – RECUSAL - MOTION**

Recusal Order, dated May 18, 2022

FILED: NEW YORK COUNTY CLERK 05/18/2022 10:35 AM

NYSCEF DOC. NO. 22

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/18/2022

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**PRESENT: HON. LYLE E. FRANKPART 11M*Justice*

-----X

PAUL NICHOLS, GAVIN WAX, GARY GREENBERG,

INDEX NO. 154213/2022

Plaintiff,

- 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

Defendant.

-----X

I am an Acting Supreme Court Justice and current candidate for Supreme Court in New York
County. I am recusing myself from this matter to avoid any appearance of impropriety.

DATE: 5/18/2022



 LYLE E. FRANK, JSC

Check One:

☐

Case Disposed

☒

Non-Final Disposition

Check if Appropriate:

☐

Other (Specify _____)

OTHER ORDER – NON-MOTION

Letter from Petitioners' Counsel to the
Honorable Laurence L. Love, undated
[pp. 224 - 227]



250 Vesey Street
27th Floor
New York, NY 10281

wmhlaw.com
T: 212-335-2030
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LAW OFFICE OF
AARON S. FOLDENAUER

30 Wall Street, 8th Floor
New York, NY 10005

aaron@nyelectionlaw.com
T: 212-961-6505

VIA E-Filing and E-Mail (Drudolf@nycourts.gov)

The Honorable Laurence L. Love
Justice of the Supreme Court, New York County
80 Centre Street, Room 122
New York, NY 10013

Re: *Nichols v. Hochul*, Index No. 154213/2022

Dear Justice Love:

We represent Petitioners in this Special Proceeding, which aims to remedy a grave constitutional injury to New York voters and candidates. Indeed, if the Court does not act, as Respondent's counsel conceded before Judge McAllister, New York voters would have to exercise the franchise with an unconstitutional Assembly map for a decade. (NYSCEF Doc. No. [6](#) at 65:19-23). Thus, in a real way, Respondents urge this Court to place its imprimatur on generational unconstitutionality.

Further, as Todd Valentine, Co-Executive of the New York State Board of Elections ("BOE") has conceded, Assembly districts have a unique impact on "New York's election infrastructure" and follow-through to several other elected offices, including judicial ones. (*Harkenrider v. Hochul*, Index No. E2022-0116cv, Doc. No. [430 ¶¶](#) 13-17). Thus, the constitutional harm, if this Court declines to remedy it, will cast a pall of suspicion over thousands of elected officials for years to come.

Petitioners seek only two forms of immediate provisional relief: (1) declaring that the BOE cannot use the current Assembly map, which the Court of Appeal has already held to be unconstitutional (the "TRO"); and (2) appointing a Special Master to re-draw the Assembly map on an expedited basis.

Cases such as these benefit from a constitutional priority over the Court's docket. Article III, Section 5 provides as follows (emphasis added):

"An apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and **any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings**, and if said court be not in session it shall convene promptly for the disposition of the same. **The court shall render its decision within sixty days after a petition is filed.** In any judicial proceeding relating to

redistricting of congressional or state legislative districts, **any law establishing congressional or state legislative districts found to violate the provisions of this article shall be invalid in whole or in part.** In the event that a court finds such a violation, the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities.”

Alas, it took some time for a judge to be assigned, and the first two judges recused themselves. Before he recused himself, Judge Frank scheduled argument on the TRO for tomorrow, May 19th, at 1:15 p.m. We respectfully request that this Court allow that hearing to proceed as scheduled.

To assist the Court, we respond to three issues raised in Respondent's opposition, and we will address the balance of their arguments during the hearing. We also raise one housekeeping matter.

Challenging Petitions and Disqualifying Candidates

In various ways (e.g., failure to join necessary parties, statute of limitations, etc.), Respondents raise various technical and procedural issues and suggest that Petitioners are seeking to challenge petitions and seek to disqualify candidates. The fundamental basis of these arguments is incorrect.

The requested TRO is about the unconstitutional Assembly map—and only the unconstitutional Assembly map. Respondents do not defend the unconstitutionality of the Assembly map. They could not if they wanted to. The Court of Appeals has already spoken. *Harkenrider v. Hochul*, 2022 WL 1236822, at *12 n. 15 (N.Y. Apr. 27, 2022) (noting that the State Assembly map suffers from the same “procedural infirmity” which renders the congressional and State Senate maps void ab initio under the New York Constitution). And the Court's duty is clear: the legislative apportionment is “subject to review by the supreme court, at the suit of any citizen” (N.Y. Constitution Article III, § 5, *cited in Harkenrider*, 2022 WL 1236822, at *4). Likewise, the remedy for “procedurally unconstitutional” enactment of the Assembly map is for the “Supreme Court ... with the assistance of [a] special master and any other relevant submissions ... [to] adopt constitutional maps with all due haste.” *Harkenrider*, 2022 WL 1236822, at *13.

Thus, when the Assembly map is redrawn, some candidates may invariably find themselves in districts that differ from the unconstitutional districts that were drawn by the legislature. The relief we seek is *not* to disqualify the candidates on this basis. Rather, as Justice McAllister did in Steuben County, Petitioners only seek for the Court, once a new Assembly map is created, to allow existing candidates an opportunity to correct their petitions and give anyone who wishes to run, regardless as to whether they had previously circulated petitions or not, time to circulate petitions to get on the ballot pursuant to the new map. Justice McAllister has taken similar steps with respect to the Senate and congressional maps. *See Harkenrider v. Hochul*, Index No. E2022-0116cv, Doc. No. [524](#), which is the Steuben County court’s plan for ballot access.

Because this relief is not even before the Court yet (Petitioners sought no TRO on these issues), Respondents’ arguments are, at best, premature.

Finally, with regard to Respondents’ concerns about the mailing of ballots, we do not believe Respondents’ statements are entirely accurate. While *military and overseas ballots* have

presumably been mailed (despite BOE's awareness of an imminent and/or pending Assembly map challenge), any such returned ballots can be discarded or not counted. And, regardless, new ballots will need to be sent out because of the pending congressional and State Senate redistricting. In addition, the New York City Board of Elections has scheduled a public inspection of sample ballots to occur on May 20, 2022, the very purpose of which is to invite public review and comment to correct any errors or issues that exist *before* all of the remaining ballots are printed.

Alleged Statutory Bar

Respondents argue that CPLR 6313(a) bars any TRO against a public officer in restraint of their duties. Respondents cite no case holding that this provision bars the Court from directing such officers to perform their duties in compliance with the Constitution.

This omission was strategic. In fact, many courts have recognized the Court's power to do just that. *See Komyathy v. Board of Ed. of Wappinger Central School Dist. No. 1*, 75 Misc. 2d 859, 862 (Sup. Ct. Dutchess Cty. 1973) (holding that notwithstanding CPLR 6313(a), "it is clear that the court has inherent power to stay such bodies on a temporary basis where it appears that they will act illegally, i.e., not within the performance of statutory duties"); *Metro. Transp. Auth. v. Vill. of Tuckahoe*, 67 Misc. 2d 895, 902 (Sup. Ct. Westchester Cty 1971) (rejecting CPLR 6313 argument; holding that "the court must balance the statutory obligation of the municipality and its appointive officials to enforce its building regulations against the statutorily recognized needs of the general public"), *aff'd*, 38 A.D.2d 570, 328 N.Y.S.2d 615 (2d Dep't 1972); *110 Manno Realty Corp. v. Town of Huntington*, 61 Misc. 2d 702, 704 (Sup. Ct. Suffolk Cty. 1970) (rejecting CPLR 6313 argument and granting temporary injunction; finding that the "proposed reclassification, it appears, is part and parcel of a contrived plan on the part of defendant, not to perform but to *prevent* the performance of a statutory duty") (emphasis in original); *United Talmudical Acad. Torah V'Yirah, Inc. v. Town of Bethel*, 24 Misc. 3d 1240(A (Table), 2009 WL 2613293, at * 6 (Sup. Ct. Sullivan Cty. Aug. 24, 2009) ("Whenever the government takes action to prevent citizens from exercising [a recognized constitutional right] there is irreparable harm which sets a high standard for the government action. CPLR § 6313(a) cannot ... be used by ... the government to strike down religious freedom."). This has been the law since the nineteenth century. *Davis v. Am. Soc. for Prevention of Cruelty to Animals*, 75 N.Y. 362, 366 (1878) ("That public bodies and public officers may be restrained by injunction from proceeding in violation of law, to the prejudice of the public or to the injury of individual rights, cannot be questioned.") (citing and quoting *People v. Canal Bd. of New York*, 55 N.Y. 390, 393 (1874)).

Thus, no statutory bar precludes relief necessitated by Respondents' unconstitutional actions.

Burden of changing primary dates

Respondents' cynical position is that the Court should not correct a constitutional infirmity of their own making. In their papers, using a "throw spaghetti at the wall" approach, these raise a bevy of specious arguments, including *laches*,¹ which have no merit at all.

¹ The only case Respondents cite is *Schulz v. New York*, 81 N.Y.2d 336 (1993), which is readily distinguishable. There, petitioners challenged an 11-month old law that permitted the state to issue bonds. By the time of the challenge, the state had issued hundreds of millions of dollars of bonds,

Using classic sleight of hand, they blame Petitioners for their alleged "delay" in bringing this proceeding now, when (a) they willfully violated the Constitution, (b) were on notice that the Assembly map was unconstitutional since Justice McAllister's decision on March 31, and (c) developed no contingency plan.

In fact, the relief Petitioners seek creates less burden, not more, and affords more time, not less. In Steuben County, all interested parties will have final Senate and congressional maps on May 20 for an August 23 primary—giving the BOE roughly three months. If the Court grants all the relief Petitioners seek and opts to order elections to be held on the historically used primary date of the second Tuesday in September, the BOE will have an additional three weeks. And, if Assembly maps are re-drawn and ordered by June 15, which is eminently achievable, and the Court approves a unified primary date of September 13, the BOE will have three months to complete the process.

Disliking the message, and unable to defend the unconstitutional Assembly map, Respondents will continue to spill much ink and use heated exhortations to attack the messengers, who are only trying to restore a semblance of integrity and public trust after the mess Respondents themselves created. Petitioners hope the Court will see through this tactic.

Court Reporter

We believe it likely that—whichever parties lose with respect to the TRO—those parties are likely to seek expedited appeal. We therefore request that tomorrow's hearing be held on the record, and that the Court have present a court reporter who is able to prepare an expedited transcript promptly upon completion of the proceedings.

Respectfully submitted,



Jim Walden

*Attorneys for Petitioners Paul Nichols
and Gary Greenberg*

/s/ Aaron Foldenauer

Aaron Foldenauer

Attorneys for Petitioner Gavin Wax

cc: All Counsel (via e-filing and email)

all of which would require cancellation and refund at even greater cost to the state. No such harm is true here, and the bond program did not raise any serious constitutional issues. Here, the Court must adhere to the Court of Appeals ruling that the Assembly maps are unconstitutional.

Letter from Craig R. Bucki to the Honorable Laurence L. Love,
dated May 19, 2022
[pp. 228 - 230]



Phillips Lytle LLP

Via NYSCEF

May 19, 2022

Hon. Laurence L. Love
New York State Supreme Court Justice
New York County Supreme Court
80 Centre Street, Room 128
New York, New York 10013

Re: *Matter of Nichols v. Hochul* (New York County Index No. 154213/2022)

Dear Justice Love:

As co-counsel with Graubard Miller to New York State Assembly Speaker Carl Heastie, we respond to the letter filed on behalf of Petitioners yesterday afternoon, May 18, 2022 (NYSCEF Dkt. No. 23). If this Court holds oral argument on Petitioners' pending motion for a temporary restraining order ("TRO"), we will fully address their arguments then. Some of Petitioners' assertions, however, are particularly troubling and require immediate response.

First, Petitioners misconstrue CPLR 6313(a), which prohibits the TRO they seek. In each of the cases Petitioners cite, the court issued a TRO *requiring* public officers to comply with statutory duties (Dkt. No. 23, at p. 3). Petitioners here ask for the opposite: a TRO *preventing* Boards of Elections from complying with duties imposed by the Election Law. This would be impermissible under CPLR 6313(a). *See DiFate v. Scher*, 45 A.D.2d 1002, 1003 (2d Dep't 1974) (holding that TRO against public officers, which enjoined them from making certain civil-service appointments, was "void on its face" under CPLR 6313(a)).

Second, Petitioners claim "[t]he requested TRO is about the unconstitutional Assembly map -- and only the unconstitutional Assembly map." Dkt. No. 23, at p. 2. Not so. Enjoining Respondents from using the enacted Assembly map, as Petitioners request (Dkt. No. 2, at p. 3), means annulling already certified candidacies not only for State Assembly, but also for delegates and alternate delegates for State Supreme Court judicial nominating conventions, for county party committee members, for New York

ATTORNEYS AT LAW

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Hon. Laurence L. Love
Page 2

May 19, 2022

State Democratic Committee members, and for party District Leaders in New York City, all of whom run for office in districts that depend on the Assembly districts where the candidates live and have already collected valid petitions to run for office. As per their prayer for relief in the Petition, moreover, Petitioners also want this Court, among other things, to “vacat[e] any certifications” of candidates who have already qualified for the primary ballot, and to reopen “designating and independent nominating petition periods” for claimed candidates like Petitioner Paul Nichols, whom the New York State Board of Elections already ruled off the Democratic primary ballot for Governor because his designating petitions contained an insufficient number of valid signatures. Dkt. No. 1, at p. 30. Under New York Election Law § 16-102, the time for making all these requests of the Court expired on April 21, 2022, 24 days before this proceeding was untimely commenced.

Third, Petitioners incorrectly assert that the impossibility of overhauling the 2022 elections for State Assembly (as well for delegates and alternate delegate to State Supreme Court judicial nominating conventions, for county party committee members, for New York State Democratic Committee members, and for party District Leaders in New York City) is somehow Respondents’ fault. While they are quick to blame this Court for claimed scheduling delays (Dkt. No. 23, at p. 2), Petitioners were the ones who sat on their hands for three months, choosing to commence this proceeding on May 15, 2022, instead of in February. This is why, far from casting any “pall of suspicion” over the enacted Assembly district lines, the Court of Appeals expressly declined to invalidate them. *Matter of Harkenrider v. Hochul*, __ N.Y.3d __, 2022 WL 1236822, at *11 n.15 (Apr. 27, 2022).

Petitioners also were the ones who chose the less-efficient path by bringing this proceeding in New York County, rather than in Steuben County where Justice McAllister has presided over redistricting litigation since February and is keenly familiar with the issues. Of course, Petitioners likely shopped for this second venue because Justice McAllister issued an Order rejecting their untimely proposed intervention to challenge to the Assembly map on May 11, 2022. Having declined to appeal from that Order, Petitioners instead hope a different Judge will give them the remedy Justice McAllister would not. Further, the ongoing preparations by Boards of



Hon. Laurence L. Love
Page 3

May 19, 2022

Elections for the June primaries is a statutory obligation, not some improper “tactic” (Dkt. No. 23, at p. 4). Petitioners’ suggestion of bad faith is baseless, and disappointing.

Fourth, Petitioners’ desperate request for a “unified primary date of September 13” only exposes their untimeliness (Dkt. No. 23, at p. 4). The Court of Appeals instructed Justice McAllister to “swiftly develop a schedule to facilitate an August primary election.” *Matter of Harkenrider v. Hochul*, 2022 WL 1236822, at *12. Justice McAllister then ordered that the “Congressional and State Senate [primary] elections will be held on Tuesday, August 23, 2022” (Steuben Dkt. No. 301, at p. 2). And the United States District Court for the Northern District of New York approved the August 23, 2022 date for the Congressional primary. *United States v. New York*, 2022 WL 1473259, at *3 (N.D.N.Y. May 10, 2022). It is too late now to re-draw the Assembly map in time for August primaries, as Petitioners likely understand. But that is no justification to override two Court orders and the instructions of the Court of Appeals by moving every single primary to mid-September.

Finally, notwithstanding Petitioners’ empty assurances to the contrary, yet another overhaul of the 2022 elections would create chaos and voter confusion. Boards of Elections are already scrambling to hold the unexpected August primaries, and ballots for the June primaries were mailed to military and overseas voters last week. Petitioners’ proposed solution to the latter problem—“discard[ing]” or “not count[ing]” ballots cast by the men and women who defend our freedoms (Dkt. No. 23, at p. 3)—should give this Court great pause.

Respectfully,

Phillips Lytle LLP

By 

Craig R. Bucki

CRBSBS3

**Order to Show Cause Regarding Petitioners' Petition and Emergency
Motion for a Temporary Restraining Order, dated May 19, 2022**

[pp. 231 - 234]

FILED: NEW YORK COUNTY CLERK 05/19/2022 03:56 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 25

RECEIVED NYSCEF: 05/19/2022

E.

At 63 Part of the Supreme Court of the State
of New York, held in and for the County of New
York at the Courthouse, 60 Centre Street, New
York, NY on the 19 day of May, 2022

HON. LAURENCE L. LOVE

PRESENT: Hon. Laurence L. Love J.S.C.

Justice

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG

Petitioners,

Index No. 154213/2022

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

**~~PROPOSED~~ ORDER TO
SHOW CAUSE REGARDING
PETITIONERS' PETITION
AND EMERGENCY MOTION
FOR A TEMPORARY
RESTRAINING ORDER**

Respondents.

WHEREAS, Petitioner Paul Nichols, a resident and registered voter of Queens County and candidate for Governor of New York State; Petitioner Gavin Wax, a resident and registered voter of New York County; and Petitioner Gary Greenberg, a resident and registered voter of Greene County and potential candidate for Congressional or State office, by their undersigned counsel, pursuant to Article III, section 5 of the New York Constitution, Unconsolidated Laws § 4221 (L 1911, ch. 773, § 1), and CPLR § 3001, commenced this CPLR Art. 4 special proceeding by filing a Petition to challenge an apportionment;

UPON the reading and filing of the annexed Petition, the Affirmation of Paul Nichols, the Affirmation of Gavin Wax, the Affirmation of Gary Greenberg, the Affirmation of Peter A. Devlin and the exhibits annexed thereto, the accompanying Memorandum of Law, and all of the pleadings and

proceedings heretofore had herein;

LET Respondents or their counsel show cause before this Court, at IAS Part 63 Room 355, at the Courthouse located at 60 Centre Street, New York, NY on the 23 day of May, 10:00 in person! 2022, at 9:30 a.m., or as soon thereafter as counsel can be heard, why Judgment should not be made and entered pursuant to CPLR § 411 and CPLR § 3001:

1. Declaring pursuant to CPLR § 3001 that the 2022 State 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;
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;
6. Awarding Petitioners reasonable attorneys' fees and costs; and

7. Awarding such other and further relief as this Court may deem just and proper.

~~BEING ALLEGED~~
SUFFICIENT CAUSE ~~APPEARING THEREFORE~~, IT IS FURTHER ORDERED

that, pending hearing and determination of the within Petition:

1. Respondents are hereby enjoined from using the 2022 State Assembly map in administering the 2022 primary and general elections; and
2. The Court will appoint a special master to begin proceedings to evaluate and draft a State Assembly map for the 2022 primary and general elections.

~~BEING ALLEGED~~
SUFFICIENT CAUSE ~~APPEARING THEREFORE~~,

IT IS ORDERED, that service of a copy of this Order to Show Cause and the papers upon which it is based, upon the Respondents and anyone else required to receive service pursuant to Unconsolidated Laws § 4221, in the same manner as a summons, on or before the 20 day of May, 2022, shall be deemed good and sufficient service;

ORDERED, that service upon the following persons, by email, at the following addresses, shall be deemed good and sufficient service of the temporary restraining order contained herein pending hearing and determination of the Petition: Governor Kathy Hochul (heather.mckay@ag.ny.gov, matthew.brown@ag.ny.gov); Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins (agoldenberg@chwllp.com, jcuti@chwllp.com, areiter@chwllp.com, dmullkoff@chwllp.com, ecker@chwllp.com, hgregorio@chwllp.com); Speaker of the Assembly Carl Heastie (dchill@graubard.com, jlessem@graubard.com, ereich@graubard.com, cbucki@phillipslytle.com, ssalcedo@phillipslytle.com, rvalentine@phillipslytle.com); New York State Board of Elections (brian.quail@elections.ny.gov, Kimberly.Galvin@elections.ny.gov);

ORDERED, that any party appearing in this matter shall appear via NYSCEF and serve

and file papers in electronically via NYSCEF absent good cause shown;

ORDERED, that answering papers, if any, shall be served by NYSCEF upon
 Petitioners' counsel ^{Monday 5/23 by 9.00 am.} at least days before the time at which the Petition is noticed to be
 heard; and


ORDERED, that reply papers, if any, shall be served by NYSCEF upon Respondents'
 counsel at least days before the time at which the Petition shall be heard by email at the
 addresses given above.

DATED: ~~New York, New York~~
~~May , 2022~~

Oral Argument
 Directed

JSC

ENTER:


 Hon.
HON. LAURENCE L. LOVE
 J.S.C.

Index No. 154213/2022

**Respondent Governor Kathy Hochul's Memorandum of Law in Opposition
to Temporary Restraining Order, dated May 19, 2022**

[pp. 235 - 243]

FILED: NEW YORK COUNTY CLERK 05/19/2022 11:50 AM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 26

RECEIVED NYSCEF: 05/19/2022

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

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG,

Petitioners,

-against-

GOVERNOR KATHY HOCHUL, SENATE MAJORITY
LEADER AND PRESIDENT PRO TEMPORE OF THE
SENATE ANDREA STEWART-COUSINS, SPEAKER OF
THE ASSEMBLY CARL HEASTIE, NEW YORK STATE
BOARD OF ELECTIONS, and THE NEW YORK STATE
LEGISLATIVE TASK FORCE ON DEMOGRAPHIC
RESEARCH AND REAPPORTIONMENT,

Respondents.

Index No. 154213/2022

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

LETITIA JAMES
Attorney General of the
State of New York
Attorney for Respondent Governor Hochul
28 Liberty Street
New York, New York 10005
(212) 416-8029

SETH FARBER
Special Litigation Counsel
Of Counsel

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PRELIMINARY STATEMENT

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

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

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

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

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

520, at 4).

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

STANDARD OF REVIEW

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Dated: New York, New York
May 19, 2022

LETITIA JAMES

Attorney General

State of New York

Attorney for Respondent Governor Hochul

s/ Seth Farber

SETH FARBER

Special Litigation Counsel

28 Liberty Street

New York, NY 10005

(212) 416-8029

Seth.Farber@ag.ny.gov

CERTIFICATION

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

Dated: New York, New York
May 19, 2022

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

Affidavit of Service, sworn to May 17, 2022

[pp. 244 - 255]

FILED: NEW YORK COUNTY CLERK 05/20/2022 05:26 PM

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/20/2022

NYSCEF DOC. NO. 27

INDEX #: 154213/2022

DATE FILED: 5/15/2022

ATTORNEY: WALDEN MACHT & HARAN LLP

250 VESEY STREET 27TH FLOOR NEW YORK NY 10281 (212)335-2030

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY**PAUL NICHOLS, GAVIN WAX, AND GARY GREENBERG
PETITIONERS,****V.****GOVERNOR KATHY HOCHUL, ET AL
RESPONDENTS.****STATE OF NEW YORK:****COUNTY OF ALBANY: ss:**

STEF MARIE, BEING DULY SWORN DEPOSES AND SAYS DEPONENT IS NOT A PARTY TO THIS ACTION AND IS OVER THE AGE OF EIGHTEEN YEARS AND RESIDES IN THE STATE OF NEW YORK.

That on 05/17/2022, 11:55AM at STATE CAPITOL BUILDING, 2ND FLOOR LOBBY, ALBANY, NY 12224, deponent served a PETITION, (PROPOSED) ORDER TO SHOW CAUSE REGARDING PETITIONERS' PETITION AND EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER, PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION BY ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER, AFFIRMATION OF PETER DEVLIN, EXHIBITS 1-4, AFFIDAVIT OF PAUL NICHOLS, AFFIDAVIT OF GAVIN WAX, AFFIDAVIT OF GARY GREENBERG, RJI AND RJI ADDENDUM upon GOVERNOR KATHY HOCHUL, a respondent in the above captioned matter.

By delivering a true copy thereof to and leaving with EMMA MUIRHEAD, a person of suitable age and discretion at the above address, the said premises being the respondent's place of business within the State of NEW YORK.

DEPONENT DESCRIBES THE INDIVIDUAL SERVED AS FOLLOWS:

Sex **F** Approximate age **34** Approximate height **5'03"** Approximate weight **120** Color of skin **WHITE** Color of hair **BLONDE**

Sworn to before me on 05/17/2022
DAVID POST NO. 01P06427868
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN ALBANY COUNTY
COMMISSION EXPIRES ON 01/03/2028



X 
STEF MARIE

SERVING BY IRVING INC.

18 EAST 41 STREET SUITE #1600 NEW YORK, NY 10017 (212)233-3346

FILED: NEW YORK COUNTY CLERK 05/20/2022 05:26 PM

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/20/2022

AFFIDAVIT OF SERVICE

NYSCEF DOC. NO. 27

INDEX #: 154213/2022

DATE FILED: 5/15/2022

RETURN DATE: 05/23/2022 @ 10:00AM

JUDGE: LAURENCE L. LOVE

ATTORNEY: WALDEN MACHT & HARAN LLP

250 VESEY STREET 27TH FLOOR NEW YORK NY 10281 (212)335-2030

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY**PAUL NICHOLS, GAVIN WAX, AND GARY GREENBERG
PETITIONERS,****V.****GOVERNOR KATHY HOCHUL, ET AL
RESPONDENTS.****STATE OF NEW YORK:****COUNTY OF ALBANY: ss:**

STEF MARIE, BEING DULY SWORN DEPOSES AND SAYS DEPONENT IS NOT A PARTY TO THIS ACTION AND IS OVER THE AGE OF EIGHTEEN YEARS AND RESIDES IN THE STATE OF NEW YORK.

That on 05/19/2022, 03:23PM at STATE CAPITOL BUILDING, 2ND FLOOR LOBBY, ALBANY, NY 12224, deponent served a **ORDER TO SHOW CAUSE REGARDING PETITIONERS' PETITION AND EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER, LETTER TO JUDGE LOVE, SUPPLEMENTAL AFFIRMATION OF PETER DEVLIN AND EXHIBITS A-D** upon **GOVERNOR KATHY HOCHUL**, a respondent in the above captioned matter.By delivering a true copy thereof to and leaving with **DENISE GAGNON**, a person of suitable age and discretion at the above address, the said premises being the respondent's place of business within the State of NEW YORK.

DEPONENT DESCRIBES THE INDIVIDUAL SERVED AS FOLLOWS:

Sex **F** Approximate age **52** Approximate height **5'04"** Approximate weight **160** Color of skin **WHITE** Color of hair **GRAY/BROWN**
Other **GLASSES**


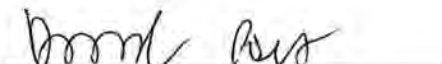
Sworn to before me on 05/20/2022

DAVID POST NO. 01P06427868

NOTARY PUBLIC, STATE OF NEW YORK

QUALIFIED IN ALBANY COUNTY

COMMISSION EXPIRES ON 01/03/2026


STEF MARIE

SERVING BY IRVING INC.

18 EAST 41 STREET SUITE #1600 NEW YORK, NY 10017 (212)233-3346

FILED: NEW YORK COUNTY CLERK 05/20/2022 05:26 PM

NYSCEF DOC. NO. 27

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/20/2022

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

PAUL NICHOLA, ET AL

INDEX NUMBER: 154213/2022

vs

Plaintiff

GOVERNOR KATHY HOCHUL, ET AL

Defendant

AFFIDAVIT OF SERVICE

State of New York }
County of New York } ss.:

The undersigned, being duly sworn, deposes and says;

Deponent is not a party herein, is over 18 years of age and resides in Rye Brook, New York

That on 5/17/2022 at 2:01 PM at 28 Wells Avenue, Building #3, 5th Floor, Yonkers, NY 10701

deponent served a(n) **Petition, [Proposed] Order to Show Cause Regarding Petitioners' Petition and Emergency Motion for a Temporary Restraining Order, Petitioners' Memorandum of Law in Support of Emergency Motion by Order to Show Cause for a Temporary Restraining Order, Affirmation of Order Peter Devlin with Exhibits 1-4, Affidavit of Paul Nichols, Affidavit of Gavin Wax, Affidavit of Gary Greenberg, Request for Judicial Intervention, Request for Judicial Intervention Addendum**on **Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins** by serving **Eli Greenwald,**

deponent knew the person so served to be a person authorized to accept service.

Description of Person Served:

Gender: Male

Skin: White

Hair: Brown

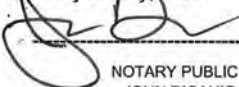
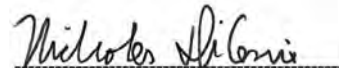
Age: 22 - 35 Yrs.

Height: 5' 9" - 6' 0"

Weight: 131-160 Lbs.

Other:

Sworn to before me this

1st day of May, 2022NOTARY PUBLIC
JOHN DICANIO
NOTARY PUBLIC STATE OF NEW YORK
WESTCHESTER COUNTY
LIC. # 01DI497768
COMM EXP. 2/11/2023Nicholas Frank DiCanio
License No. 2105721Serving By Irving, Inc. | 18 East 41st Street, Suite 1600 | New York, NY 10017
New York City Dept. of Consumer Affairs License No. 0761160

FILED: NEW YORK COUNTY CLERK 05/20/2022 05:26 PM

NYSCEF DOC. NO. 27

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/20/2022

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

PAUL NICHOLA, ET AL

INDEX NUMBER: 154213/2022

vs

Plaintiff

GOVERNOR KATHY HOCHUL, ET AL

*Defendant***AFFIDAVIT OF SERVICE**State of New York }
County of New York } ss.:

The undersigned, being duly sworn, deposes and says;

Deponent is not a party herein, is over 18 years of age and resides in Rye Brook, New York

That on **5/20/2022 at 12:14 PM at 28 Wells Avenue, Building #3, 5th Floor, Yonkers, NY 10701**deponent served a(n) **Order to Show Cause Regarding Petitioners' Petition and Emergency Motion for a Temporary Restraining Order, Supplemental Affirmation of Peter Devlin with Exhibits A-D, Letter to The Honorable Laurence L. Love**on **Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins** by serving **Annie "Doe" (Refused to Give Last Name)**,

deponent knew the person so served to be a person authorized to accept service.

Description of Person Served:

Gender: Female

Skin: Black

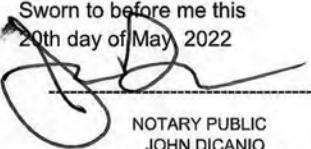
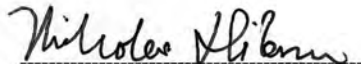
Hair: Dark Brown

Age: 22 - 35 Yrs.

Height: 5' 4" - 5' 8"

Weight: 161-200 Lbs.

Other:

Sworn to before me this
20th day of May, 2022
NOTARY PUBLIC
JOHN DICANIO
NOTARY PUBLIC STATE OF NEW YORK
WESTCHESTER COUNTY
LIC. # 01DI4977768
COMM EXP. 2/11/2023Nicholas Frank DiCanio
License No. 2105721Serving By Irving, Inc. | 18 East 41st Street, Suite 1600 | New York, NY 10017
New York City Dept. of Consumer Affairs License No. 0761160

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NYSCEF DOC. NO. 27

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/20/2022

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

PAUL NICHOLA, ET AL

INDEX NUMBER: 154213/2022

vs

Plaintiff

GOVERNOR KATHY HOCHUL, ET AL

Defendant

AFFIDAVIT OF SERVICE

State of New York }
County of New York } ss.:

The undersigned, being duly sworn, deposes and says;

Deponent is not a party herein, is over 18 years of age and resides in Rye Brook, New York

That on 5/17/2022 at 2:45 PM at 1446 East Gun Hill Road, Bronx, NY 10469

deponent served a(n) **Petition, [Proposed] Order to Show Cause Regarding Petitioners' Petition and Emergency Motion for a Temporary Restraining Order, Petitioners' Memorandum of Law in Support of Emergency Motion by Order to Show Cause for a Temporary Restraining Order, Affirmation of Order Peter Devlin with Exhibits 1-4, Affidavit of Paul Nichols, Affidavit of Gavin Wax, Affidavit of Gary Greenberg, Request for Judicial Intervention, Request for Judicial Intervention Addendum**on **Speaker of the Assembly Carl Heastie** by serving **Michelle "Doe" (Refused to Give Last Name)**,

deponent knew the person so served to be a person authorized to accept service.

Description of Person Served:

Gender: Female

Skin: Black

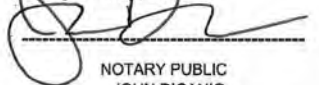
Hair: Brown

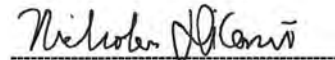
Age: 22 - 35 Yrs.

Height: 5' 4" - 5' 8"

Weight: 100-130 Lbs.

Other:

Sworn to before me this
17th day of May, 2022

 NOTARY PUBLIC
 JOHN DICANIO
 NOTARY PUBLIC STATE OF NEW YORK
 WESTCHESTER COUNTY
 LIC. # 01DI4977768
 COMM EXP. 2/11/2023


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New York City Dept. of Consumer Affairs License No. 0761160

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NYSCEF DOC. NO. 27

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RECEIVED NYSCEF: 05/20/2022

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

PAUL NICHOLA, ET AL

INDEX NUMBER: 154213/2022

vs

Plaintiff

GOVERNOR KATHY HOCHUL, ET AL

Defendant

AFFIDAVIT OF SERVICE

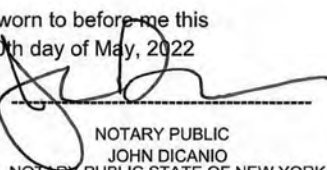
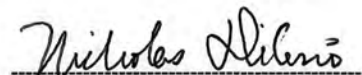
State of New York }
County of New York } ss.:

The undersigned, being duly sworn, deposes and says;

Deponent is not a party herein, is over 18 years of age and resides in Rye Brook, New York

That on **5/20/2022 at 12:56 PM at 1446 East Gun Hill Road, Bronx, NY 10469**deponent served a(n) **Order to Show Cause Regarding Petitioners' Petition and Emergency Motion for a Temporary Restraining Order, Supplemental Affirmation of Peter Devlin with Exhibits A-D, Letter to The Honorable Laurence L. Love**on **Speaker of the Assembly Carl Heastie** by serving **Michelle "Doe" (Refused to Give Last Name)**,

deponent knew the person so served to be a person authorized to accept service.

Description of Person Served:Gender: Female
Skin: Black
Hair: Brown
Age: 22 - 35 Yrs.
Height: 5' 4" - 5' 8"
Weight: 100-130 Lbs.
Other:Sworn to before me this
20th day of May, 2022
NOTARY PUBLIC
JOHN DICANIO
NOTARY PUBLIC STATE OF NEW YORK
WESTCHESTER COUNTY
LIC. # 01DI497768
COMM EXP. 2/11/2023Nicholas Frank DiCanio
License No. 2105721Serving By Irving, Inc. | 18 East 41st Street, Suite 1600 | New York, NY 10017
New York City Dept. of Consumer Affairs License No. 0761160

FILED: NEW YORK COUNTY CLERK 05/20/2022 05:26 PM
AFFIDAVIT OF SERVICE

INDEX NO. 154213/2022

NYSCEF DOC. NO. 27

INDEX #: 154213/2022

DATE FILED: 5/15/2022

ATTORNEY: WALDEN MACHT & HARAN LLP

250 VESEY STREET 27TH FLOOR NEW YORK NY 10281 (212)335-2030

RECEIVED NYSCEF: 05/20/2022

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PAUL NICHOLS, GAVIN WAX, AND GARY GREENBERG

PETITIONERS,

V.

GOVERNOR KATHY HOCHUL, ET AL

RESPONDENTS.

STATE OF NEW YORK:

COUNTY OF ALBANY: ss:

STEF MARIE, BEING DULY SWORN DEPOSES AND SAYS DEPONENT IS NOT A PARTY TO THIS ACTION AND IS OVER THE AGE OF EIGHTEEN YEARS AND RESIDES IN THE STATE OF NEW YORK.

That on 05/17/2022, 11:16AM at 40 NORTH PEARL STREET, SUITE 5, ALBANY, NY 12207-2729, deponent served a PETITION, (PROPOSED) ORDER TO SHOW CAUSE REGARDING PETITIONERS' PETITION AND EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER, PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION BY ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER, AFFIRMATION OF PETER DEVLIN, EXHIBITS 1-4, AFFIDAVIT OF PAUL NICHOLS, AFFIDAVIT OF GAVIN WAX, AFFIDAVIT OF GARY GREENBERG, RJI AND RJI ADDENDUM upon NEW YORK STATE BOARD OF ELECTIONS, a respondent in the above captioned matter.

By delivering to and leaving with AARON SUGGS, ESQ. at the above address and that deponent knew the person so served to be the agent duly authorized to accept service of process on behalf of the NEW YORK STATE BOARD OF ELECTIONS.

DEPONENT DESCRIBES THE INDIVIDUAL SERVED AS FOLLOWS:

Sex **M** Approximate age **45** Approximate height **6'03"** Approximate weight **250** Color of skin **BLACK** Color of hair **BALD**

Sworn to before me on 05/17/2022
 DAVID POST NO. 01P06427868
 NOTARY PUBLIC, STATE OF NEW YORK
 QUALIFIED IN ALBANY COUNTY
 COMMISSION EXPIRES ON 01/03/2026

David Post

X Stef Marie
 STEF MARIE

SERVING BY IRVING INC.

18 EAST 41 STREET SUITE #1600 NEW YORK, NY 10017 (212)233-3346

FILED: NEW YORK COUNTY CLERK 05/20/2022 05:26 PM

INDEX NO. 154213/2022

AFFIDAVIT OF SERVICE

RECEIVED NYSCEF: 05/20/2022

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INDEX #: 154213/2022

DATE FILED: 5/15/2022

RETURN DATE: 05/23/2022 @ 10:00AM

JUDGE: LAURENCE L. LOVE

ATTORNEY: WALDEN MACHT & HARAN LLP

250 VESEY STREET 27TH FLOOR NEW YORK NY 10281 (212)335-2030

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY**PAUL NICHOLS, GAVIN WAX, AND GARY GREENBERG
PETITIONERS,****V.****GOVERNOR KATHY HOCHUL, ET AL
RESPONDENTS.****STATE OF NEW YORK:****COUNTY OF ALBANY: ss:**

STEF MARIE, BEING DULY SWORN DEPOSES AND SAYS DEPONENT IS NOT A PARTY TO THIS ACTION AND IS OVER THE AGE OF EIGHTEEN YEARS AND RESIDES IN THE STATE OF NEW YORK.

That on 05/19/2022, 02:53PM at 40 NORTH PEARL STREET, SUITE 5, ALBANY, NEW YORK 12207, deponent served a **ORDER TO SHOW CAUSE REGARDING PETITIONERS' PETITION AND EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER, LETTER TO JUDGE LOVE, SUPPLEMENTAL AFFIRMATION OF PETER DEVLIN AND EXHIBITS A-D** upon **NEW YORK STATE BOARD OF ELECTIONS**, a respondent in the above captioned matter.By delivering to and leaving with **TODD VALENTINE** at the above address and that deponent knew the person so served to be the agent duly authorized to accept service of process on behalf of the **NEW YORK STATE BOARD OF ELECTIONS**.

DEPONENT DESCRIBES THE INDIVIDUAL SERVED AS FOLLOWS:

Sex **M** Approximate age **53** Approximate height **6'01"** Approximate weight **300** Color of skin **WHITE** Color of hair **BROWN**
Other **GLASSES**

Sworn to before me on 05/20/2022

DAVID POST NO. 01P06427868

NOTARY PUBLIC, STATE OF NEW YORK

QUALIFIED IN ALBANY COUNTY

COMMISSION EXPIRES ON 01/03/2026

X *Stef Marie*
STEF MARIE

SERVING BY IRVING INC.

18 EAST 41 STREET SUITE #1600 NEW YORK, NY 10017 (212)233-3346

FILED: NEW YORK COUNTY CLERK 05/20/2022 05:26 PM

NYSCEF DOC. NO. 27

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/20/2022

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

PAUL NICHOLA, ET AL

INDEX NUMBER: 154213/2022

vs

Plaintiff

GOVERNOR KATHY HOCHUL, ET AL

Defendant

AFFIDAVIT OF SERVICE

State of New York }
County of New York } ss.:

The undersigned, being duly sworn, deposes and says;

Deponent is not a party herein, is over 18 years of age and resides in Sunnyside, New York

That on 5/18/2022 at 12:10 PM at 250 Broadway, Suite 2100, New York, NY 10007

deponent served a(n) **Petition, [Proposed] Order to Show Cause Regarding Petitioners' Petition and Emergency Motion for a Temporary Restraining Order, Petitioners' Memorandum of Law in Support of Emergency Motion by Order to Show Cause for a Temporary Restraining Order, Affirmation of Order Peter Devlin with Exhibits 1-4, Affidavit of Paul Nichols, Affidavit of Gavin Wax, Affidavit of Gary Greenberg, Request for Judicial Intervention, Request for Judicial Intervention Addendum**on **New York State Legislative Task Force on Demographic Research and Reapportionment**, accepted by **Donna Baybusky**,

deponent knew the person so served to be a person authorized to accept service.

Description of Person Served:

Gender: Female

Skin: White

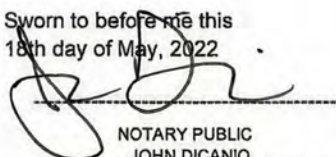
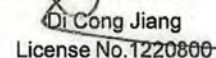
Hair: Red/Brown

Age: 51 - 65 Yrs.

Height: 5' 4" - 5' 8"

Weight: 131-160 Lbs.

Other: Glasses

Sworn to before me this
18th day of May, 2022NOTARY PUBLIC
JOHN DICANIO
NOTARY PUBLIC STATE OF NEW YORK
WESTCHESTER COUNTY
LIC. # 01D1497768
COMM EXP. 2/11/2023
Di Cong Jiang
License No. 1220800Serving By Irving, Inc. | 18 East 41st Street, Suite 1600 | New York, NY 10017
New York City Dept. of Consumer Affairs License No. 0761160

FILED: NEW YORK COUNTY CLERK 05/20/2022 05:26 PM

NYSCEF DOC. NO. 27

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/20/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
PAUL NICHOLA, ET AL

INDEX NUMBER: 154213/2022

vs

Plaintiff

GOVERNOR KATHY HOCHUL, ET AL

Defendant

AFFIDAVIT OF SERVICE

State of New York }
County of New York } ss.:

The undersigned, being duly sworn, deposes and says;

Deponent is not a party herein, is over 18 years of age and resides in Sunnyside, New York

That on 5/19/2022 at 1:47 PM at 250 Broadway, Suite 2100, New York, NY 10007

deponent served a(n) **Order to Show Cause Regarding Petitioners' Petition and Emergency Motion for a Temporary Restraining Order, Letter to The Honorable Laurence L. Love, Supplemental Affirmation of Peter Devlin with Exhibits A-D**

on **The New York State Legislative Task Force on Demographic Research and Reapportionment**, accepted by **Donna Baybusky**,

deponent knew the person so served to be a person authorized to accept service.

Description of Person Served:

Gender: Female

Skin: White

Hair: Red/Brown

Age: 51 - 65 Yrs.

Height: 5' 4" - 5' 8"

Weight: 131-160 Lbs.

Other: Glasses

Sworn to before me this
19th day of May, 2022

NOTARY PUBLIC
JOHN DICANIO
NOTARY PUBLIC STATE OF NEW YORK
WESTCHESTER COUNTY
LIC. # 01DI4977768
COMM EXP 2/11/2023

Di Cong Jiang
License No. 1220800

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New York City Dept. of Consumer Affairs License No. 0761160

FILED: NEW YORK COUNTY CLERK 05/20/2022 05:26 PM

NYSCEF DOC. NO. 27

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/20/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
PAUL NICHOLA, ET AL

INDEX NUMBER: 154213/2022

vs

Plaintiff

GOVERNOR KATHY HOCHUL, ET AL

*Defendant***AFFIDAVIT OF SERVICE**

State of New York }
County of New York } ss.:

The undersigned, being duly sworn, deposes and says;

Deponent is not a party herein, is over 18 years of age and resides in Sunnyside, New York

That on **5/17/2022 at 12:51 PM at 28 Liberty Street, 16th Floor, New York, NY 10005**

deponent served a(n) **Petition, [Proposed] Order to Show Cause Regarding Petitioners' Petition and Emergency Motion for a Temporary Restraining Order, Petitioners' Memorandum of Law in Support of Emergency Motion by Order to Show Cause for a Temporary Restraining Order, Affirmation of Order Peter Devlin with Exhibits 1-4, Affidavit of Paul Nichols, Affidavit of Gavin Wax, Affidavit of Gary Greenberg, Request for Judicial Intervention, Request for Judicial Intervention Addendum**

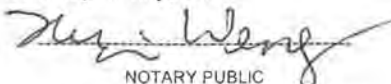
on **New York State Attorney General**, accepted by **Jasmine Hughes**.

deponent knew the person so served to be a person authorized to accept service.

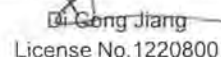
Description of Person Served:

Gender: Female
Skin: Black
Hair: Black
Age: 22 - 35 Yrs.
Height: 5' 9" - 6' 0"
Weight: Over 200 Lbs.
Other: Glasses

Sworn to before me this
17th day of May, 2022



NOTARY PUBLIC
HE YI WENG
NOTARY PUBLIC STATE OF NEW YORK
KINGS COUNTY COUNTY
LIC # 01WE6178606
COMM EXP 12/3/2023



Qi Gong Jiang
License No. 1220800

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New York City Dept. of Consumer Affairs License No. 0761150

FILED: NEW YORK COUNTY CLERK 05/20/2022 05:26 PM

NYSCEF DOC. NO. 27

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/20/2022

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

PAUL NICHOLA, ET AL

INDEX NUMBER: 154213/2022

vs

Plaintiff

GOVERNOR KATHY HOCHUL, ET AL

Defendant

AFFIDAVIT OF SERVICE

State of New York }
County of New York } ss.:

The undersigned, being duly sworn, deposes and says;

Deponent is not a party herein, is over 18 years of age and resides in Sunnyside, New York

That on 5/19/2022 at 2:35 PM at 28 Liberty Street, 16th Floor, New York, NY 10005

deponent served a(n) **Order to Show Cause Regarding Petitioners' Petition and Emergency Motion for a Temporary Restraining Order, Letter to The Honorable Laurence L. Love, Supplemental Affirmation of Peter Devlin with Exhibits A-D**on **New York State Attorney General**, accepted by **Jasmine Hughes**,

deponent knew the person so served to be a person authorized to accept service.

Description of Person Served:

Gender: Female

Skin: Black

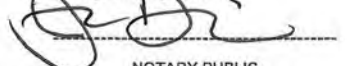
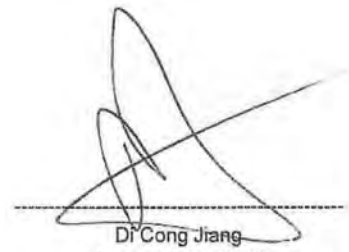
Hair: Black

Age: 22 - 35 Yrs.

Height: 5' 9" - 6' 0"

Weight: Over 200 Lbs.

Other:

Sworn to before me this
10th day of May, 2022
NOTARY PUBLIC
JOHN DICANIO
NOTARY PUBLIC STATE OF NEW YORK
WESTCHESTER COUNTY
LIC # 01DI4977768
COMM EXP. 2/11/2023
Di Cong Jiang
License No. 1220800Serving By Irving, Inc. | 18 East 41st Street, Suite 1800 | New York, NY 10017
New York City Dept. of Consumer Affairs License No. 0761160

Notice of Appearance of Jim Walden, dated May 22, 2022

FILED: NEW YORK COUNTY CLERK 05/22/2022 07:01 PM

NYSCEF DOC. NO. 28

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/22/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORKPAUL NICHOLS, GAVIN WAX, GARY
GREENBERG,

Petitioners,

Index No. 154213/2022

v.

NOTICE OF APPEARANCEGOVERNOR KATHY HOCHUL, SENATE
MAJORITY LEADER AND PRESIDENT PRO
TEMPORE OF THE SENATE ANDREA STEWART-
COUSINS, SPEAKER OF THE ASSEMBLY CARL
HEASTIE, NEW YORK STATE BOARD OF
ELECTIONS, and THE NEW YORK STATE
LEGISLATIVE TASK FORCE ON DEMOGRAPHIC
RESEARCH AND REAPPORTIONMENT,

Respondents.

To: The Clerk of the Court and all parties of record:

PLEASE TAKE NOTICE that the undersigned hereby appears as counsel of record for Petitioners Paul Nichols, Gavin Wax, and Gary Greenberg in the above-captioned matter and requests that all notices and other papers in this action be served at the address stated below.

I hereby certify that I am admitted to practice before this Court.

Dated: New York, NY
May 22, 2022**WALDEN MACHT & HARAN LLP**By: /s/ Jim WaldenJim Walden
250 Vesey Street, 27th Floor
New York, NY 10281
Tel: (212) 335-2030
jwalden@wmhlaw.com*Attorney for Petitioners Paul Nichols, Gavin
Wax, and Gary Greenberg*

Notice of Appearance of Peter A. Devlin, dated May 22, 2022

FILED: NEW YORK COUNTY CLERK 05/22/2022 07:03 PM

NYSCEF DOC. NO. 29

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/22/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORKPAUL NICHOLS, GAVIN WAX, GARY
GREENBERG,

Petitioners,

Index No. 154213/2022

v.

NOTICE OF APPEARANCEGOVERNOR KATHY HOCHUL, SENATE
MAJORITY LEADER AND PRESIDENT PRO
TEMPORE OF THE SENATE ANDREA STEWART-
COUSINS, SPEAKER OF THE ASSEMBLY CARL
HEASTIE, NEW YORK STATE BOARD OF
ELECTIONS, and THE NEW YORK STATE
LEGISLATIVE TASK FORCE ON DEMOGRAPHIC
RESEARCH AND REAPPORTIONMENT,

Respondents.

To: The Clerk of the Court and all parties of record:

PLEASE TAKE NOTICE that the undersigned hereby appears as counsel of record for
Petitioners Paul Nichols, Gavin Wax, and Gary Greenberg in the above-captioned matter and
requests that all notices and other papers in this action be served at the address stated below.

I hereby certify that I am admitted to practice before this Court.

Dated: New York, NY
May 22, 2022**WALDEN MACHT & HARAN LLP**By: /s/ Peter A. DevlinPeter A. Devlin
250 Vesey Street, 27th Floor
New York, NY 10281
Tel: (212) 335-2030
pdevlin@wmhlaw.com*Attorney for Petitioners Paul Nichols, Gavin
Wax, and Gary Greenberg*

**Respondent Speaker of the Assembly Carl Heastie's Notice of Motion
to Dismiss, dated May 22, 2022**

[pp. 258 - 261]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 30

RECEIVED NYSCEF: 05/23/2022

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NEW YORK

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG,

Petitioners,

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

Respondents.

**NOTICE OF
MOTION**

Index No. 154213/2022

Assigned Justice:
Hon. Laurence L. Love

Upon the accompanying memorandum of law dated May 22, 2022; the accompanying affirmation of Steven B. Salcedo, Esq., dated May 22, 2022, with exhibits; the accompanying affidavits of William A. Barclay, Philip A. Palmesano, and Eric “Ari” Brown sworn to on May 19, 2022; the accompanying affidavits of Michael J. Norris, Michael J. Fitzpatrick, Angelo J. Morinello, Karl Brabenec, Stephen Hawley, Joseph M. Giglio, Christopher Tague, Brian D. Miller, Joseph Angelino, Joshua Jensen, Mary Beth Walsh, Edward Ra, Doug Smith, Jarett Gandolfo, Robert Smullen, John K. Mikulin, Kevin M. Burne, and Brian Manktelow sworn to on May 20, 2022; the accompanying affidavit of John Lemondes sworn to on May 22, 2022; and all papers and proceedings herein, Respondent Speaker of the Assembly Carl Heastie (the “Speaker”) will move the Supreme Court of the State of New York, New York County, at 60 Centre Street, New York, New

York 10007, in IAS Part 63, Room 355, on May 23, 2022 at 10:00 a.m., or as soon thereafter as counsel may be heard, for an Order under CPLR 404(a):

1. Dismissing the Petition in its entirety with prejudice; and
2. For such additional relief as this Court deems necessary and/or

appropriate, including but not limited to an Order awarding the Speaker the costs and attorneys' fees he will have incurred on this motion, and an Order confirming and/or imposing the New York State Assembly district map enacted in Chapter 14, § 1, of the New York Laws of 2022.

Dated: New York, New York
May 22, 2022

GRAUBARD MILLER

By: /s/ C. Daniel Chill
C. Daniel Chill
Elaine Reich
The Chrysler Building
405 Lexington Avenue, 11th Floor
New York, New York 10174
Telephone No. (212) 818-8800
dchill@graubard.com
ereich@graubard.com

Dated: Buffalo, New York
May 22, 2022

PHILLIPS LYTLE LLP

By: Steven B. Salcedo
Craig R. Bucki
Steven B. Salcedo
Rebecca A. Valentine
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-8400
cbucki@phillipslytle.com
ssalcedo@phillipslytle.com
rvalentine@phillipslytle.com

TO: WALDEN MACHT & HARAN LLP
 Jim Walden and Peter A. Devlin, Esqs.
 Attorneys for Petitioners
Paul Nichols and Gary Greenberg
 250 Vesey Street, 27th Floor
 New York, New York 10281
 (212) 335-2030
 jwalden@wmhlaw.com

LAW OFFICE OF AARON S. FOLDENAUER
 Aaron S. Foldenauer, Esq.
 Attorneys for Petitioner
Gavin Wax
 30 Wall Street, 8th Floor
 New York, New York 10005
 (212) 961-6505
 aaron@nyelectionlaw.com

CUTI HECKER WANG LLP
 Eric Hecker, Alexander Goldenberg, Alice Reiter, Esqs.
 Attorneys for Respondent
Senate Majority Leader Andrea Stewart-Cousins
 305 Broadway, Suite 607
 New York, New York 10007
 (212) 620-2600
 ehecker@chwllp.com

LETITIA JAMES, NEW YORK STATE ATTORNEY GENERAL
 Seth Farber, Esq.
 Attorneys for Respondent
Governor Kathy Hochul
 28 Liberty Street
 New York, New York 10005
 (212) 416-8029
 seth.farber@ag.ny.gov

NEW YORK STATE BOARD OF ELECTIONS
 Brian Quail, Kevin Murphy, and Aaron Suggs, Esqs.
 Attorneys for Respondent
New York State Board of Elections
 40 N. Pearl Street, Suite 5
 Albany, New York 12207
 (518) 474-2063
 brian.quail@elections.ny.gov

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 30

RECEIVED NYSCEF: 05/23/2022

THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC
RESEARCH AND REAPPORTIONMENT

198 State Street

Lobby

Albany, New York 12210

Doc #10437001

**Affirmation of Steven B. Salcedo, for Respondent Speaker of the
Assembly Carl Heastie, in Support of Motion to Dismiss,
dated May 22, 2022
[pp. 262 - 267]**

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 31

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/22/2022

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NEW YORK

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG,

Petitioners,

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

Respondents.

**AFFIRMATION OF
STEVEN B. SALCEDO**

Index No. 154213/2022

Assigned Justice:
Hon. Laurence L. Love

Steven B. Salcedo affirms the following under penalties of perjury pursuant to
CPLR 2106(a):

1. I am admitted to practice law in the courts of New York State.
2. I am associated with Phillips Lytle LLP, attorneys for Respondent Speaker of the Assembly Carl Heastie (the "Speaker"). As such, I am fully familiar with the facts stated in this affirmation, except for those stated upon information and belief, which I believe to be true.
3. I offer this affirmation in support of the Speaker's motion to dismiss the Petition under CPLR 404(a).
4. Attached as **Exhibit A** is a true copy of the Petition in this proceeding.

5. Attached as **Exhibit B** is a true copy of the original petition filed in *Harkenrider v. Hochul*, Steuben County Index No. E2022-0116CV, with Hon. Patrick F. McAllister presiding (the “*Harkenrider Lawsuit*”).

6. Attached as **Exhibit C** is a true copy of New York State’s political calendar, as it existed on February 3, 2022.

7. Attached as **Exhibit D** is a true copy of the amended petition filed in the *Harkenrider Lawsuit*.

8. Attached as **Exhibit E** is a true copy of Justice McAllister’s March 31, 2022 Order in the *Harkenrider Lawsuit*.

9. Attached as **Exhibit F** is a true copy of the affirmation of Misha Tseytlin, counsel for the petitioners in the *Harkenrider Lawsuit*, dated April 14, 2022. The affirmation opposed a motion to intervene filed with the Appellate Division, Fourth Department.

10. Attached as **Exhibit G** is a true copy of the Fourth Department’s Order denying that motion to intervene.

11. Attached as **Exhibit H** is a true copy of Justice McAllister’s April 18, 2022 order in the *Harkenrider Lawsuit*.

12. Attached as **Exhibit I** is a true copy of a letter from the New York State Board of Elections to Justice McAllister. The letter is dated April 28, 2022.

13. Attached as **Exhibit J** is a true copy of Justice McAllister’s April 28, 2022 Order in the *Harkenrider Lawsuit*.

14. Attached as **Exhibit K** is a true copy of Justice McAllister's May 21, 2022 Order in the *Harkenrider* Lawsuit. The order includes remedial Congressional and State Senate maps, along with the report of Special Master Jonathan Cervas.

15. Attached as **Exhibit L** is a true copy of the "Proposed Answer" submitted with Petitioner Gavin Wax's motion to intervene in the *Harkenrider* Lawsuit.

16. Attached as **Exhibit M** are true copies of certain Twitter messages posted by Mr. Wax related to New York's redistricting process and the *Harkenrider* Lawsuit.

17. Attached as **Exhibit N** is a true copy of the "Petition in Intervention" submitted with Petitioner Gary Greenberg's motion to intervene in the *Harkenrider* Lawsuit.

18. Upon information and belief, Mr. Greenberg failed to qualify as a New York State Senate candidate for the June 23, 2020 Democratic Party primary, due to insufficient ballot-access signatures. Attached as **Exhibit O** is a true copy of a related news article, and true copies of printouts from WebCivil Supreme. The news article indicates that the State Board of Elections removed Mr. Greenberg from the primary ballot, and the printouts indicate that Mr. Greenberg unsuccessfully challenged the Board's decision in Albany County Supreme Court.

19. Attached as **Exhibit P** are true copies of certain Twitter messages posted by Mr. Greenberg related to the Adult Survivors Act, a proposed New York State law.

20. Attached as **Exhibit Q** are true copies of certain Twitter messages posted by Mr. Greenberg related to New York's redistricting process and the *Harkenrider* Lawsuit.

21. Attached as **Exhibit R** is a true copy of Justice McAllister's May 11, 2022 Order in the *Harkenrider* Lawsuit.

22. Attached as **Exhibit S** is a true copy of an affidavit submitted by Thomas Connolly, Director of Operations for the New York State Board of Elections, in the *Harkenrider* Lawsuit. The affidavit was sworn to on March 21, 2022.

23. Attached as **Exhibit T** is a true copy of Justice McAllister's April 29, 2022 Order in the *Harkenrider* Lawsuit.

24. Attached as **Exhibit U** is a true copy of the New York State Board of Elections' Certification for the June 28, 2022 Primary Election.

25. Petitioner Paul Nichols states that he attempted to appear on the ballot for the Democratic Party's New York State gubernatorial primary election (Dkt. No. 9 ¶ 3). He further states that "the Board of Elections removed [him] from the [primary] ballot after determining that [his] designating petition contained invalid signatures" (*id.*). Attached as **Exhibit V** is a true copy of a verified petition filed by Mr. Nichols in Albany County Supreme Court, and a true copy of an Order of that court. The petition is dated May 2, 2022, and the Order is dated May 11, 2022. The Petition challenged the Board's decision to remove Mr. Nichols from the primary ballot; the Order dismissed the Petition.

26. Attached as **Exhibit W** is a true copy of an affidavit submitted by Todd D. Valentine, Co-Executive Director for the New York State Board of Elections, in the *Harkenrider* Lawsuit. The affidavit was sworn to on May 9, 2022. Also included in Exhibit W is a true copy of an affidavit submitted by Kristen Zebrowski Stavisky, Co-Executive Director for the New York State Board of Elections, in the *Harkenrider* Lawsuit. The affidavit was sworn to on May 9, 2022.

27. Attached as Exhibit X is a true copy of the Rules of the Democratic Party of the State of New York, which was filed in the *Harkenrider* Lawsuit on May 9, 2022.


28. Attached as Exhibit Y are true copies of screenshots of the website www.gavinwax.com. The first screenshot contains a portion of the website as it existed on March 26, 2022. The second contains the same portion of the website as it existed on May 19, 2022. The latter describes Mr. Wax as a "political activist," but the former does not.

29. Attached as Exhibit Z is a true copy of an affidavit submitted by New York State Assemblyman Andrew Goodell in the *Harkenrider* Lawsuit. The affidavit was sworn to on May 5, 2022.

30. Attached as Exhibit AA is a true copy of an affidavit submitted by Mr. Wax in the *Harkenrider* Lawsuit, sworn to on May 15, 2022.

31. For the reasons described in the accompanying memorandum of law, the Speaker asks this Court to dismiss the Petition under CPLR 404(a), and for such additional relief as this Court deems appropriate.

Dated: Buffalo, New York
May 22, 2022


Steven B. Salcedo

CERTIFICATE OF COMPLIANCE WITH 22 NYCRR § 202.8-b

This affirmation complies with 22 NYCRR § 202.8-b because it contains 1,070 words, excluding the caption, table of contents, table of authorities, and signature block. The word count was generated by the word-processing system used to prepare this document.

Dated: Buffalo, New York
May 22, 2022

PHILLIPS LYTLE LLP

By: Steven B. Salcedo

Craig R. Bucki

Steven B. Salcedo

Rebecca A. Valentine

Attorneys for Respondent

Speaker of the Assembly Carl Heastie

One Canalside

125 Main Street

Buffalo, New York 14203-2887

Telephone No. (716) 847-8400

cbucki@phillipslytle.com

ssalcedo@phillipslytle.com

rvalentine@phillipslytle.com

Doc #10437012

**Exhibit A to Salcedo Affirmation-
Petitioner's Petition, dated May 15, 2022
(Reproduced herein at pages 19 to 49)**

**Exhibit B to Salcedo Affirmation-
Petition, in Harkenrider v. Hochul, Steuben County Index
No. E2022-0116CV, dated February 3, 2022
[pp. 269 - 335]**

FILED: NEWBENKCOONNYCCERRK00303220022071307PM

INDEXNO. E20221012022

NYSCEF DOC. NO. 33

RECEIVED NYSCEF: 02/03/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

-----X

TIM HARKENRIDER, GUY C. BROUGHT,
LAWRENCE CANNING, PATRICIA CLARINO,
GEORGE DOOHER, JR., STEPHEN EVANS, LINDA
FANTON, JERRY FISHMAN, JAY FRANTZ,
LAWRENCE GARVEY, ALAN NEPHEW, SUSAN
ROWLEY, JOSEPHINE THOMAS, and MARIANNE
VOLANTE,

Index No. _____

PETITION

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,

Respondents.

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Petitioners Tim Harkenrider, Guy C. Brought, Lawrence Canning, Patricia Clarino, George Doohar, Jr., Stephen Evans, Linda Fanton, Jerry Fishman, Jay Frantz, Lawrence Garvey, Alan Nephew, Susan Rowley, Josephine Thomas, and Marianne Volante, by their counsel, Keyser Maloney & Winner LLP, and Troutman Pepper Hamilton Sanders LLP, for their Petition against Respondents 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 E. Heastie, the New York State Board of Elections, and the New York State Legislative Task Force on Demographic Research and Reapportionment, allege as follows:

PRELIMINARY STATEMENT

1. The People of New York in 2014 enshrined in the New York Constitution an exclusive process for enacting replacement congressional and state legislative districts, while also prohibiting partisan and incumbent-protection gerrymandering. Yet, in the very first redistricting cycle after these landmark constitutional amendments, the Democratic Party politicians who control the New York Legislature and Governor's office brazenly enacted a congressional map that is undeniably politically gerrymandered in their party's favor. As Dave Wasserman, a nonpartisan national elections expert correctly noted, these politicians' congressional map is "an effective gerrymander," designed so that Democrats will "gain three seats and eliminate four Republican seats," creating "probably the biggest shift in the country."¹ The non-partisan election analysis website FiveThirtyEight similarly explained that the map is so "skewed toward Democrats" and "egregious" as to "represent[] a failure for [New York's] new redistricting process."² And even a top attorney for the famously left-leaning Brennan Center for Justice opined that the congressional map "isn't good for democracy," because it is "a master class in gerrymandering, . . . tak[ing] out a number of Republican incumbents very strategically."³ Indeed, the congressional map is so obviously biased that it favors Democratic partisan interests more than *any* of 5,000 computer-generated maps, drawn without partisan considerations.

¹ Grace Ashford & Nicholas Fandos, *N.Y. Democrats Could Gain 3 House Seats Under Proposed District Lines*, N.Y. Times (Jan. 30, 2022), available at <https://www.nytimes.com/2022/01/30/nyregion/new-york-redistricting-congressional-map.html> (all websites last visited on Feb. 2, 2022).

² Nathaniel Rakich, *New York's Proposed Congressional Map Is Heavily Biased Toward Democrats. Will It Pass?*, FiveThirtyEight (Jan. 31, 2022), available at <https://fivethirtyeight.com/features/new-yorks-proposed-congressional-map-is-heavily-biased-toward-democrats-will-it-pass/>.

³ Nick Reisman, *How the Proposed Congressional Lines Could Alter New York's Politics*, Spectrum News 1 (Feb. 1 2022), available at <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2022/02/01/how-the-proposed-congressional-lines-could-alter-ny-s-politics>.

2. The People of New York in 2014 amended Sections 4 and 5 of Article III of the New York Constitution, establishing an *exclusive* process for redistricting that, both as a matter of procedure and substance, prohibits partisan and incumbent-protection gerrymandering. Through the creation of the New York Independent Redistricting Commission (“IRC” or “the Commission”), the requirements for multiple public hearings to receive public comment on proposed maps, and limiting the New York State Legislature’s (“Legislature”) authority to an up or down vote on IRC-proposed maps, these amendments designed a process to preclude gerrymandering. Indeed, these amendments explicitly prohibit drawing maps “for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.” N.Y. Const. art. III, § 4(c)(5). These amendments thus bar the sorts of gamesmanship and self-interested gerrymandering that plagued the redistricting process in this State for years.

3. The State of New York even bragged about these reforms to its redistricting process before the U.S. Supreme Court, claiming that Article III, Section 4(c)(5) was powerful evidence that States could fight partisan gerrymandering by barring the drawing of district lines for the purpose of favoring or disfavoring a political party.⁴

4. The Democrat-controlled Legislature attempted, but failed, to gut these reforms in 2021 through a proposed constitutional amendment. That amendment would have allowed the Legislature to assume vast redistricting authority if the Commission failed to vote on redistricting plans for the Legislature’s consideration.

⁴ Amicus Br. for States of N.Y., et al. at 18, *Rucho v. Common Cause*, 558 U.S. ____ (2019) (No. 18-422).

5. But the People decisively voted this measure down in 2021, re-confirming the IRC’s exclusive redistricting process under New York law.

6. Undeterred, the Democrats who control the Legislature and Governor Kathy Hochul have egregiously violated both the procedural and substantive protections in the New York Constitution to seek precisely the type of advantage for their party that the People outlawed in 2014 and reaffirmed in 2021. Governor Hochul thus lived up to her promise to “use [her] influence to help Democrats expand the House majority through the redistricting process,” and help the Democratic Party “regain its position that it once had when [she] was growing up.”⁵

7. This Court should invalidate the unconstitutional congressional map on two separate and independent bases.

8. First, the Legislature had no authority to enact the new map because the Legislature did not follow the *exclusive* process for enacting replacement maps that the People enshrined through the 2014 amendments, meaning that the congressional map is entirely void. Accordingly, the only validly enacted or adopted maps are those that the Legislature and courts adopted for New York after the 2010 decennial census. But the congressional map is now unconstitutionally malapportioned after the 2020 census and does not have the correct number of seats. This Court should expeditiously adopt a new map—prior to the impending deadlines for candidates to access the ballot—to cure the malapportionment now affecting the post-2010-census congressional map.

⁵ Katie Glueck & Luis Ferré-Sadurní, *Interview with Kathy Hochul: “I Feel a Heavy Weight of Responsibility”*, N.Y. Times (Aug. 25, 2021), available at <https://www.nytimes.com/2021/08/25/nyregion/kathy-hochul-interview.html>.

9. Second, if this Court holds that the Legislature somehow had the authority to adopt a replacement map notwithstanding these procedural failures, this Court should reject it as a matter of substance, as the map is an obviously unconstitutional partisan and incumbent-protection gerrymander. If this Court takes this approach, it should invalidate the map and then send it back to the Legislature to create a new congressional map, which complies with the law.

THE PARTIES

10. Petitioner Tim Harkenrider is an elector of the state of New York, residing at 22 Spruce Street, Canisteo, NY 14823, in Steuben County, within Congressional District 23.

11. Petitioner Guy C. Brought is an elector of the state of New York, residing at 170 Horton Lane, Apt. 462, Port Ewen, NY 12466, in Ulster County, within Congressional District 19.

12. Petitioner Lawrence Canning is an elector of the state of New York, residing at 2843 Johnny Cake Hill Road, Hamilton, NY 13346, in Madison County, within Congressional District 19.

13. Petitioner Patricia Clarino is an elector of the state of New York, residing at 274 Garden Street, New Windsor, NY 12553, in Orange County, within Congressional District 18.

14. Petitioner George Dooher, Jr. is an elector of the state of New York, residing at 209 Dixon Dr., Syracuse, New York 13219, in Onondaga County, within Congressional District 22.

15. Petitioner Stephen Evans is an elector of the state of New York, residing at 440 West 41st Street, Apt. 4G, New York, NY 10036, in New York County, within Congressional District 10.

16. Petitioner Linda Fanton is an elector of the state of New York, residing at 2347 Fulmer Valley Road, Wellsville, NY 14895, in Allegany County, within Congressional District 23.

17. Petitioner Jerry Fishman is an elector of the state of New York, residing at 8200 Narrows Avenue, Brooklyn, NY 11209, in Kings County, within Congressional District 11.

18. Petitioner Jay Frantz is an elector of the state of New York, residing at 39 Orchard Place, Gowanda, NY 14070, in Cattaraugus County, within Congressional District 23.

19. Petitioner Lawrence Garvey is an elector of the state of New York, residing at 2 Hillman Road, New City, NY 10956, in Rockland County, within Congressional District 17.

20. Petitioner Alan Nephew is an elector of the state of New York, residing at 28 Aldrich Street, Gowanda, NY 14070, in Cattaraugus County, within Congressional District 23.

21. Petitioner Susan Rowley is an elector of the state of New York, residing at 876 Ford Peterson Road, Frewsburg, NY 14738, in Chautauqua County, within Congressional District 23.

22. Petitioner Josephine Thomas is an elector of the state of New York, residing at 322 Wynthrop Road, Syracuse, NY 13209, in Onondaga County, within Congressional District 22.

23. Petitioner Marianne Volante is an elector of the state of New York, residing at 170 Loder Road, Yorktown Heights, NY 10598, in Westchester County, within Congressional District 16.

24. Respondent Kathy Hochul is the Governor of the State of New York. She is being sued in her official capacity.

25. Respondent Brian A. Benjamin is the Lieutenant Governor of the State of New York and President of the New York State Senate. He is being sued in his official capacity.

26. Respondent Andrea Stewart-Cousins is the New York State Senate Majority Leader and President *Pro Tempore* of the New York State Senate, representing the 35th Senate District.

Majority Leader Stewart-Cousins has offices in Albany and at 28 Wells Avenue, Building #3, 5th Floor, Yonkers, NY 10701. She is being sued in her official capacity.

27. Respondent Carl E. Heastie is the Speaker of the New York State Assembly, representing the 83rd Assembly District. Speaker Heastie has offices in Albany and at 1446 East Gun Hill Road, Bronx, NY 10469. He is being sued in his official capacity.

28. Respondent New York State Board of Elections was established on June 1, 1974, as an Executive Department agency vested with the authority and responsibility for administration and enforcement of the laws relating to election in the State of New York. It has its principal place of business at 40 North Pearl Street, Suite 5, Albany, NY 12207.

29. Respondent New York State Legislative Task Force on Demographic Research and Reapportionment (“LATFOR”) was established by the Legislature in 1978 pursuant to New York Legislative Law § 83-m, with the principal responsibility—at least before the 2014 constitutional amendments to Article III, Section 4—of preparing and formulating reapportionment plans to the Legislature following each decennial census. LATFOR’s principal place of business is located at 250 Broadway, Suite 2100, New York, NY 10007.

JURISDICTION AND VENUE

30. This Court has jurisdiction over this lawsuit pursuant to Article III, Section 5 of the New York Constitution, CPLR § 3001, and Unconsolidated Laws § 4221, the latter of which grants authority to the “supreme court” to “review” any “petition of any citizen” challenging “[a]n apportionment by the legislature.”

31. Venue is proper in this County under Article III, Section 5 of the New York Constitution, CPLR § 503(a), and Unconsolidated Laws § 4221, the latter of which authorizes the

filing of a petition challenging “[a]n apportionment by the legislature” in “the supreme court where any such petitioner resides.”

FACTUAL BACKGROUND

A. Redistricting in New York

32. Following each federal decennial census, the New York Constitution requires the State of New York to redraw its congressional districts to adjust for population changes. The process of redrawing these district lines is known as redistricting.

33. New York congressional districts must be redrawn so that each district is contiguous; contains, to the extent possible, an equal number of inhabitants; and is in as compact a form as possible, as required by Article III, Section 4 of the New York State Constitution.

34. Redistricting is an extremely time-sensitive requirement, including because candidates must know what their districts are in advance of an election, in order to meet state-ballot-access requirements. Multiple petition and signature-related deadlines are looming for New York congressional candidates. *See generally* N.Y. Election Law § 6-100, *et seq.*

i. The Redistricting Process Before 2014

35. Before 2014, the Legislature maintained primary responsibility for redistricting.

36. To aid the Legislature in its task, LATFOR would prepare proposed redistricting maps for the Legislature’s vote.

37. Established in 1978, LATFOR is a partisan body that has consistently produced partisan maps. It consists of six members, including four legislators and two non-legislators. The Temporary President of the Senate appoints one legislator and one non-legislator. The Speaker of

the Assembly also appoints one legislator and one non-legislator. The Minority Leader of the Assembly appoints one legislator, and the Minority Leader of the Senate appoints one legislator.

38. Under the LATFOR system, “legislators w[ould never] give up their right to draw district lines.” David Freedlander, *Backgrounder: How Redistricting Will Reshape New York’s Battle Lines*, Observer (Dec. 27, 2010).⁶ Indeed, legislators could effectively control redistricting under the LATFOR process in a partisan manner, by controlling “who winds up on [LATFOR]—those who make it are likely to be the favorites of [incumbent legislative leaders] and are likely to get exactly the districts that they want.” *Id.*

39. Over time, the Legislature manipulated its role in the redistricting process to protect existing incumbents. Under this pre-2014 system, elections were often predestined, with state legislative incumbents winning reelection more than 98% of the time, “usually overwhelmingly.” *Elections With No Meaning*, N.Y. Times (Feb. 21, 2004), at A14.⁷ The “major reason” for this seemingly insurmountable incumbency advantage was gerrymandering, allowing the party in power to draw districts with “surgical precision” to “exclude the homes of rival candidates” and making favorable districts nearly “impregnable.” *Id.* With incumbents facing little chance of defeat under the then-existing process, elections became uncompetitive, and voters became increasingly disillusioned by the reality that they could not choose their representatives.

40. This system granted political parties significant leeway to gerrymander for partisan and incumbent gain. Only the requirement of “one person, one vote,” and requirements that

⁶Available at <http://observer.com/2010/12/backgrounder-how-redistricting-will-reshape-new-yorks-battle-lines/>.

⁷ Available at <https://www.nytimes.com/2004/02/21/opinion/elections-with-no-meaning.html>.

districts “shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the first year of the next decade . . . , and shall at all times consist of contiguous territory,” N.Y. Const. art. III, § 4 (2014), constrained the party leaders responsible for drawing new maps. The New York Constitution required respect for county and city lines, noting that “no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county,” and “[n]o town, except a town having more than a full ratio of apportionment, and no block in a city inclosed by streets or public ways, shall be divided in the formation of senate districts,” as well as the “block on border” and “town on border” requirements. *Id.*; *see also* N.Y. Const. art. III, § 4(c)(6) (current version). But even these “requirements” were largely not meaningful constraints. *See Schneider v. Rockefeller*, 31 N.Y.2d 420, 426–27, 293 N.E.2d 67 (1972).

41. Additionally, prior to 2014, some New York Courts had interpreted the then-pertinent constitutional provisions as not providing for a claim of partisan gerrymandering. *Bay Ridge Cmty. Council, Inc. v. Carey*, 479 N.Y.S.2d 746, 749, 103 A.D.2d 280 (2d Dep’t 1984) (*per curiam*), *aff’d* 66 N.Y.2d 657, 486 N.E.2d 830 (1985) (order).

42. Therefore, the pre-2014 system for redistricting and reapportionment gave broad discretion to the politicians in power, and *required* only that all state legislative and congressional districts largely abided by the equal-population principle, creating unfair and undemocratic maps that ensconced powerful parties in the seat of government.

ii. The Redistricting Process After the 2014 Reforms

43. In recent years, however, the People of this State explicitly outlawed partisan gerrymandering and constitutionalized an exclusive, nonpartisan procedure for redistricting.

44. In 2014, New Yorkers enacted a constitutional amendment, amending Article III, Sections 4 and 5 of the New York Constitution, and adding a new Section 5-b to the same Article, voting in favor of the following ballot measure:

The Proposed amendment to sections 4 and 5 and addition of new section 5-b to Article 3 of the State Constitution revises the redistricting procedure for state legislative and congressional districts. The proposed amendment establishes a redistricting commission every 10 years beginning in 2020, with two members appointed by each of the four legislative leaders and two members selected by the eight legislative appointees; prohibits legislators and other elected officials from serving as commissioners; establishes principles to be used in creating districts; requires the commission to hold public hearings on proposed redistricting plans; subjects the commission's redistricting plan to legislative enactment; provides that the legislature may only amend the redistricting plan according to the established principles if the commission's plan is rejected twice by the legislature; provides for expedited court review of a challenged redistricting plan; and provides for funding and bipartisan staff to work for the commission. Shall the proposed amendment be approved?

*2014 N.Y. State Prop. No. 1: An Amendment Revising State's Redistricting Procedure.*⁸

45. Proposition 1 amended the New York Constitution to vest primary redistricting responsibility in the newly created IRC, as well as establishing numerous procedural safeguards against the Legislature's continued gerrymandering practices.

46. One procedural safeguard is the IRC's 10-member composition. Two Commissioners are appointed by the New York State Senate Majority Leader and Temporary President, two are appointed by the New York State Senate Minority Leader, two are appointed by the Speaker of the New York State Assembly, and two are appointed by the New York State Assembly Minority Leader. The final two members are then selected by these eight appointees

⁸ Available at <https://www.elections.erie.gov/Files/Election%20Results/2014/11042014/2014-General.pdf>.

and cannot be enrolled as a Democrat or Republican in the past five years. All Commission members must be registered voters in New York.

47. Article III, Section 4 of the New York Constitution requires the IRC to hold public hearings in cities and counties around the State and release draft plans, data, and related information to facilitate public review of proposed district lines. Draft plans must be made available at least thirty days before the first public hearing and no later than September 15 of the year following the census.

48. Article III, Section 5-b(f) and (g) of the New York Constitution governs IRC voting and the procedure for approving and submitting redistricting maps to the Legislature. Five members of the IRC constitute a quorum. IRC approval of a plan requires seven votes, which must include a member appointed by each of the legislative leaders. In the event no plan gets seven votes, the IRC must submit the plan(s) with the highest vote to the Legislature.

49. Article III, Section 4 of the New York Constitution requires the IRC to submit an initial set of maps and the necessary implementing legislation to the Legislature no later than January 15 of the second year following the census. The Legislature then votes on the maps and implementing legislation without amendment. N.Y. Const. art. III, § 4(b); *see also* N.Y. Legis. Law § 93(1).

50. If the Legislature fails to adopt the first set of maps and implementing legislation, or the Governor vetoes adopted implementing legislation, the redistricting process reverts back to the IRC. The IRC must submit a second set of maps and implementing legislation to the Legislature, subject to the requirements outlined above, within 15 days of being notified of the first rejection and no later than February 28. The Legislature then votes on the second set of

proposed maps and implementing legislation without amendment. N.Y. Const. art. III, § 4(b); *see also* N.Y. Legis. Law § 93(1).

51. If (and only if) the Legislature fails to adopt the IRC’s second set of maps and implementing legislation, or the Governor vetoes the second adopted implementing legislation, can the Legislature amend the IRC’s proposed redistricting maps and enact its own replacement maps.

52. The 2014 amendments to Article III, Section 4 also changed and added to the *substantive* redistricting requirements. Now, the New York Constitution specifically provides that districts “shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.” N.Y. Const. art. III, § 4(c).

53. The Legislature must follow all of the substantive requirements for redistricting applicable to the IRC. That is, any maps and implementing legislation adopted by the Legislature cannot involve partisan gerrymandering or incumbent-favoring gerrymandering, must be compact and contiguous, and must have equal population between districts, in addition to the already-noted procedural requirement that all maps be enacted via a single mandatory process involving the IRC.

54. The Legislature also established an additional guardrail against partisan gerrymandering with Section 3 of the Redistricting Reform Act of 2012. 2012 N.Y. Sess. Laws 17, § 3. Applicable above and apart from New York Legislative Law §§ 93, 94, Section 3 of the Redistricting Reform Act of 2012 provides, in pertinent part, that “[a]ny amendments by the senate or assembly to a redistricting plan submitted by the independent redistricting commission, shall not affect more than two percent of the population of any district contained in such plan.” 2012 N.Y. Sess. Laws 17, § 3.

iii. The Legislative Democrats Fail To Derail These Reforms With A Proposed 2021 Constitutional Amendment

55. In 2021, the Legislature referred a constitutional amendment to New York voters that would have gutted the 2014 constitutional reforms, in favor of the Legislature over the Commission, but the People decisively voted this measure down.

56. The ballot proposal would have amended the New York Constitution in a number of ways, including section 4(b) of Article III, to provide:

If either house shall fail to approve the legislation implementing the second redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto, or the redistricting commission fails to vote on a redistricting plan and implementing legislation by the required deadline and makes a submission to the legislature pursuant to subdivision (g-1) of section five-b of this article, each house shall introduce such implementing legislation with any amendments each house of the legislature deems necessary.

2021 Statewide Ballot Proposals, New York State Board of Elections (amendment underlined).⁹

57. The IRC's exclusive redistricting process, enshrined in Article III, Section 4 of the New York Constitution, can only be altered by a constitutional amendment. Yet, within days of the People voting down the 2021 constitutional amendment, the Legislature referred a bill that purports to achieve largely the same result as the failed amendment would have to the Governor for her signature. The Governor signed this unconstitutional bill on November 24, 2021.

58. This law attempts to avoid the Constitution's limitations by purporting to amend only section 4(c) of the Redistricting Reform Act of 2012, notwithstanding the expressed desires of the People of this State:

If either house shall fail to approve the legislation implementing the second redistricting plan, or the governor shall veto such legislation and the legislature

⁹ Available at <https://www.elections.ny.gov/2021BallotProposals.html>.

shall fail to override such veto within ten days of such veto, or if the commission does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan and the commission submitted to the legislature pursuant to subdivision (a) of this section all plans in its possession, both completed and in draft form, and the data upon which such plans are based, each house shall introduce such implementing legislation with any amendments each house deems necessary. If approved by both houses, such legislation shall be presented to the governor for action within three days.

L.2021, c. 633, § 1 (amendment underlined).

B. The Post-2010 Census Map For Congress Is Unconstitutional Under The New York Constitution

59. Following the 2010 Census, the Legislature in 2012 reapportioned New York's state legislative districts, but it could not agree on new congressional districts. As a result, a panel of three federal judges appointed a federal magistrate judge, Roanne Mann, to propose a new congressional map for New York. On March 19, 2012, the judicial panel imposed its congressional map, which was largely the same as the map issued by Judge Mann. *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012); *see also* Thomas Kaplan, *New Congressional Lines Imposed by Federal Court*, N.Y. Times (Mar. 19, 2012).¹⁰

60. After the 2010 census, New York had a population goal of 719,298 residents for each of its 27 congressional districts.

61. In the interim, various population shifts caused congressional districts to become unconstitutionally malapportioned.

62. New York's 26 congressional districts have a population goal of 776,971 residents.

¹⁰ Available at <https://www.nytimes.com/2012/03/20/nyregion/judges-impose-new-congressional-map-for-new-york.html>.

63. The prior congressional map does not comply with this new population target or the constitutional requirements for population equality.

64. In other words, none of the districts complies with the “strict standard of population equality applicable to congressional apportionment,” which require “maximum population equality.” *Schneider v. Rockefeller*, 31 N.Y.2d 420, 427–28, 293 N.E.2d 67 (1972).

65. None of the prior districts matches exactly (or even within 1,000 residents) the population goal of 776,971 residents.

66. For example, in prior Congressional District 23, where Petitioners Tim Harkenrider, Linda Fanton, Jay Frantz, Alan Nephew, and Susan Rowley reside, the current population is 83,462 residents below the population goal (a -10.7% deviation).

67. In prior Congressional District 22, where Petitioner Lawrence Canning resides, the current population is 80,361 residents below the population goal (a -10.3% deviation).

68. In prior Congressional District 19, where Petitioner Guy C. Brought resides, the current population is 78,298 residents below the population goal (a -10.1% deviation).

69. In prior Congressional District 24, where Petitioners George Dooher, Jr. and Josephine Thomas reside, the current population is 59,664 residents below the population goal (a -7.7% deviation).

70. Moreover, the prior congressional map includes 27 congressional districts, and New York only receives 26 congressional seats after the most recent census, so that map is plainly

invalid. U.S. Census Bureau, 2020 Census: Apportionment of the U.S. House of Representatives (April 26, 2021).¹¹

C. The IRC And Legislature Failed To Follow The Constitutional Process For Redistricting To Cure This Malapportionment

i. The Commission's Initial Efforts To Develop Redistricting Maps

71. On April 26, 2021, the U.S. Census Bureau released the population counts from the 2020 Census, showing that New York's resident population increased by more than 4 percent, or 823,147 residents, from 19,378,102 a decade ago, to 20,201,249 in 2020. Because of national population shifts, however, New York lost one of its congressional seats in the United States House of Representatives, leaving the State with a total of 26 such districts.

72. The 2020 Census data further showed, as previously mentioned, that New York's congressional districts are now unconstitutionally malapportioned.

73. Pursuant to the 2014 constitutional amendments, the New York Constitution established an exclusive process for adopting any replacement redistricting maps, granting the IRC and Legislature specifically defined roles.

74. The IRC's current members are David Imamura, serving as Chair, Jack M. Martins, serving as Vice Chair, Eugene Bengier, Ross Brady, John Conway III, Dr. Ivelisse Cuevas-Molina, Dr. John Flateau, Elaine Frazier, Charles H. Nesbitt, and Willis H. Stephens, Jr.

75. Consistent with the procedures established by the 2014 amendments, Democratic leaders in the Legislature appointed the "Democratic Caucus" of the Commission, made up of:

¹¹ Available at <https://www.census.gov/library/visualizations/2021/dec/2020-apportionment-map.html>.

David Imamura, Eugene Bengner, John Flateau, and Elaine Frazier, along with non-party enrollee Ivelisse Cuevas-Molina.

76. Similarly, Republican leaders in the Legislature selected the “Republican Caucus” of the Commission, made up of: Jack Martins, John Conway, Charles Nesbitt, and Willis Stephens, joined by Conservative Party member Ross Brady.

77. From the outset, Democratic legislative leaders attempted to hamstring the new Commission with multiple challenges and delays.

78. The Democrats attempted to impede the Commission by delaying its receipt of state funding from the Legislature. Despite a \$1 million allocation in the 2020 state budget, the funding never materialized, forcing Commission staff to work on a voluntary basis for months. After more than a year, the Legislature finally allocated \$4 million to the Commission’s redistricting efforts in April 2021. Ethan Geringer-Sameth, *New York Redistricting Commission Kicks Off State’s New Map-Drawing Process*, Gotham Gazette (July 20, 2021);¹² Sarah Darmanjian, *NY’s Independent Redistricting Commission Clinches \$4M Budget*, News10 (Apr. 12, 2021).¹³

79. Finally, beginning on June 20, 2021, the IRC held a series of nine public meetings across the State to hear public testimony about the new maps and the redistricting process, as required by the New York Constitution. N.Y. Const. art. III, § 4(c).

80. On September 15, 2021, members of the IRC released initial map drafts, consistent with constitutional requirements. N.Y. Const. art. III, § 4(c).

¹² Available at <https://www.gothamgazette.com/state/10664-new-york-redistricting-commission-set-to-kick-off>.

¹³ Available at <https://www.news10.com/news/redistricting-commission/>.

81. Republican members had hoped to submit a single bipartisan set of draft maps. Speaking to reporters about the two draft plans, Commissioner Martins said the IRC “should end up with the maps being negotiated and presented jointly,” but the Democratic commissioners had not agreed to meet over the weekend before the Commission released the draft maps. *See* Rebecca C. Lewis & Zach Williams, *Takeaways From New York’s (Competing!) Redistricting Draft Maps*, City & State N.Y. (Sept. 15, 2021).¹⁴

82. The Democratic members viewed the competing draft maps differently, with Commissioner Imamura stating that “the fact that we put out two plans does not indicate that the commission will be unable to come to a bipartisan agreement.” *Id.*

83. The IRC held an additional fourteen public hearings across the State, during which residents voiced concerns, desires, and suggestions regarding the draft maps and the redistricting process. The IRC also solicited written comments and draft maps from the public.

84. Democratic members revised their respective maps between the end of November and when the full Commission met to deliberate in December. Testimony of Eugene Banger at 23:44–24:10, Virtual Public Meeting of the NYIRC, Jan. 3, 2022 (“1/3/22 IRC Meeting”).¹⁵

85. The IRC held its last public hearing on December 5, 2021, and the final deadline for public comments and draft maps was December 6, 2021.

¹⁴ Available at <https://www.cityandstateny.com/policy/2021/09/new-yorks-first-draft-2022-redistricting-maps-have-been-released/185374/>.

¹⁵ Available at <https://totalwebcasting.com/view/?func=VOFF&id=nysirc&date=2022-01-03&seq=1>.

86. Following the public comment period, the IRC scheduled meetings to negotiate and finalize a single set of maps to submit to the Legislature. The IRC agreed on a procedure for putting together this set of consensus maps:

- a. First, two third-party redistricting organizations, Redistricting Partners and Redistricting Insight, would prepare a set of maps without IRC input, using the draft maps released by the IRC in September, as well as the public testimony and written comments.
- b. The Commission would then hold a series of meetings, breaking into subgroups, to review the organizations' preliminary maps.
- c. Based on these discussions, the IRC would make changes to the preliminary maps and work to arrive at a single map.

87. All of the members of the Commission initially followed their agreed-upon plan and worked together on a set of consensus maps for over two weeks, moving toward a bipartisan consensus.

88. On December 22, 2021, the full Commission met to discuss the bipartisan maps. By this point, only a small number of issues remained open, and the Commission was close to reaching a consensus. After discussing the open issues for two hours, the Commission broke at 1:00 p.m., agreeing to reconvene at 4:00 p.m. to reach an agreement on the remaining issues. Testimony of Jack Martins at 8:44–9:14, 1/3/22 IRC Meeting, *supra*.

89. When the IRC reconvened at 4:00 p.m. on December 22, Commissioner Imamura read a statement announcing that the Democratic Caucus would no longer negotiate the bipartisan maps, as all members previously agreed to do. Instead, the Democratic Caucus was only willing

to negotiate on the latest iteration of the maps it had released unexpectedly, and without explanation, the day prior. Testimony of Jack Martins at 9:16–9:49, 1/3/22 IRC Meeting, *supra*.

ii. The IRC Submits Two Sets Of Maps To The Legislature

90. On January 3, 2022, the IRC met to vote on maps to send to the Legislature.

91. The Democratic Caucus again refused to negotiate with the full Commission, discuss the bipartisan maps, or make any concessions. Commissioner Martins expressed his disappointment with the impasse, noting that the Republican members had reached an agreement with Democrats on 90 percent of the new district lines before talks broke down.

92. The Commission then voted on two redistricting plans—the Democratic members’ partisan maps presented on December 21 (“Plan A”) and the consensus maps, which were based on the preliminary maps drawn by independent organizations and negotiated by the full Commission throughout December 2021 (“Plan B”).

93. Both plans received five votes each, resulting in both being delivered to the Legislature on January 3.

94. The Legislature rejected both plans out-of-hand, without consideration of the public’s input, the Commission’s negotiations and reflections on the public’s testimony, bipartisan priorities, and the other considerations New Yorkers enshrined in the Constitution.

95. The Assembly set the plans for a party vote, rejecting them all. Before the final vote, Assemblyman Colin Schmitt asked Assemblyman Kenneth Zebrowski, a Democrat representing the 96th District who sponsored Plan A, whether the Assembly would “follow[] all of the currently prescribed State Law and State constitutional process for redistricting” if the Legislature failed to approve any of the IRC’s plans—including taking public input before enacting

new maps. Assemblyman Zebrowski did not give a concrete answer, saying “I don't—I don't think that's germane to—to this debate right now.” Transcript at 12–14, Session, New York State Assembly (Jan. 10, 2022) (Questioning of Assemblyman Zebrowski by Assemblyman Colin Schmitt).¹⁶

96. In the Senate, Plan A's maps received no votes in favor of enactment. Seventeen senators voted in favor of Plan B's Senate and Assembly districts, with forty-six voting no, while nineteen senators voted to enact Plan B's congressional map, with forty-four voting against. Before voting in favor of Plan B, Senator Andrew Lanza commented on the Commission's lack of real autonomy, saying, “I think it's been the worst-kept secret in Albany, if not the entire country, that this Independent Redistricting Commission was never going to be allowed to remain independent.” Transcript at 73:14–17, Regular Session, New York State Senate (Jan. 10, 2022) (Testimony of Senator Andrew Lanza).¹⁷

97. On January 10, the Legislature advised the Commission that it had rejected the submitted plans.

98. Following this rejection, the IRC had until January 25 to submit a revised plan under the 2014 amendments to the Constitution.

99. The full Commission met to discuss a single plan for the final submission to the Legislature, as required by Article III, Section 4(b) of the New York Constitution. The Republican members attempted to restart negotiations on the previously negotiated bipartisan maps. Chairman

¹⁶ Available at <https://www.nyasembly.gov/av/session/>.

¹⁷ Available at <https://legislation.nysenate.gov/pdf/transcripts/2022-01-10T15:51/>.

Imamura stated that the Democratic members wanted to re-submit virtually the same plan that the legislature had rejected. Despite multiple entreaties from the Republican members, the Democratic members refused to meet to discuss bipartisan maps.

100. On January 18, before the IRC's constitutional window for revision expired, Speaker Carl Heastie announced he had appointed Assembly Democrat Kenneth Zebrowski to be the temporary co-chair of LATFOR. Speaker Heastie stated that "the results of reapportionment will determine the path our state and our nation take for the coming decade," and "Assemblymember Zebrowski is the right person for the job." Assembly Speaker Carl E. Heastie, News Release, *Speaker Heastie Announces Assemblymember Zebrowski Appointed Temporary Co-Chair of LATFOR* (Jan. 18, 2022).¹⁸

101. On January 24, 2021, Commissioner Imamura announced that the IRC was at an impasse and would not be submitting a second set of redistricting maps to the Legislature at all.

102. On the same day, Commissioner Martins made a statement on behalf on the Republican members on the Commission, outlining the Democratic members' refusal to engage with anything other than their partisan maps and expressing his disappointment that the Commission failed its constitutional mandate.

103. On January 25, 2022, the 15-day window for the IRC to submit revised maps to the Legislature closed without the IRC submitting new maps, as required by the Constitution.

104. Upon information and belief, the Democratic Caucus of the IRC decided not to submit a compromise congressional map within the constitutional timeframes after receiving

¹⁸ Available at <https://www.nyassembly.gov/Press/?sec=story&story=100542>.

encouragement to undermine the constitutional process from Democratic Party politicians and officials.

iii. Notwithstanding The Failure Of The Constitutional Process, The Legislature Nevertheless Attempted To Enact A Replacement Congressional Map, And The Map It Enacted Is An Unconstitutional Partisan And Incumbent-Protection Gerrymander

105. Despite the failure of the IRC to vote on and present a second set of maps, the Legislature proceeded to craft its own congressional map, turning a blind eye to the mandatory and exclusive constitutional process for redistricting established in Article III, Section 4.

106. In doing so, the Legislature ignored calls from all across the aisle to engage with the public and be more transparent about the choices it was making in drawing district lines. Clifford Michel & Farah Javed, *Albany Democrats Seize Control of Redistricting, With Unclear Role for Public*, The City (Jan. 27, 2022).¹⁹

107. Instead, Democratic leaders crafted and pushed through legislation to enact its own new congressional map over the course of only a few days, releasing the Legislature's proposed map on Sunday evening, January 30, without a single public hearing. Ashford & Fandos, *supra*.

108. This map bears no resemblance to the two maps proposed by the IRC.

109. To underscore how different the Legislature's map is, and to make adoption of this unrecognizable congressional map possible, the Legislature added a "notwithstanding clause" to the enacting legislation, exempting the map from any laws to the contrary, including the 2% rule embodied in 2012 New York Session Laws 17, § 3.

¹⁹ Available at <https://www.thecity.nyc/2022/1/26/22903787/albany-democrats-seize-control-of-redistricting-with-unclear-role-for-public>.

110. The result is an unmistakably gerrymandered map for Congress.

111. The Legislature created a congressional map that, without a doubt, creates “an effective [Democratic] gerrymander, resulting in the Democrats “gain[ing] three seats and eliminat[ing] four Republican seats,” and creating the biggest shift in the country” with “the stroke of a pen.” Ashford & Fandos, *supra*.

112. As noted by Laura Ladd Bierman, the executive director of the League of Women Voters of New York, “New Yorkers deserve a transparent and fair redistricting process, and it is shameful that the Legislature has denied them this.” *NYC Would Get More Seats in State Senate Under Proposed Maps*, N.Y. Daily News Feb. 1, 2022).²⁰ So, even though the New York Constitution prohibits partisan gerrymandering, she noted that the congressional map “reflect[s] a Legislature that appears to care more about favoring partisan interests than it does for fair maps.” *Id.*

113. In fact, the Legislature’s congressional gerrymander was so successful, so biased in favor of Democrats, that the enacted congressional map is more favorable to Democrats than *any* of the 5,000 computer simulated maps, designed specifically to follow New York’s redistricting requirements without focusing on any goal of increasing partisan advantage.

114. The Legislature concocted numerous individual congressional districts with boundaries with no honest explanation except for impermissible partisan and incumbent-favoring gerrymandering. The following examples are illustrative.

²⁰ Available at <https://www.nydailynews.com/news/politics/new-york-elections-government/ny-state-senate-nyc-seats-legislative-redistricting-20220202-2xoyaqnvlfdliax5tosbnuaage-story.html>.

115. In Long Island, the Legislature completely changed Congressional Districts 1 and 2, swapping Republican voters for Democratic voters in an egregious gerrymander.

116. In particular, the Legislature placed areas with high concentrations of Republican voters into new Congressional District 2 while moving solidly Democrat communities into Congressional District 1—all of the Republican communities in Brookhaven on the south shore are now in District 2, whereas the heavily Democrat areas in the center of Long Island are now channeled into District 1.

117. This partisan reconfiguration creates several new town splits, and an additional county split, where Congressional District 1 now reaches into Nassau County between Oyster Bay and Huntington. By packing Republicans into Congressional District 2, the Legislature effectively flipped Congressional District 1.

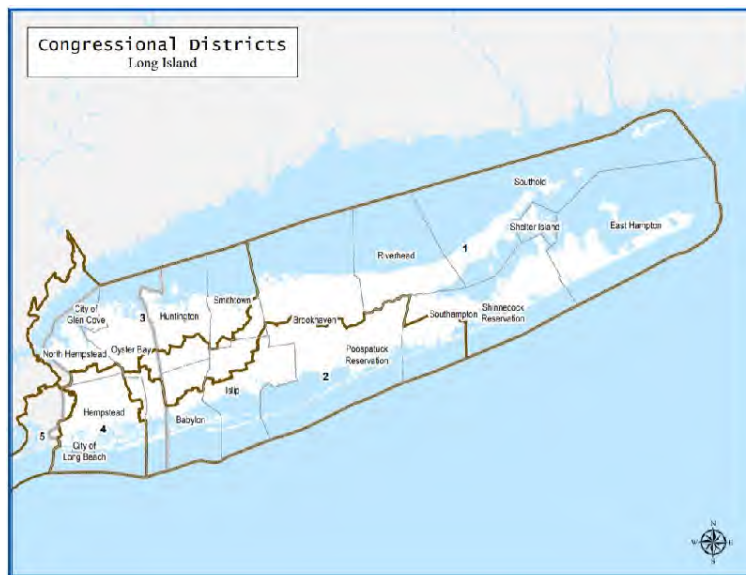
118. The result of this blatant gerrymandering has turned Congressional District 1 from a strong Republican district, solely in Suffolk County, into a lean Democratic district, unnecessarily sprawling across two counties.

119. Similarly, the redrawing shifted District 2 from a safe Republican district into an outright uncompetitive Republican stronghold.

Map of Prior Congressional Districts 1 & 2²¹



Map of New Congressional Districts 1 & 2



²¹ All maps, unless otherwise specified, come from the LATFOR government website, available at <https://www.latfor.state.ny.us/maps/>.

120. The new Congressional District 3 is dramatically different from the old map in order to accomplish the Legislature's partisan goals.

121. The old District 3 bridged Suffolk and Nassau counties, with a slight reach into Queens County. The new map reaches from Suffolk County, through Nassau and Queens counties, and then skips through Bronx County all the way up into Westchester County across the Long Island Sound in a thin strip up to the town of Rye, capturing overwhelmingly Democrat-voting towns along the shore.

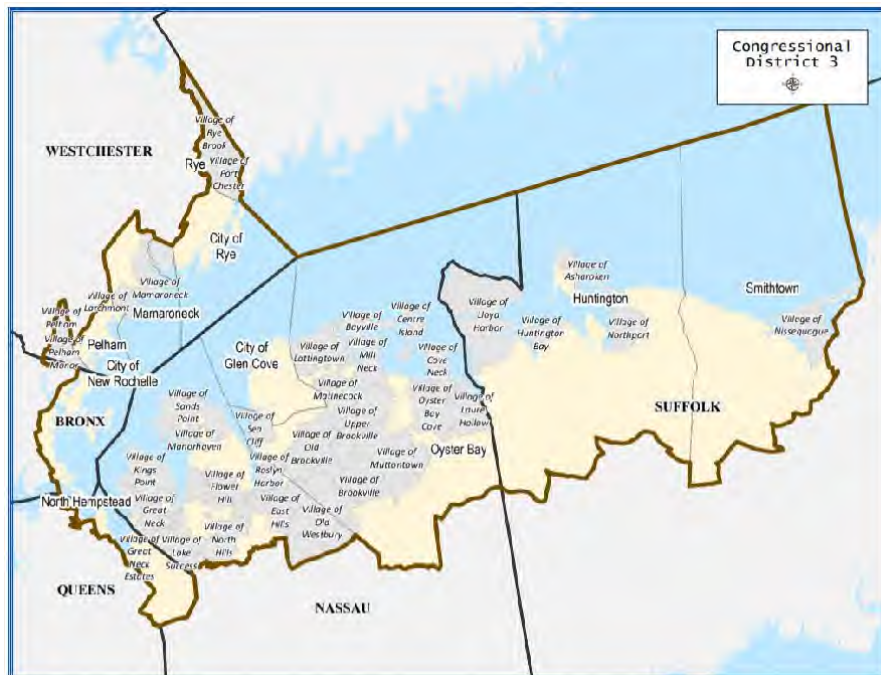
122. This combination of Westchester, with a district largely populated on Suffolk and Nassau counties, makes no sense. These communities have no nexus and share no communities of interest.

123. With these stark and otherwise unexplainable changes, the Legislature has decreased competitiveness, shifting Congressional District 3 from a competitive Democratic-leaning district to a strong Democrat district.

Map of Old Congressional District 3



Map of New Congressional District 3



124. The new Congressional Districts 8, 9, 10, and 11 radically break up established communities of interest in Brooklyn to create a partisan advantage for Democrats.

125. The new map divides closely knit, concentrated Orthodox Jewish and Russian communities with strong social and cultural ties, resulting in conservative Republican-leaning voters spread or “cracked” across multiple districts.

126. These new districts are drawn as vertical stripes across the southern two-thirds of Brooklyn, moving large numbers from the Russian Jewish communities in Brooklyn into Congressional District 8 and dividing the Orthodox Jewish communities between Congressional District 9 and Congressional District 10.

127. This partisan gerrymander also split other communities of interest—in Congressional District 10, the Legislature cut across an established Asian community, moving half of it into Congressional District 11.

128. In particular, it cuts Sunset Park off from northern Brooklyn and the Lower East Side of Manhattan, separating the Asian American, Pacific Islander, and Latino communities—which have formed the “backbone” of the district for nearly 30 years, since the 1992 reapportionment process—from its related communities of interest in northern Brooklyn and Manhattan’s Lower East side. Kristyn Brendlen, *Brooklyn Electeds, Community leaders Ask State Gov Officials to Reconsider Redistricting Maps*, Brooklyn Paper (Feb. 1, 2022).²² This new split breaks up these linked communities from the North Brooklyn area, which is especially important given the recent “rise in anti-Asian hate.” *Id.*

²² Available at <https://www.brooklynpaper.com/brooklyn-electeds-community-redistricting/>.

129. Democratic Assemblymember Marcela Mitaynes also decried this inexplicable particular line-drawing, noting that the Legislature had “separate[d]” these “culturally and historically connected” communities for nothing more than “political expediency to ensure a[n] electoral advantage in the near term,” and “fail[ed] to meet the necessary level of transparency, accountability, and public participation that our constituents rightfully deserve from our democratically elected leaders,” before concluding that she would “not dismantle the political voice of [her] constituents by voting to approve the proposed Congressional Districts.” Assemblymember Marcela Mitaynes’ Statement on New York State’s Proposed 2022 Congressional Maps (Feb. 2, 2022).²³

130. The Legislature designed this particular shift with the intent of unseating incumbent Republican Congresswoman Nicole Malliotakis from Congressional District 11. Carl Campanile, *Dems Plan to Topple GOP Rep. Malliotakis in Redistricting Plan*, N.Y.Post (Jan. 27 2022);²⁴ Jeff Coltin, *Rep. Nicole Malliotakis is (Probably) Screwed*, City & State New York (Jan. 31, 2022).²⁵

131. Congressional District 11 shifted from the previous map where it covered Staten Island and adjacent southern portions of Brooklyn, to now covering Staten Island and winding northwestward into the heavily liberal areas of Brooklyn—Sunset Park, Red Hook, Gowanus, Windsor Terrace, and Park Slope, thereby drastically changing the political composition of this district, providing the Democrats a drastically increased chance of flipping the seat.

²³ Available at https://docs.google.com/document/d/16jJFKDH-_U8P5aAsjwEOCQaLZSIXsAkTnaZiW9xaCMs/edit?usp=sharing.

²⁴ Available at <https://nypost.com/2022/01/27/dems-plan-to-topple-gop-rep-nicole-malliotakis-in-redistricting-plan/>.

²⁵ Available at <https://www.cityandstateny.com/politics/2022/01/rep-nicole-malliotakis-probably-screwed/361412/>.

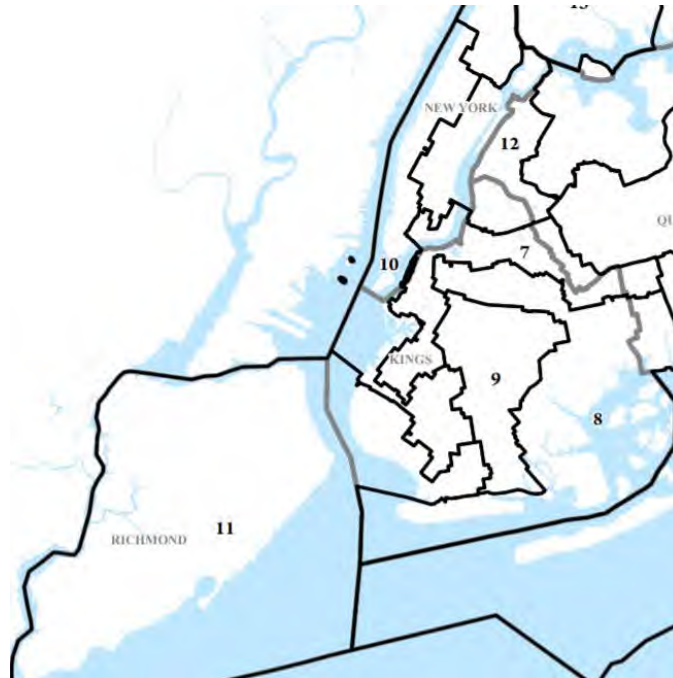
132. As the Asian American Legal Defense Fund noted on Twitter, “[t]he legislature’s map does not keep our [Asian American] communities together”²⁶:



133. These redrawn Brooklyn districts are blatant gerrymanders, with bizarre, roving boundaries crossing multiple bodies of water and snaking between each other for no discernible reason besides partisan advantage.

134. These shifts allowed the Legislature to place additional, safe Democratic voters into District 11, changing that district from a strong Republican district to a Democratic district.

²⁶ Available at <https://twitter.com/aaldef/status/1488223479371599876>.

Map of Old Congressional Districts 8, 9, 10, & 11**Map of New Congressional Districts 8, 9, 10, & 11**

Map of Old Congressional District 8



Map of New Congressional District 8



Map of Old Congressional District 9**Map of New Congressional District 9**

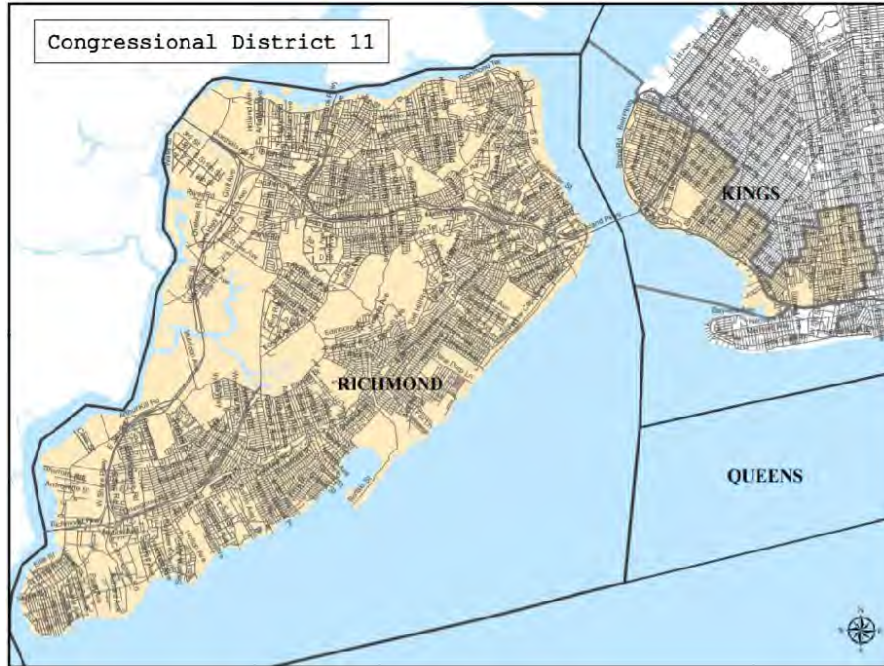
Map of Old Congressional District 10**Map of New Congressional District 10**

Overlay of Old Congressional District 10 and New Congressional District 10²⁷

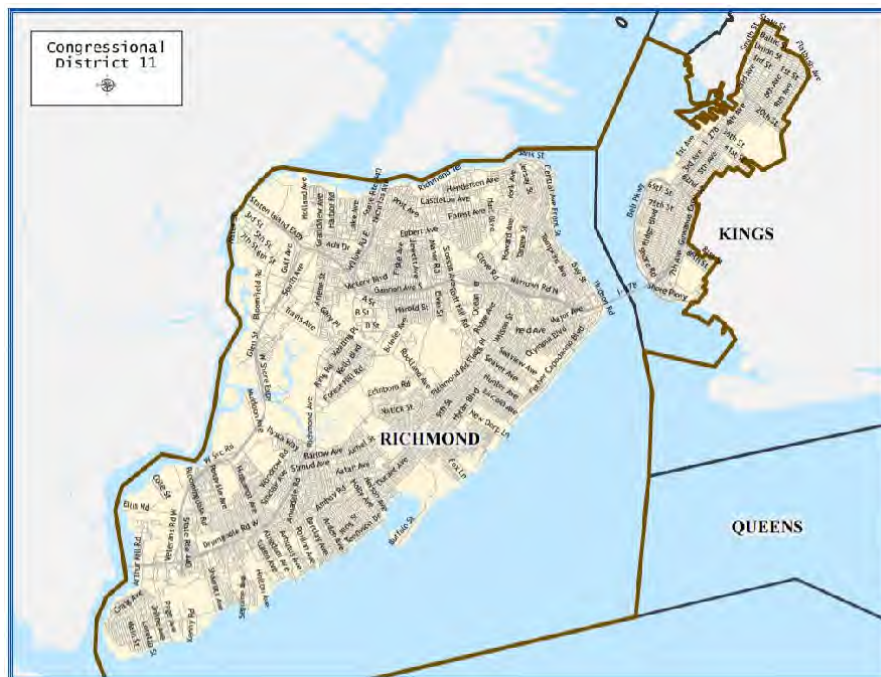


²⁷ Nicholas Fandos, *How N.Y. Democrats Came Up With Their Gerrymandered Districts on Their New Map*, N.Y. Times (Jan. 31, 2022), available at <https://www.nytimes.com/2022/01/31/nyregion/nyc-congressional-district-nadler.html>.

Map of Old Congressional District 11



Map of New Congressional District 11



135. The old Congressional District 16 was almost entirely contained in Westchester County, with only a small section of the Bronx for population purposes, while the new District connects a section of the Bronx to Mount Vernon and Yonkers—Democratic strongholds—then winds in a narrow segment up through Westchester County into Putnam County, grabbing rural and suburban Republican communities, in order to “crack” them out of Congressional District 18.

136. The towns of Putnam Valley, Carmel, Yorktown, and Somers—strongly Republican areas—are awkwardly connected to highly populated Democratic communities, neutralizing these Republican votes. The bisection of Westchester County and added county split into Putnam County creates a district with geographically distanced communities.

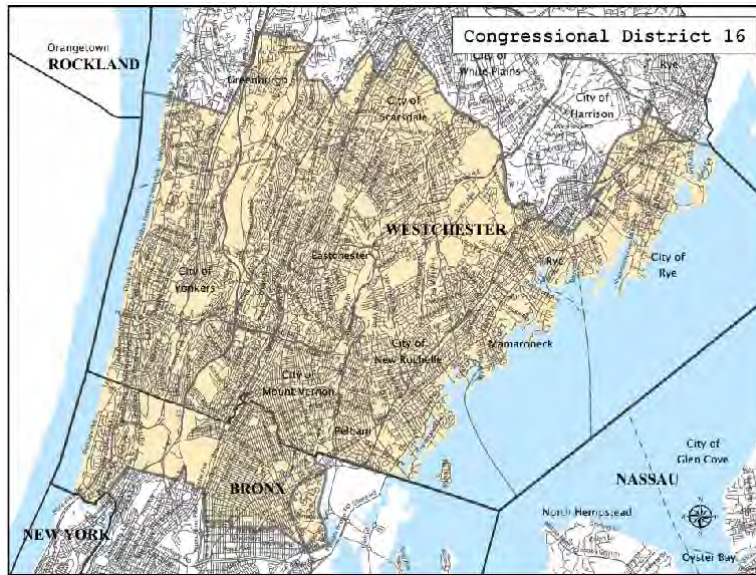
137. Furthermore, the gerrymander of Congressional District 16 removes Republican voters from Congressional District 18 into a strong Democratic district, making Congressional District 18 a safer Democratic district, without jeopardizing the Democratic Party’s interests in Congressional District 16.

138. Congressional District 18 is now oddly shaped, like a sitting dog, with a tail that extends into the Ulster County towns of Rochester and Wawarsing, with legs made of Peekskill, Cortlandt, North Salem, Lewisboro, Bedford, and Pound Ridge, and a noticeable space between those legs where the central portions of Putnam and Westchester counties were scooped out for Congressional District 16.

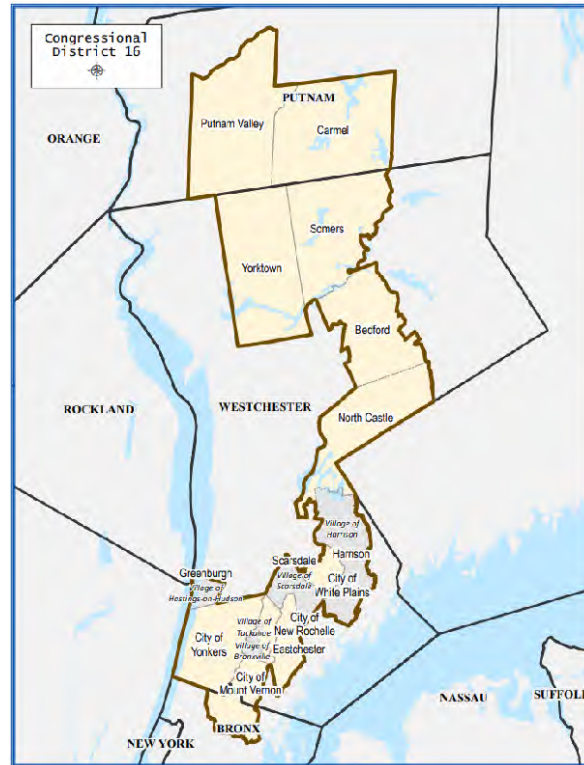
139. The legislative Democrats made these shifts not only to shore up their party’s chances in Congressional District 18, but also to protect incumbent Democratic Congressman Sean Maloney, the newly elected chair of the Democratic Congressional Campaign Committee.

140. As a result of this gamesmanship, Congressional District 16 moves only somewhat from a very strong Democratic district to a still-strong Democratic one, whereas District 18 shifts from a lean Republican district to a lean Democratic district.

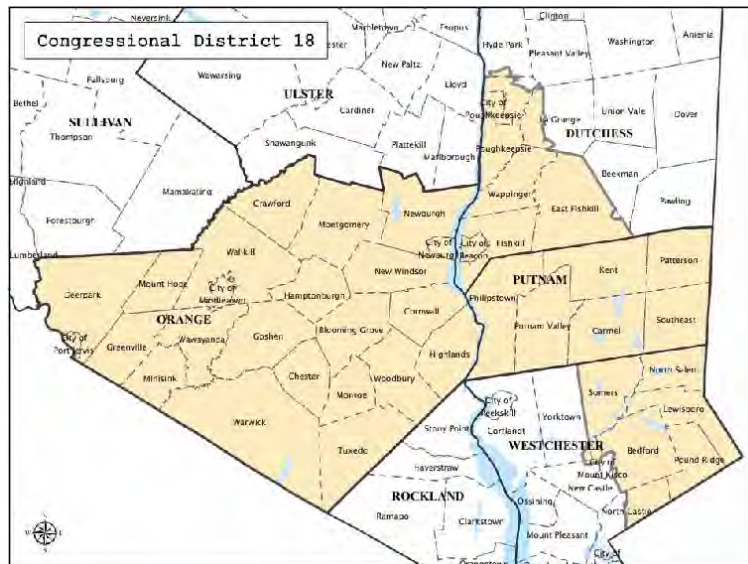
Map of Old Congressional District 16



Map of New Congressional District 16



Map of Old Congressional District 18



Map of New Congressional District 18



141. The new Congressional District 17 is similarly stretched to include strong Democrat-voting communities with rural Republican areas, while splitting the conservative Jewish communities to neutralize their Republican votes.

142. The old Congressional District 17 was compactly located in Rockland and Westchester counties.

143. Now, the District reaches from Sullivan County through Orange County into Rockland County, finally crossing the river to connect with Democrat strongholds in Westchester County, including Greenburgh and Mount Kisco.

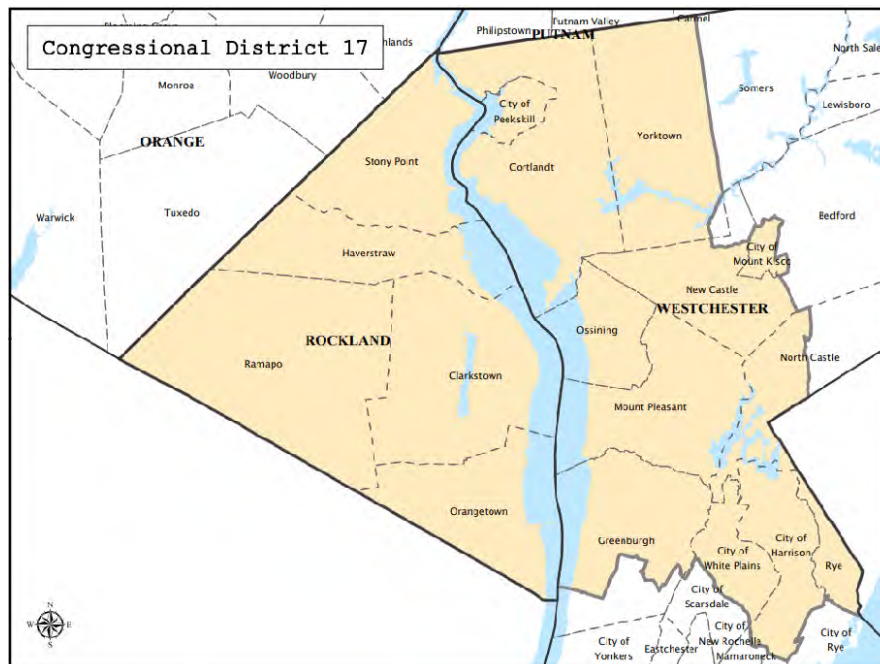
144. The District also includes part of the strongly Democrat city of White Plains.

145. The district combines the Orthodox communities in Sullivan and Rockland counties but excludes the Kiryas Joel Jewish community in Orange County, despite the extensive public testimony and overwhelming evidence in support of keeping these communities together.

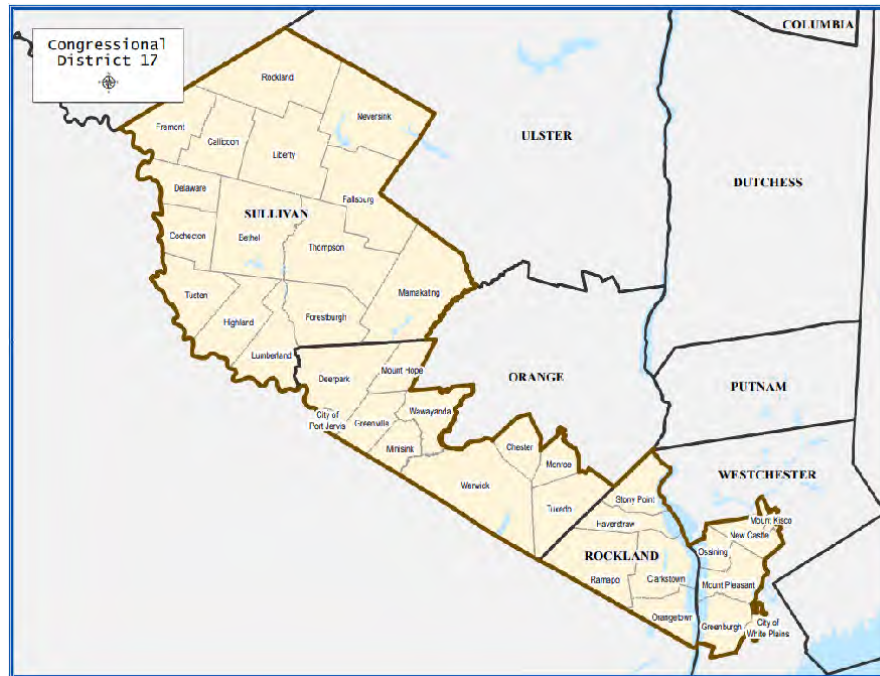
146. The resulting new District cracks those conservative communities, spreading Republican voters among multiple districts to decrease their voting power, without jeopardizing any Democratic districts.

147. Thus, Congressional District 17 shifted only slightly from a Democratic stronghold to a still-reliable but less Democratic district.

Map of Old Congressional District 17



Map of New Congressional District 17



148. Congressional District 19 is similarly drawn for the impermissible purpose of strengthening the Democratic Party's political interests, with the four reaching corners of Congressional District 19 showing how the Legislature shopped for Democratic voters in order to turn the district from Republican-leaning to a Democratic-advantage district.

149. The new Congressional District 19 extends through the Republican communities in Columbia and Greene counties to pick up part of Albany County—specifically the Town of Bethlehem—to add Democrat voters and a new county split.

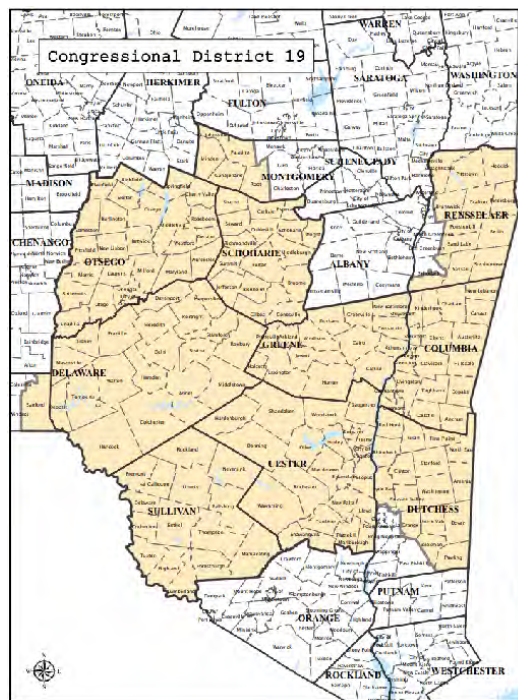
150. In Ulster County, the District picks up Democrats while specifically avoiding communities with large numbers of Republican voters.

151. The new Congressional District 19 then stretches far west to encompass the mostly Democratic city of Binghamton, to pick up additional Democratic voters there.

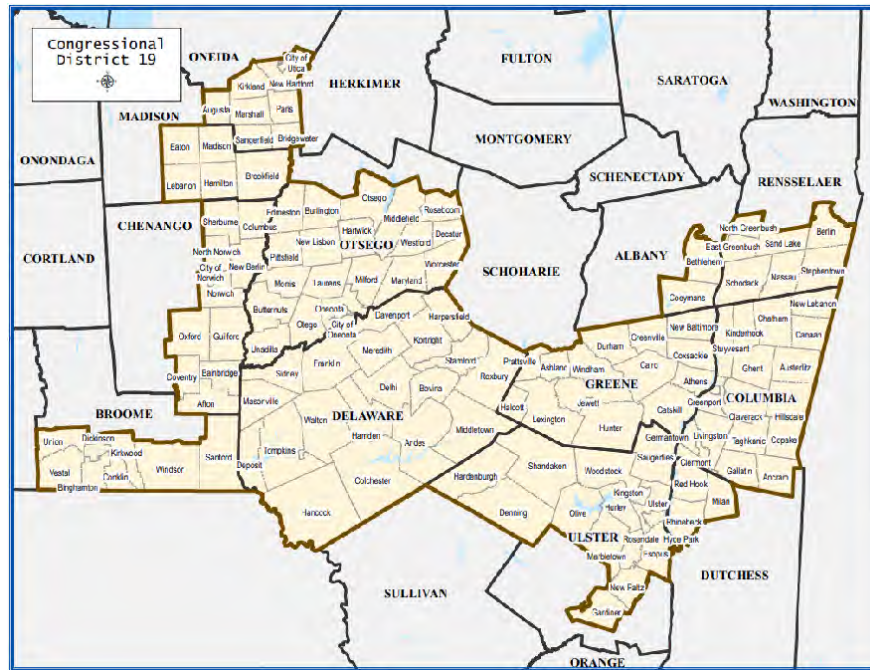
152. Finally, the District extends northward to pick up the Democrat-voting city of Utica.

153. All of these particular partisan choices flipped this District into a Democratic advantage.

Map of Old Congressional District 19



Map of New Congressional District 19



154. The Legislature also gerrymandered Congressional District 21 to pack it with additional Republican voters.

155. The new Congressional District 21 now extracts Saratoga and Schenectady counties, in addition to splitting off a portion of Warren County, from the surrounding areas, replacing those regions with much of Oneida County and Herkimer County, half of Montgomery County, and all of Schoharie County, thereby packing additional Republican voters into this single district and eliminating their ability to make surrounding districts more competitive for Democratic candidates.

Map of Old Congressional District 21

Congressional District 21



Map of New Congressional District 21

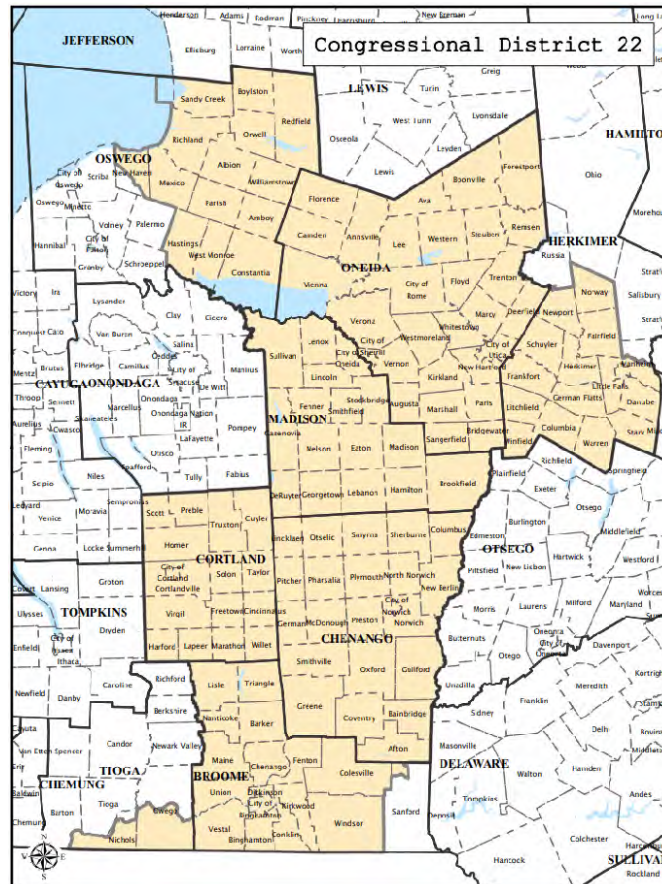
Congressional District 21



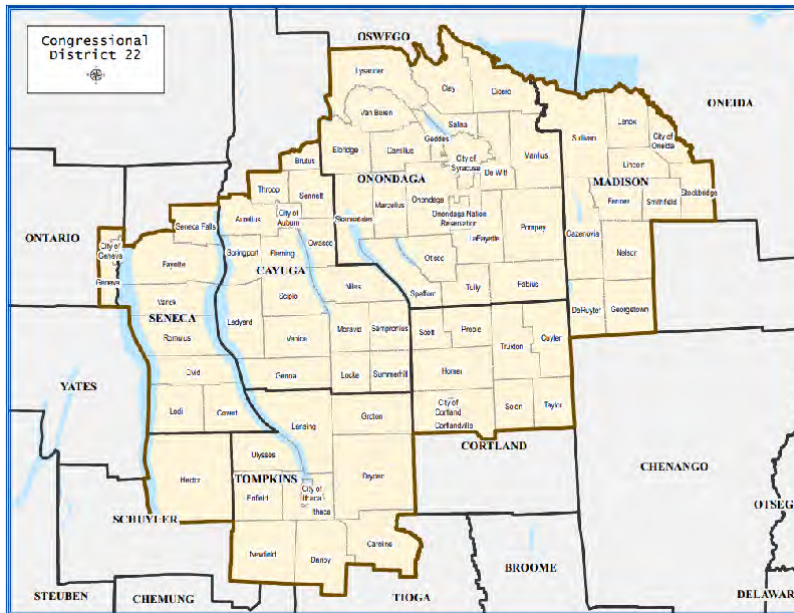
156. In Congressional District 22, the Legislature removed Republican areas and replaced them with Tompkins County, including the city of Ithaca, to flip the district from a competitive Republican district to a strong Democratic one.

157. As a result, Congressional District 22 underwent a massive political swing, changing from a very competitive Republican district to a strong Democratic district.

Map of Old Congressional District 22



Map of New Congressional District 22



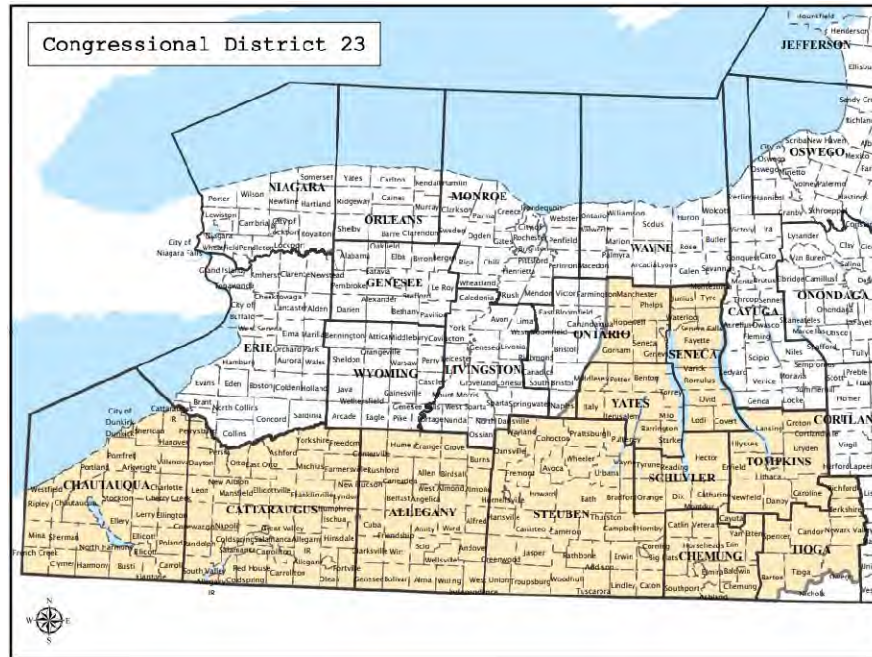
158. The Legislature gerrymandered Congressional District 23 by “packing” as many Republican votes into this district as it could, for partisan gain.

159. The new District now includes southern Erie County towns—first-ring suburbs to the city of Buffalo—connecting them with far away and rural areas around Binghamton.

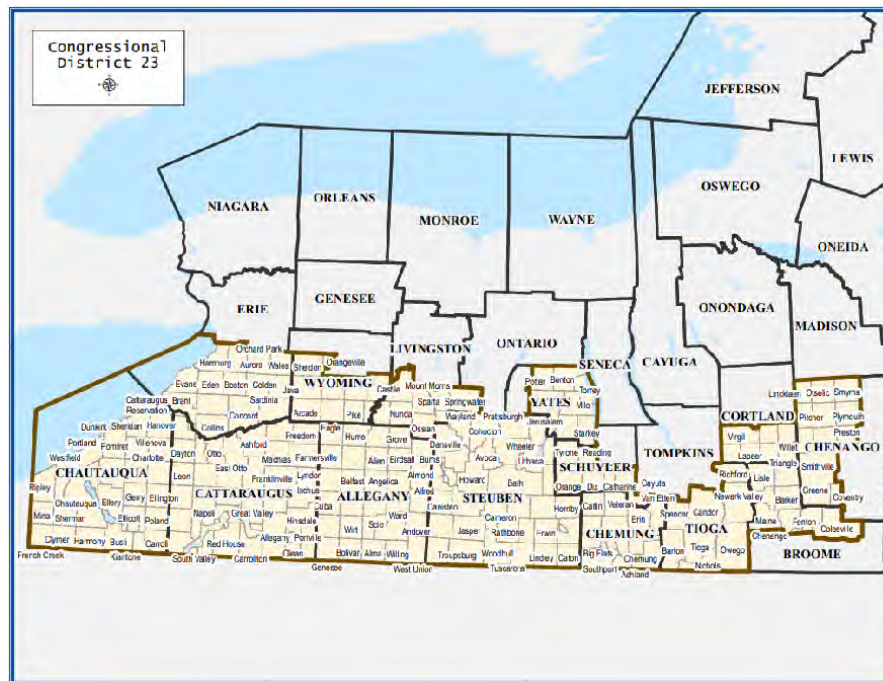
160. The old district also included some heavily Democratic areas in Tompkins County, but the Legislature removed those areas, as noted above, placing them in Congressional District 22, in order to flip that district.

161. As a result, Congressional District 23 became less competitive and shifted from a very strong Republican district to an uncontested Republican district.

Map of Old Congressional District 23



Map of New Congressional District 23



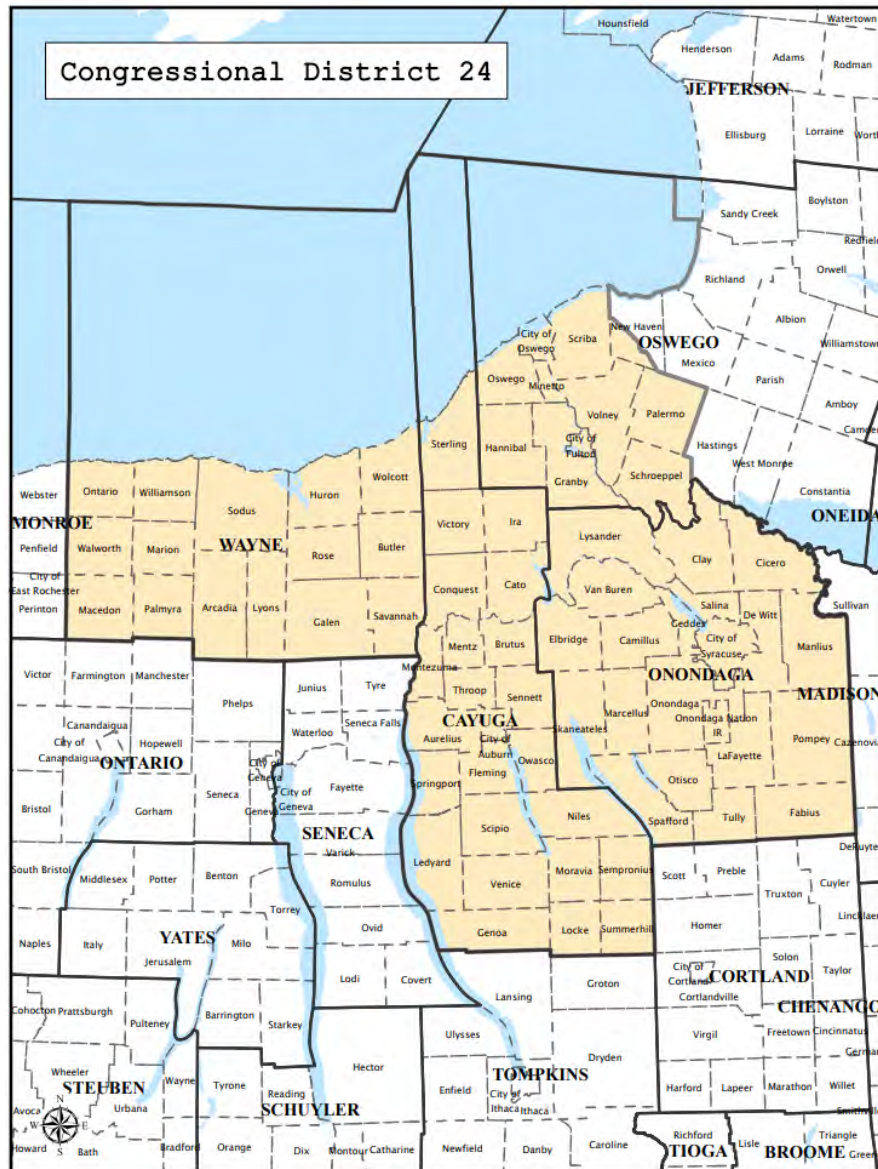
162. Previously, District 24 compactly encompassed the bordering counties of Wayne, Cayuga, and Onondaga, as well as part of Oswego County.

163. Now, this District extends from Lewiston, in Niagara County, and various similarly Republican areas in northeast Erie County, traveling all the way eastward and northward to Jefferson County (all the way to the St. Lawrence County line), while notably avoiding certain portions of Monroe and Ontario counties.

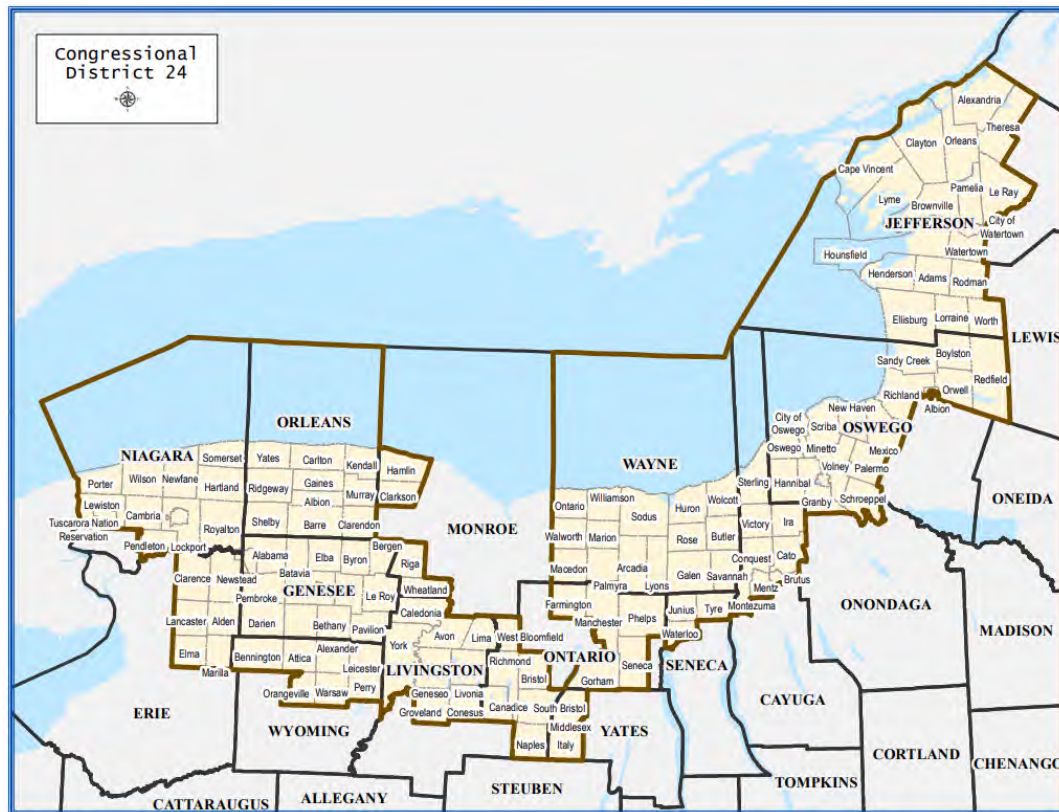
164. Indeed, this District now stretches across four media markets, connecting numerous areas, over more than 250 miles, with little or nothing in common.

165. As a result, the Legislature shifted Congressional District 24 from a highly competitive Democratic district into a very strong Republican district, designed to protect numerous surrounding districts from any serious Republican challenge.

Map of Old Congressional District 24



Map of New Congressional District 24



166. Each of these blatantly gerrymandered districts, both individually and together, have no reasonable explanation except for the Legislative Democrats' specific goal of increasing their political power. These examples are only illustrative of the map's partisan design as a whole.

167. On February 2, 2022, notwithstanding the egregious gerrymander within the Legislature's map, the Democrats in the Assembly and State Senate adopted the congressional map (with only slight modifications not related to their gerrymandering efforts), despite every Republican in the Assembly and State Senate voting against the map. *See* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196 and A.9039 (as technically amended by A.9167).

168. In addition to the Republican legislators, all of whom voted against this egregious gerrymander, Democratic Assemblymembers Simcha Eichenstein and Marcela Mitaynes voted against the congressional maps as well.

iv. The Governor Signs The Legislature’s Unfair Congressional Map Into Law Despite Widespread Objection From New Yorkers

169. After the Legislature released its proposed congressional map, there was extensive public outcry over both the process and substance.

170. Members of the public took to the IRC’s public comment page to decry the Legislature’s opaque approach to redrawing the maps. Submissions, New York Independent Redistricting Committee (“IRC Public Submissions”).²⁸ As one comment said, “[t]his is clearly gerrymandering at its worst.” IRC Public Submissions, *supra* (submitted by Anthony on Jan. 31, 2022). Betsy Gotbaum, the executive director of good-government group Citizens Union, described the Legislature’s lack of process succinctly: “There was no public input.” Jacob Kaye, *State Legislature Shares Version of Congressional Redistricting Map*, Queens Daily Eagle (Feb. 1, 2022).²⁹ She also noted that the Legislature’s actions completely deprived the process of an accurate understanding of the public’s desires in a new map: “We don’t really know what groups of people really wanted once the commission couldn’t come to any kind of a conclusion and then the legislators took it over. We don’t know.” *Id.*

171. New Yorkers across the state quickly flagged the new map as a highly partisan gerrymander. “If it looks like gerrymandering and sounds like gerrymandering—it’s most likely

²⁸ Available at <https://nyirc.gov/submissions>.

²⁹ Available at <https://queenseagle.com/all/state-legislature-shares-version-of-congressional-redistricting-map>.

gerrymandering,” said Brian Browne, a political science professor at St. John’s University in New York City. Kaye, *supra*. “This is why people don’t trust politicians,” observed Pat Kiernan, a local morning news anchor on NY1, “[a]nd the Democrats have given up any high ground they had over Republicans on gerrymandering.” Nicholas Fandos, *How N.Y. Democrats Came Up With Gerrymandered Districts on Their New Map*, N.Y. Times (Jan. 31, 2022).³⁰

172. Even Democratic politicians condemned the map. Cynthia Appleton, the Democratic chair for Wyoming County, described the congressional map as “an absolute travesty.” Jerry Zremski, *New Congressional Map Sparks Gerrymandering Outcry*, Buffalo News (Jan. 31, 2022).³¹ Nate McMurray, a former Democratic congressional candidate, offered a similar view on the new map, calling it “nuts.” *Id.* Melanie D’Arrigo, a Democratic candidate running in Congressional District 3, harshly criticized the new map as well: “We cannot stay silent as we watch the state legislature publish a map that extreme gerrymanders our district.” Kaye, *supra*. Describing the redrawn District 3, which now spans five counties, D’Arrigo despaired, “How is this fair to the people who live in any of these counties?” *Id.* She further noted that “[c]onstituent services will be more difficult, more expensive and less efficient: the needs of someone living on the border of Connecticut being wildly different from someone in Huntington,” and “[a]ll of the voters at stake deserve real representation, not to be used as political pawns.” *Id.*

173. On February 3, 2022, Governor Hochul signed the Legislature’s congressional map into law, thereby blessing her fellow Democrats’ blatant gerrymandering efforts.

³⁰ Available at <https://www.nytimes.com/2022/01/31/nyregion/nyc-congressional-district-nadler.html>.

³¹ Available at https://buffalonews.com/news/new-congressional-map-sparks-gerrymandering-outcry/article_0ab6b528-82e6-11ec-8d7b-07d7c0c217b8.html.

D. The Map's Impact On Petitioners

174. The Legislature's blatant gerrymandering has caused grave harm to Petitioners, all of whom want a fair, representative government at both the state and national level, unhindered by partisan interests and egregious gerrymandering.

175. Broadly, this kind of partisan gerrymandering is profoundly undemocratic and cuts deeply into the public's confidence in their representative government. The Legislature's egregious attempt to entrench the majority party's incumbents and political power harms the franchise of all New York voters, Petitioners included.

176. For example, the proposed map treats Petitioners unequally and dilutes their voting power based on their political beliefs. Through this map, Democrats have essentially guaranteed that they will win more congressional districts—and thus more power—than is warranted by the party's popular support. As a result, representatives will subject Petitioners to laws and policies that do not fairly reflect the public will.

177. Moreover, when incumbents choose their voters—rather than voters electing their chosen representatives—the public's faith in the franchise is diminished.

178. Participation in the democratic process will decrease, as voting holds little appeal to those in gerrymandered districts because their votes cannot change the preordained outcomes of elections. New Yorkers made their will clear when they voted to ban partisan gerrymandering.

179. Allowing this map to be enacted deals a crushing blow to the State's representative democracy and the faith of the People in those governing them.

180. More specifically, each of Petitioners suffers directly from this map, including because they lose the opportunity to vote for their preferred congressional candidate, rather than one selected for them by the Legislature's cynical line-drawing.

181. For example, the new Congressional District 16, a strong Democratic district where Petitioner Marianne Volante lives, moved Republican voters from Congressional District 18, where Petitioner Patricia Clarino lives, decreasing competition and turning District 18 into a safe Democratic district, without jeopardizing the Democratic Party's interests in District 16. As a result, Petitioner Clarino's vote is diluted, while Petitioner Volante and other District 16 Republicans' votes will never outweigh the Democratic vote that has been gerrymandered around them.

182. In the new Congressional District 23, where Petitioners Tim Harkenrider, Linda Fanton, Jay Frantz, Alan Nephew, and Susan Rowley reside, the Legislature "packed" as many Republican votes into the district as it could. As a result, the Republican votes of Petitioners and similar voters in the District are far in excess of what their candidates need to win in elections. Rather than fairly spreading Republicans through logically constructed districts, the Legislature has ensured that many of their votes are wasted in District 23.

183. Conversely, in the new Congressional District 10, where Petitioner Stephen Evans resides, and Congressional District 11, where Petitioner Jerry Fishman resides, the Legislature broke up conservative communities of interest, "cracking" and effectively neutralizing Republican voters in these districts. As a result, these Petitioners' votes are diluted, and they are subjected to political policies that do not align with their own views or the will of their communities.

184. Similarly, new Congressional District 17, where Petitioner Lawrence Garvey resides, new Congressional District 19, where Petitioners Guy C. Brought and Lawrence Canning reside, and new Congressional District 22, where Petitioners George Dooher, Jr. and Josephine Thomas reside, each “crack” and neutralize Republican votes by breaking up communities of interest and unnaturally reaching across the state to add Democratic voters to each of these districts. These Petitioners will be forced to endure representatives who do not reflect the communities they represent, enforcing their unwelcome policies.

185. Petitioners regularly vote for Republicans running for Congress and engage in campaign activity for Republicans running for Congress, so the gerrymandering of the congressional map dilutes the power of their votes and political action efforts.

FIRST CAUSE OF ACTION

(N.Y. Const. art. III, § 4(b); N.Y. Legis. Law § 93(1) – Failure To Follow Constitutional And Statutory Procedures For Redistricting)

186. Petitioners hereby incorporate each of the foregoing paragraphs as if fully set forth herein.

187. Article III, Section 4(e) of the New York Constitution provides that “[t]he process for redistricting congressional . . . districts established by this section and sections five and five-b of this article *shall govern* redistricting in this state,” with limited exceptions not relevant here. N.Y. Const. art. III, § 4(e) (emphases added); *see* N.Y. Legis. Law § 93(3) (same).

188. Section 4(b) of Article III requires that, should the Legislature “fail to approve the legislation implementing the first redistricting plan” prepared by the IRC, the IRC then “*shall* prepare and submit to the legislature a second redistricting plan and the necessary implementing

legislation for such plan,” and that “[s]uch legislation *shall* be voted upon, without amendment.”

N.Y. Const. art. III, § 4(b) (emphases added); *see also* N.Y. Legis. Law § 93(1).

189. Only then, after having considered and rejected such a *second* redistricting plan, or, after the Governor vetoes any such second plan after the Legislature approved it, may the Legislature “introduce” its own “implementing legislation” along with “any amendments” that comply with Article III, Section 4. N.Y. Const. art. III, § 4(b); *see also* N.Y. Legis. Law § 93(1).

190. Because the Legislature never received, let alone considered and acted upon, a second redistricting plan from the Commission, it never obtained redistricting authority under the *exclusive* process established by the New York Constitution for introducing redistricting maps.

191. After the Legislature rejected both of the first-round maps introduced by the IRC out of hand, the Commission did not adopt and introduce second-round maps to the Legislature within 15 days, leaving the Legislature with no maps to act on within the scope of its limited constitutional role.

192. As a result, the Legislature did not consider a second map or maps from the IRC, which mandatory consideration was required before the Legislature was constitutionally permitted to adopt its own congressional map. N.Y. Const. art. III, § 4(b).

193. The 2021 legislation enacted by the Legislature and Governor purporting to give the Legislature authority to circumvent the Constitution, to adopt its own maps if the Commission failed to vote on second-round maps, L.2021, c. 633, § 1, is unconstitutional. There is no provision of law that allows the Legislature to sidestep the Constitution’s exclusive process for redistricting in New York via legislative enactment.

194. The Legislature enacted L.2021, c. 633, § 7150 in an effort to avoid the effect of the People voting down a constitutional amendment to provide for what L.2021, c. 633, § 7150(1) purports to do. But, of course, a constitutional amendment is necessary to make the changes to New York’s exclusive, constitutionally enshrined redistricting process

195. The Legislature cannot act contrary to the Constitution’s restrictions on the respective duties and responsibilities allocated to it and other entities responsible for redistricting. Because the Legislature acted contrary to the Constitution when it enacted L.2021, c. 633, § 7150, the 2022 congressional map is invalid.

196. Since the Legislature had and has no constitutional authority to draw congressional districts given the IRC’s failure to follow the exclusive, constitutionally mandated procedures, this Court cannot give the Legislature another opportunity to draw curative districts.

197. Thus, this Court should draw its own map for Congress prior to the upcoming deadlines for candidates to gain access to the ballot, just as happened after the 2010 census.

SECOND CAUSE OF ACTION

(N.Y. Const. art. III, § 4(c)(2); N.Y. Legis. Law § 93(2)(b) – Unconstitutional Malapportionment)

198. Petitioners hereby incorporate each of the foregoing paragraphs as if fully set forth herein.

199. Article III, Section 4(c)(2) provides that “[t]o the extent practicable, districts shall contain as nearly as may be an equal number of inhabitants,” and that “[f]or each district that deviates from this requirement,” the entity responsible for drawing the map “shall provide a specific public explanation as to why such deviation exists.” N.Y. Const. art. III, § 4(c)(2).

200. This constitutional requirement establishes a population-equality standard for congressional districts, absent a “specific” and “public” explanation from the mapdrawer as to why any deviation is necessary. N.Y. Const. art. III, § 4(c)(2).

201. Therefore, following any decennial census, all congressional districts must abide by this equal-population requirement.

202. As explained above, the congressional map enacted by the Legislature following the 2020 decennial census is ultra vires because the Legislature ignored entirely the mandatory, *exclusive* process established by the 2014 constitutional amendments for enacting any such redistricting, as well as applicable substantive requirements for any Legislature-created map. *See supra* First Cause Of Action.

203. That is, the Legislature enacted its congressional map without abiding by the constitutional and statutory requirement that the IRC present a second round of maps following the Legislature’s decision not to approve the first round of maps. N.Y. Const. art. III, § 4(b). Indeed, the Constitution *requires* that the Legislature “vote[] upon” the “second redistricting plan and the necessary implementing legislation” before it may introduce its own plan, and yet the Legislature never complied with these rules. *Id.*; *see also supra* First Cause Of Action.

204. These violations render the 2022 congressional map invalid, leaving only the vestigial map that the court adopted after the 2010 decennial census in place.

205. But the map that the federal court adopted in the wake of the 2010 census is plainly unconstitutional *today*, following the 2020 census, given New York’s inarguable population shifts, because it does not meet the equal-population requirement of the New York Constitution.

206. That is, following the 2022 Census, none of those congressional districts “[t]o the extent practicable” “contain as nearly as may be an equal number of inhabitants.” N.Y. Const. art. III, § 4(c)(2); N.Y. Legis. Law § 93(2)(b).

207. Thus, this Court must now also declare that the court-adopted congressional map—the only validly-adopted map in existence, *supra* First Cause Of Action—is invalid, and adopt a replacement, constitutional congressional map.

THIRD CAUSE OF ACTION

(N.Y. Const. art. III, § 4(c)(5); N.Y. Legis. Law § 93(2)(e) – Unlawful/Unconstitutional Partisan And Incumbent-Protection Gerrymandering)

208. Petitioners hereby incorporate each of the foregoing paragraphs as if fully set forth herein.

209. Article III, Section 4(c)(5) of the New York Constitution provides that “in the creation of . . . congressional districts . . . [d]istricts shall not be to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.” N.Y. Const. art. III, § 4(c)(5).

210. New York Legislative Law § 93(2)(e) provides that, “in the creation of . . . congressional districts . . . [d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.” N.Y. Legis. Law § 93(2)(e).

211. New York Legislative Law § 93(4) also provides that “any law establishing congressional . . . districts found to violate the provisions of this article shall be invalid in whole or in part.” N.Y. Legis. Law § 93(4).

212. The 2022 congressional map violates the clear prohibitions against partisan and incumbent-favoring/disfavoring gerrymandering found in Article II, Section 4(c)(5) of the New York Constitution and New York Legislative Law § 93(2)(e).

213. The Legislature drew the 2022 congressional map “to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties,” N.Y. Const. art. III, § 4(c)(5), as discussed in detail above, *supra* ¶¶ 102–68.

214. Governor Hochul, who signed the congressional map into law, previously acknowledged that it was her intention “to use [her] influence to help Democrats” by way of “the redistricting process,” and claimed that she fully “embrace[d] that” role as Governor. Glueck & Ferré-Sadurní, *supra*.

215. For that reason, the enacted congressional map violates both the New York Constitution and New York Legislative Law § 93, requiring this Court to strike it as “invalid.” N.Y. Legis. Law § 93(4).

FOURTH CAUSE OF ACTION

(CPLR § 3001 – Declaratory Judgment)

216. Petitioners hereby incorporate each of the foregoing paragraphs as if fully set forth herein.

217. Petitioners seek a declaratory judgment from the Court “as to the rights and other legal relations of the parties,” CPLR § 3001, regarding the substantive and procedural requirements for redistricting in this State.

218. It is imperative that the New York Courts properly construe the recent amendments to Article 3, Section 4 of the New York Constitution and New York Legislative Laws § 93.

219. The 2014 amendments to the New York Constitution prohibit the Legislature and Governor from reapportioning seats for Congress in a manner that

- a. disregards the exclusive procedures for redistricting, including the requirement that the IRC submit two rounds of maps for the Legislature's consideration before the Legislature may undertake the redistricting function itself;
- b. creates districts that fail to contain as nearly as possible an equal number of inhabitants, requiring, as practicable, no deviation from perfect population equality;
- c. creates a partisan gerrymander with the intent to favor of any political party; and
- d. creates an incumbent-protection or incumbent-disfavoring gerrymander with the intent of aiding or hurting any incumbent.

Each of these violations, alone and in tandem, requires the Court to invalidate the congressional map.

220. Respondents' actions in violating each of these constitutional requirements come from a determined effort to advance the interests of the Democratic Party by entrenching incumbent Democrats and targeting incumbent Republicans, in direct contravention of the will of the citizens of the State of New York, who voted in favor of ridding such partisan interests from the redistricting process.

221. Further, the 2021 legislation, L.2021, c. 633, § 7150, enacted by the Legislature and Governor in an attempt to give the Legislature authority to circumvent the Constitution and

adopt this unlawful map, is unconstitutional. The Legislature cannot contravene the Constitution's exclusive process for redistricting in New York through legislative enactment.

222. Each of these constitutional violations has harmed Petitioners, who are now subject to a gerrymandered and highly partisan map for their representatives in Congress.

223. This issue is ripe for judicial review.

224. Absent resolution of these constitutional questions, neither Respondents nor the citizens of New York will have adequate guidance regarding the propriety of the enacted map and the prior court-drawn map, in preparation for impending elections.

225. If each of these fundamental issues regarding the redistricting processes in New York is not resolved in short order, it will be too late to do so without threatening the integrity of upcoming elections.

226. Therefore, this Court should enter judgment declaring that the 2022 enacted congressional map violates the New York Constitution, declare that the 2012 congressional map now violates the New York Constitution in light of the population shifts identified in the 2020 Census, strike down the 2021 legislation, L.2021, c. 633, § 7150, as unconstitutional, and itself draw a new congressional map cured of all legal infirmities.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully demand that this Court review the constitutionality of the congressional apportionment and enter judgment and order against Respondents as follows:

A. Declaring pursuant to CPLR § 3001 that:

i) the 2022 congressional map constitutes an unconstitutional map enacted without complying with the mandatory constitutional procedures for redistricting in Article III, Section 4(b) of the New York Constitution;

ii) the prior congressional map, court-adopted after the 2010 decennial census, is the only validly enacted map currently in existence, but is now unconstitutionally malapportioned, failing to comply with the mandatory constitutional requirements that each district contain an equal number of inhabitants, found in Article III, Section 4(c)(2) of the New York Constitution;

iii) the 2022 congressional map, apart and aside from procedural deficiencies, constitutes an unconstitutional partisan and incumbency-favoring/disfavoring gerrymander, in violation of Article III, Section 4(c)(5) of the New York Constitution and New York Legislative Law § 93(2)(e); and

iv) the 2012 congressional districts are unconstitutional in light of the population shifts identified in the 2020 census;

B. Enjoining Respondents from conducting any elections under the post-2010 congressional map;

C. Enjoining Respondents from conducting any elections under the 2022 congressional map;

D. Adopting a new, legally compliant congressional map;

E. Alternatively, and only if the Court does not agree with Petitioners' procedural claim, ordering the Legislature to attempt to cure the legal and constitutional infirmities in 2022 congressional map and adopt a lawful congressional map;

F. Suspending or enjoin the operation of any other state laws that would undermine this Court's ability to offer effective and complete relief to Petitioners for the November 2022 elections and related primaries.

G. Awarding Petitioners all of their reasonable attorneys' fees and costs; and

H. Awarding such other and further relief as this Court may deem just and proper.

Dated: New York, New York

February 3, 2022

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**Exhibit C to Salcedo Affirmation-
New York State's Political Calendar, as of February 3, 2022
[pp. 336 - 337]**

FILED: NEW YORK COUNTY CLERK 0303220022071307PM
 NYSEOF BOE. 46
 40 NORTH PEARL STREET - SUITE 5,
 ALBANY, NEW YORK 12207 (518) 474-6220
 For TDD/TTY, call the NYS Relay 711
www.elections.ny.gov

PRIMARY ELECTION DATES	
June 28	Primary Election §8-100(1)(a)
June 18 – 26	Days of Early Voting for the Primary Election. §8-600(1)
Feb 1	Certification of offices to be filed at 2022 General Election by SBOE and CBOE. §4-106 (1&2)
Feb 15	PARTY CALLS: Last day for State & County party chairs to file a statement of party positions to be filed at the Primary Election. §2-120(1)

Primary Election
June 28, 2022

General Election
November 8, 2022

***** Please be aware that since this is a re-districting year this calendar is subject to change by the Legislature and should be used advisedly. *****

FILING REQUIREMENTS: All certificates and petitions of designation or nomination, certificates of acceptance or declination of such designations or nominations, certificates of authorization for such designations or nominations, certificates of disqualification, certificates of substitution for such designations or nominations and objections and specifications of objections to such certificates and petitions required to be filed with the State Board of Elections or a board of elections outside of the city of New York shall be deemed timely filed and accepted for filing if sent by mail or overnight delivery service, in an envelope postmarked or showing receipt by the overnight delivery service prior to midnight of the last day of filing, and received no later than two business days after the last day to file such certificates, petitions, objections or specifications. Failure of the post office or authorized overnight delivery service to deliver any such petition, certificate, or objection to such board of elections outside the city of New York no later than two business days after the last day to file such certificates, petitions, objections, or specifications shall be a fatal defect per NY Election Law §1-106.

All papers required to be filed, unless otherwise provided, shall be filed between the hours of 9 AM – 5 PM. If the last day for filing shall fall on a Saturday, Sunday or legal holiday, the next business day shall become the last day for filing. NYEL §1-106

Within NYC: all such certificates, petitions and specifications of objections required to be filed with the board of elections of the city of New York must be actually received on or before the last day to file. The New York City Board of Elections is open for the receipt of such petitions, certificates and objections until midnight on the last day to file.

DESIGNATING PETITIONS FOR PRIMARY	
Mar 1	First day for signing designating petitions. §6-134(4)
Apr 4-7	Dates for filing designating petitions. §6-158(1)
Apr 11	Last day to authorize designations. §6-120(3)
Apr 11	Last day to accept or decline designations. §6-158(2)
Apr 15	Last day to fill a vacancy after a declination. §6-158(3)
Apr 19	Last day to file authorization of substitution after declination of a designation. §6-120(3)

PARTY NOMINATION OTHER THAN PRIMARY	
Feb 8 – Mar 1	Dates for holding state committee meeting to nominate candidates for statewide office. §6-104(6)
Mar 1	First day to hold a town caucus. §6-108
July 8	Last day to decline all party nominations after primary loss. §6-146(6)
July 12	Last day to fill vacancy after declination by primary loser. §6-158(3)
July 18	Last day to file authorization of substitution after declination by primary loser. §6-120(3)
July 28	Last day for filing nominations made at a town or village caucus or by a party committee. §6-158(6)
July 28	Last day to file certificates of nomination to fill vacancies created pursuant to §6-116, §6-104 & §6-158(6)
Aug 1	Last day to accept or decline a nomination for office made based on §6-116 & §6-158(7)
Aug 1	Last day to file authorization of nomination made based on §6-116. §6-120(3)
Aug 5	Last day to fill a vacancy after a declination made based on §6-116. §6-158(8)

INDEPENDENT PETITIONS	
April 19	First day for signing nominating petitions. §6-138(4)
May 24-31	Dates for filing independent nominating petitions. §6-158(9)
June 3	Last day to accept or decline a nomination. §6-158(11)
June 6	Last day to fill vacancy after a declination. §6-158(12)
July 1	Last day to decline after acceptance if nominee loses party primary. §6-158(11)

CERTIFICATION OF PRIMARY	
May 4	Certification of primary ballot by SBOE of designations filed in its office. §4-110
May 5	Certification of primary ballot by CBOE of designations filed in its office. §4-114

CANVASS OF PRIMARY RESULTS	
July 11	Canvass of Primary returns by County Board of Elections. §9-200(1)
July 11	Verifiable Audit of Voting Systems. §9-211(1)
July 18	Recanvass of Primary returns. §9-208(1)

GENERAL ELECTION DATES	
Nov 8	General Election. §8-100(1)(c)
Oct 29 – Nov 6	Days of Early Voting for the General Election. §8-600(1)

CERTIFICATION OF GENERAL ELECTION BALLOT	
Sept 14	Certification of general election ballot by SBOE of nominations filed in its office. §4-112(1)
Sept 15	Certification of general election ballot by CBOE of nominations and questions; CBOEs. §4-114

CANVASS OF GENERAL ELECTION RESULTS	
Nov 23	Recanvass of General Election returns to occur no later than Nov. 23. §9-208(1)
Nov 23	Verifiable Audit of Voting Systems to occur no later than Nov. 23. §9-211(1)
Dec 2	Certification and transmission of Canvass of General Election returns by County Board of Elections. §9-214(1)
Dec 15	Last day for State Board of Canvassers meet to certify General Election. §9-216(2)

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OPPORTUNITY TO BALLOT PETITIONS

Mar 22	First day for signing OTB petitions. §6-164
April 14	Last day to file OTB petitions. §6-158(4)
April 21	Last day to file an OTB petition if there has been a declination by a designated candidate. §6-158(4)

JUDICIAL DISTRICT CONVENTIONS	
Minutes of a convention must be filed within 72 hours of adjournment. §6-158(6)	
Aug 4 – 10	Dates for holding judicial conventions. §6-158(5)
Aug 11	Last day to file certificates of nominations. §6-158(6)
Aug 15	Last day to decline nomination. §6-158(7)
Aug 19	Last day to fill vacancy after a declination. §6-158(8)

SIGNATURE REQUIREMENTS FOR DESIGNATING AND OPPORTUNITY TO BALLOT PETITIONS §6-136	
5% of the active enrolled voters of the political party in the political unit or the following, whichever is less:	
For an office to be filed by all the voters of:	
The entire state	15,000
(with at least 100 or 5% of enrolled voters from each of one-half of the congressional districts)	
*New York City	7,500
*Any county or borough of NYC	4,000
*A municipal court district within NYC	1,500
*Any city council district within NYC	900
Cities/counties having more than 250,000 inhabitants	2,000
Cities/counties having more than 25,000 but not more than 250,000 inhabitants	1,000
Any city, county, councilmanic or county legislative districts in any city other than NYC	500
Any congressional district	1,250
Any state senatorial district	1,000
Any assembly district	500
Any county legislative district	500
any political subdivision contained within another political subdivision, except as herein provided, requirement is not to exceed the number required for the larger subdivision; a political subdivision containing more than one assembly district, county or other political subdivision, requirement is not to exceed the aggregate of the signatures required for the subdivision or parts of subdivision so contained.	
*NOTE: Section 1057-b of the New York City Charter supersedes New York Election Law signature requirements for Designating and OTB petitions and independent nominating petitions with respect to certain NY city offices.	

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NYSCEF DOC# 188 REQUIREMENTS FOR INDEPENDENT NOMINATING PETITIONS §6-142

1% of the total number of votes excluding blank and void cast for the office of governor at the last gubernatorial election in the political unit for any office to be voted for by all the voters of the entire state.45,000 (with at least 500 or 1% of enrolled voters from each of one-half of the congressional districts)

5% of the total number of votes excluding blank and void cast for the office of governor at the last gubernatorial election in the political unit except that not more than 3,500 signatures shall be required on a petition for an office to be filled in any political subdivision outside the City of New York, and not more than the following for any office to be voted for by all the voters of:

*New York City1,500
*Any county or borough or any two counties or boroughs within New York City4,000
Any municipal court district3,000
*Any city council district within NYC2,700
Any congressional district3,500
Any state senatorial district3,000
Any assembly district1,500

Any political subdivision contained within another political subdivision, except as herein provided, requirement is not to exceed the number for the larger subdivision.

*NOTE: Section 1057-b of the New York City Charter supersedes New York Election Law signature requirements for Designating and OTB petitions and Independent nominating petitions with respect to certain NY City offices.

VOTER REGISTRATION FOR PRIMARY	
Feb 21	List of Registered Voters: Such lists shall be published before the twenty-first day of February. § 5-604
June 3	Mail Registration for Primary: Last day to postmark application for primary; last day it must be received by board of elections is June 8. §5-210(3)
June 3	In person registration for Primary: Last day application must be received by board of elections to be eligible to vote in primary election. §§5-210, 5-211, 5-212
June 8	Changes of address for Primary received by this date must be processed. §5-208(3)

CHANGE OF ENROLLMENT	
Feb 14	A change of enrollment rec'd by the BOE not later than Feb. 14 th or after July 5 th is effective immediately. Any change of enrollment made between Feb 15-July 5 th , shall be effective July 5 th . §5-304(3)

VOTER REGISTRATION FOR GENERAL	
Oct 14	Mail Registration for General: Last day to postmark application for general election; it must also be received by board of elections by Oct 19. §5-210(3)
Oct 14	In person registration for General: Last day application must be received by board of elections to be eligible to vote in general election. If honorably discharged from the military or have become a naturalized citizen after October 14 th , you may register in person at the county board of elections office up until October 29 th . §§5-210, 5-211, 5-212
Oct 19	Changes of address for General received by this date must be processed. §5-208(3)

ABSENTEE VOTING FOR PRIMARY	
June 13	Last day to postmark, email or fax application or letter for primary ballot. §8-400(2)(c).
June 27	Last day to apply in person for primary ballot. §8-400(2)(c)
June 28	Last day to postmark primary election ballot. Must be received by the county board no later than July 5 th . §8-412(1)
June 28	Last day to deliver primary ballot in person to your county board or your poll site, by close of polls. §8-412(1)

MILITARY/SPECIAL FEDERAL VOTERS FOR PRIMARY	
May 13	Deadline to transmit ballots to eligible Military/Special Federal/UOCAVA Voters. §10-108(1) & §11-204(4)
June 3	Last day for a board of elections to receive application for Military/Special Federal/UOCAVA absentee ballot for primary if not previously registered. §10-106(5) & §11-202(1)(a)
June 21	Last day for a board of elections to receive application for Military/Special Federal/UOCAVA absentee ballot for primary if already registered. §10-106(5) & §11-202(1)(b)
June 27	Last day to apply personally for Military ballot for primary if previously registered. §10-106(5)
June 28	Last day to postmark Military/Special Federal/UOCAVA ballot for primary. Date by which it must be received by the board of elections is July 5 th . §10-114(1) & §11-212

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CAMPAIGN FINANCIAL DISCLOSURE	
PRIMARY ELECTION §14-108(1)	
32 Day Pre-Primary	May 27
11 Day Pre-Primary	June 17
10 Day Post-Primary	July 15
24 Hour Notice §14-108(2)	9 NYCRR 6200.2(a) June 14 through June 27

GENERAL ELECTION §14-108(1)	
32 Day Pre-General	October 7
11 Day Pre-General	October 28
27 Day Post-General	December 5
24 Hour Notice §14-108(2)	October 25 through November 7

Periodic Reports §14-108(1)	
January 18 th	
July 15 th	

Additional Independent Expenditure Reporting	
24 Hour Notice §14-107(4) (a) (ii); (b)	Primary: May 29 through June 27 General: October 9 through November 7
Weekly Notice	Refer to §14-107(4)(a)(i); (b)

CONTRIBUTION LIMITS FOR LOCAL OFFICES	
Apr 15	Last day to calculate and post local limits to CBOE website and send to SBOE. §14-114(11)

Designation of Polling Places	
March 15	Last day to designate polling places for each election district for ensuing year §4-104
May 1	Last day to designate early voting sites for the general election. 9 NYCRR 6211.1(a)
May 1	Last day to file early voting Communication Plan with SBOE. 9 NYCRR 6211.7(c)
May 13	Last day to designate early voting sites for primaries and special elections. 9 NYCRR 6211.1(a)

Revised: January 12, 2022

**** Please be aware that since this is a re-districting year this calendar is subject to change by the Legislature and should be used advisedly. ****

**Exhibit D to Salcedo Affirmation-
Amended Petition, in Harkenrider I., dated February 8, 2022
[pp. 338 - 420]**

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NYSCEF DOC. NO. 38

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

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TIM HARKENRIDER, GUY C. BROUGHT,
LAWRENCE CANNING, PATRICIA CLARINO,
GEORGE DOOHER, JR., STEPHEN EVANS, LINDA
FANTON, JERRY FISHMAN, JAY FRANTZ,
LAWRENCE GARVEY, ALAN NEPHEW, SUSAN
ROWLEY, JOSEPHINE THOMAS, and MARIANNE
VOLANTE,

Index No. E2022-0116CV

AMENDED PETITION

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,

Respondents.

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Petitioners Tim Harkenrider, Guy C. Brought, Lawrence Canning, Patricia Clarino, George Dooher, Jr., Stephen Evans, Linda Fanton, Jerry Fishman, Jay Frantz, Lawrence Garvey, Alan Nephew, Susan Rowley, Josephine Thomas, and Marianne Volante, by their counsel, Keyser Maloney & Winner LLP, and Troutman Pepper Hamilton Sanders LLP, for their Petition against Respondents 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 E. Heastie, the New York State Board of Elections, and the New York State Legislative Task Force on Demographic Research and Reapportionment, allege as follows:

PRELIMINARY STATEMENT

1. The People of New York in 2014 enshrined in the New York Constitution an exclusive process for enacting replacement congressional and state legislative districts, while also prohibiting partisan and incumbent-protection gerrymandering. Yet, in the very first redistricting cycle after these landmark constitutional amendments, the Democratic Party politicians who control the New York Legislature and Governor's office violated these constitutional provisions.

2. These politicians brazenly enacted a congressional map ("2022 congressional map") that is undeniably politically gerrymandered in their party's favor. Dave Wasserman, a nonpartisan national elections expert, correctly noted that these politicians' congressional map is "an effective gerrymander," designed so that Democrats will "gain three seats and eliminate four Republican seats," creating "probably the biggest shift in the country."¹ The non-partisan election analysis website FiveThirtyEight similarly explained that the map is so "skewed toward Democrats" and "egregious" as to "represent[] a failure for [New York's] new redistricting process."² And even a top attorney for the famously left-leaning Brennan Center for Justice opined that the congressional map "isn't good for democracy," because it is "a master class in gerrymandering, . . . tak[ing] out a number of Republican incumbents very strategically."³ Indeed,

¹ Grace Ashford & Nicholas Fandos, *N.Y. Democrats Could Gain 3 House Seats Under Proposed District Lines*, N.Y. Times (Jan. 30, 2022), available at <https://www.nytimes.com/2022/01/30/nyregion/new-york-redistricting-congressional-map.html> (all websites last visited on Feb. 8, 2022).

² Nathaniel Rakich, *New York's Proposed Congressional Map Is Heavily Biased Toward Democrats. Will It Pass?*, FiveThirtyEight (Jan. 31, 2022), available at <https://fivethirtyeight.com/features/new-yorks-proposed-congressional-map-is-heavily-biased-toward-democrats-will-it-pass/>.

³ Nick Reisman, *How the Proposed Congressional Lines Could Alter New York's Politics*, Spectrum News 1 (Feb. 1 2022), available at <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2022/02/01/how-the-proposed-congressional-lines-could-alter-ny-s-politics>.

the congressional map is so obviously biased that it favors Democratic partisan interests more than *any* of 5,000 computer-generated maps drawn without partisan considerations.

3. While the 2022 congressional map received the great bulk of media attention, the Legislature's new state Senate map ("2022 state Senate map") is likewise politically gerrymandered to favor the Democratic Party and Democratic Party incumbent politicians. Yet again, when the Legislature's state Senate map was compared to any of 5,000 computer-generated maps designed to create state Senate districts consistent with New York law but without partisan considerations, it is the most favorable to the Democratic Party.

4. In 2014, the People of New York amended Sections 4 and 5 of Article III of the New York Constitution, establishing an *exclusive* process for redistricting that, both as a matter of procedure and substance, prohibits partisan and incumbent-protection gerrymandering. Through the creation of the New York Independent Redistricting Commission ("IRC" or "the Commission"), the requirements for multiple public hearings to receive public comment on proposed maps, and limiting the New York State Legislature's ("Legislature") authority to an up-or-down vote on IRC-proposed maps, these amendments designed a process to preclude gerrymandering. Indeed, these amendments explicitly prohibit drawing maps "for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." N.Y. Const. art. III, § 4(c)(5). Thus, the amendments bar the sorts of gamesmanship and self-interested gerrymandering that have plagued the redistricting process in this State for years.

5. The State of New York even bragged about these reforms to its redistricting process before the U.S. Supreme Court, claiming that Article III, Section 4(c)(5) was powerful evidence

that States could fight partisan gerrymandering by barring the drawing of district lines for the purpose of favoring or disfavoring a political party.⁴

6. The Democrat-controlled Legislature attempted, but failed, to gut these reforms in 2021 through a proposed constitutional amendment. That amendment would have allowed the Legislature to assume vast redistricting authority if the Commission failed to vote on redistricting plans for the Legislature’s consideration.

7. But the People decisively voted this measure down in 2021, reconfirming the IRC’s exclusive redistricting process under New York law.

8. Undeterred, the Democrats who control the Legislature and Governor Kathy Hochul have egregiously violated both the procedural and substantive protections in the New York Constitution to seek precisely the type of advantage for their party that the People outlawed in 2014 and reaffirmed in 2021. Governor Hochul thus lived up to her promise to “use [her] influence to help Democrats expand the House majority through the redistricting process,” and help the Democratic Party “regain its position that it once had when [she] was growing up.”⁵

9. This Court should invalidate both the unconstitutional 2022 congressional map and unconstitutional 2022 state Senate map on two separate and independent bases.

10. First, the Legislature had no authority to enact the new maps because the Legislature did not follow the *exclusive* process for enacting replacement maps that the People enshrined through the 2014 amendments, meaning that the Senate map and congressional map are

⁴ Amicus Br. for States of N.Y., et al. at 18, *Rucho v. Common Cause*, 558 U.S. ____ (2019) (No. 18-422).

⁵ Katie Glueck & Luis Ferré-Sadurní, *Interview with Kathy Hochul: “I Feel a Heavy Weight of Responsibility”*, N.Y. Times (Aug. 25, 2021), available at <https://www.nytimes.com/2021/08/25/nyregion/kathy-hochul-interview.html>.

entirely void.⁶ Accordingly, the only validly enacted or adopted maps are those that the Legislature and courts adopted for New York after the 2010 decennial census. But the prior congressional map (“2012 congressional map”) is now unconstitutionally malapportioned after the 2020 census and does not have the correct number of seats. And the prior state Senate map (“2012 state Senate map”) is similarly malapportioned, given changes in New York’s population. This Court should expeditiously adopt new maps—prior to the impending deadlines for candidates to access the ballot—to cure the malapportionment now affecting the 2012 congressional and state Senate maps.⁷

11. Second, if this Court holds that the Legislature somehow had the authority to adopt replacement maps notwithstanding these procedural failures, this Court should reject the new 2022 congressional map and 2022 state Senate map as a matter of substance, as those maps are obviously unconstitutional partisan and incumbent-protection gerrymanders. If this Court takes this approach, it should invalidate the 2022 congressional map and 2022 state Senate map and then send them back to the Legislature to create new maps that comply with the law.

THE PARTIES

12. Petitioner Tim Harkenrider is an elector of the state of New York, residing at 22 Spruce Street, Canisteo, NY 14823, in Steuben County, within Congressional District 23 and state Senate District 59.

⁶ To be sure, this same procedural basis for invalidation applies equally to the state Assembly map. However, the Petitioners do not challenge that map in this lawsuit. Of course, any other elector, N.Y. Const. art. III, § 5; Unconsolidated Laws § 4221, can challenge the Assembly map if that elector chooses.

⁷ Although this failure applies equally to the state Assembly map enacted by the Legislature, Petitioners do not challenge that map or ask for its invalidation. Therefore, the Court need not consider any procedural failures related to enactment of the 2022 state Assembly map.

13. Petitioner Guy C. Brought is an elector of the state of New York, residing at 170 Horton Lane, Apt. 462, Port Ewen, NY 12466, in Ulster County, within Congressional District 19 and state Senate District 48.

14. Petitioner Lawrence Canning is an elector of the state of New York, residing at 2843 Johnny Cake Hill Road, Hamilton, NY 13346, in Madison County, within Congressional District 19 and state Senate District 55.

15. Petitioner Patricia Clarino is an elector of the state of New York, residing at 274 Garden Street, New Windsor, NY 12553, in Orange County, within Congressional District 18 and state Senate District 41.

16. Petitioner George Dooher, Jr. is an elector of the state of New York, residing at 209 Dixon Dr., Syracuse, New York 13219, in Onondaga County, within Congressional District 22 and state Senate District 52.

17. Petitioner Stephen Evans is an elector of the state of New York, residing at 440 West 41st Street, Apt. 4G, New York, NY 10036, in New York County, within Congressional District 10 and state Senate District 30.

18. Petitioner Linda Fanton is an elector of the state of New York, residing at 2347 Fulmer Valley Road, Wellsville, NY 14895, in Allegany County, within Congressional District 23 and state Senate District 58.

19. Petitioner Jerry Fishman is an elector of the state of New York, residing at 8200 Narrows Avenue, Brooklyn, NY 11209, in Kings County, within Congressional District 11 and state Senate District 22.

20. Petitioner Jay Frantz is an elector of the state of New York, residing at 39 Orchard Place, Gowanda, NY 14070, in Cattaraugus County, within Congressional District 23 and state Senate District 58.

21. Petitioner Lawrence Garvey is an elector of the state of New York, residing at 2 Hillman Road, New City, NY 10956, in Rockland County, within Congressional District 17 and state Senate District 40.

22. Petitioner Alan Nephew is an elector of the state of New York, residing at 28 Aldrich Street, Gowanda, NY 14070, in Cattaraugus County, within Congressional District 23 and state Senate District 58.

23. Petitioner Susan Rowley is an elector of the state of New York, residing at 876 Ford Peterson Road, Frewsburg, NY 14738, in Chautauqua County, within Congressional District 23 and state Senate District 58.

24. Petitioner Josephine Thomas is an elector of the state of New York, residing at 322 Wynthrop Road, Syracuse, NY 13209, in Onondaga County, within Congressional District 22 and state Senate District 52.

25. Petitioner Marianne Volante is an elector of the state of New York, residing at 170 Loder Road, Yorktown Heights, NY 10598, in Westchester County, within Congressional District 16 and state Senate District 42.

26. Respondent Kathy Hochul is the Governor of the State of New York. She is being sued in her official capacity.

27. Respondent Brian A. Benjamin is the Lieutenant Governor of the State of New York and President of the New York State Senate. He is being sued in his official capacity.

28. Respondent Andrea Stewart-Cousins is the New York State Senate Majority Leader and President *Pro Tempore* of the New York State Senate, representing the 35th Senate District. Majority Leader Stewart-Cousins has offices in Albany and at 28 Wells Avenue, Building #3, 5th Floor, Yonkers, NY 10701. She is being sued in her official capacity.

29. Respondent Carl E. Heastie is the Speaker of the New York State Assembly, representing the 83rd Assembly District. Speaker Heastie has offices in Albany and at 1446 East Gun Hill Road, Bronx, NY 10469. He is being sued in his official capacity.

30. Respondent New York State Board of Elections was established on June 1, 1974, as an Executive Department agency vested with the authority and responsibility for administration and enforcement of the laws relating to election in the State of New York. It has its principal place of business at 40 North Pearl Street, Suite 5, Albany, NY 12207.

31. Respondent New York State Legislative Task Force on Demographic Research and Reapportionment (“LATFOR”) was established by the Legislature in 1978 pursuant to New York Legislative Law § 83-m, with the principal responsibility—at least before the 2014 constitutional amendments to Article III, Section 4—of preparing and formulating reapportionment plans to the Legislature following each decennial census. LATFOR’s principal place of business is located at 250 Broadway, Suite 2100, New York, NY 10007.

JURISDICTION AND VENUE

32. This Court has jurisdiction over this lawsuit pursuant to Article III, Section 5 of the New York Constitution, CPLR § 3001, and Unconsolidated Laws § 4221, the latter of which grants authority to the “supreme court” to “review” any “petition of any citizen” challenging “[a]n apportionment by the legislature.”

33. Venue is proper in this County under Article III, Section 5 of the New York Constitution, CPLR § 503(a), and Unconsolidated Laws § 4221, the latter of which authorizes the filing of a petition challenging “[a]n apportionment by the legislature” in “the supreme court where any such petitioner resides.”

FACTUAL BACKGROUND

A. Redistricting in New York

34. Following each federal decennial census, the New York Constitution requires the State of New York to redraw its state Senate, state Assembly, and congressional districts to adjust for population changes. The process of redrawing these district lines is known as redistricting.

35. New York congressional and state Senate districts must be redrawn so that each district is contiguous; contains, to the extent possible, an equal number of inhabitants; and is in as compact a form as possible, as required by Article III, Sections 4 and 5 of the New York State Constitution.

36. Redistricting is an extremely time-sensitive requirement, including because candidates must know what their districts are in advance of an election, in order to meet state-ballot-access requirements. Multiple petition and signature-related deadlines are looming for New York congressional candidates. *See generally* N.Y. Election Law § 6-100, *et seq.*

i. The Redistricting Process Before 2014

37. Before 2014, the Legislature maintained primary responsibility for redistricting.

38. To aid the Legislature in its task, LATFOR would prepare proposed redistricting maps for the Legislature’s vote.

39. Established in 1978, LATFOR is a partisan body that has consistently produced partisan maps. It consists of six members, including four legislators and two non-legislators. The Temporary President of the Senate appoints one legislator and one non-legislator. The Speaker of the Assembly also appoints one legislator and one non-legislator. The Minority Leader of the Assembly appoints one legislator, and the Minority Leader of the Senate appoints one legislator.

40. Under the LATFOR system, “legislators w[ould never] give up their right to draw district lines.” David Freedlander, *Backgrounder: How Redistricting Will Reshape New York’s Battle Lines*, Observer (Dec. 27, 2010).⁸ Indeed, legislators could effectively control redistricting under the LATFOR process in a partisan manner, by controlling “who winds up on [LATFOR]—those who make it are likely to be the favorites of [incumbent legislative leaders] and are likely to get exactly the districts that they want.” *Id.*

41. Over time, the Legislature manipulated its role in the redistricting process to protect existing incumbents. Under this pre-2014 system, elections were often predestined, with state legislative incumbents winning reelection more than 98% of the time, “usually overwhelmingly.” *Elections With No Meaning*, N.Y. Times (Feb. 21, 2004), at A14.⁹ The “major reason” for this seemingly insurmountable incumbency advantage was gerrymandering, allowing the party in power to draw districts with “surgical precision” to “exclude the homes of rival candidates” and making favorable districts nearly “impregnable.” *Id.* With incumbents facing little chance of

⁸Available at <http://observer.com/2010/12/backgrounder-how-redistricting-will-reshape-new-yorks-battle-lines/>.

⁹ Available at <https://www.nytimes.com/2004/02/21/opinion/elections-with-no-meaning.html>.

defeat under the then-existing process, elections became uncompetitive, and voters became increasingly disillusioned by the reality that they could not choose their representatives.

42. This system granted political parties significant leeway to gerrymander for partisan and incumbent gain. Only the requirement of “one person, one vote,” and requirements that districts “shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the first year of the next decade . . . , and shall at all times consist of contiguous territory,” N.Y. Const. art. III, § 4 (2014), constrained the party leaders responsible for drawing new maps. The New York Constitution required respect for county and city lines, noting that “no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county,” and “[n]o town, except a town having more than a full ratio of apportionment, and no block in a city inclosed by streets or public ways, shall be divided in the formation of senate districts,” as well as the “block on border” and “town on border” requirements. *Id.*; *see also* N.Y. Const. art. III, § 4(c)(6) (current version). But even these “requirements” were largely meaningless constraints. *See Schneider v. Rockefeller*, 31 N.Y.2d 420, 426–27, 293 N.E.2d 67 (1972).

43. Additionally, prior to 2014, some New York Courts interpreted the then-pertinent constitutional provisions as not providing for a claim of partisan gerrymandering. *Bay Ridge Cmty. Council, Inc. v. Carey*, 479 N.Y.S.2d 746, 749, 103 A.D.2d 280 (2d Dep’t 1984) (per curiam), *aff’d* 66 N.Y.2d 657, 486 N.E.2d 830 (1985) (order).

44. Therefore, the pre-2014 system for redistricting and reapportionment gave broad discretion to the politicians in power and *required* only that all state legislative and congressional districts largely abide by the equal-population principle, creating unfair and undemocratic maps that ensconced powerful parties in the seat of government.

ii. The Redistricting Process After the 2014 Reforms

45. In recent years, however, the People of this State explicitly outlawed partisan gerrymandering and constitutionalized an exclusive, nonpartisan redistricting procedure.

46. In 2014, New Yorkers amended Article III, Sections 4 and 5 of the New York Constitution, and added a new Section 5-b to the same Article, enacting the following ballot measure:

The Proposed amendment to sections 4 and 5 and addition of new section 5-b to Article 3 of the State Constitution revises the redistricting procedure for state legislative and congressional districts. The proposed amendment establishes a redistricting commission every 10 years beginning in 2020, with two members appointed by each of the four legislative leaders and two members selected by the eight legislative appointees; prohibits legislators and other elected officials from serving as commissioners; establishes principles to be used in creating districts; requires the commission to hold public hearings on proposed redistricting plans; subjects the commission's redistricting plan to legislative enactment; provides that the legislature may only amend the redistricting plan according to the established principles if the commission's plan is rejected twice by the legislature; provides for expedited court review of a challenged redistricting plan; and provides for funding and bipartisan staff to work for the commission. Shall the proposed amendment be approved?

*2014 N.Y. State Prop. No. 1: An Amendment Revising State's Redistricting Procedure.*¹⁰

47. Proposition 1 amended the New York Constitution to vest primary redistricting responsibility in the newly created IRC and established numerous procedural safeguards against the Legislature's continued gerrymandering practices.

48. One such procedural safeguard is the IRC's 10-member composition. Two Commissioners are appointed by the New York State Senate Majority Leader and Temporary President, two are appointed by the New York State Senate Minority Leader, two are appointed

¹⁰ Available at <https://www.elections.eric.gov/Files/Election%20Results/2014/11042014/2014-General.pdf>.

by the Speaker of the New York State Assembly, and two are appointed by the New York State Assembly Minority Leader. The final two members are then selected by these eight appointees and cannot have enrolled as a Democrat or Republican in the past five years. All Commission members must be registered voters in New York.

49. Article III, Section 4 of the New York Constitution requires the IRC to hold public hearings in cities and counties around the State and release draft plans, data, and related information to facilitate public review of proposed district lines. Draft plans must be made available at least thirty days before the first public hearing and no later than September 15 of the year following the census.

50. Article III, Section 5-b(f) and (g) of the New York Constitution governs IRC voting and the procedure for approving and submitting redistricting maps to the Legislature. Five members of the IRC constitute a quorum. IRC approval of a plan requires seven votes, which must include a member appointed by each of the legislative leaders. If no plan gets seven votes, the IRC must submit the plan(s) with the highest vote to the Legislature.

51. Article III, Section 4 of the New York Constitution requires the IRC to submit an initial set of maps and the necessary implementing legislation to the Legislature no later than January 15 of the second year following the census. The Legislature then votes on the maps and implementing legislation without amendment. N.Y. Const. art. III, § 4(b); *see also* N.Y. Legis. Law § 93(1).

52. If the Legislature fails to adopt the first set of maps and implementing legislation or if the Governor vetoes adopted implementing legislation, then the redistricting process reverts back to the IRC. The IRC must submit a second set of maps and implementing legislation to the

Legislature, subject to the requirements outlined above, within 15 days of notification of the first rejection and no later than February 28. The Legislature then votes on the second set of proposed maps and implementing legislation without amendment. N.Y. Const. art. III, § 4(b); *see also* N.Y. Legis. Law § 93(1).

53. If (and only if) the Legislature fails to adopt the IRC's second set of maps and implementing legislation, or if the Governor vetoes the second adopted implementing legislation, can the Legislature amend the IRC's proposed redistricting maps and enact its own replacement maps.

54. The 2014 amendments to Article III, Section 4 also changed and added to the *substantive* redistricting requirements. Now, the New York Constitution specifically provides that districts "shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." N.Y. Const. art. III, § 4(c).

55. The Legislature must follow all of the substantive requirements for redistricting applicable to the IRC. That is, any maps and implementing legislation adopted by the Legislature cannot involve partisan gerrymandering or incumbent-favoring gerrymandering, must be compact and contiguous, and must have equal population between districts, in addition to the already-noted procedural requirement that all maps be enacted via a single mandatory process involving the IRC.

56. The Legislature also established an additional guardrail against partisan gerrymandering with Section 3 of the Redistricting Reform Act of 2012. 2012 N.Y. Sess. Laws 17, § 3. Applicable above and apart from New York Legislative Law §§ 93, 94, Section 3 of the Redistricting Reform Act of 2012 provides that "[a]ny amendments by the senate or assembly to a redistricting plan submitted by the independent redistricting commission, shall not affect more

than two percent of the population of any district contained in such plan.” 2012 N.Y. Sess. Laws 17, § 3.

iii. The Legislative Democrats Fail To Derail These Reforms With A Proposed 2021 Constitutional Amendment

57. In 2021, the Legislature referred a constitutional amendment to New York voters that would have gutted the 2014 constitutional reforms in favor of the Legislature over the Commission, but the People decisively voted this measure down.

58. The ballot proposal would have amended the New York Constitution in a number of ways, including section 4(b) of Article III, to provide:

If either house shall fail to approve the legislation implementing the second redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto, or the redistricting commission fails to vote on a redistricting plan and implementing legislation by the required deadline and makes a submission to the legislature pursuant to subdivision (g-1) of section five-b of this article, each house shall introduce such implementing legislation with any amendments each house of the legislature deems necessary.

2021 Statewide Ballot Proposals, New York State Board of Elections (amendment underlined).¹¹

59. The IRC’s exclusive redistricting process, enshrined in Article III, Section 4 of the New York Constitution, can only be altered by a constitutional amendment. Yet, within days of the People’s rejection of the 2021 constitutional amendment, the Legislature referred a bill that purports to achieve largely the same result as the failed amendment to the Governor for her signature. The Governor signed this unconstitutional bill on November 24, 2021.

¹¹ Available at <https://www.elections.ny.gov/2021BallotProposals.html>.

60. This law attempts to avoid the Constitution's limitations by purporting to amend only section 4(c) of the Redistricting Reform Act of 2012, notwithstanding the expressed desires of the People of this State:

If either house shall fail to approve the legislation implementing the second redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto within ten days of such veto, or if the commission does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan and the commission submitted to the legislature pursuant to subdivision (a) of this section all plans in its possession, both completed and in draft form, and the data upon which such plans are based, each house shall introduce such implementing legislation with any amendments each house deems necessary. If approved by both houses, such legislation shall be presented to the governor for action within three days.

L.2021, c. 633, § 1 (amendment underlined).

B. The 2012 Congressional Map and 2012 State Senate Map Are Unconstitutional Under The New York Constitution

61. Following the 2010 Census, the Legislature in 2012 reapportioned New York's state legislative districts, 2011–2012 N.Y. Reg. Sess. Leg. Bills S.6696 and A.9525 (as technically amended by S.6755 and A.9584), but could not agree on new congressional districts. As a result, a panel of three federal judges appointed a federal magistrate judge, Roanne Mann, to propose a new congressional map for New York. On March 19, 2012, the judicial panel imposed its congressional map, which was largely the same as the map issued by Judge Mann. *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012); *see also* Thomas Kaplan, *New Congressional Lines Imposed by Federal Court*, N.Y. Times (Mar. 19, 2012).¹²

¹² Available at <https://www.nytimes.com/2012/03/20/nyregion/judges-impose-new-congressional-map-for-new-york.html>.

62. After the 2010 census, New York had a population goal of 719,298 residents for each of its 27 congressional districts, and 313,242 residents for each of its state Senate districts.

63. In the interim, various population shifts caused state Senate and congressional districts to become unconstitutionally malapportioned.

64. New York's 26 congressional districts now have a population goal of 776,971 residents, whereas the state Senate districts have a population goal of 320,537.

65. The 2012 congressional map does not comply with this new population target or the constitutional requirements for population equality.

66. In other words, none of the districts complies with the "strict standard of population equality applicable to congressional apportionment," which requires "maximum population equality." *Schneider v. Rockefeller*, 31 N.Y.2d 420, 427–28, 293 N.E.2d 67 (1972).

67. None of the prior districts matches exactly (or even within 1,000 residents) the population goal of 776,971 residents.

68. For example, in 2012 Congressional District 23, where Petitioners Tim Harkenrider, Linda Fanton, Jay Frantz, Alan Nephew, and Susan Rowley reside, the current population is 83,462 residents below the population goal (a -10.7% deviation).

69. In 2012 Congressional District 22, where Petitioner Lawrence Canning resides, the current population is 80,361 residents below the population goal (a -10.3% deviation).

70. In 2012 Congressional District 19, where Petitioner Guy C. Brought resides, the current population is 78,298 residents below the population goal (a -10.1% deviation).

71. In 2012 Congressional District 24, where Petitioners George Dooher, Jr. and Josephine Thomas reside, the current population is 59,664 residents below the population goal (a -7.7% deviation).

72. In 2012 Congressional District 10, where Petitioner Stephen Evans resides, the current population is 26,832 residents above the population goal (a 3.5% deviation).

73. Moreover, the 2012 congressional map includes 27 congressional districts, and New York only receives 26 congressional seats after the most recent census, so that map is plainly invalid. U.S. Census Bureau, 2020 Census: Apportionment of the U.S. House of Representatives (April 26, 2021).¹³

74. The 2012 state Senate map is no better. Even allowing for some deviation between state Senate districts as presumptively valid, *Schneider*, 31 N.Y.2d at 428–29, many of the 2012 state Senate districts vary wildly in population without any valid explanation for their continued use.

75. 2012 state Senate District 27—where Petitioner Stephen Evans resides—now has a population 12.2% above the goal.

76. 2012 state Senate District 53—where Petitioner Lawrence Canning resides—now has a population 10.6% below the goal.

77. 2012 state Senate District 57—where Petitioners Linda Fanton, Jay Frantz, Alan Nephew, and Susan Rowley reside—now has a population 13.3% below the goal.

¹³ Available at <https://www.census.gov/library/visualizations/2021/dec/2020-apportionment-map.html>.

78. 2012 state Senate District 58—where Petitioner Tim Harkenrider resides—now has a population 10.1% below the goal.

79. Many more 2012 state Senate districts have similarly large population deviations.

C. The IRC And Legislature Failed To Follow The Constitutional Process For Redistricting To Cure This Malapportionment

i. The Commission's Initial Efforts To Develop Redistricting Maps

80. On April 26, 2021, the U.S. Census Bureau released the population counts from the 2020 Census, showing that New York's resident population increased by more than 4 percent, or 823,147 residents, from 19,378,102 a decade ago to 20,201,249 in 2020. Because of national population shifts, however, New York lost one of its congressional seats in the United States House of Representatives, leaving the State with 26 congressional districts.

81. The 2020 Census data further showed, as previously mentioned, that New York's congressional and state Senate districts are now unconstitutionally malapportioned.

82. Pursuant to the 2014 constitutional amendments, the New York Constitution established an exclusive process for adopting any replacement redistricting maps, granting the IRC and Legislature specifically defined roles.

83. The IRC's current members are David Imamura, serving as Chair, Jack M. Martins, serving as Vice Chair, Eugene Benger, Ross Brady, John Conway III, Dr. Ivelisse Cuevas-Molina, Dr. John Flateau, Elaine Frazier, Charles H. Nesbitt, and Willis H. Stephens, Jr.

84. Consistent with the procedures established by the 2014 amendments, Democratic leaders in the Legislature appointed the "Democratic Caucus" of the Commission, made up of: David Imamura, Eugene Benger, John Flateau, and Elaine Frazier, along with non-party enrollee Ivelisse Cuevas-Molina.

85. Similarly, Republican leaders in the Legislature selected the “Republican Caucus” of the Commission, made up of: Jack Martins, John Conway, Charles Nesbitt, and Willis Stephens, joined by Conservative Party member Ross Brady.

86. From the outset, Democratic legislative leaders attempted to hamstring the new Commission with multiple challenges and delays.

87. The Democrats attempted to impede the Commission by delaying its receipt of state funding from the Legislature. Despite a \$1 million allocation in the 2020 state budget, the funding never materialized, forcing Commission staff to work on a voluntary basis for months. After more than a year, the Legislature finally allocated \$4 million to the Commission’s redistricting efforts in April 2021. Ethan Geringer-Sameth, *New York Redistricting Commission Kicks Off State’s New Map-Drawing Process*, Gotham Gazette (July 20, 2021);¹⁴ Sarah Darmanjian, *NY’s Independent Redistricting Commission Clinches \$4M Budget*, News10 (Apr. 12, 2021).¹⁵

88. Finally, beginning on June 20, 2021, the IRC held a series of nine public meetings across the State to hear public testimony about the new maps and the redistricting process, as required by the New York Constitution. N.Y. Const. art. III, § 4(c).

89. On September 15, 2021, members of the IRC released initial map drafts, consistent with constitutional requirements. N.Y. Const. art. III, § 4(c).

90. Republican members had hoped to submit a single bipartisan set of draft maps. Speaking to reporters about the two draft plans, Commissioner Martins said the IRC “should end

¹⁴ Available at <https://www.gothamgazette.com/state/10664-new-york-redistricting-commission-set-to-kick-off>.

¹⁵ Available at <https://www.news10.com/news/redistricting-commission/>.

up with the maps being negotiated and presented jointly,” but the Democratic commissioners had not agreed to meet over the weekend before the Commission released the draft maps. *See* Rebecca C. Lewis & Zach Williams, *Takeaways From New York’s (Competing!) Redistricting Draft Maps*, City & State N.Y. (Sept. 15, 2021).¹⁶

91. The Democratic members viewed the competing draft maps differently, with Commissioner Imamura stating that “the fact that we put out two plans does not indicate that the commission will be unable to come to a bipartisan agreement.” *Id.*

92. The IRC held an additional fourteen public hearings across the State, during which residents voiced concerns, desires, and suggestions regarding the draft maps and the redistricting process. The IRC also solicited written comments and draft maps from the public.

93. Democratic members revised their respective maps between the end of November and when the full Commission met to deliberate in December. Testimony of Eugene Banger at 23:44–24:10, Virtual Public Meeting of the NYIRC, Jan. 3, 2022 (“1/3/22 IRC Meeting”).¹⁷

94. The IRC held its last public hearing on December 5, 2021, and the final deadline for public comments and draft maps was December 6, 2021.

95. Following the public comment period, the IRC scheduled meetings to negotiate and finalize a single set of maps to submit to the Legislature. The IRC agreed on a procedure for putting together this set of consensus maps:

¹⁶ Available at <https://www.cityandstateny.com/policy/2021/09/new-yorks-first-draft-2022-redistricting-maps-have-been-released/185374/>.

¹⁷ Available at <https://totalwebcasting.com/view/?func=VOFF&id=nysirc&date=2022-01-03&seq=1>.

- a. First, two third-party redistricting organizations, Redistricting Partners and Redistricting Insight, would prepare a set of maps without IRC input, using the draft maps released by the IRC in September, as well as the public testimony and written comments.
- b. The Commission would then hold a series of meetings, breaking into subgroups, to review the organizations' preliminary maps.
- c. Based on these discussions, the IRC would make changes to the preliminary maps and work to arrive at a single map.

96. All Commission members initially followed their agreed-upon plan and worked together on a set of consensus maps for over two weeks, moving toward a bipartisan consensus.

97. On December 22, 2021, the full Commission met to discuss the bipartisan maps. By this point, only a small number of issues remained open, and the Commission was close to reaching a consensus. After discussing the open issues for two hours, the Commission broke at 1:00 p.m., agreeing to reconvene at 4:00 p.m. to reach an agreement on the remaining issues. Testimony of Jack Martins at 8:44–9:14, 1/3/22 IRC Meeting, *supra*.

98. When the IRC reconvened at 4:00 p.m. on December 22, Commissioner Imamura read a statement announcing that the Democratic Caucus would no longer negotiate the bipartisan maps, as all members previously agreed to do. Instead, the Democratic Caucus was only willing to negotiate on the latest iteration of the maps it had released unexpectedly, and without explanation, the day prior. Testimony of Jack Martins at 9:16–9:49, 1/3/22 IRC Meeting, *supra*.

ii. The IRC Submits Two Sets Of Maps To The Legislature

99. On January 3, 2022, the IRC met to vote on maps to send to the Legislature.

100. The Democratic Caucus again refused to negotiate with the full Commission, discuss the bipartisan maps, or make any concessions. Commissioner Martins expressed his disappointment with the impasse, noting that the Republican members had reached an agreement with Democrats on 90 percent of the new district lines before talks broke down.

101. The Commission then voted on two redistricting plans—the Democratic members’ partisan maps presented on December 21 (“Plan A”) and the consensus maps, which were based on the preliminary maps drawn by independent organizations and negotiated by the full Commission throughout December 2021 (“Plan B”).

102. Both plans received five votes each, resulting in both being delivered to the Legislature on January 3.

103. The Legislature rejected both plans out-of-hand, without consideration of the public’s input, the Commission’s negotiations and reflections on the public’s testimony, bipartisan priorities, and the other considerations New Yorkers enshrined in the Constitution.

104. The Assembly set the plans for a party vote, rejecting them all. Before the final vote, Assemblyman Colin Schmitt asked Assemblyman Kenneth Zebrowski, a Democrat representing the 96th District who sponsored Plan A, whether the Assembly would “follow[] all of the currently prescribed State Law and State constitutional process for redistricting” if the Legislature failed to approve any of the IRC’s plans—including taking public input before enacting new maps. Assemblyman Zebrowski did not give a concrete answer, saying “I don’t—I don’t think that’s germane to—to this debate right now.” Transcript at 12–14, Session, New York State

Assembly (Jan. 10, 2022) (Questioning of Assemblyman Zebrowski by Assemblyman Colin Schmitt).¹⁸

105. In the Senate, Plan A's maps received no votes in favor of enactment. Seventeen senators voted in favor of Plan B's Senate and Assembly districts, with forty-six voting no, while nineteen senators voted to enact Plan B's congressional map, with forty-four voting against. Before voting in favor of Plan B, Senator Andrew Lanza commented on the Commission's lack of real autonomy, saying, "I think it's been the worst-kept secret in Albany, if not the entire country, that this Independent Redistricting Commission was never going to be allowed to remain independent." Transcript at 73:14–17, Regular Session, New York State Senate (Jan. 10, 2022) (Testimony of Senator Andrew Lanza).¹⁹

106. On January 10, the Legislature advised the Commission that it had rejected the submitted plans.

107. Following this rejection, the IRC had until January 25 to submit a revised plan under the 2014 amendments to the Constitution.

108. The full Commission met to discuss a single plan for the final submission to the Legislature, as required by Article III, Section 4(b) of the New York Constitution. The Republican members attempted to restart negotiations on the previously negotiated bipartisan maps. Chairman Imamura stated that the Democratic members wanted to re-submit virtually the same plan that the

¹⁸ Available at <https://www.nyasembly.gov/av/session/>.

¹⁹ Available at <https://legislation.nysenate.gov/pdf/transcripts/2022-01-10T15:51/>.

legislature had rejected. Despite multiple entreaties from the Republican members, the Democratic members refused to meet to discuss bipartisan maps.

109. On January 18, before the IRC's constitutional window for revision expired, Speaker Carl Heastie announced he had appointed Assembly Democrat Kenneth Zebrowski to be the temporary co-chair of LATFOR. Speaker Heastie stated that "the results of reapportionment will determine the path our state and our nation take for the coming decade," and "Assemblymember Zebrowski is the right person for the job." Assembly Speaker Carl E. Heastie, News Release, *Speaker Heastie Announces Assemblymember Zebrowski Appointed Temporary Co-Chair of LATFOR* (Jan. 18, 2022).²⁰

110. On January 24, 2021, Commissioner Imamura announced that the IRC was at an impasse and would not be submitting a second set of redistricting maps to the Legislature at all.

111. On the same day, Commissioner Martins made a statement on behalf on the Republican members on the Commission, outlining the Democratic members' refusal to engage with anything other than their partisan maps and expressing his disappointment that the Commission failed its constitutional mandate.

112. On January 25, 2022, the 15-day window for the IRC to submit revised maps to the Legislature closed without the IRC submitting new maps, as required by the Constitution.

113. Upon information and belief, the Democratic Caucus of the IRC decided not to submit a compromise congressional map within the constitutional timeframes after receiving

²⁰ Available at <https://www.nyasassembly.gov/Press/?sec=story&story=100542>.

encouragement to undermine the constitutional process from Democratic Party politicians and officials.

iii. Notwithstanding The Failure Of The Constitutional Process, The Legislature Nevertheless Attempted To Enact Replacement Congressional And State Senate Maps, And The Maps It Enacted Are An Unconstitutional Partisan And Incumbent-Protection Gerrymanders

114. Despite the failure of the IRC to vote on and present a second set of maps, the Legislature proceeded to craft its own congressional map, turning a blind eye to the mandatory and exclusive constitutional process for redistricting established in Article III, Section 4.

115. In doing so, the Legislature ignored calls from all across the aisle to engage with the public and be more transparent about the choices it was making in drawing district lines. Clifford Michel & Farah Javed, *Albany Democrats Seize Control of Redistricting, With Unclear Role for Public*, The City (Jan. 27, 2022).²¹

116. Instead, Democratic leaders crafted and pushed through legislation to enact their own new congressional map over the course of only a few days, releasing the Legislature's proposed map on Sunday evening, January 30, without a single public hearing. Ashford & Fandos, *supra*.

117. This map bears no resemblance to the two maps proposed by the IRC.

118. To underscore how different the Legislature's map is, and to make adoption of this unrecognizable congressional map possible, the Legislature added a "notwithstanding clause" to

²¹ Available at <https://www.thecity.nyc/2022/1/26/22903787/albany-democrats-seize-control-of-redistricting-with-unclear-role-for-public>.

the enacting legislation, exempting the map from any laws to the contrary, including the 2% rule embodied in 2012 New York Session Laws 17, § 3.

119. The Democratic leaders also crafted and hurriedly pushed through legislation to enact their own state Senate districts, releasing this map two days later, on February 1, 2022. Bill Mahoney, *New State Senate Maps Shift Two Seats from Upstate to NYC. Here's Where.*, Politico.com (Feb. 1, 2022).²²

120. The result is unmistakably gerrymandered maps for Congress and state Senate.²³

a. Gerrymandered Congressional Districts

121. The Legislature created a congressional map that, without a doubt, creates “an effective [Democratic] gerrymander, resulting in the Democrats “gain[ing] three seats and eliminat[ing] four Republican seats,” and creating the biggest shift in the country” with “the stroke of a pen.” Ashford & Fandos, *supra*.

122. As noted by Laura Ladd Bierman, the executive director of the League of Women Voters of New York, “New Yorkers deserve a transparent and fair redistricting process, and it is shameful that the Legislature has denied them this.” *NYC Would Get More Seats in State Senate Under Proposed Maps*, N.Y. Daily News Feb. 1, 2022).²⁴ So, even though the New York Constitution prohibits partisan gerrymandering, she noted that the congressional map “reflect[s] a

²² Available at <https://www.politico.com/news/2022/02/01/new-state-senate-maps-shift-two-seats-from-upstate-to-nyc-heres-where-pro-00004173>.

²³ This failure applies equally to the Legislature’s enactment of the state Assembly map. But, again, Petitioners do not challenge that map, and so the Court need not consider it.

²⁴ Available at <https://www.nydailynews.com/news/politics/new-york-elections-government/ny-state-senate-nyc-seats-legislative-redistricting-20220202-2xoyaqnvlfdliax5tosbnuage-story.html>.

Legislature that appears to care more about favoring partisan interests than it does for fair maps.”

Id.

123. In fact, the Legislature’s congressional gerrymander was so successful and so biased in favor of Democrats, that the enacted congressional map is more favorable to Democrats than *any* of the 5,000 computer simulated maps designed specifically to follow New York’s redistricting requirements without aiming to increase partisan advantage.

124. The Legislature concocted numerous individual congressional districts with boundaries with no honest explanation except for impermissible partisan and incumbent-favoring gerrymandering. The following examples are illustrative.

125. In Long Island, the Legislature completely changed Congressional Districts 1 and 2, swapping Republican voters for Democratic voters in an egregious gerrymander.

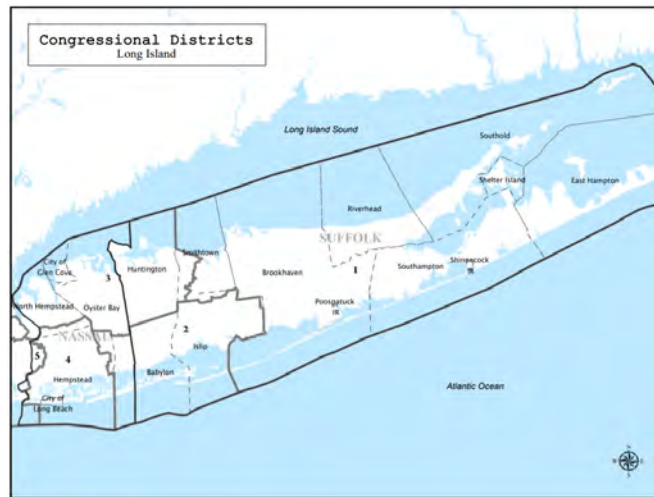
126. In particular, the Legislature placed areas with high concentrations of Republican voters into new Congressional District 2 while moving solidly Democrat communities into Congressional District 1—all the Republican communities in Brookhaven on the south shore are now in District 2, whereas the heavily Democrat areas in the center of Long Island are now channeled into District 1.

127. This partisan reconfiguration creates several new town splits and an additional county split where Congressional District 1 now reaches into Nassau County between Oyster Bay and Huntington. By packing Republicans into Congressional District 2, the Legislature effectively flipped Congressional District 1.

128. The result of this blatant gerrymandering has turned Congressional District 1 from a strong Republican district, solely in Suffolk County, into a lean Democratic district, unnecessarily sprawling across two counties.

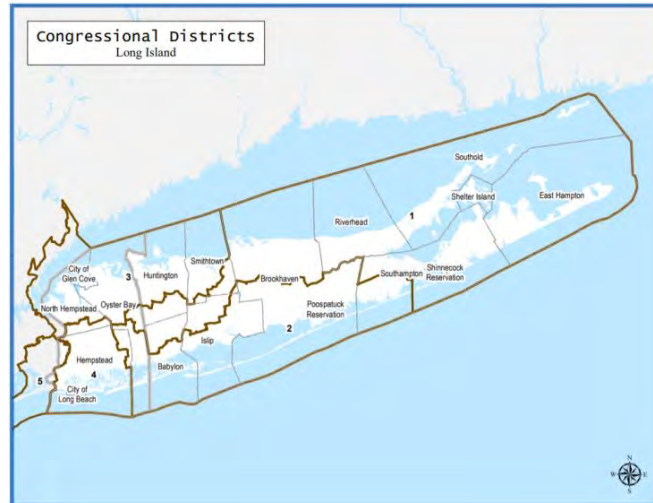
129. Similarly, the redrawing shifted District 2 from a safe Republican district into an outright uncompetitive Republican stronghold.

Map of Prior Congressional Districts 1 & 2²⁵



²⁵ All maps, unless otherwise specified, come from the LATFOR government website, available at <https://www.latfor.state.ny.us/maps/>.

Map of New Congressional Districts 1 & 2



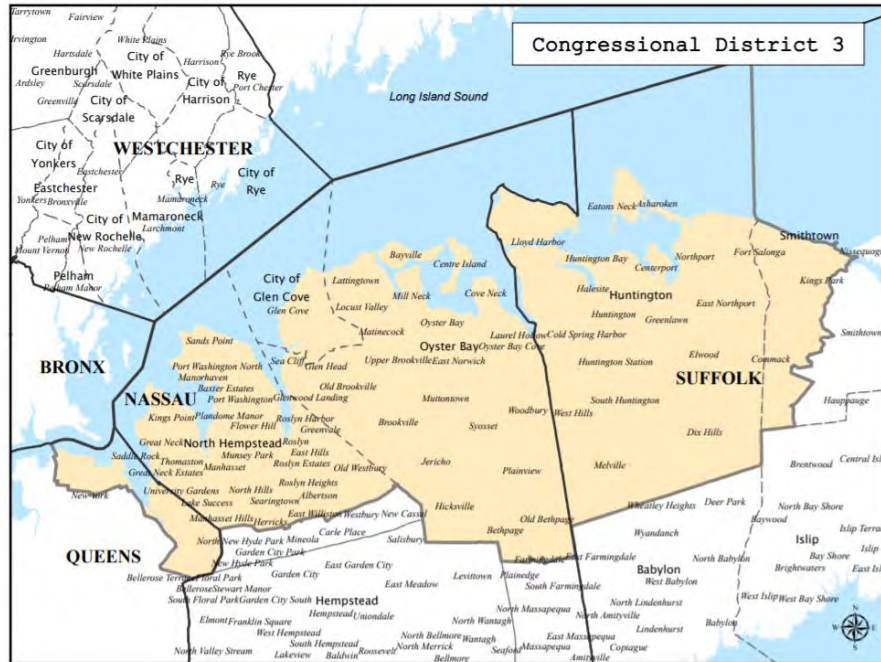
130. The new Congressional District 3 is dramatically different from the old map in order to accomplish the Legislature's partisan goals.

131. The old District 3 bridged Suffolk and Nassau counties, with a slight reach into Queens County. The new map reaches from Suffolk County, through Nassau and Queens counties, and then skips through Bronx County all the way up into Westchester County across the Long Island Sound in a thin strip up to the Town of Rye, capturing overwhelmingly Democrat-voting towns along the shore.

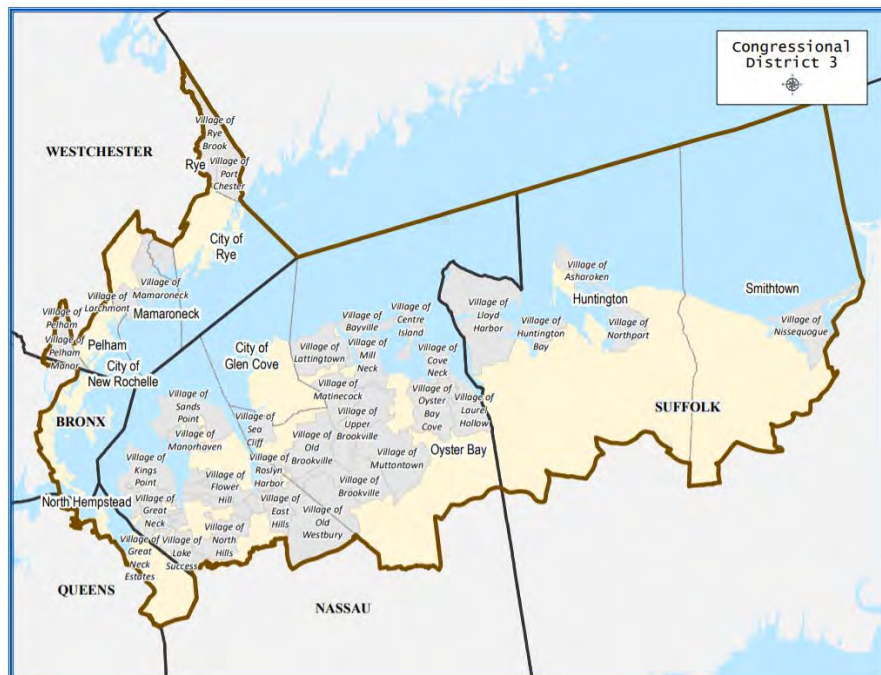
132. This combination of Westchester, with a district largely populated on Suffolk and Nassau counties, makes no sense. These communities have no nexus and share no communities of interest.

133. With these stark and otherwise unexplainable changes, the Legislature has decreased competitiveness, shifting Congressional District 3 from a competitive Democratic-leaning district to a strong Democrat district.

Map of Old Congressional District 3



Map of New Congressional District 3



134. The new Congressional Districts 8, 9, 10, and 11 radically break up established communities of interest in Brooklyn to create a partisan advantage for Democrats.

135. The new map divides closely knit, concentrated Orthodox Jewish and Russian communities with strong social and cultural ties, resulting in conservative Republican-leaning voters spread or “cracked” across multiple districts.

136. These new districts are drawn as vertical stripes across the southern two-thirds of Brooklyn, moving large numbers from the Russian Jewish communities in Brooklyn into Congressional District 8 and dividing the Orthodox Jewish communities between Congressional District 9 and Congressional District 10.

137. This partisan gerrymander also split other communities of interest—in Congressional District 10, the Legislature cut across an established Asian community, moving half of it into Congressional District 11.

138. In particular, it cuts Sunset Park off from northern Brooklyn and the Lower East Side of Manhattan, separating the Asian American, Pacific Islander, and Latino communities—which have formed the “backbone” of the district for nearly 30 years, since the 1992 reapportionment process—from its related communities of interest in northern Brooklyn and Manhattan’s Lower East side. Kristyn Brendlen, *Brooklyn Electeds, Community leaders Ask State Gov Officials to Reconsider Redistricting Maps*, Brooklyn Paper (Feb. 1, 2022).²⁶ This new split breaks up these linked communities from the North Brooklyn area, which is especially important given the recent “rise in anti-Asian hate.” *Id.*

²⁶ Available at <https://www.brooklynpaper.com/brooklyn-electeds-community-redistricting/>.

139. Democratic Assemblymember Marcela Mitaynes also decried this inexplicable particular line-drawing, noting that the Legislature had “separate[d]” these “culturally and historically connected” communities for nothing more than “political expediency to ensure a[n] electoral advantage in the near term,” and “fail[ed] to meet the necessary level of transparency, accountability, and public participation that our constituents rightfully deserve from our democratically elected leaders,” before concluding that she would “not dismantle the political voice of [her] constituents by voting to approve the proposed Congressional Districts.” Assemblymember Marcela Mitaynes’ Statement on New York State’s Proposed 2022 Congressional Maps (Feb. 2, 2022).²⁷

140. The Legislature designed this particular shift to unseat incumbent Republican Congresswoman Nicole Malliotakis from Congressional District 11. Carl Campanile, *Dems Plan to Topple GOP Rep. Malliotakis in Redistricting Plan*, N.Y.Post (Jan. 27 2022);²⁸ Jeff Coltin, *Rep. Nicole Malliotakis is (Probably) Screwed*, City & State New York (Jan. 31, 2022).²⁹

141. Congressional District 11 shifted from the previous map, where it covered Staten Island and adjacent southern portions of Brooklyn, to now covering Staten Island and winding northwestward into the heavily liberal areas of Brooklyn—Sunset Park, Red Hook, Gowanus, Windsor Terrace, and Park Slope, thereby drastically changing the political composition of this district and providing the Democrats a drastically increased chance of flipping the seat.

²⁷ Available at https://docs.google.com/document/d/16jFKDH-_U8P5aAsjwEOCQaLZSIXsAkTnaZiW9xaCMs/edit?usp=sharing.

²⁸ Available at <https://nypost.com/2022/01/27/dems-plan-to-topple-gop-rep-nicole-malliotakis-in-redistricting-plan/>.

²⁹ Available at <https://www.cityandstateny.com/politics/2022/01/rep-nicole-malliotakis-probably-screwed/361412/>.

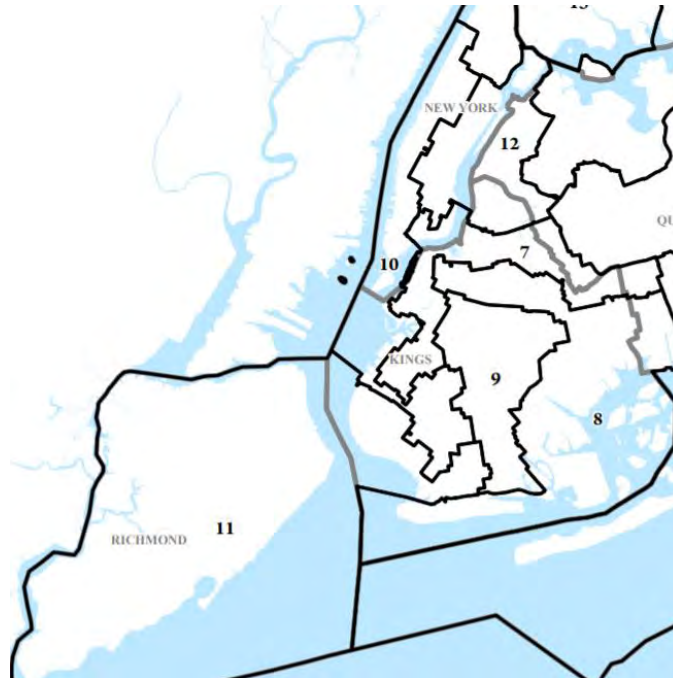
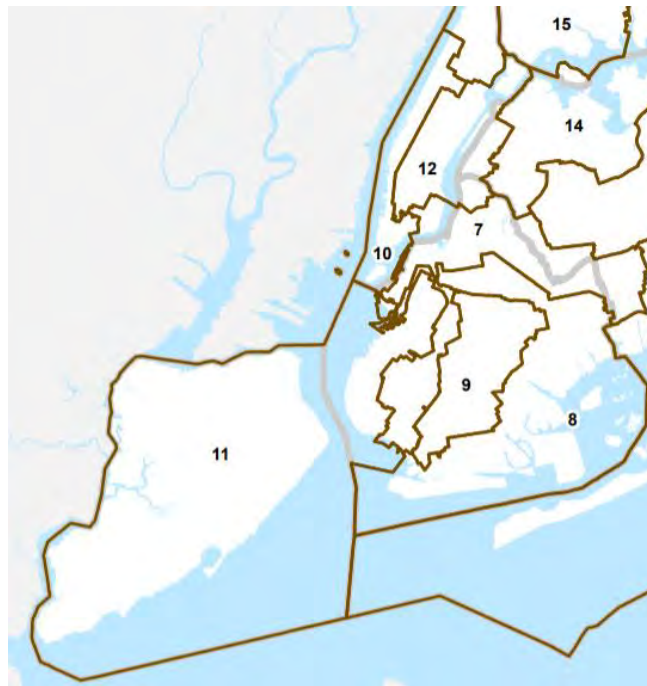
142. As the Asian American Legal Defense Fund noted on Twitter, “[t]he legislature’s map does not keep our [Asian American] communities together”³⁰:



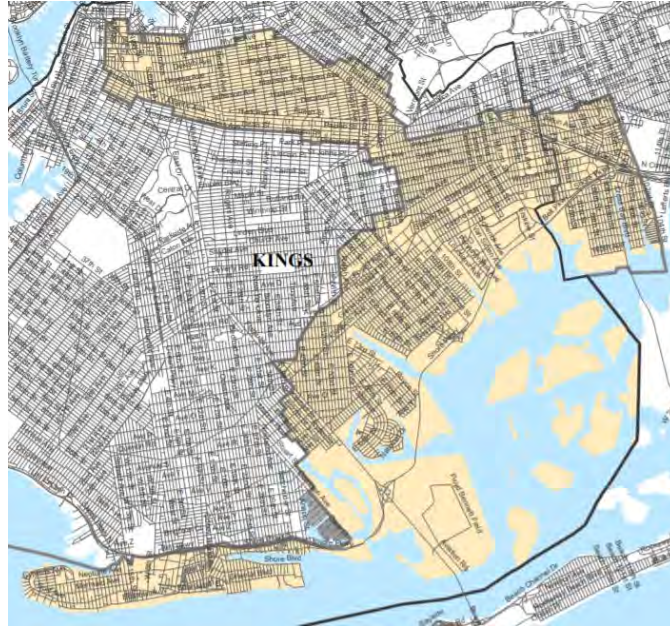
143. These redrawn Brooklyn districts are blatant gerrymanders, with bizarre, roving boundaries crossing multiple bodies of water and snaking between each other for no discernible reason besides partisan advantage.

144. These shifts allowed the Legislature to place additional, safe Democratic voters into District 11, changing that district from a strong Republican district to a Democratic district.

³⁰ Available at <https://twitter.com/aaldef/status/1488223479371599876>.

Map of Old Congressional Districts 8, 9, 10, & 11**Map of New Congressional Districts 8, 9, 10, & 11**

Map of Old Congressional District 8



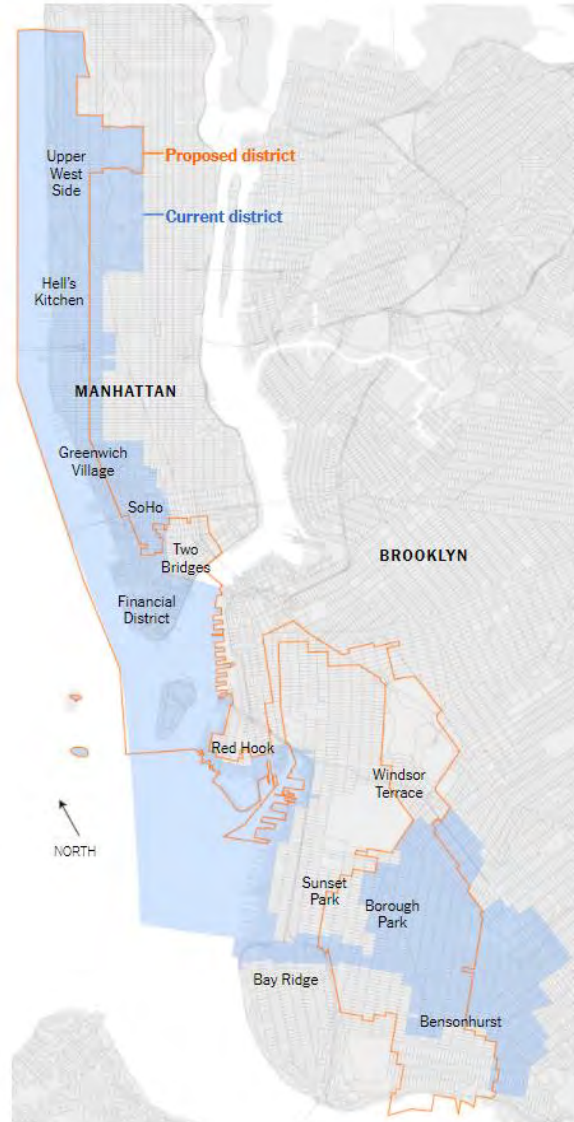
Map of New Congressional District 8



Map of Old Congressional District 9**Map of New Congressional District 9**

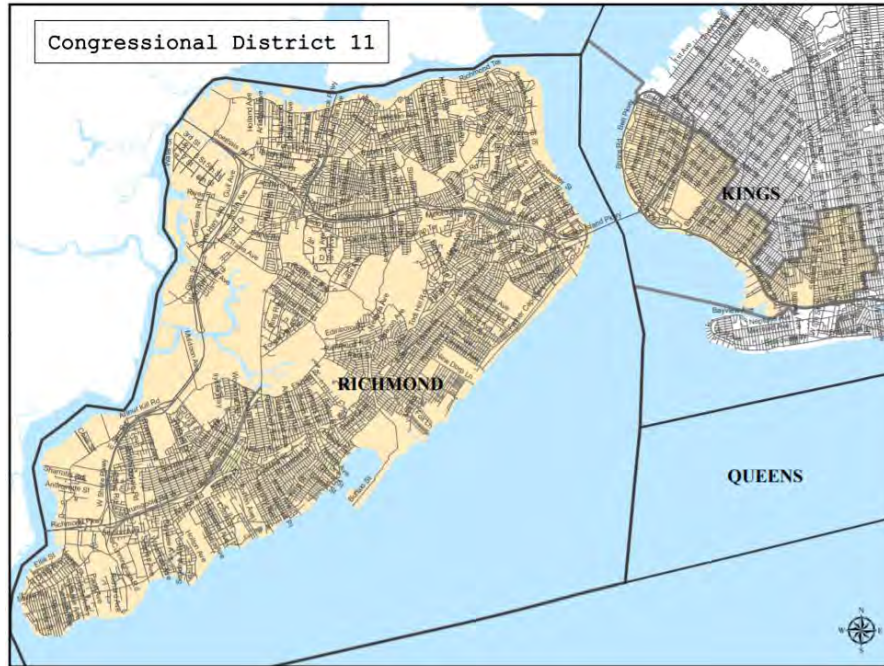
Map of Old Congressional District 10**Map of New Congressional District 10**

Overlay of Old Congressional District 10 and New Congressional District 10³¹

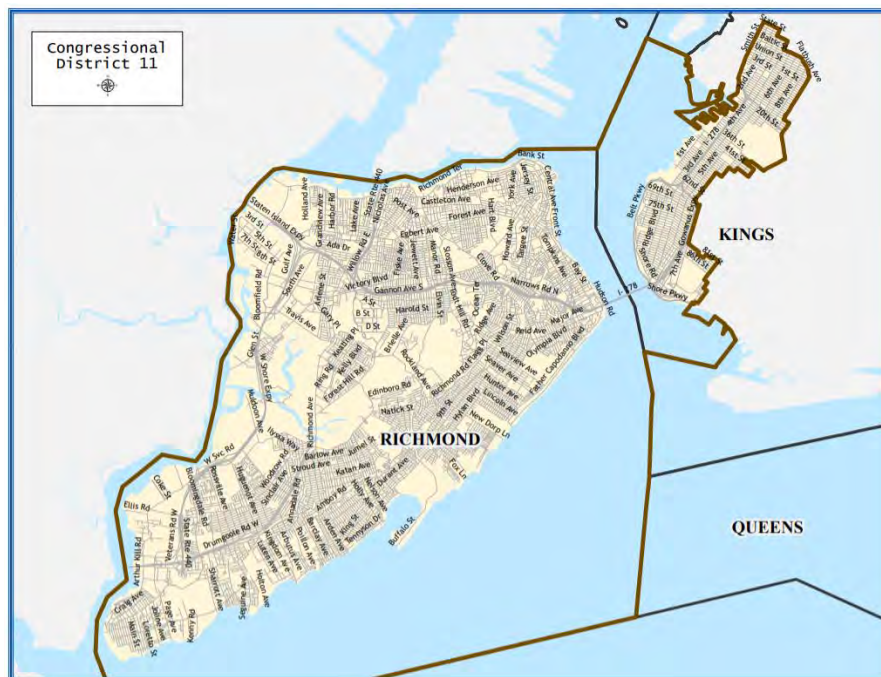


³¹ Nicholas Fandos, *How N.Y. Democrats Came Up With Their Gerrymandered Districts on Their New Map*, N.Y. Times (Jan. 31, 2022), available at <https://www.nytimes.com/2022/01/31/nyregion/nyc-congressional-district-nadler.html>.

Map of Old Congressional District 11



Map of New Congressional District 11



145. The old Congressional District 16 was almost entirely contained in Westchester County, with only a small section of the Bronx for population purposes, while the new District connects a section of the Bronx to Mount Vernon and Yonkers—Democratic strongholds—then winds in a narrow segment up through Westchester County into Putnam County, grabbing rural and suburban Republican communities to “crack” them out of Congressional District 18.

146. The towns of Putnam Valley, Carmel, Yorktown, and Somers—strongly Republican areas—are awkwardly connected to highly populated Democratic communities, neutralizing these Republican votes. The bisection of Westchester County and added county split into Putnam County creates a district with geographically distanced communities.

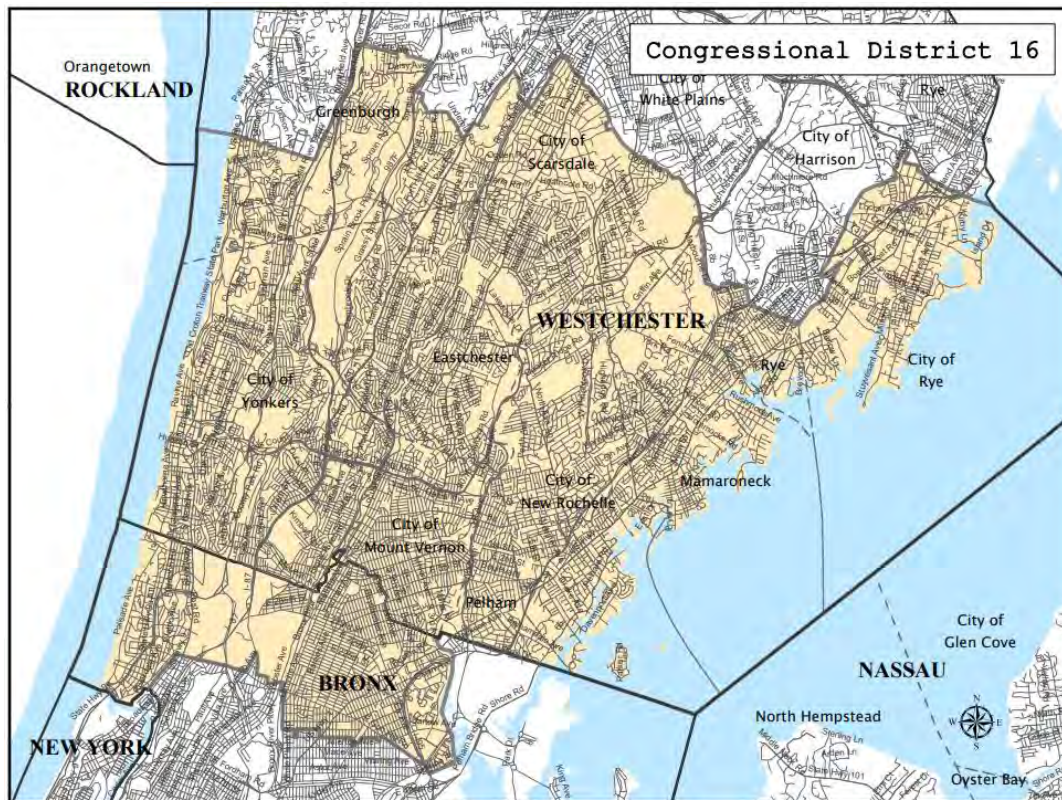
147. Furthermore, the gerrymander of Congressional District 16 removes Republican voters from Congressional District 18 and places them into a strong Democratic district, making Congressional District 18 a safer Democratic district without jeopardizing the Democratic Party’s interests in Congressional District 16.

148. Congressional District 18 is now oddly shaped, like a sitting dog, with a tail that extends into the Ulster County towns of Rochester and Wawarsing, with legs made of Peekskill, Cortlandt, North Salem, Lewisboro, Bedford, and Pound Ridge, and a noticeable space between those legs where the central portions of Putnam and Westchester counties were scooped out for Congressional District 16.

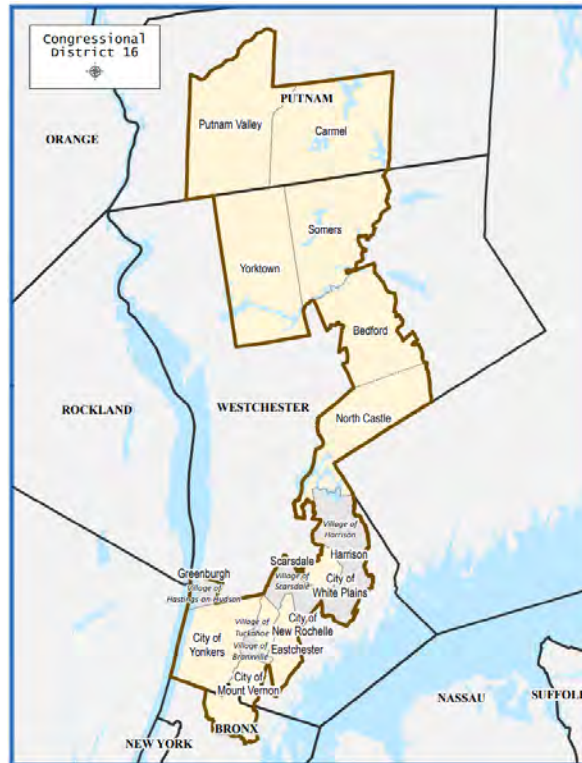
149. The legislative Democrats made these shifts not only to shore up their party’s chances in Congressional District 18, but also to protect incumbent Democratic Congressman Sean Maloney, the newly elected chair of the Democratic Congressional Campaign Committee.

150. As a result of this gamesmanship, Congressional District 16 moves only somewhat from a very strong Democratic district to a still-strong Democratic one, whereas District 18 shifts from a lean Republican district to a lean Democratic district.

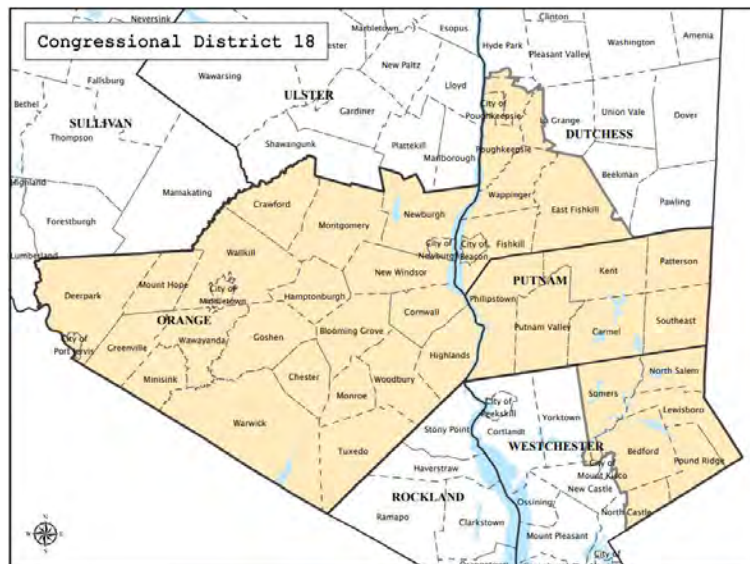
Map of Old Congressional District 16



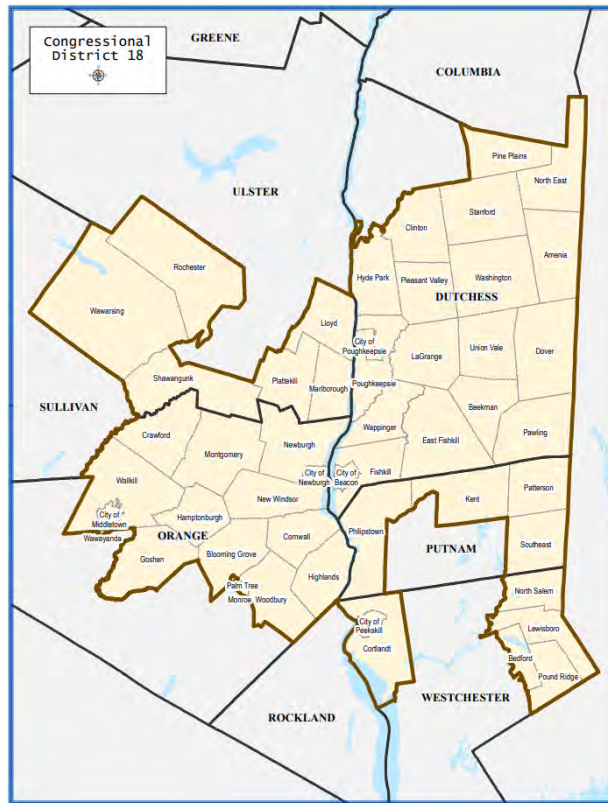
Map of New Congressional District 16



Map of Old Congressional District 18



Map of New Congressional District 18



151. The new Congressional District 17 is similarly stretched to include strong Democrat-voting communities with rural Republican areas, while splitting the conservative Jewish communities to neutralize their Republican votes.

152. The old Congressional District 17 was compactly located in Rockland and Westchester counties.

153. Now, the District reaches from Sullivan County through Orange County into Rockland County, finally crossing the river to connect with Democrat strongholds in Westchester County, including Greenburgh and Mount Kisco.

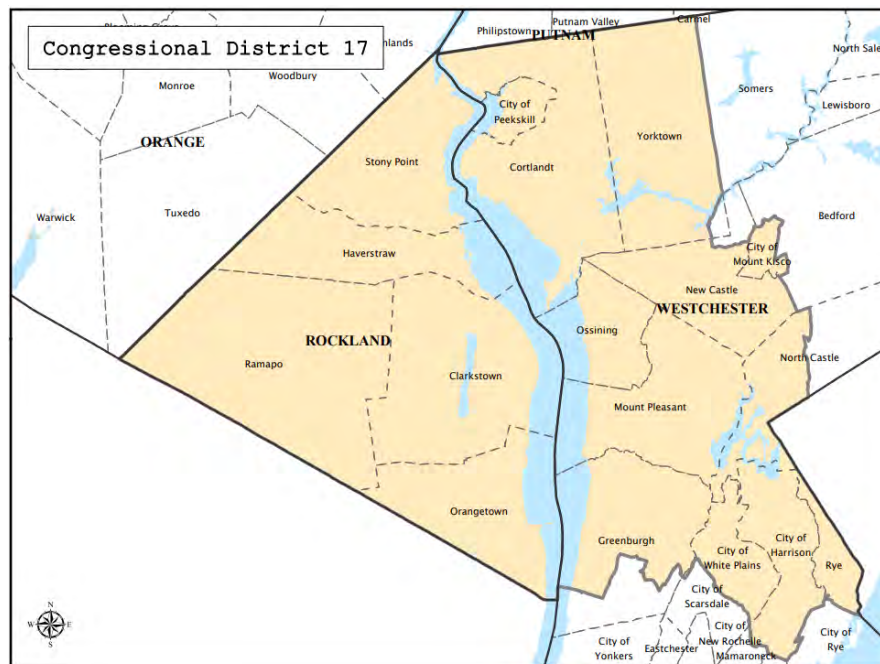
154. The District also includes part of the strongly Democrat city of White Plains.

155. The district combines the Orthodox communities in Sullivan and Rockland counties but excludes the Kiryas Joel Jewish community in Orange County, despite the extensive public testimony and overwhelming evidence in support of keeping these communities together.

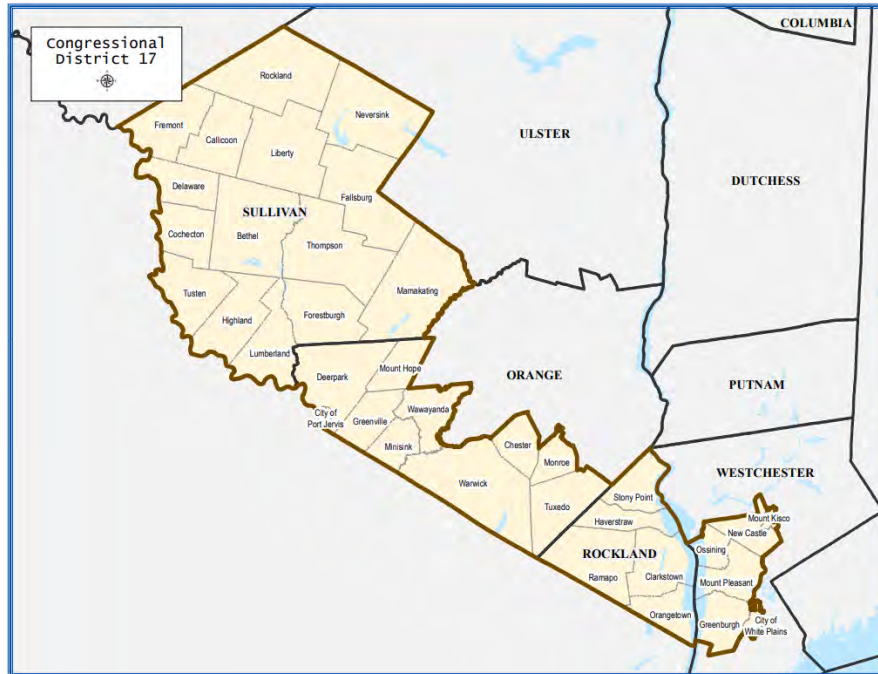
156. The resulting new District cracks those conservative communities, spreading Republican voters among multiple districts to decrease their voting power without jeopardizing any Democratic districts.

157. Thus, Congressional District 17 shifted only slightly from a Democratic stronghold to a still-reliable but less Democratic district.

Map of Old Congressional District 17



Map of New Congressional District 17



158. Congressional District 19 is similarly drawn for the impermissible purpose of strengthening the Democratic Party's political interests, with the four reaching corners of Congressional District 19 showing how the Legislature shopped for Democratic voters to turn the district from Republican-leaning to a Democratic-advantage district.

159. The new Congressional District 19 extends through the Republican communities in Columbia and Greene counties to pick up part of Albany County—specifically the Town of Bethlehem—to add Democrat voters and a new county split.

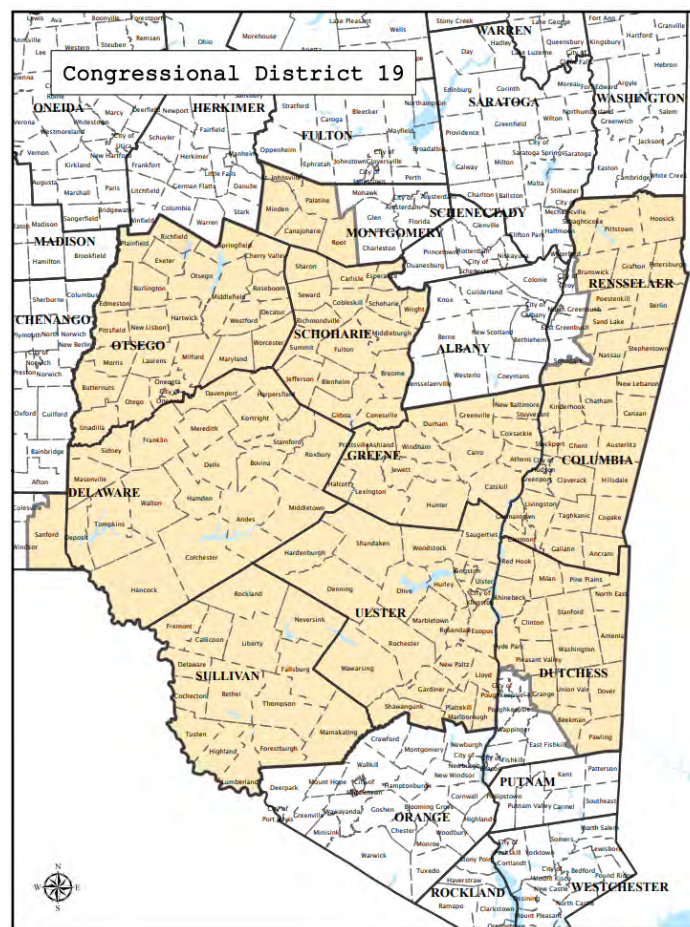
160. In Ulster County, the District picks up Democrats while specifically avoiding communities with large numbers of Republican voters.

161. The new Congressional District 19 then stretches far west to encompass the mostly Democratic city of Binghamton, to pick up additional Democratic voters there.

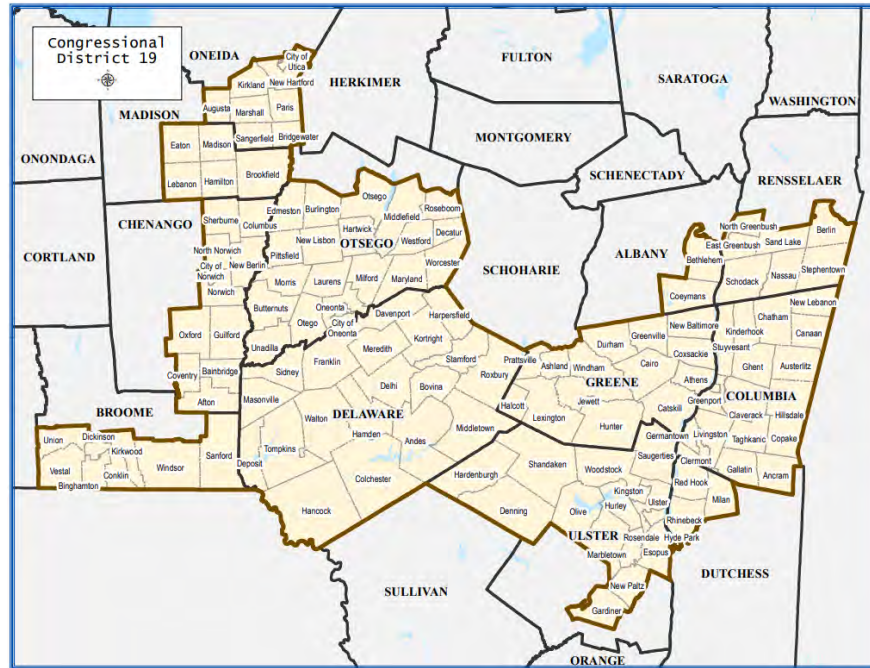
162. Finally, the District extends northward to pick up the Democrat-voting city of Utica.

163. All these particular partisan choices flipped this District into a Democratic-advantage district.

Map of Old Congressional District 19



Map of New Congressional District 19

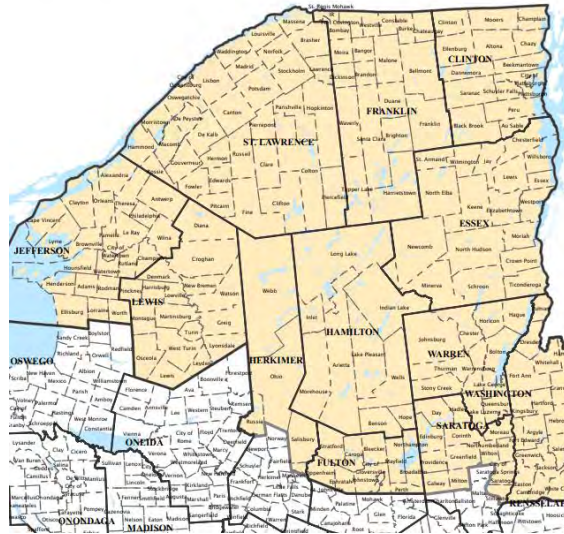


164. The Legislature also gerrymandered Congressional District 21 by packing it with additional Republican voters.

165. The new Congressional District 21 now extracts Saratoga and Schenectady counties, in addition to splitting off a portion of Warren County, from the surrounding areas, replacing those regions with much of Oneida County and Herkimer County, half of Montgomery County, and all of Schoharie County, thereby packing additional Republican voters into this single district and eliminating their ability to make surrounding districts more competitive for Democratic candidates.

Map of Old Congressional District 21

Congressional District 21



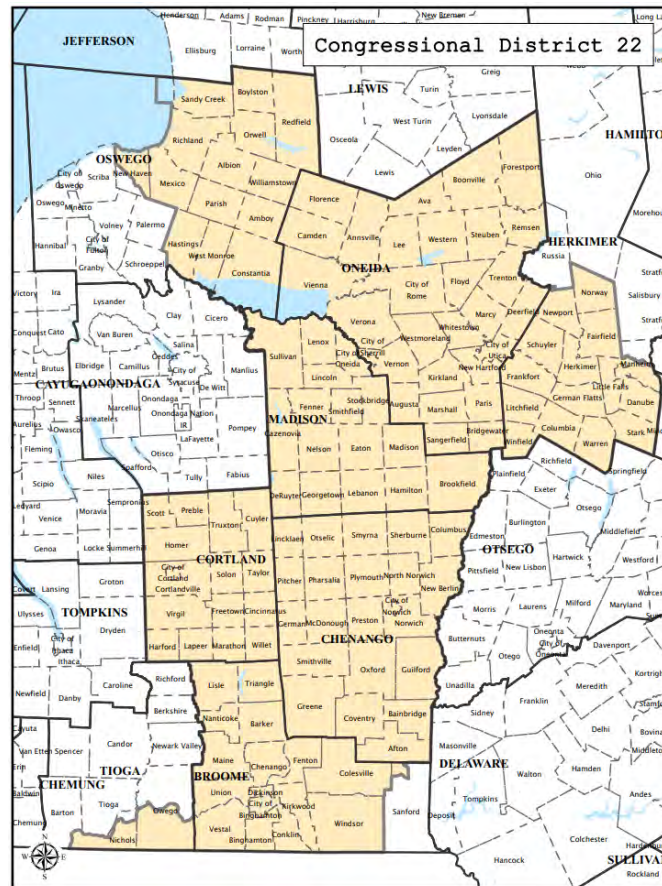
Map of New Congressional District 21



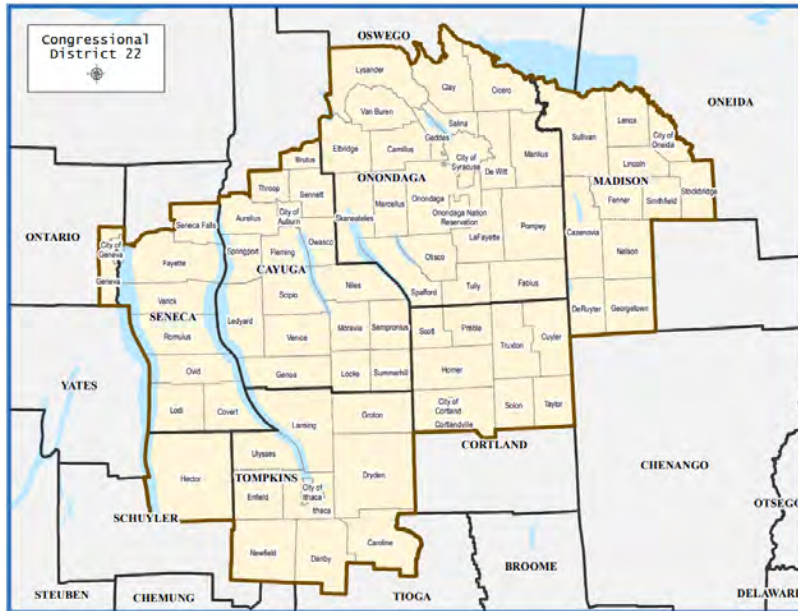
166. In Congressional District 22, the Legislature removed Republican areas and replaced them with Tompkins County, including the city of Ithaca, to flip the district from a competitive Republican district to a strong Democratic one.

167. As a result, Congressional District 22 underwent a massive political swing, changing from a very competitive Republican district to a strong Democratic district.

Map of Old Congressional District 22



Map of New Congressional District 22



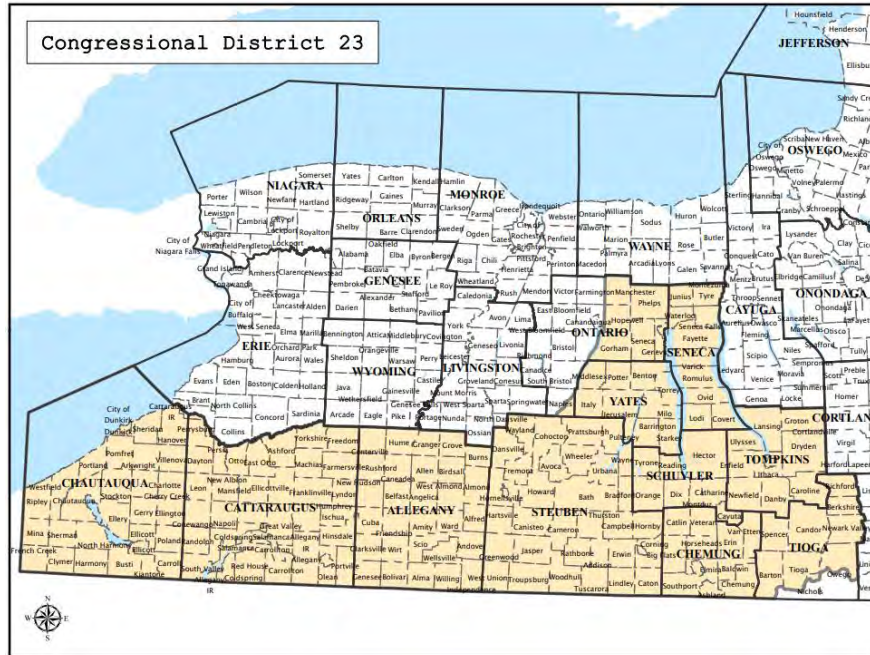
168. The Legislature gerrymandered Congressional District 23 by “packing” as many Republican votes into this district as it could, again for partisan gain.

169. The new district now includes southern Erie County towns—first-ring suburbs to the city of Buffalo—connecting them with far away and rural areas around Binghamton.

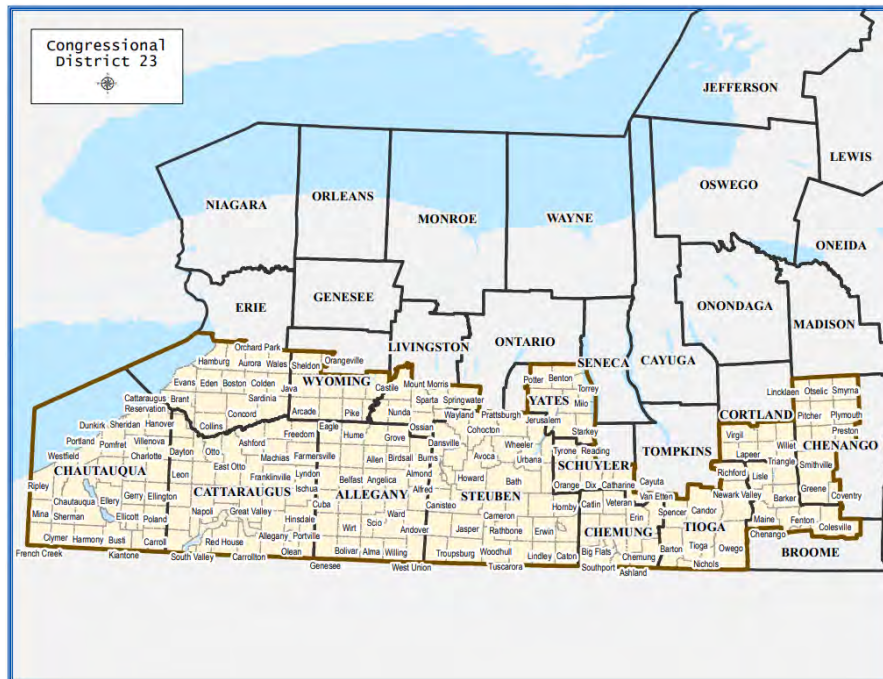
170. The old district also included some heavily Democratic areas in Tompkins County, but the Legislature removed those areas, as noted above, placing them in Congressional District 22 to flip that district.

171. As a result, Congressional District 23 became less competitive and shifted from a very strong Republican district to an uncontested Republican district.

Map of Old Congressional District 23



Map of New Congressional District 23



172. Previously, District 24 compactly encompassed the bordering counties of Wayne, Cayuga, and Onondaga, as well as part of Oswego County.

173. Now, this District extends from Lewiston, in Niagara County, and various similarly Republican areas in northeast Erie County, all the way eastward and northward to Jefferson County (all the way to the St. Lawrence County line), while notably avoiding certain portions of Monroe and Ontario counties.

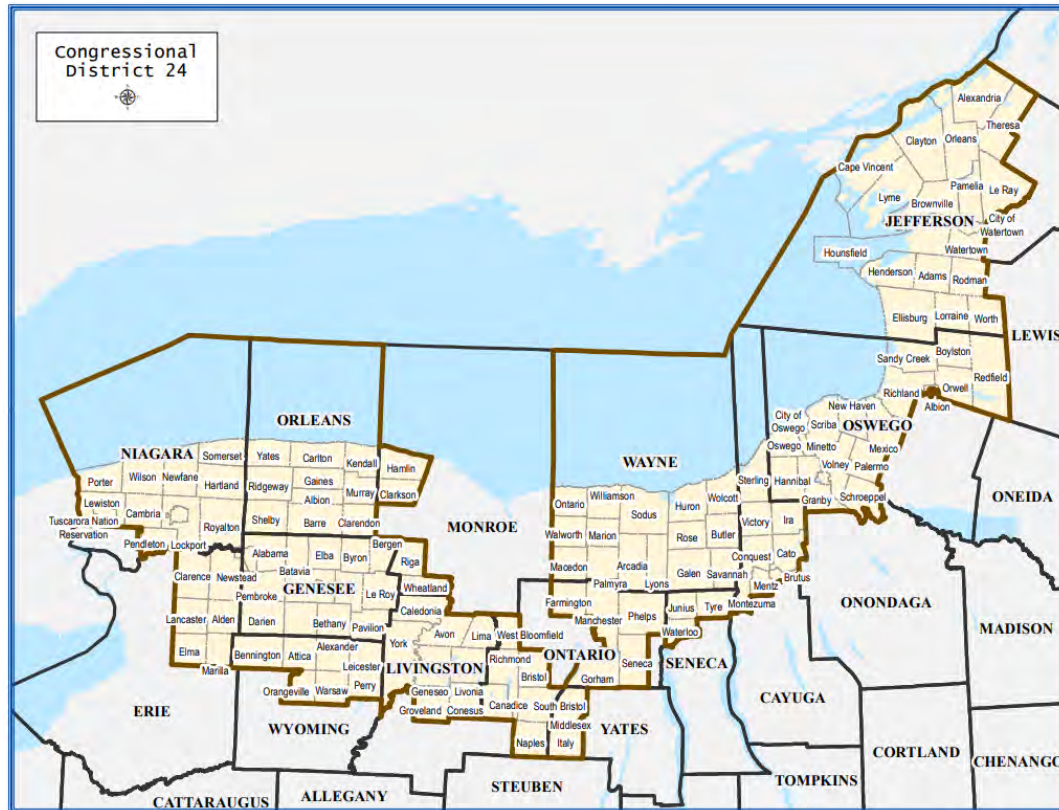
174. Indeed, this District now stretches across four media markets, connecting numerous areas over more than 250 miles with little or nothing in common.

175. As a result, the Legislature shifted Congressional District 24 from a highly competitive Democratic district into a very strong Republican district, designed to protect numerous surrounding districts from any serious Republican challenge.

Map of Old Congressional District 24



Map of New Congressional District 24



176. Each of these blatantly gerrymandered districts, both individually and collectively, has no reasonable explanation except the Legislative Democrats' specific goal of increasing their political power. These examples are only illustrative of the map's partisan design as a whole.

177. On February 2, 2022, notwithstanding the egregious gerrymander within the Legislature's map, the Democrats in the Assembly and State Senate adopted the congressional map (with only slight modifications unrelated to their gerrymandering efforts), despite every Republican in the Assembly and State Senate voting against the map. *See* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196 and A.9039 (as technically amended by A.9167).

178. In addition to the Republican legislators, all of whom voted against this egregious gerrymander, Democratic Assemblymembers Simcha Eichenstein and Marcela Mitaynes voted against the congressional maps.

b. Gerrymandered State Senate Districts

179. The 2022 state Senate map is no better. Just as the Legislature gerrymandered the congressional districts, it concocted numerous state Senate districts with no viable explanation but impermissible partisan and incumbent-favoring plotting. *See Mahoney, supra*.

180. On Long Island, the Legislature sought to pack Republican voters into two strongly Republican districts and make each of the other seven districts more favorable for Democratic candidates.

181. For example, in state Senate District 2, the new map packs Republican voters who had been in Senate District 1 in the 2012 state Senate map, thereby making new Senate District 1 more favorable for a Democratic candidate.

182. The Legislature similarly packed Long Island's state Senate District 4 with Republican voters. The already somewhat-reliable Republican Senate District 4 now encompasses Bayport, Oakdale, and east Islip, areas that previously made state Senate District 3 competitive.

183. And the Legislature combined the Republican incumbents who currently represent state Senate Districts 3 and 4 into new Senate District 4, while creating an open seat in new Senate District 3.

184. In short, the Legislature connected and consolidated some of the most Republican areas of Suffolk and Nassau counties in state Senate District 4, ensuring that Republican voters

who previously resided in multiple districts that had been represented by Republican state Senators for the majority of the last decade would now be represented by only one Republican state Senator.

185. In new state Senate Districts 5 and 6, the Legislature combined areas that had been in different state Senate districts for decades, and which are not communities of interest, to turn previously swing districts into strongly Democrat-favoring districts.

186. In state Senate District 5, the Legislature removed the half of the district that had been in the Town of Oyster Bay and ran the district southward into the Town of Babylon, picking up very Democratic regions to make the district more favorable for Democratic candidates.

187. The Legislature then took Oyster Bay from old Senate District 5 and placed it in new Senate District 6, running that district southward to add strong Democrat areas from Uniondale and the Village of Hempstead to make that district much more favorable for Democratic candidates.

188. The Legislature also increased the Democratic Party's advantage in state Senate District 7, and in state Senate District 9, the Legislature removed the heavily Orthodox Jewish communities known as the Five Towns, which have a history of voting strongly Republican, from the district and then moved them to a heavily Democratic district in Queens, thus making Senate District 9 more favorable for a Democratic candidate. Unlike the 2012 state Senate map, the 2022 state Senate map now breaks the Nassau-Queens border.

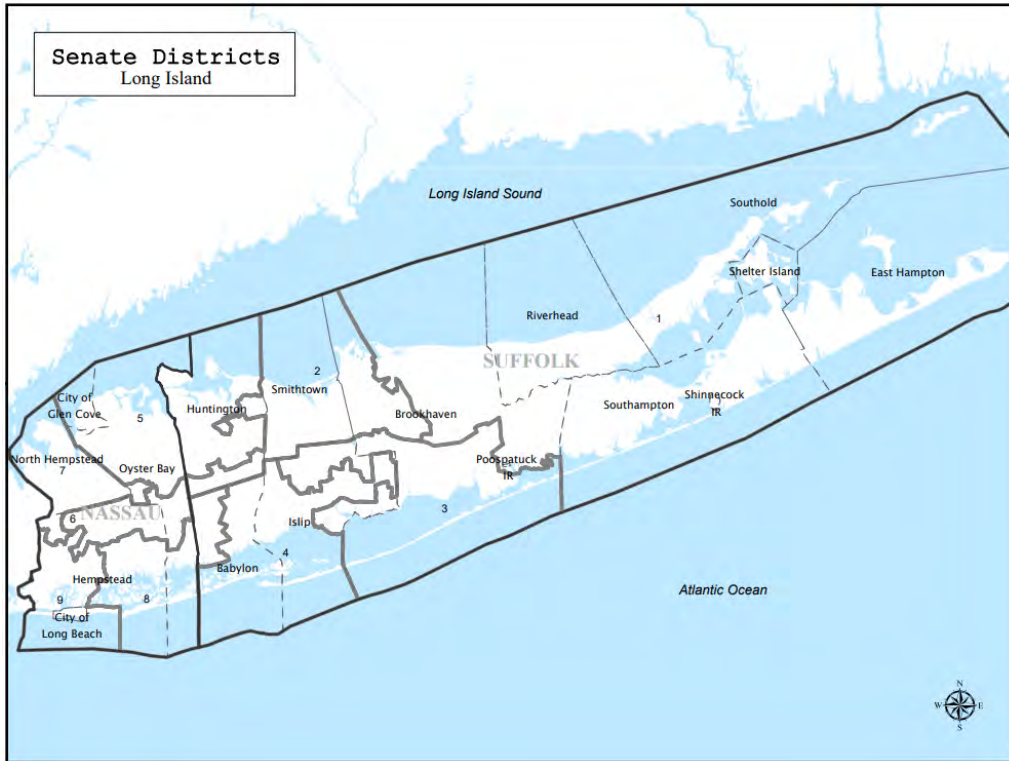
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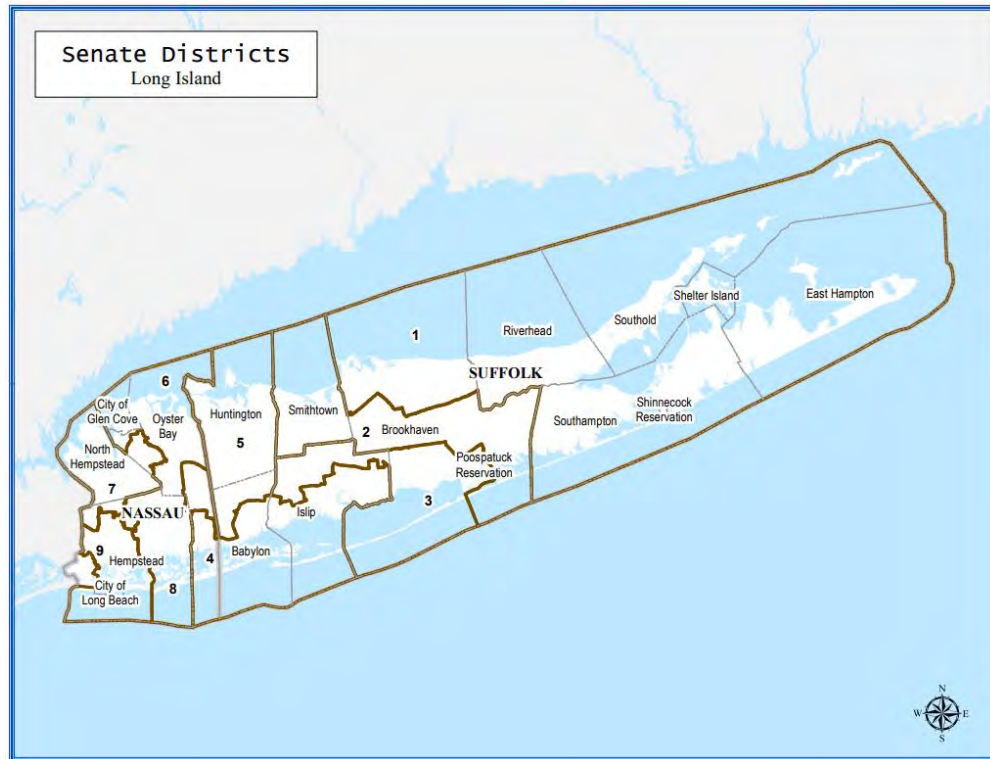
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Map of Old State Senate Districts on Long Island



Map of New State Senate Districts on Long Island



189. The Legislature's partisan gerrymander of Senate District 9 also impacts Senate District 10. The Legislature removed heavily Orthodox Jewish and Republican leaning areas known as the Five Towns from state Senate District 9 in Nassau County and placed them into Senate District 10, an already heavily Democratic district in Queens, combining two unrelated communities, and thereby diluting the voting power of Republicans in the new district without at all risking that seat for Democrats.

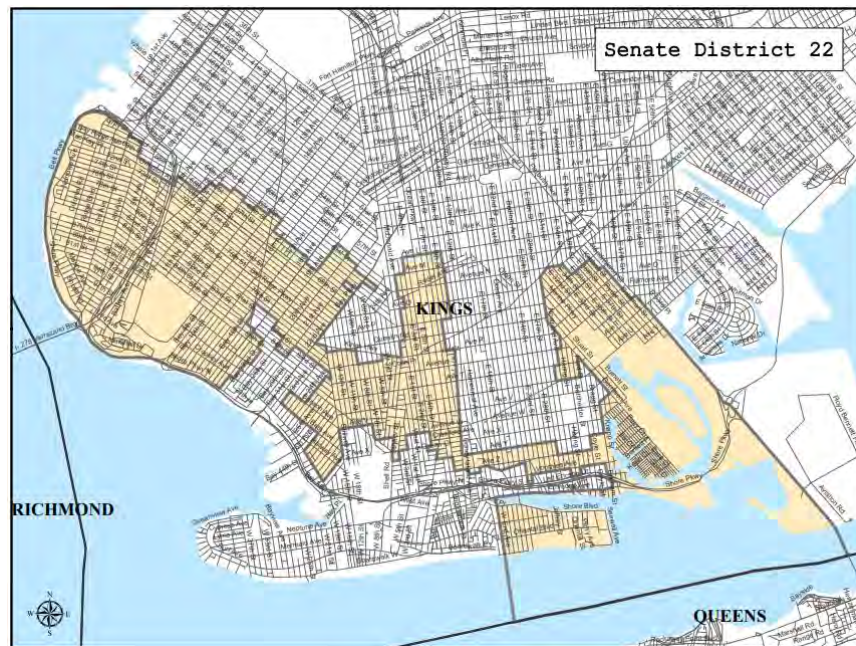
190. Moreover, the Legislature failed to respect the longstanding division of Nassau County from New York City by breaking the Nassau County-Queens County border, where there had been no prior cross-border state Senate districts breaching that line. By moving the Five Towns to a Queens-based Senate district, the Legislature targets a religious community of interest

and separates it from other suburban areas with similar government, school district, and community institutions to join it with New York City.

191. In state Senate District 22, the Legislature specifically drew the boundaries to remove Republican votes in southern Brooklyn by awkwardly extending a long arm northeastward into communities in northern Brooklyn that share little in common, using those heavily Democratic voting areas to negate the Republicans at the southwestern ends of the District.

192. By doing so, the Legislature divided Brooklyn's Russian and Orthodox Jewish community of interest between multiple state Senate districts.

Map of Old State Senate District 22

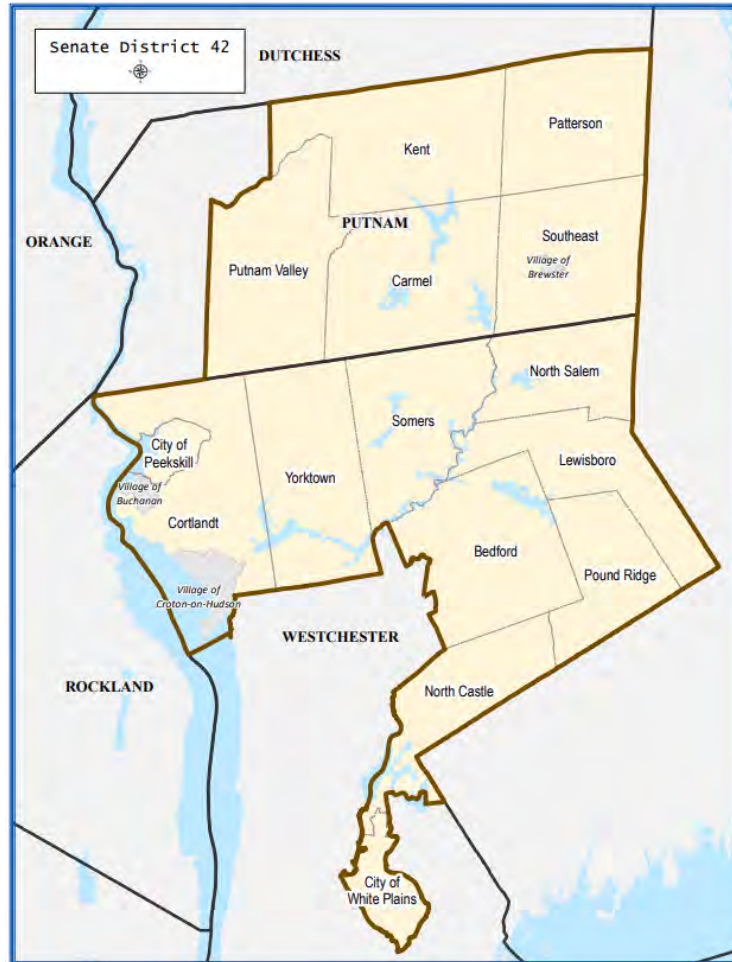


Map of New State Senate District 22



193. North of New York City, the Legislature continued its gerrymander. Republican leaning towns in Dutchess County and swing northern Westchester towns were removed from what had been Senate District 40, and in the new Senate District 42, a thin finger stretches southward to include the city of White Plains—which has nothing in common with the more rural/suburban towns in Putnam and norther Westchester counties. This converted a swing district that had been represented by Republicans for most of the last decade into a strong Democratic district.

Map of New State Senate District 42



194. Putnam County is now split between state Senate District 42 and state Senate District 41 and is now connected with Orange County, instead of Dutchess County, with which it shares a natural community of interest.

195. The Legislature moved the Putnam County Town of Philipstown and the Dutchess County communities of Beacon and Fishkill from what had been Senate District 41 (Dutchess and Putnam counties) to the new, Orange County-based Senate District 41. The Legislature did so because these three communities are Democrat-leaning and, by moving them to the new state

Senate District 41, they shifted the district from Republican to Democratic, making it a safe seat for the Democratic incumbent. The Legislature accomplished this shift by removing the Republican-performing Orange County towns of Montgomery, Crawford, Chester, and Monroe from the previous Senate District 39 in its new incarnation as Senate District 41, and placed them in new Senate District 44.

196. The Legislature likewise gerrymandered state Senate District 44, by packing it with Republican voters, removing parts of Ulster County that generally vote Democrat from the district, and adding parts of Orange County that generally vote Republican, as well as similar areas in Delaware and Broome counties.

197. New state Senate District 48 (which most closely approximates state Senate District 46 in the 2012 state Senate map), is now a somewhat strong Democratic district, flipping from a lean Republican district. The Legislature accomplished this gerrymandered flip by lopping off Republican-performing areas in the northern reaches of the previous district—Montgomery County and portions of Schenectady County—and replacing them with more Democratic areas in Ulster, Dutchess, and Columbia counties.

198. In state Senate District 46, the Legislature disconnected the City of Albany and the Albany County river cities that face it across the Hudson River and combined it with Republican areas in Saratoga County with which it has little in common, to create a safe Democratic district.

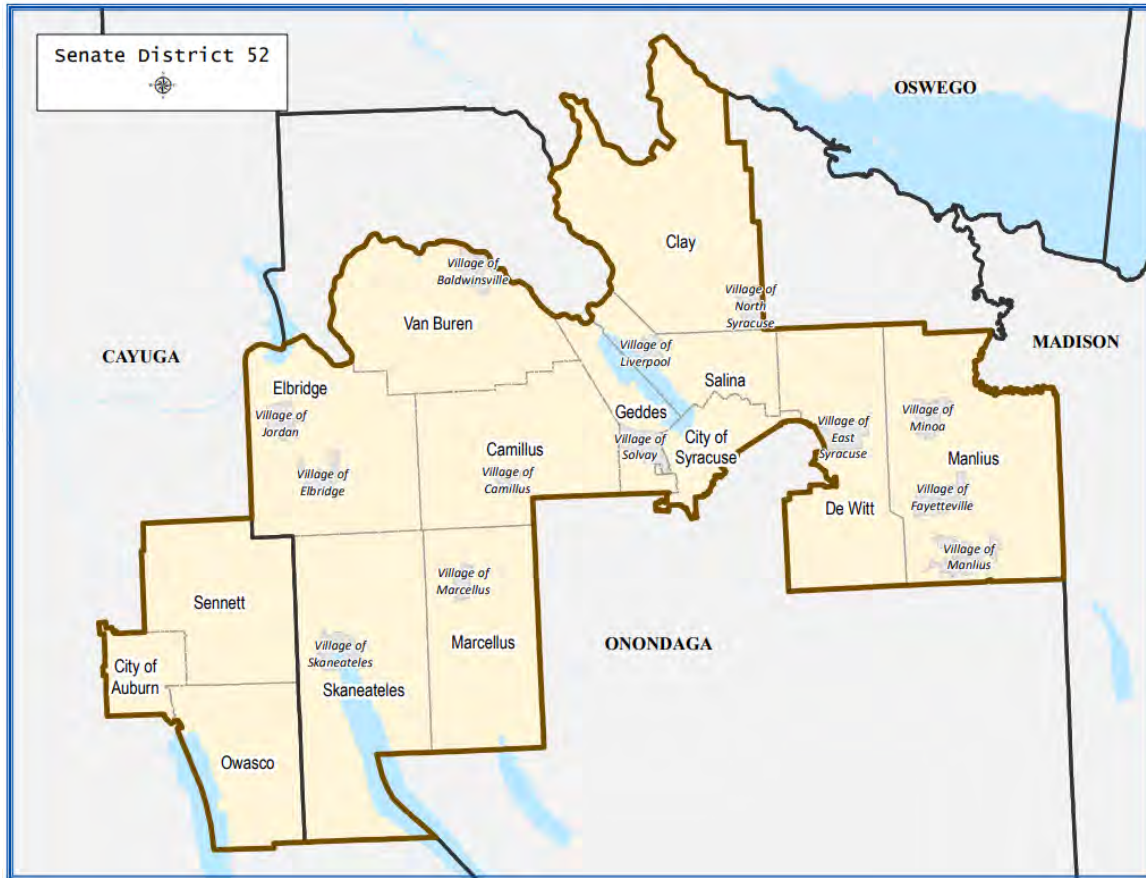
199. The Legislature's drawing of new state Senate District 51 lumps both Republican Senator James Tedisco and Republican Senator Peter Oberacker into the same district. The Democratic leaders in the Legislature drew this district specifically to disfavor or remove one of these two incumbent Republican Senators.

200. The Legislature flipped new state Senate District 52 (which somewhat approximates state Senate District 50 in the 2012 state Senate map) from a district that had elected a Republican for the majority of the last decade into a district favoring Democratic candidates by adding a larger portion of the City of Syracuse into a district based in Onondaga County suburbs.

Map of Old State Senate District 50



Map of New State Senate District 52



201. In new state Senate District 53, the Legislature cynically disconnected Tompkins County, a portion of Cortland County, and portions of Tioga and Broome counties from surrounding areas with which they had been historically connected to create a new district that strongly favors a Democrat candidate.

202. In new state Senate District 54, the Legislature packed Republicans by adding Wayne County to other strongly Republican-performing areas in Genesee, Livingston, Ontario, and Cayuga counties.

203. The Legislature's specific choices here made this district noticeably less competitive, creating a very strong Republican district, and also extracted these strong Republican areas from their previous districts, which also included swing areas, thereby decreasing protection in neighboring districts.

204. In new state Senate District 56 (which most closely resembles District 55 in the 2012 state Senate map), the Legislature added a large portion of the City of Rochester, and its heavily Democratic voting citizens to flip this district from one that had been represented by a Republican state senator until his recent retirement into a strong Democratic district. The situation is virtually identical in new state Senate District 57.

205. In new state Senate District 58, the Legislature packed a large number of Republicans to remove them from surrounding districts and decrease competitiveness, enabling the Legislature to create the new Democratic district in Tompkins and Broome counties.

206. In creating new state Senate District 60, the Legislature broke the Erie-Niagara County border and added the City of Niagara Falls to what had been state Senate District 60 under the 2012 state Senate map and removed the towns of Orchard Park, Evans, and Brant. Previously, State Senate District 60 had been a competitive swing district represented by both Republicans and Democrats over the last decade. By adding the heavily Democratic City of Niagara Falls, which is in a different county than the rest of the district, the district changed from one that leaned Democratic to one that is now solidly Democratic, reducing realistic competition there.

207. Relatedly, the Legislature gerrymandered new state Senate District 62 by packing it with Republicans. The Legislature removed from this district the City of Niagara Falls, while

adding the reliably Republican towns to the east, to make this a heavily Republican district with little to no competitiveness.

208. The Legislature also gerrymandered state Senate District 63 by cobbling together from several disparate areas: the suburban swing Town of Amherst, the east side of Buffalo, and part of Lackawanna County. The Town of Amherst is much more closely aligned with the other suburban towns to the north of the City of Buffalo and these three areas are not communities of interest by any reasonable metric and lack commonalities with one another.

209. As a result, new state Senate District 63 is overwhelmingly Democratic, with no real risk of the Democrats losing that Senate seat.

210. All in all, the 2022 state Senate map largely guarantees the Democratic Party in New York an outsized number of state Senate seats compared to their political support in this State.

211. In fact, the Legislature's state Senate gerrymander was so successful and so biased in favor of Democrats, that the enacted state Senate map is more favorable to Democrats than *any* of the 5,000 computer simulated maps designed specifically to follow New York's redistricting requirements without partisan considerations.

212. Despite these and other gerrymandered districts within the new 2022 state Senate map, the Legislature enacted that map on a vote of 118–29 in the Assembly and 43–20 (a straight party line) in the Senate on February 3, 2022. *See* 2021–2022 N.Y. Reg. Sess. Leg. Bills A.9040-A and A.9168.

iv. The Governor Signs The Legislature's Unfair Congressional And State Senate Maps Into Law Despite Widespread Objection From New Yorkers

213. After the Legislature released its proposed maps, there was extensive public outcry over both the process and substance.

214. Members of the public took to the IRC’s public comment page to decry the Legislature’s opaque approach to redrawing the maps. Submissions, New York Independent Redistricting Committee (“IRC Public Submissions”).³² As one comment said, “[t]his is clearly gerrymandering at its worst.” IRC Public Submissions, *supra* (submitted by Anthony on Jan. 31, 2022). Betsy Gotbaum, the executive director of good-government group Citizens Union, described the Legislature’s lack of process succinctly: “There was no public input.” Jacob Kaye, *State Legislature Shares Version of Congressional Redistricting Map*, Queens Daily Eagle (Feb. 1, 2022).³³ She also noted that the Legislature’s actions completely deprived the process of an accurate understanding of the public’s desires in new maps: “We don’t really know what groups of people really wanted once the commission couldn’t come to any kind of a conclusion and then the legislators took it over. We don’t know.” *Id.*

215. New Yorkers across the state quickly flagged the new maps as highly partisan gerrymanders. “If it looks like gerrymandering and sounds like gerrymandering—it’s most likely gerrymandering,” said Brian Browne, a political science professor at St. John’s University in New York City. Kaye, *supra*. “This is why people don’t trust politicians,” observed Pat Kiernan, a local morning news anchor on NY1, “[a]nd the Democrats have given up any high ground they had over Republicans on gerrymandering.” Nicholas Fandos, *How N.Y. Democrats Came Up With Gerrymandered Districts on Their New Map*, N.Y. Times (Jan. 31, 2022).³⁴

³² Available at <https://nyirc.gov/submissions>.

³³ Available at <https://queenseagle.com/all/state-legislature-shares-version-of-congressional-redistricting-map>.

³⁴ Available at <https://www.nytimes.com/2022/01/31/nyregion/nyc-congressional-district-nadler.html>.

216. Even Democratic politicians condemned the maps. Cynthia Appleton, the Democratic chair for Wyoming County, described the congressional map as “an absolute travesty.” Jerry Zremski, *New Congressional Map Sparks Gerrymandering Outcry*, Buffalo News (Jan. 31, 2022).³⁵ Nate McMurray, a former Democratic congressional candidate, offered a similar view on the new map, calling it “nuts.” *Id.* Melanie D’Arrigo, a Democratic candidate running in Congressional District 3, harshly criticized the new map as well: “We cannot stay silent as we watch the state legislature publish a map that extreme gerrymanders our district.” Kaye, *supra*. Describing the redrawn Congressional District 3, which now spans five counties, D’Arrigo despaired, “How is this fair to the people who live in any of these counties?” *Id.* She further noted that “[c]onstituent services will be more difficult, more expensive and less efficient: the needs of someone living on the border of Connecticut being wildly different from someone in Huntington,” and “[a]ll of the voters at stake deserve real representation, not to be used as political pawns.” *Id.*

217. On February 3, 2022, Governor Hochul signed the Legislature’s congressional and state Senate maps, 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196, A.9039-A, A.9040-A, and A.9168, into law, thereby blessing her fellow Democrats’ blatant gerrymandering efforts. Patrick Ryan, *Gov. Hochul Signs New State and Congressional Redistricting Maps into Law* WIVB.com (Feb. 3, 2022) (providing signed bills).³⁶

³⁵ Available at https://buffalonews.com/news/new-congressional-map-sparks-gerrymandering-outcry/article_0ab6b528-82e6-11ec-8d7b-07d7c0c217b8.html.

³⁶ Available at <https://www.wivb.com/news/new-york/gov-hochul-signs-new-state-and-congressional-redistricting-maps-into-law/>.

D. The 2022 Maps' Impact On Petitioners

218. The Legislature's blatant gerrymandering has caused grave harm to Petitioners, all of whom want a fair, representative government at both the state and national level, unhindered by partisan interests and egregious gerrymandering.

219. Broadly, this kind of partisan gerrymandering is profoundly undemocratic and cuts deeply into the public's confidence in their representative government. The Legislature's egregious attempt to entrench the majority party's incumbents and political power harms the franchise of all New York voters, Petitioners included.

220. For example, the adopted 2022 congressional and state Senate maps treat Petitioners unequally and dilutes their voting power based on their political beliefs. Through this map, Democrats have essentially guaranteed that they will win more congressional and state Senate districts—and thus more power—than is warranted by the party's popular support. As a result, political representatives will subject Petitioners to laws and policies that do not fairly reflect the public will.

221. Moreover, when incumbents choose their voters—rather than voters electing their chosen representatives—the public's faith in the franchise is diminished.

222. Participation in the democratic process will decrease, as voting holds little appeal to those in gerrymandered districts because their votes cannot change the preordained outcomes of elections. New Yorkers made their will clear when they voted to ban partisan gerrymandering.

223. Enacting these maps deals a crushing blow to the State's representative democracy and the faith of the People in those governing them.

224. More specifically, each of Petitioners suffers directly from these maps, including because they lose the opportunity to vote for their preferred congressional and state Senate candidates, rather than ones selected for them by the Legislature's cynical line-drawing.

225. For example, the new Congressional District 16, a strong Democratic district where Petitioner Marianne Volante lives, moved Republican voters from Congressional District 18, where Petitioner Patricia Clarino lives, decreasing competition and turning District 18 into a safe Democratic district, without jeopardizing the Democratic Party's interests in District 16. As a result, Petitioner Clarino's vote is diluted, while Petitioner Volante and other Congressional District 16 Republicans' votes will never outweigh the Democratic vote that has been gerrymandered around them.

226. In the new Congressional District 23, where Petitioners Tim Harkenrider, Linda Fanton, Jay Frantz, Alan Nephew, and Susan Rowley reside, the Legislature "packed" as many Republican votes into the district as it could. As a result, the Republican votes of Petitioners and similar voters in the District far exceed the amount their candidates need to win in elections. Rather than fairly spreading Republicans through logically constructed districts, the Legislature has ensured that many of their votes are wasted in Congressional District 23.

227. Conversely, in the new Congressional District 10, where Petitioner Stephen Evans resides, and Congressional District 11, where Petitioner Jerry Fishman resides, the Legislature broke up conservative communities of interest, "cracking" and effectively neutralizing Republican voters in these districts. As a result, these Petitioners' votes are diluted, and they are subjected to political policies that do not align with their own views or the will of their communities.

228. Similarly, new Congressional District 17, where Petitioner Lawrence Garvey resides, new Congressional District 19, where Petitioners Guy C. Brought and Lawrence Canning reside, and new Congressional District 22, where Petitioners George Dooher, Jr. and Josephine Thomas reside, each “crack” and neutralize Republican votes by breaking up communities of interest and unnaturally reaching across the state to add Democratic voters to each of these districts. These Petitioners will be forced to endure representatives who do not reflect the communities they represent, enforcing their unwelcome policies.

229. Petitioners face similar harms from the gerrymandered 2022 state Senate map. In state Senate District 41—where Petitioner Patricia Clarino resides—the Legislature gerrymandered the district to lean Democratic, depriving Petitioner Clarino of the representation of her choice.

230. Similarly, in state Senate District 42—where Petitioner Marianne Volante resides—the Legislature drew the boundaries to stretch down into White Plains and create a safely Democratic district, depriving Petitioner Volante of the representation of her choice.

231. In state Senate District 48—where Petitioner Guy C. Brought resides—the Legislature removed more-conservative-voting areas in Montgomery County and Schenectady County, replacing them with more liberal areas in Dutchess and Columbia counties, thereby flipping this district into a somewhat strong Democratic district, thereby forcing upon Petitioner Brought a likely Democratic state Senator whose political policies will not align with his own.

232. In state Senate District 58—where Petitioners Linda Fanton, Jay Frantz, Alan Nephew, and Susan Rowley all reside—and state Senate District 59—where Petitioner Tim Harkenrider resides—the Legislature “packed” Republican voters into these districts, so the

Republican votes of Petitioners and similar voters in the District far exceed the amount their candidates need to win in elections. By doing so, the Legislature has ensured that Petitioners' votes will be wasted in these state Senate Districts.

233. Petitioners regularly vote for Republicans running for Congress and state legislative office and engage in campaign activity for Republicans running for Congress and state legislative office. Thus, the gerrymandering of the 2022 state Senate and congressional maps dilutes the power of their votes and political action efforts.

FIRST CAUSE OF ACTION

(N.Y. Const. art. III, § 4(b); N.Y. Legis. Law § 93(1) – Failure To Follow Constitutional And Statutory Procedures For Redistricting)

234. Petitioners hereby incorporate each of the foregoing paragraphs as if fully set forth herein.

235. Article III, Section 4(e) of the New York Constitution provides that “[t]he process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article *shall govern* redistricting in this state,” with limited exceptions not relevant here. N.Y. Const. art. III, § 4(e) (emphases added); *see* N.Y. Legis. Law § 93(3) (same).

236. Section 4(b) of Article III requires that, should the Legislature “fail to approve the legislation implementing the first redistricting plan” prepared by the IRC, the IRC then “*shall* prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan,” and that “[s]uch legislation *shall* be voted upon, without amendment.” N.Y. Const. art. III, § 4(b) (emphases added); *see also* N.Y. Legis. Law § 93(1).

237. Only then, after having considered and rejected such a *second* redistricting plan, or, after the Governor vetoes any such second plan after the Legislature approved it, may the Legislature “introduce” its own “implementing legislation” along with “any amendments” that comply with Article III, Section 4. N.Y. Const. art. III, § 4(b); *see also* N.Y. Legis. Law § 93(1).

238. Because the Legislature never received, let alone considered and acted upon, a second redistricting plan from the Commission, it never obtained redistricting authority under the *exclusive* process established by the New York Constitution for introducing and adopting its own redistricting maps. *See* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196, A.9039-A, A.9040-A, and A.9168.

239. After the Legislature rejected the first-round maps introduced by the IRC out of hand, the Commission did not adopt and introduce second-round maps to the Legislature within 15 days, leaving the Legislature with no maps to act on within the scope of its limited constitutional role.

240. As a result, the Legislature did not consider a second map or maps from the IRC, which mandatory consideration was required before the Legislature was constitutionally permitted to adopt its own congressional map. N.Y. Const. art. III, § 4(b).

241. The 2021 legislation enacted by the Legislature and Governor purporting to give the Legislature authority to circumvent the Constitution, to adopt its own maps if the Commission failed to vote on second-round maps, L.2021, c. 633, § 1, is unconstitutional. There is no provision of law that allows the Legislature to sidestep the Constitution’s exclusive process for redistricting in New York via legislative enactment.

242. The Legislature enacted L.2021, c. 633, § 7150 in an effort to avoid the effect of the People voting down a constitutional amendment to provide for what L.2021, c. 633, § 7150(1) purports to do. But, of course, a constitutional amendment is necessary to make the changes to New York’s exclusive, constitutionally enshrined redistricting process

243. The Legislature cannot act contrary to the Constitution’s restrictions on the respective duties and responsibilities allocated to it and other entities responsible for redistricting. Because the Legislature acted contrary to the Constitution when it enacted L.2021, c. 633, § 7150, the 2022 congressional and state Senate maps are invalid.

244. Since the Legislature had and has no constitutional authority to draw congressional or state Senate districts given the IRC’s failure to follow the exclusive, constitutionally mandated procedures, this Court cannot give the Legislature another opportunity to draw curative districts.

245. Thus, this Court should draw its own maps for Congress and state Senate prior to the upcoming deadlines for candidates to gain access to the ballot, just as happened regarding the 2012 congressional map.

SECOND CAUSE OF ACTION

(N.Y. Const. art. III, § 4(c)(2); N.Y. Legis. Law § 93(2)(b) – Unconstitutional Malapportionment)

246. Petitioners hereby incorporate each of the foregoing paragraphs as if fully set forth herein.

247. Article III, Section 4(c)(2) provides that “[t]o the extent practicable, districts shall contain as nearly as may be an equal number of inhabitants,” and that “[f]or each district that

deviates from this requirement,” the entity responsible for drawing the map “shall provide a specific public explanation as to why such deviation exists.” N.Y. Const. art. III, § 4(c)(2).

248. This constitutional requirement establishes a population-equality standard for congressional and state Senate districts, absent a “specific” and “public” explanation from the mapdrawer as to why any deviation is necessary. N.Y. Const. art. III, § 4(c)(2).

249. Therefore, following any decennial census, all congressional and state Senate districts must abide by this equal-population requirement.

250. As explained above, the 2022 congressional and state Senate maps are ultra vires because the Legislature ignored entirely the mandatory, *exclusive* process established by the 2014 constitutional amendments for enacting any such redistricting, as well as applicable substantive requirements for any Legislature-created map. *See supra* First Cause Of Action.

251. That is, the Legislature enacted its congressional and state Senate maps without abiding by the constitutional and statutory requirement that the IRC present a second round of maps following the Legislature’s decision not to approve the first round of maps. N.Y. Const. art. III, § 4(b). Indeed, the Constitution *requires* that the Legislature “vote[] upon” the “second redistricting plan and the necessary implementing legislation” before it may introduce its own plan, and yet the Legislature never complied with these rules. *Id.*; *see also supra* First Cause Of Action.

252. These violations render the 2022 congressional and state Senate maps invalid, leaving only the vestigial maps that the Legislature enacted or the court adopted after the 2010 decennial census. *See* 2011–2012 N.Y. Reg. Sess. Leg. Bills S.6696 and A.9525 (as technically amended by S.6755 and A.9584); *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012).

253. But the 2012 congressional map and 2012 state Senate map, *see id.*, are plainly unconstitutional *today*, following the 2020 census, given New York’s inarguable population shifts, because they do not meet the New York Constitution’s equal-population requirement.

254. That is, following the 2022 Census, none of the previous congressional and state Senate districts “[t]o the extent practicable” “contain as nearly as may be an equal number of inhabitants.” N.Y. Const. art. III, § 4(c)(2); N.Y. Legis. Law § 93(2)(b); *see supra* ¶¶ 61–79.

255. Thus, this Court must now also declare that the Legislature-enacted 2012 state Senate map, and court-adopted 2012 congressional map—the only validly-adopted map in existence, *supra* First Cause Of Action—are invalid, and adopt replacement, constitutional congressional and state Senate maps.

THIRD CAUSE OF ACTION

(N.Y. Const. art. III, § 4(c)(5); N.Y. Legis. Law § 93(2)(e) – Unlawful/Unconstitutional Partisan And Incumbent-Protection Gerrymandering)

256. Petitioners hereby incorporate each of the foregoing paragraphs as if fully set forth herein.

257. Article III, Section 4(c)(5) of the New York Constitution provides that “in the creation of state senate and . . . congressional districts . . . [d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.” N.Y. Const. art. III, § 4(c)(5).

258. New York Legislative Law § 93(2)(e) provides that, “in the creation of state senate and . . . congressional districts . . . [d]istricts shall not be drawn to discourage competition or for

the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.” N.Y. Legis. Law § 93(2)(e).

259. New York Legislative Law § 93(4) also provides that “any law establishing congressional or state legislative districts found to violate the provisions of this article shall be invalid in whole or in part.” N.Y. Legis. Law § 93(4).

260. The 2022 congressional and state Senate maps, 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196, A.9039-A, A.9040-A, and A.9168, violate the clear prohibitions against partisan and incumbent-favoring/disfavoring gerrymandering found in Article II, Section 4(c)(5) of the New York Constitution and New York Legislative Law § 93(2)(e).

261. The Legislature drew the 2022 congressional and state Senate maps “to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties,” N.Y. Const. art. III, § 4(c)(5), as discussed in detail above, *supra* ¶¶ 114–212.

262. Governor Hochul, who signed the maps into law, previously acknowledged that it was her intention “to use [her] influence to help Democrats” by way of “the redistricting process,” and claimed that she fully “embrace[d] that” role as Governor. Glueck & Ferré-Sadurní, *supra*.

263. For that reason, the enacted congressional and state Senate maps violate both the New York Constitution and New York Legislative Law § 93, requiring this Court to strike them as “invalid.” N.Y. Legis. Law § 93(4).

FOURTH CAUSE OF ACTION

(CPLR § 3001 – Declaratory Judgment)

264. Petitioners hereby incorporate each of the foregoing paragraphs as if fully set forth herein.

265. Petitioners seek a declaratory judgment from the Court “as to the rights and other legal relations of the parties,” CPLR § 3001, regarding the substantive and procedural requirements for redistricting in this State.

266. It is imperative that the New York Courts properly construe the recent amendments to Article 3, Section 4 of the New York Constitution and New York Legislative Laws § 93.

267. The 2014 amendments to the New York Constitution prohibit the Legislature and Governor from reapportioning seats for Congress and state Senate in a manner that

- a. disregards the exclusive procedures for redistricting, including the requirement that the IRC submit two rounds of maps for the Legislature’s consideration before the Legislature may undertake the redistricting function itself;
- b. creates districts that fail to contain as nearly as possible an equal number of inhabitants, requiring, as practicable, no deviation from perfect population equality;
- c. creates a partisan gerrymander with the intent to favor of any political party; and
- d. creates an incumbent-protection or incumbent-disfavoring gerrymander with the intent of aiding or hurting any incumbent or candidate.

Each of these violations, alone and in tandem, requires the Court to invalidate the congressional and state Senate maps.

268. Respondents’ actions in violating each of these constitutional requirements come from a determined effort to advance the interests of the Democratic Party by entrenching incumbent Democrats and targeting incumbent Republicans, in direct contravention of the will of

the citizens of the State of New York, who voted in favor of ridding such partisan interests from the redistricting process.

269. Further, the 2021 legislation, L.2021, c. 633, § 7150, enacted by the Legislature and Governor in an attempt to give the Legislature authority to circumvent the Constitution and adopt these unlawful maps, is unconstitutional. The Legislature cannot contravene the Constitution's exclusive process for redistricting in New York through legislative enactment.

270. Each of these constitutional violations has harmed Petitioners, who are now subject to gerrymandered and highly partisan maps for their representatives in Congress and state Senate.

271. This issue is ripe for judicial review.

272. Absent resolution of these constitutional questions, neither Respondents nor the citizens of New York will have adequate guidance regarding the propriety of the enacted maps and the prior legislature-enacted and court-drawn maps, in preparation for impending elections.

273. If each of these fundamental issues regarding the redistricting processes in New York is not resolved in short order, it will be too late to do so without threatening the integrity of upcoming elections.

274. Therefore, this Court should enter judgment declaring that the 2022 congressional and state Senate maps, *see* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196, A.9039-A, A.9040-A, and A.9168, violate the New York Constitution, declare that the 2012 congressional and state Senate maps, *see* 2011–2012 N.Y. Reg. Sess. Leg. Bills S.6696 and A.9525 (as technically amended by S.6755 and A.9584); *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012), now violate the New York Constitution in light of the population shifts

identified in the 2020 Census, strike down the 2021 legislation, L.2021, c. 633, § 7150, as unconstitutional, and itself draw a new congressional map cured of all legal infirmities.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully demand that this Court review the constitutionality of the congressional apportionment and enter judgment and order against Respondents as follows:

A. Declaring pursuant to CPLR § 3001 that:

i) the 2022 congressional map and 2022 state Senate map, *see* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196, A.9039-A, A.9040-A, and A.9168, both constitute unconstitutional maps enacted without complying with the mandatory constitutional procedures for redistricting in Article III, Section 4(b) of the New York Constitution;

ii) the 2012 congressional map, court-adopted after the 2010 decennial census, *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012), and the 2012 state Senate map, legislatively enacted after the 2010 decennial census, 2011–2012 N.Y. Reg. Sess. Leg. Bills S.6696 and A.9525 (as technically amended by S.6755 and A.9584), are the only validly enacted maps currently in existence, but are now unconstitutionally malapportioned, failing to comply with the mandatory constitutional requirements that each district contain an equal number of inhabitants, found in Article III, Section 4(c)(2) of the New York Constitution;

iii) the 2022 congressional map and 2022 state Senate map, apart and aside from procedural deficiencies, constitute unconstitutional partisan and incumbency-favoring/disfavoring gerrymanders, in violation of Article III, Section 4(c)(5) of the New York Constitution and New York Legislative Law § 93(2)(e);

iv) the 2012 congressional map and 2012 state Senate map are unconstitutional in light of the population shifts identified in the 2020 census; and

v) the 2021 legislation, L.2021, c. 633, § 7150, enacted by the Legislature and Governor in an attempt to give the Legislature authority to circumvent the Constitution and adopt these unlawful maps, is unconstitutional.

B. Enjoining Respondents from conducting any elections under the 2012 congressional map and 2012 state Senate map;

C. Enjoining Respondents from conducting any elections under the 2022 congressional map and 2022 state Senate map;

D. Adopting new, legally compliant congressional and state Senate maps;

E. Alternatively, and only if the Court does not agree with Petitioners' procedural claim, ordering the Legislature to attempt to cure the legal and constitutional infirmities in the 2022 congressional map and 2022 state Senate map and adopt lawful maps for each;

F. Suspending or enjoining the operation of any other state laws that would undermine this Court's ability to offer effective and complete relief to Petitioners for the November 2022 elections and related primaries, including, if this Court deems necessary, § 3(i) of 2021–2022 S.8172-A and A.9039-A, and § 2 of 2021–2022 S.8185-A and A.9040-A;

G. Awarding Petitioners all of their reasonable attorneys' fees and costs; and

H. Awarding such other and further relief as this Court may deem just and proper.

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Dated: New York, New York

February 8, 2022

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**Exhibit E to Salcedo Affirmation-
Decision and Order of the Honorable Patrick F. McAllister, in
Harkenrider I., dated March 31, 2022
[pp. 421 - 438]**

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STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

Index No. E2022-0116CV

TIM HARKENRIDER, GUY C. BROUGHT,
LAWRENCE CANNING, PATRICIA CLARINO,
GEORGE DOOHER, JR., STEVEN EVANS, LINDA
FANTON, JERRY FISHMAN, JAY FRANTZ,
LAWRENCE GARVEY, ALAN NEWPHEW,
SUSAN ROWLEY, JOSEPHINE THOMAS, and
MARIANNE VOLANTE,

Petitioners,

-against-

DECISION and ORDER

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,

Respondents.

PRESENT: Hon. Patrick F. McAllister
Acting Supreme Court Justice

The Petitioners, through their attorneys, are seeking to set aside the newly enacted congressional districts and senate districts. The Petitioners allege that the Respondents did not have the authority under the constitution to create the new congressional and senate districts as they did, and further that the Respondents engaged in prohibited gerrymandering when creating the districts. The Respondents oppose the Petitioners' application. The court heard oral argument on March 3, 2022. The court reserved decision pending further development of the record. The court heard testimony of several experts and final arguments were heard on March 31, 2022.

In making this Decision and Order the court has considered all the submissions made in this matter. To specifically innumerate them would needlessly waste pages of paper and lots of ink. The e-file system has them all enumerated.

Background:

Although it has been quite some time since one party controlled the Senate, the Assembly, and held the governorship, New York State has a long history of gerrymandering when it comes to the creation of new voting districts. Whichever major political party has been in power has used the creation of new voting districts to their own advantage and to the disadvantage of their opposition. The result was that 98% of incumbents were getting reelected before the constitutional amendment in 2014.

The scourge of gerrymandering is not unique to New York. In recent years the courts throughout the country have been called on to invalidate gerrymandered districts and to create new fairer districts. League of Women Voters v. Commonwealth, 178 AD3d 737 (Pa. 2018); League of Women Voters of Fla. v. Detzner, 172 So. 3d 363 (Fla. 2015); Rucho v. Common Cause, 204 L.Ed. 2d 931 (2019). In 2014, New York State took major steps to avoid being plagued by gerrymandering by amending Article III §§4 & 5 of the New York State Constitution. The 2020 census was the first time after the constitutional amendment that led New York to draw new districts. Therefore, this is a case of first impression in many respects.

Under New York's very old rule there was a district seat for each county, except for Hamilton County. The Federal Courts found that unconstitutional because some counties were sparsely populated resulting in the citizens of those counties receiving disproportionate representation as compared to the heavily populated counties. Reynolds v. Sims, 377 U.S. 533 (1964); In re Orans, 15 NY2d 339 (1965). The law was changed to create districts that were roughly equal in population. In doing so other redistricting criteria in the Constitution such as not crossing county lines were given less value. See, Wolpoff v. Cuomo, 80 NY2d 70 (1992).

In the past most redistricting challenges were heard in federal court. However, in Rucho v. Common Cause, 139 S.Ct. 2482 (2019) the court ruled that federal courts do not have the authority to strike down maps based on partisan gerrymandering. Hence, this action is brought in state supreme court.

The courts have recognized that redistricting requires a balancing of sometimes competing Federal and State Constitutional requirements. "The test is whether the Legislature has 'unduly departed' from the State Constitution's requirements regarding contiguity, compactness and integrity of counties (Matter of Schneider v. Rockefeller, 31 NY2d 420, 429) in its compliance with federal mandates. It is not our function to determine whether a plan can be worked out that is superior to that set up by the legislature. Our duty is, rather, to determine whether the legislative plan substantially complies with the Federal and State Constitutions." Wolpoff v. Cuomo, (*supra*. at 78). To again quote Wolpoff "This is no simple endeavor". "Balancing the myriad requirements imposed by both the State and the Federal Constitution is a function entrusted to the Legislature. It is not the role of this, or indeed any, court to second-guess the determinations of the Legislature, the elective representatives of the people in this regard. We are hesitant to substitute our own determination for that of the Legislature even if

we would have struck a slightly different balance on our own.” ” Wolpoff v. Cuomo, (*supra*. at 79).

Standing:

The Respondents challenge whether or not the Petitioners in this case have standing to bring this action since the various Petitioners live in only a small number of Congressional and State Senate Districts.

It is the law’s policy to only allow an aggrieved person to bring a lawsuit. One not affected by anything a would-be defendant has done or threatened to do ordinarily has no business suing. *New York Practice 6th Ed.* Seigel §136 Pg. 270.

Many of the prior redistricting challenges where the courts have found petitioners do not have standing were cases focused only on a particular district boundary. In those cases if the petitioner did not live in the district he/she did not have standing. The Petitioners in this case are challenging the entire process as being in violation of the Constitutionally prescribed method for redistricting and in particular that the Congressional and State Senate maps were drawn with a political bias that is contrary to the Constitution. In Dairylea Cooperative, Inc. v. Walkey, 38 NY2d 6 (1975) a milk distributor sought to challenge a Commissioner of Agriculture decision which granted a milk dealer license to another entity. The court found there was standing because the Plaintiff was in the “zone of interest.” Further, only when there is a clear lack of injury would standing be denied.

In Society of Plastics Industry, Inc. v. County of Suffolk, 77 NY2d 761 (1991) the court made clear that having an economic interest is not sufficient to find standing if the issue is a non-economic interest. In that case to have standing the Plaintiff needed to show non-economic issues such as environmental or aesthetic reasons to challenge the legislation.

If this court finds the method used in enacting these maps violated the Constitution this would not affect just a handful of districts, but in fact would effect every district in New York. It would be impractical to require someone from every district to serve as a Petitioner. Once one district is invalid it impacts neighboring districts. But if the entire process is invalidated then everyone is impacted. The court finds these Petitioners have standing.

The 2014 Constitutional Amendment:

The 2014 amendment to the New York Constitution includes both a provision to prohibit discrimination against racial or language minority voting groups and a prohibition against creating maps with partisan bias. The prohibition against discriminating against minority voting groups at the least encapsulated the requirements of the Federal Voting Rights Act, and according to many experts expanded their protection. That new provision is not currently being challenged. Therefore, the court will focus on the prohibition against partisan

bias and the process by which redistricting was to take place.

To tell how important the people considered the issue of partisan bias not only was Article III section 4 amended to add “Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties”, but the Constitutional process for redistricting was also revised to create an Independent Redistricting Committee (IRC), which was to create non-biased bipartisan maps. This provision creating an IRC was intended to take the creation of proposed redistricting maps out of the hands of a one-sided, partisan legislature as much as possible. This IRC committee was to consist of appointees as follows: two members by the temporary president of the senate, two members by the speaker of the assembly, two by the minority leader of the senate and two by the minority leader of the assembly, plus two additional members which were to be appointed, one by the Democratic committee members and one by the Republican committee members. NY Constitution Art. III §5-b. Although the word “compromise” is not used it is clear from reading the constitutional amendment that the people of the State of New York believed that nonpartisan maps agreed upon as a result of a compromise were the best way to avoid gerrymandering when redistricting. At the very least in the event one party controlled both the senate and the assembly the amended constitution required there to be both support from some of the Democrats on the committee and also by some of the Republicans on the committee in order for the redistricting plan to receive the minimum seven votes necessary for the plan to be submitted to the legislature for approval, and to the governor for signature. NY Constitution Art III §5-b(f).(1) reads as follows:

“In the event that the speaker of the assembly and the temporary president of the senate are members of the same political party, approval of a redistricting plan and implementing legislation by the commission for submission to the legislature **shall** require the vote in support of its approval by at least seven members including at least one member appointed by each of the legislative leaders.” (Emphasis added)

In 2022 the Democrats controlled both the senate and the assembly. Nevertheless, the IRC committee failed to come up with any plan that obtained the minimum seven votes. There was no plan that received bipartisan support. That eventuality was anticipated in the constitution and according to Art. III §5-b(g) the plan or plans receiving the highest vote were to be submitted to the legislature. The Democrat committee and the Republican committee each submitted their own plans known as Plan A and Plan B with an equal number of IRC votes, but only from their own respective subcommittees. The court heard limited testimony concerning both Plan A and Plan B and received copies of those plans as exhibits. Even though a few of the proposed districts seemed to be the same in both plans, the IRC was not able to come up with a bipartisan plan that received seven votes. Both Plan A and Plan B were submitted to the legislature and the legislature quickly rejected both plans. According to the amended constitution, the committee was then to submit to the legislature a second set of redistricting plans. NY Constitution Art. III §4(b).

In 2022 the committee never submitted a second revised redistricting proposal to the legislature. Hence, the legislature went ahead and in a few days drafted and passed their own redistricting maps. A couple of Democrats voted against the legislature's redistricting maps, but otherwise the legislation was passed along party lines. It is these Congressional and Senate redistricting maps that this court must review to determine whether they violate the state and/or federal constitutions.

Before analyzing the specifics of the redistricting plans that were passed, it is important to review what did not happen. The IRC committee never embraced the task of coming up with compromise plans. It was clear from the amended constitution that the people of the State of New York believed the best way to avoid partisan politics in drawing new district lines was for a small group to work together to come up with compromise plans that obtained some bipartisan support. The plans did not have to be unanimously approved by the members of the committee, but at least some members of each subcommittee had to support the plan. The court comes to this conclusion from the following:

1. The Constitution was amended to add Article III §4(c)(5) which now reads as follows:
"Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." ;
2. The Constitution created an Independent Restricting Committee (IRC);
3. The IRC was constructed in such a way that neither political party would attain the seven votes necessary without bipartisan support;
4. The Constitution specifically reads that the approved plan had to have support from at least one appointee of each of the political leaders that appointed members to the IRC.
5. That even if the IRC plan was rejected it was the IRC and not the legislature that was authorized to draw a second set of revised maps.
6. That even if the second set of IRC maps was rejected, the legislature could only vary the enacted maps slightly from the IRC maps. There could be no more than a 2% deviation in any district according to the Redistricting Reform Act of 2012.
7. The people of the State of New York rejected the 2021 ballot proposal that would have authorized the legislature to draw the maps in the event the IRC was not able to come with maps.

By contrast the important constitutional amendment that protected racial and language minority voting groups from being discriminated against had only one provision. Article III §4(c)(1). There was no new committee appointed to insure that this amendment to the Constitution was carried out. The court can only conclude that the people of the State of New York thought the creation of a non-biased, nonpartisan IRC committee that must work together to arrive at bipartisan redistricting maps was crucial to avoid gerrymandering - and even though the legislature, under certain circumstances, had the power to create their own redistricting maps, the legislature would have been under scrutiny in rejecting two sets of proposed bi-partisan maps before drawing their own maps, a circumstance that would invite the wrath of the electorate. Further, the law only permits slight alterations of the IRC maps by the legislature.

The legislature is not free to ignore the IRC maps and develop their own.

In a democracy it is rare if ever that one party has all the right answers and all the right policies. A democracy works best when every responsible adult has a voice and when by listening to each other a compromise is worked out that incorporates part of everyone's opinion. Unfortunately, in recent years the idea of "compromise" has gotten the reputation as being something distasteful and something to be avoided. Yet compromise is the foundation upon which the United States Constitution, our political system, and our country was established. It is compromise that is the safest way to avoid the plague of partisan gerrymandering. If gerrymandering is allowed to occur then certain groups of voters will be discriminated against and become disenfranchised. Discrimination comes in many forms whether it be against ones race, sex, age, religion, political party or something else. The New York Constitution specifically says, "When drawing district lines, the commission shall consider whether such lines would result in the denial or abridgement of racial or language minority voting rights, and districts shall not be drawn to have the purpose of, nor shall they result in, the denial or abridgment of such rights. Districts shall be drawn so that, based on the totality of the circumstances, racial or minority language groups do not have less opportunity to participate in the political process than other members of the electorate and to elect representatives of their choice." Art. III §4(c)(1).

Gerrymandering discrimination hurts everyone because it tends to silence minority voices. Then none of us receives the benefit from the input of the silenced. Imagine a society where only Democrats are able to work on cancer research or only Republicans could be board certified as heart surgeons. Imagine all the accomplishments and discoveries that would never come to pass because the majority thought it best to eliminate minority positions or views. Lives and the common good are at stake. When we choose to ignore the benefits of compromise we not only hurt others, we hurt ourselves as well.

There is nothing in the constitution that permits the IRC to just throw up their collective hands. Courts are very familiar with juries who say "We can't come to an agreement" during deliberations. However, the more the court keeps requiring them to go back and try again the more likely they are to finally reach a consensus. It is rare for the court to end up with a hung jury. Here the IRC stopped working well before their deadline. What someone should have done was bring an action to compel the members of the IRC to continue their work or for the political sides of the legislatures that appointed 8 of the 10 members of the IRC to remove and replace any IRC member that did not embrace his/her constitutional role. NY Constitution Art III §5-b(a)(1)-(4). Then either the court could have compelled the IRC to work together until they came up with a plan or the IRC new members could develop new bipartisan maps. Instead the IRC was permitted to throw up their hands and the legislature stepped in. Does the Constitution permit the legislature to take over if the IRC fails to do its job? By the Constitution the IRC's drop dead date for submitting a plan was February 28th. This action was commenced long before that deadline.

Under the “new” process that was put in place a committee (IRC) was formed to try to create a fair redistricting map. The committee had 4 Democrats, 4 Republicans and 2 people that could not be Democrats or Republicans. The Democrats chose 1 of the 2 and the Republicans chose the other. This year the committee met and considered a number of plans. The Democrats came up with a plan (Plan A) and the Republicans came up with a different plan (Plan B). The IRC could not come up with a compromise plan so both the Democrat and Republican plans were submitted to the legislature, although neither plan had obtained the required seven votes. Seven votes in favor of a plan were required since the Democrats control both the Senate and the Assembly. Both submitted plans were rejected by the legislature and sent back to the committee. The committee could not agree on anything different. They had a 15 day deadline but the IRC stopped working well before the deadline. So the legislature created it’s own map. The legislature’s plan differed significantly from either Plan A or Plan B submitted by the IRC.

Under the 2014 amendment the districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties. Under constitutional criteria the maps must be compact, contiguous, of equal populations, avoid abridgment of racial or language minority voting rights, maintain cores, and not cross the boundary lines of pre-existing subdivisions such as counties, cities, towns and communities of interest and there was to be no partisan gerrymandering. “The anti-gerrymander provision of the State Constitution is found in article III. Section 4 requires that Senate districts ‘be in as compact form as practicable’ and ‘consist of contiguous territory’; and section 5 provides that Assembly districts shall be formed from ‘convenient and contiguous territory in as compact form as practicable. As we recognized in Matter of Orans, (15 NY2d 339, 351, supra), these constitutional requirements remain binding although they must be harmonized with the first principle of substantial equality of population among districts.” Schneider v. Rockefeller, 31 NY2d 420 (1972).

The Failed 2021 Constitutional Amendment and Subsequent 2021 Legislation:

The political powers realized that the redistricting compromise plan envisioned by our 2014 amended constitution had a flaw. The plan lacked a way to handle the contingency of the committee not coming up with a bipartisan plan(s). Thus another constitutional amendment was proposed and put before the voters in November of 2021, under which the legislature could create and the Governor enact its own redistricting plan in the event the IRC committee failed to carry out its constitutionally prescribed duties. This constitutional amendment was voted down by the people of the State of New York - Republicans, Democrats, and Independents alike. Just three (3) weeks later, the legislature enacted legislation signed by the governor giving themselves the power to do exactly what the people of the State of New York had just voted down three (3) weeks earlier. Even though the proposed 2021 Constitutional Amendment contained other new provisions, none were hot button issues. In part this decision will focus on that legislation that was enacted just three (3) weeks after the proposed 2021 Constitutional Amendment was voted down.

Redistricting Reform Act of 2012 (The 2% Rule):

Another key component of the Redistricting Reform Act of 2012 that directly impacts the subsequent 2014 constitutional amendment was that: **“Any amendments by the senate or assembly to a redistricting plan submitted by the independent redistricting commission, shall not affect more than two percent of the population of any district contained in such plan.”** Redistricting Reform Act of 2012 N.Y. Sess, Laws 17 §3. The currently enacted plans vary by more than 2% from either of the plans submitted by the IRC. The Respondents do not allege that the plans they developed adhere to the 2% modification limit of either IRC map that was submitted. The Respondents contend that the “Notwithstanding any other provision” language of the newly enacted 2021 legislation made it so the legislature was not bound by the 2% rule. Obviously, it could not be compared to a final IRC map as such a map was never submitted. The court finds the 2% variance rule was another important procedural check to avoid partisan gerrymandering. These current maps ignore that procedural requirement. In essence, the legislature through the 2021 legislation, freed themselves from the constitutional process and the 2% limitation.

Analysis:

The New York Constitution Article III §§4 & 5 describes the process for the creation of election districts. Unconsolidated Laws §4221 says the supreme court has the jurisdiction to hear a petition brought by any citizen that wishes to challenge the redistricting law. The court is mandated to give this case the highest priority. The court has 60 days in which to render a decision from when the petition was filed. The Petition was filed February 3, 2022 so a decision must be rendered by April 4, 2022. If the court finds the redistricting plans invalid the legislature shall have a reasonable opportunity to correct their deficiency. Art. III §5. The Petitioners contend that this provision should be ignored by the court because the legislature never properly had jurisdiction to create these maps in the first place, since the IRC never submitted a second map to be considered.

The Petitioners seek to have this court find the 2022 Congressional Map and the 2022 Senate Map to be void *ab initio*. The Petitioners allege the legislature lacked the constitutional authority to enact redistricting maps because the Constitution proscribed an exclusive process, which in 2022 was not followed.

Not only must this court interpret the redistricting process under the 2014 amendment to the Constitution, but must also determine whether or not the legislature had the authority to alter the constitutional process by passing the recent 2021 legislation, when granting that same legislative authority was voted down by the people of the State of New York in the 2021 proposed Constitutional Amendment three weeks earlier.

On the November, 2021 ballot there was a proposed constitutional amendment to Article III Section 4(b) of the New York State Constitution that would have added language that

in the event the IRC redistricting commission fails to vote on a redistricting plan and implementing legislation by the required deadline then each house should introduce a redistricting plan and implementing legislation. When the constitutional amendment was voted down by the People of the State of New York the legislature passed a 2021 amendment to the Redistricting Reform Act of 2012 Section 4 (a) & (c) to provide that if the commission does not vote on any redistricting plan for any reason the legislature shall draft redistricting maps and implementing legislation and submit it to the governor.

In challenging the recently enacted 2021 legislation this court must start with the presumption that the legislation is constitutional. Matter of Moran Towing Corp. v. Urbach, 99 NY2d 443 (2003). Further, facial constitutional challenges like this one are disfavored. Overstock.com, Inc. v. New York State Dept. of Taxation and Fin., 20 NY3d 586 (2013). A challenge to a duly enacted statute requires the challenger to satisfy the substantial burden of demonstrating that in every conceivable application the enacted law suffers wholesale constitutional impairment. Center for Jud. Accountability, Inc. v. Cuomo, 167 AD3d 1406 (Third Dept. 2018); appeal dismissed 33 NY3d 933 (2019). Basically the challenger must establish that there is no set of circumstances under which the legislation could be valid. Overstock.com, Inc. v. New York State Dept. of Taxation and Fin., (*supra*). This court must make every effort to interpret the statute in a manner that otherwise avoids a constitutional conflict. See, People v. Davidson, 27 NY3d 1083 (2016).

The Petitioners contend that the November, 2021 legislation not only amended the Redistricting Reform Act of 2012 but also created a second path for redistricting that is not in the constitution. The constitution envisions the redistricting process to occur through the IRC. Only after the IRC has twice submitted maps that are rejected by the Legislature does the Legislature take up the process. The Constitution uses such words as “the” and “shall” to indicate this was the way and the only way that redistricting maps were to be drawn.

The 2021 legislation purportedly revised the 2012 Redistricting Reform Act so that if the IRC fails for any reason to submit a plan then the legislature shall prepare their own redistricting maps. However, the legislature can not override a constitutional barrier by passing a new law. City of N.Y. v. N. Y. State Div. of Human Rights, 93 NY2d 768 at 774 (1999). Further, this 2021 legislation purportedly negated the 2% variance limitation if the legislature drafted their own maps.

This court finds that by enacting the legislation in November of 2021 the legislature made it substantially less likely that the IRC would ever submit a bipartisan plan when the senate, assembly and governorship are all controlled by the same political party. Since the senate and assembly leaders appoint four of the ten members of the IRC, these four members, and by extension the legislature, would essentially have carte blanche veto power to keep the vote below the seven votes necessary to pass such a bipartisan plan. The intent of the 2014 constitutional amendment is to have bipartisan maps drawn by the IRC commission submitted and passed by the legislature.

Some might argue that whether the IRC failed to twice submit bipartisan maps or whether they did submit bipartisan maps and the legislature voted them down twice that it doesn't make any difference; that the legislature had the power to step in under either scenario. However, this court sees a difference. In this case the Legislature can say the IRC did not come up with bipartisan maps so we had to act. The IRC was a scapegoat for the legislature. If on the other hand the constitutional process were followed, the legislature would be in the awkward political position of having to vote down two sets of proposed bipartisan redistricting maps before drafting their own maps, at the risk of raising the ire of the voters at the next election. In addition the legislature, in drafting their own maps, would be under pressure and scrutiny to adopt a good portion of the proposed bipartisan maps submitted by the IRC commission, and they would also be limited by the no more than 2% alteration rule. The conclusion is that the currently enacted maps would have been substantially different had the constitutional process been followed.

This court finds that the November, 2021 legislation which purported to authorize the legislature to act in the event the IRC failed to act was not a mere enactment of legislation to help clarify or implement the Constitution, but in fact substantially altered the Constitution. Alteration of the Constitution can only be done by constitutional amendment and as recently as November, 2021 the people rejected the constitutional amendment that would have granted the legislature such authority. Therefore, this court finds the recently enacted Congressional and Senate maps are unconstitutional. Further, the enacted maps are void *ab initio*. Under the currently constructed Constitution when the IRC failed to act and submit a second set of maps there is nothing the Legislature has the power to do. Therefore, the court will need to step in. The court would note that not only are the Congressional District Maps and Senate District Maps void but the Assembly District Maps are void *ab initio* as well. The same faulty process was used for all three maps. Therefore new maps will need to be prepared for the Assembly Districts as well.

The People of the State of New York have spoken clearly. First, in the 2014 Constitutional Amendment not only did the People include language to prevent gerrymandering, but they also set forth a process to attain bipartisan redistricting maps through the IRC. The People of the State of New York again spoke loudly when they soundly voted down the proposed 2021 Constitutional amendment that would have granted authority to the Legislature to bypass the IRC redistricting process.

Although the court has already stricken the enacted redistricting maps as unconstitutional the court will discuss the Petitioners' further argument that the congressional and senate redistricting maps were the result of partisan bias. The standard of proof is beyond a reasonable doubt.

When considering redistricting there are two fundamental federal law principles that apply. There is the Equal Protection Clause of the 14th Amendment and the Voting Rights Act. The Equal Protection clause requires districts to be composed of the same number of residents

or within acceptable variance thereof. The Voting Rights Act prohibits drawing lines that deny racial or language minorities a fair opportunity to elect a candidate of their choice. In addition to those federal requirements, the New York constitution adds several other factors which must be considered, including the district being contiguous, compact, drawn so as to not favor or disfavor an incumbent or a political party, trying to keep county and town boundaries within the same district, and trying to maintain the cores of prior districts. Because of the need to make districts equal in population it is not always possible to meet all of the other factors to be considered. Article III §4 (c) 1 - 5 list a number of factors which "shall" be considered. "Shall" is a requirement.

What is compactness? "Reapportionment is one area in which appearances do matter." Shaw v. Reno, 509 U.S. 630 at 647 (1993). Compactness has been described in scientific terms as the extent to which a district's geography is dispersed around its center. In practice many courts use the eyeball test. Bush v. Vera, 517 U.S. 952 at 959 (1996). The Petitioners in this case claim districts that look like snakes or are elongated over hundreds of miles violate the Constitutional requirement of compactness. What the courts have found is that "compactness" may vary depending on whether or not the issue is racial gerrymandering or dilution of vote cases. "Dramatically irregular shapes may have sufficient probative force to call for an explanation." Shaw v. Reno, (*supra*. at 647); Karcher v. Daggett, 462 U.S. 725 at 755 (1983).

A contiguous district requires that all parts of the district be connected. This is usually measured by whether it is possible to travel to all parts of the district without ever leaving the district. In this case, some of these proposed districts you would need a boat to go from one section of the district to another, but at least you do not have to cross district lines, just County lines and other political boundaries.

According to the eyeball test there are some districts that don't look like they are compact. They include Congressional Districts 1,2, 3, 7, 8, 10, 17, 18, 19, 22 and 24. However, the eyeball test is not proof beyond a reasonable doubt.

The preservation of the cores of prior districts. At least 11 states, including New York, include this as part of the criteria when drawing new maps. The likely theory behind this is that by maintaining continuity of districts you maintain continuity of the representation for the citizens within that group. Obviously, when the number of districts has to change it is impossible to fully comply with this criteria.

According to *Redistricting Law 2020* by Davis, Strigari, Underhill, Wice & Zamarripa 18 states have now included language prohibiting redistricting to be drawn with the intent of favoring or disfavoring an incumbent or a political party, with 12 other states currently in the process of adopting neither favoring or disfavoring language. This language was the new anti-gerrymandering requirement added by the 2014 New York Constitutional Amendment.

Although the Federal Courts no longer have the authority under the First and/or

Fourteenth Amendments to invalidate maps based on partisan gerrymandering, numerous states and state courts have been addressing these issues. Rucho v. Common Cause, (*supra.*). States have been addressing this through constitutional amendments, the appointments of independent commissions and by prohibiting the drawing of district lines for partisan advantage. Rucho v. Common Cause, (*supra.*). In recent years both Florida and Pennsylvania courts have found and overturned maps based on partisan gerrymandering. See, League of Women Voters of Pa. v. Commonwealth 644 PA 287 (2018); League of Women Voters of Fla. v. Detzner, 172 So. 3d 363 (2015). In both of these cases the courts interpreted their respective constitutional provision which prohibited redistricting with the intent to favor or disfavor a political party or an incumbent. In the 2014 Constitutional Amendment Art. III §4(c)(5) New York added “Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.” The meaning of this portion of the constitution and how it applies to the recently enacted Congressional and State Senate maps is key. Courts have for a long time struggled with being able to adequately define a standard to apply in such situations. Everyone agrees that politics plays some part in redistricting. In Davis v. Bandemer, 478 U.S. 109 (1986). At what point does permissible partisanship become unfair or unconstitutional? How much is too much? Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections, No. 11 C 5065 2011 U.S. Dist. LEXIS 117656 (2011).

In this case the Petitioners have presented expert testimony through Shawn Trende indicating that he ran at first 5,000 and then 10,000 potentially unbiased simulated redistricting maps. Respondents’ expert Michael Barber testified he ran 50,000 maps attempting to duplicate Trende’s maps. Trende and Barber’s maps came up with the same results. The result according to Trende’s Gerrymandering Index was that the maps adopted by the Legislature and signed by Governor Hochul were the most favorable to Democrats of any of the sample maps. Barber disagreed with Trende’s use of a Gerrymandering Index and concluded that the enacted maps actually favored Republicans. Likewise, Respondents other experts came to the conclusion that the enacted maps actually favored Republicans. The court finds it strains credulity that a Democrat Assembly, Democrat Senate, and Democrat Governor would knowingly pass maps favoring Republicans. Petitioners had two experts testify and Respondents had five experts testify. However, it is not the number of experts that is determinative but the quality and credibility of the expert testimony.

The Respondents’ expert attempted to discredit Trende’s analysis by claiming that a large percentage of Trende’s simulated maps are redundant in that the maps essentially show the same boundaries. It is claimed that as many as one half to three-fourths of the simulated maps are duplicative. Therefore, it was argued that Trende should have eliminated the duplicates as he did when addressing Maryland maps. Duplication or redundancy is claimed to be a common problem with this type of simulation. However, Trende ultimately did 10,000 simulated maps which could be reduced to 2,500 simulated maps if three quarters were redundant maps and were eliminated. Even under this analysis the enacted maps are the worst of 2,500 simulated maps, ie the worst of the worst.

What all the experts agreed upon was that the enacted congressional map would likely lead to the Republicans winning four Congressional seats. The Republicans currently hold 8 of the 27 congressional seats. A majority of the 5,000, 10,000 or 50,000 unbiased maps would have the Republicans winning less than four seats if you use 50.01% Democrats in a given district as the standard for which way a given district is likely to elect a Democrat or a Republican. Thus the Partisan Index used by the Respondents experts conclude the enacted maps favors Republicans because they are likely to receive four seats. However, both Trende and Respondents' expert, Jonathan Katz, testified that historically the Republicans win a district up to 52% Democrat and that incumbent Republicans enjoy an additional 3%, which means the districts would have to be at least 55% Democrats for the Democrats to actually win. The enacted maps gives the Democrats at least 55% in every district except the four that are Republican leaning. Obviously actual elections vary but as a general rule that is what the reliable historical data shows. What Trende's report shows is that the first four districts heavily lean toward the Republicans. See Trende's Gerrymandering Index (graphs pgs. 14 & 15 of the Expert Report dated February 14, 2021). However, in the enacted plans congressional seats 5 - 13 not only favor Democrats but show 55% or higher Democrats in those districts making them noncompetitive and virtually impossible for a Republican to win. However, in the "unbiased" sampling by Trende and Barber as few as 2 seats heavily favor Republicans, but in sample districts 3 - 13, while the Democrats were favored in those samples, their advantage was in most cases substantially less than 55% Democrat leaning and in many cases less than 52% Democrat leaning. That would mean these districts would be competitive and if historical data is accurate would likely result in several of those seats going to Republicans.

The Respondents' experts claim that the Gerrymandering Index should not be recognized by the court. The Petitioners cite Szeliga v. Lamone, C-02-CV-21-001816, a recent Maryland case (March 25, 2022) that recognized the Gerrymandering Index as proof that the maps were biased.

What is clear from the testimony of virtually every expert (Trende, Lavigna, Barber, and Katz) is that at least in the congressional redistricting maps the drawers packed Republicans into four districts thus cracking the Republican voters in neighboring districts and virtually guaranteeing Democrats winning 22 seats. In 5,000, 10,000 or 50,000 unbiased computer drawn maps there were several, and perhaps as many as 10 competitive districts. The enacted congressional map shows virtually zero competitive districts. Trende concludes and the court agrees that this shows political bias. Katz and Barber agree with Trende that creating districts with no competitive districts is a potential sign of political bias. However, both Katz and Barber conclude there is no bias since Republicans are likely to win four seats; and that four seats is higher than most of the projected wins assuming the Democrats win every district that is at least 50.01 % Democrat leaning which is what the Partisan Index is designed to depict.

The court finds that Trende's maps, and those drawn by Katz and by Barber, do not include every constitutional consideration. Katz and Barber testified they attempted to duplicate the maps drawn by Trende using the same variables used by Trende. However, none

of Respondents' experts attempted to draw computer generated maps using all the constitutionally required considerations. Katz said to do so would have significantly increased the time it would take to draw the maps. Both Katz and Barber thought that by including every constitutional consideration the maps would have been different, but they could not say how or by how much they would have differed. If they had done so and could thus demonstrate that the additional constitutional factors not considered in Trende's maps cause a representative sample that differed appreciably from Trende's sample then the court could have considered those maps against the enacted map to see whether or not the same political bias was shown. Since no such computer generated maps were provided to the court the court must use the evidence before it.

According to Rucho (*supra.*) the fundamental difficulty in formulating a standard to adjudicate whether or not partisan gerrymandering has occurred is for the court to determine what is "fair". Is fairness formulating a greater number of competitive districts? Whitford v. Gill, 218 F. Supp.3d 837 (W.D. Wis 2016). Does fairness require as many safe seats for each party as possible? Davis v. Brademer, 478 U.S. 109 (1986). This court concludes that generating a map that significantly reduces the number of competitive seats is a clear sign of bias.

The court finds by clear evidence and beyond a reasonable doubt that the congressional map was unconstitutionally drawn with political bias in violation of Art. III §4(c)(5). One does not reach the worst of 2,500, 5,000, 10,000 or 50,000 maps by chance. Therefore, the court agrees with the Petitioners that the congressional map was unconstitutionally drawn with political bias in violation of Art. III §4(c)(5) of the New York Constitution.

The court will next consider the newly enacted senate map. The Petitioners presented credible evidence that this map also was gerrymandered. However, Todd Breitbart testified in-depth that many of the changes found between the 2012 enacted senate map and the 2022 enacted senate map were attempts by the legislature to correct malapportionment, and other constitutional deficiencies in the 2012 map. The court finds that testimony sufficiently credible. However, the court does not accept Breitbart's premise that the Republicans essentially gerrymandered the 2012 senate map since in 2012 the Assembly and Governorship were controlled by the Democrats and so the Republicans and Democrats had to work together to enact the maps. Therefore Petitioners could not show that the enacted 2022 senate map was drawn with political bias beyond a reasonable doubt. However, since this map was already struck down as void *ab initio* a new map will need to be drawn.

Having declared the recently enacted 2022 maps unconstitutional where do we go from here. It was clear from the testimony that not only is the 2012 congressional map not useable because New York State now only has 26 instead of 27 Congressional districts, but the 2012 senate map is also not useable because as a result of population shifts that map is now constitutionally malapportioned. Therefore, that leaves no maps. At this point in time, the candidates have been collecting signatures for over a month to get on the ballot for districts that

no longer exist. The end of the signature gathering process will occur within a few days. Yet Petitioners urge the court to have the parties quickly submit new maps and create new election time-lines so that the election can proceed on properly drawn redistricting maps that are free of partisan bias. The Respondents contend it is too late in the election cycle to try to draft new maps and then hold elections based on the new maps.

The Respondents point out that the U.S. Supreme Court has long ruled that Congressional elections can proceed even under defective lines. Merrill v. Milligan, 142 S. Ct. 879(2022); Abbott v. Perez, 138 S. Ct. 2305 (2018); Wells v. Rockefeller, 394 U.S. 542 (1969). In Wells v. Rockefeller the court faced a similar time deadline when on March 20, 1968 the primary election was three months away and yet the court permitted the election based on the redistricting maps that were constitutionally infirm, rather than delay the primaries and redraw the redistricting maps. Therefore, the Respondents urge this years election to proceed under the unconstitutional maps.

The Petitioners urge the court to strike down these constitutionally infirm maps and have new maps prepared. This of course will require revision of the election schedule since candidates would not even know what district he/she would run in before most of the current deadlines would have expired. The Petitioners urge moving the primary back to as late as August 23, 2022. The Petitioners cite other states that have recently moved their primaries to a later date because of challenges to the redistricting maps. See, Harper v. Hall, 865 S.E.2d 301, 302 (N.C. 2021); In re 2022 Legislative Districting of the State of Maryland, No. COA-MISC-0025-2021 (Md. Mar. 2022).

This court is well aware that this Decision and Order is only the beginning of the process and not the end of the process. There will likely be appeals to the Appellate Division and the Court of Appeals in addition to what ever time it takes to draw new maps. Then once the maps are drawn the County Boards of Election need time to apply the new redistricting maps to the precincts within their respective borders.

On March 3, 2022 when the court initially denied Petitioners application to stay the election process the court was not at all sure that the Petitioners could overcome the extremely high hurdle of demonstrating the maps violated the constitution. Thus, the court did not see a substantial likelihood for ultimate success by the Petitioners. Therefore the request for a temporary stay was denied. The court was also unaware of the prior courts ruling with regard to not permitting new elections in Congressional races in 2023 even when the maps were found to be unconstitutional. Having now determined that the various redistricting maps are unconstitutional the court is still concerned about the relatively brief time in which everything would need to happen to draw new maps, complete the appellate review process, revise the election process guidelines, and give the county election commissioners time to do their jobs.

However, this court's deadline of April 4, 2022 to make a decision was set by law (60 days to render a decision) in order to allow time for elections under newly drawn maps.

As the court sees it the drop dead date for sending out overseas military ballots is forty-five days before the November 8, 2022 general election. Thus, the ballots have to be finalized and mailed out no later than September 23, 2022. Between the primary election and that September 23rd date the votes have to be counted, the elections need to be certified, candidates need time to challenge election results, and the ballots need to be prepared. Thus, August 23, 2022 is the last possible date to hold a primary. An earlier August date would be preferred from the stand point of providing sufficient time from the holding of the primary to the completion of the November ballot. However, the same 45 day rule applies with regard to sending out overseas primary ballots. Thus, the primary ballots would have to be sent out no later than July 8, 2022. That only leaves about 100 days from today for the drawing of new maps, the candidates to gather signatures, the preparation of the primary ballots, the appellate review process, etc.

The court is mindful that in the Maryland case decided on March 25, 2022 that court threw out the recently enacted gerrymandered maps and ordered new maps to be drawn. This court finds that although it will be very difficult this court must require new maps to be drawn and the current maps are void and unusable. The court will leave it to the legislature and governor to develop new time frames for gathering signatures, how many signatures will be required to be on the ballot, whether signatures already gathered can be counted toward meeting the quota to appear of the ballot, etc.

N.Y. Constitution Art III §5 states as follows:

“In any judicial proceeding relating to redistricting of congressional or state legislative districts, any law establishing congressional or state legislative districts found to violate the provisions of this article shall be invalid in whole or in part. In the event that a court finds such a violation the legislature **shall** have a full and reasonable opportunity to correct the law’s legal infirmities.” (Emphasis added)

Therefore, the Constitution requires the Legislature to be given another chance to pass maps that do not violate the Constitution. Part of the problem is these maps were void *ab initio* for failure to follow the constitutional process of having bipartisan maps presented by the IRC. The second problem was the Congressional map that was presented was determined to be gerrymandered. The Legislature could correct the gerrymander issue, but they can not correct the constructional failure to have IRC present bipartisan maps for Congressional, State Senate, and State Assembly Districts. Therefore, the court will require any revised maps generated by the Legislature to receive bipartisan support among both Democrats and Republicans in both the senate and the assembly. The maps do not have to be unanimously approved, but they must enjoy a reasonable amount of bipartisan support to insure the constitutional process is protected. This they will need to do quickly. In Maryland the court gave their legislature 5 days in which to submit appropriate new maps for the court to review. The court will give the legislature until April 11, 2022 (which is slightly more time than they took to prepare the

enacted maps) to enact new bipartisan supported proposed maps that meet the constitutional requirements. This court will review those maps. If the maps do not receive bipartisan support or if no revised maps are submitted, then I will retain an expert at the States expense to draw new maps. Not only would the process be expensive it is possible that New York would not have a Congressional map in place that meets the Constitutional requirements in time for the primaries even with moving the primary date back to August 23, 2022.

NOW, therefore, upon consideration of all papers and proceedings heretofore had herein, and after due deliberation, it is

ORDERED, ADJUDGED, and DECREED the Petitioner are found to be in the zone of interest and therefore having standing to bring this action; and it is further

ORDERED, ADJUDGED, and DECREED that the Governor and Lt. Governor are necessary parties to this action; and it is further

ORDERED, ADJUDGED, and DECREED that the process used to enact the 2022 redistricting maps was unconstitutional and therefore void *ab initio*; and it is further

ORDERED, ADJUDGED, and DECREED that with regard to the enacted 2022 Congressional map the Petitioners were able to prove beyond a reasonable doubt that the map was enacted with political bias and thus in violation of the constitutional prohibition against gerrymandering under Article III Sections 4 and 5 of the Constitution; and it is further

ORDERED, ADJUDGED, and DECREED that the maps enacted by 2021-2022 N.Y. Reg. Sess. Leg. Bills S8196 and A.9039-A (as technically amended by A.9167) be, and are hereby found to be void and not usable; and it is further

ORDERED, ADJUDGED, and DECREED that the maps enacted by 2021-2022 N.Y. Reg. Sess. Leg. Bills S9040-A and A.9168 be, and are hereby found to be void and not usable; and it is further

ORDERED, ADJUDGED, and DECREED that congressional, state senate and state assembly maps that were enacted after the 2010 census are no longer valid due to unconstitutional malapportionment and therefore can not be used; and it is further

ORDERED, ADJUDGED, and DECREED that the legislation enacted in November, 2021 purporting to create a way to bypass the IRC is unconstitutional and in clear violation of the Peoples' express desire to not amend the Constitution to permit the Legislature to act in the event the IRC failed to submit maps; and it is further

ORDERED, ADJUDGED, and DECREED that the enacted legislation L. 2021 c. 633 §1 be and is hereby found to be void and not usable and shall be stricken from the books; and it

is further

ORDERED, ADJUDGED, and DECREED that the Petitioners and others have been injured as a result of the unconstitutional enacted maps; and it is further

ORDERED, ADJUDGED, and DECREED that in order to grant appropriate relief the court hereby grants to Petitioners a permanent injunction refraining and enjoining the Respondents, their agents, officers, and employees or others from using, applying, administering, enforcing or implementing any of the recently enacted 2022 maps for this or any other election in New York, included but not limited to the 2022 primary and general election for Congress, State Senate and State Assembly; and it is further

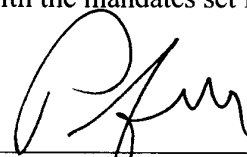
ORDERED, ADJUDGED, and DECREED that the Legislature shall have until April 11, 2022 to submit bipartisanly supported maps to this court for review of the Congressional District Maps, Senate District Maps, and Assembly District Maps that meet Constitutional requirements; and it is further

ORDERED, ADJUDGED, and DECREED that in the event the Legislature fails to submit maps that receive sufficient bipartisan support by April 11, 2022 the court will retain a neutral expert at State expense to prepare said maps; and it is further

ORDERED, ADJUDGED, and DECREED that any request for attorneys' fees and costs is denied; and it is further

ORDERED, ADJUDGED, and DECREED that this Court retains jurisdiction to issue any and all further orders which shall be necessary to comply with the mandates set forth herein.

Dated: March 31, 2022


 Hon. Patrick F. McAllister
 Acting Supreme Court Justice

ENTER

**Exhibit F to Salcedo Affirmation-
Affirmation of Misha Tseytlin, for Petitioners, in Opposition
to Motion to Intervene, in Harkenrider I., dated April 14, 2022
[pp. 439 - 443]**

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 37

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/22/2022

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT**

-----X

TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, AND MARIANNE VIOLANTE,

AFFIRMATION

A.D. No. CAE 22-00506

Petitioners-Respondents,

Steuben County
Index No. E2022-0116CV

-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,

Respondents-Appellants.

-----X

Misha Tseytlin, an attorney admitted to practice in the State of New York, affirms under the penalties of perjury as follows:

1. I am a Partner at Troutman Pepper Hamilton Sanders LLP, attorneys for Petitioners in this CPLR Article 4 special proceeding. I am familiar with the facts and circumstances of the proceedings in this matter.

2. I submit this affirmation in opposition to Proposed Intervenor's (New York Congressmen, congressional candidates, and voters) request to intervene as Respondents-Appellants in this matter.

3. Given the press of time facing the parties in this expedited appeal and Petitioners' need to concentrate their efforts on merits briefing due before this Court tomorrow, Petitioners offer only this limited response to Proposed Intervenor's untimely and prejudicial intervention request.

4. All motions to intervene—whether as of right or by permission—must be timely to be granted. CPLR 1012 & 1013. Upon a “*timely motion*,” a nonparty may intervene as of right “when the representation of the person’s interest by the parties is or may be inadequate and the person is or may be bound by the judgment.” CPLR 1012(a)(2) (emphasis added). And, upon a “*timely motion*,” a court may, in its discretion, permit a nonparty to intervene after considering “whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.” CPLR 1013 (emphasis added).

5. Proposed Intervenor is not entitled to intervene as their request is clearly untimely and will cause serious prejudice to Petitioners.

6. Petitioners filed their Petition in this matter on February 3, 2022. *See* NYSCEF No.1. Seventy days later, on April 13, 2022, Proposed Intervenor moved to intervene. Proposed Intervenor's request is patently untimely.

7. Proposed Intervenors offer no serious explanation for their delay in seeking to intervene. While Proposed Intervenors attempt to justify their delay contending that they “refrained from seeking intervention in the trial court” based on their ostensible belief that the court would “permit the current election process to proceed” under the challenged Congressional Plan, Affirmation of Matthew D. Brinckerhoff (“Brinckerhoff Aff.”) ¶ 5, this argument makes no sense.

8. As a threshold matter, based on the timing of their seeking intervention, it had been *fourteen days* since the Supreme Court issued its remedy. Thus, given that Proposed Intervenors waited at least that long before deciding to seek intervention, their claim that the Court’s decision “necessitated intervention on appeal,” Brinckerhoff Aff. ¶ 6, falls flat.

9. In any event, throughout the entirety of this case, beginning with the Petition filed on February 3, 2022, Petitioners have sought relief for the 2022 elections. *See* NYSCEF No.1 at 66–67; *see* NYSCEF No.18 at 81–82.

10. Even beyond the Petition, a continual and critical argument between the parties below was whether and to what extent the Supreme Court should modify 2022 election deadlines in order to allow the Supreme Court to grant complete relief to Petitioners for the 2022 elections upon proof of their claims. *See* NYSCEF No.72 at 28–30; NYSCEF No.82 at 25–27; NYSCEF No.102 at 11–12; NYSCEF No.199 at 2; NYSCEF No.206 at 4; NYSCEF No.228 at 2; NYSCEF No.229 at 4–5;

NYSCEF No.232 at 4–10; NYSCEF No.233 at 2–9; NYSCEF No.234 at 3–12; NYSCEF No.237 at 2–4; NYSCEF No.238 at 1–11.

11. And even at the initial, March 3, 2022 hearing the Supreme Court acknowledged the possibility of “suspend[ing] the election process” in 2022, but merely noted that it was not inclined to “at th[at] time” given lingering questions about the strength of Petitioners’ claims before the Supreme Court could hold a hearing and review the evidence. NYSCEF No.231 at 69–70.

12. Thereafter, the Supreme Court specifically permitted supplemental briefing on these very issues on March 16, 2022. *See* NYSCEF No.232 at 1.

13. Proposed Intervenors acknowledge that they were following this case, knowledgeable of the Supreme Court’s March 3 *interim* opinion on pausing 2022 election deadlines in order to provide full relief to Petitioners. *See* Brinckerhoff Aff. ¶ 5. And they acknowledge that they were aware of supplemental briefing in the Supreme Court on the same issue. *Id.* Thus, Proposed Intervenors knew at that time that their interests could be affected, and could have timely intervened in litigation.

14. This untimely intervention request is also deeply prejudicial to Petitioners.

15. Proposed Intervenors are led by several Democratic Representatives, Jamaal Bowman, Yvette Clarke, Adriano Espaillat, Hakeem Jeffries, Sean Patrick Maloney, Gregory Meeks, Grace Meng, Jerrold Nadler, Paul Tonko, and Ritchie

Torres, as well as aspiring Democratic Representatives, Vanessa Fajans-Turner, Laura Gillen, Jackie Gordon, and Josh Lafazan. These individuals are the most direct beneficiaries of the unconstitutional gerrymander here.

16. Had Proposed Intervenors timely intervened, Petitioners would have sought and surely obtained discovery from Proposed Intervenors, including to determine whether they had any conversations with LATFOR, the Democratic-controlled majority of the Legislature, or the Governor, seeking to make the map more favorable for Proposed Intervenors. It would be deeply prejudicial to permit these Proposed Intervenors to come into this case now, after the discovery period has long closed, to obtain the benefits of party status without answering discovery.

17. Petitioners would also be prejudiced by having to face a *fourth* party group—represented by a *fourth* counsel—at the April 20 oral argument.

Dated: Chicago, Illinois
April 14, 2022



Misha Tseytlin

**Exhibit G to Salcedo Affirmation-
Order of the Appellate Division, Fourth Department, entered
April 14, 2022
[pp. 444 - 445]**

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 38

RECEIVED NYSCEF: 05/22/2022

FILED: APPELLATE DIVISION - 4TH DEPT 04/14/2022

CAE 22-00506

NYSCEF DOC. NO. 41

RECEIVED NYSCEF: 04/15/2022

**SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department**

CAE 22-00506

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, AND CURRAN, JJ.

IN THE MATTER OF TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEVEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, AND MARIANNE VOLANTE, PETITIONERS-RESPONDENTS,

V

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, AND NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT, RESPONDENTS-APPELLANTS, ET AL., RESPONDENT.

Proposed intervenors, New York congressional members, candidates for office, and voters, having moved pursuant to CPLR 1012 (a) (2) and 1013, upon the return of an order to show cause granted by the Honorable Stephen K. Lindley on April 14, 2022, for leave to intervene as respondents-appellants and for permission to file a brief on the appeal taken herein from an order of the Supreme Court, Steuben County, entered March 31, 2022,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is hereby ORDERED that the motion is denied.

Entered: April 14, 2022

Ann Dillon Flynn
Clerk of the Court

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.



I, ANN DILLON FLYNN, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original document, now on file in this office.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this

APR 14 2022

Ann Dillon Flynn

Clerk

**Exhibit H to Salcedo Affirmation-
Order of the Honorable Patrick F. McAllister,
in Harkenrider I., dated April 18, 2022
[pp. 446 - 447]**

FILED: NEWBORKCOUNTYCLERK0451222022041307PM

INDEXNO.E2622101262Y

NYSCEF DOC. NO. 298

RECEIVED NYSCEF: 05/22/2022

STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

Index No. E2022-0116CV

TIM HARKENRIDER, GUY C. BROUGHT,
LAWRENCE CANNING, PATRICIA CLARINO,
GEORGE DOOHER, JR., STEVEN EVANS, LINDA
FANTON, JERRY FISHMAN, JAY FRANTZ,
LAWRENCE GARVEY, ALAN NEWPHEW,
SUSAN ROWLEY, JOSEPHINE THOMAS, and
MARIANNE VOLANTE,

Petitioners,

-against-

ORDER

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,

Respondents.

PRESENT: Hon. Patrick F. McAllister
Acting Supreme Court Justice

The Legislature has failed to submit revised maps as ordered by this court. Instead the Respondents filed an appeal that stayed this court's order. The court has reviewed the Decision of Hon. Stephen K. Lindley, Justice of the Supreme Court dated April 8, 2022. Based on that Decision this court has retained Jonathan Cervas to serve as special master to prepare and draw a new neutral, non-partisan Congressional map. The court is taking this action because the case is one in which the parties desire and the public need requires a speedy determination of the controversy over a non-partisan Congressional map. The statutory filing period for declaration of Congressional candidacy has already expired. However, a new period can be designated in the event the Court of Appeals upholds the decision to strike the currently enacted map. In discussing the matter with Dr. Jonathan Cervas the court has prepared the following time line:

The parties, any other interested parties, and any person seeking to participate as an intervenor or *amicus curiae* shall file and submit any proposed complete Congressional Map or any proposed single congressional district map, or any community of interest map to the court and Dr. Cervas for consideration by April 22, 2022:

The parties, any other interested parties, and any person, shall submit any reply or response to the opposing parties' submission to the court and the special master by April 29, 2022;

The parties, any other interested parties, and any person shall appear before Dr. Jonathan Cervas for a hearing on May 6, 2022 at 9:30 a.m. in person at the Steuben County Courthouse in Bath, New York;

Dr. Jonathan Cervas shall complete his proposed 2022 preliminary Congressional redistricting map by May 16, 2022;

The parties, and any other interested parties and any person shall submit any written opposition to the proposed map by May 20, 2022; and

The final non-partisan Congressional redistrict map shall be issued by May 24, 2022;

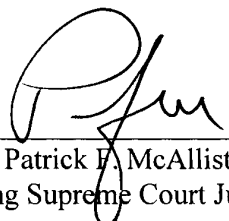
The information collected by, or submitted to, the IRC including any minutes of public hearings shall be made available to Dr. Jonathan Cervas and his research assistants;

The State of New York shall pay to Dr. Cervas a total sum not to exceed \$90,000.00 as and for the work on preparing the Congressional map for 2022. Dr. Cervas shall submit a voucher for payment upon completion of his work at a rate of \$450.00 per hour. Dr. Cervas shall be free to retain assistants to help him in preparing the map. The payment for the assistants shall be through Dr. Cervas and be included within the \$90,000.00 cap.

NOW, therefore, upon consideration of all papers and proceedings heretofore had herein, and after due deliberation, it is

Dated: April 18, 2022

ENTER


Hon. Patrick F. McAllister
Acting Supreme Court Justice

**Exhibit I to Salcedo Affirmation-
Letter from New York State Board of Elections to the Honorable
Patrick F. McAllister, dated April 28, 2022
[pp. 448 - 449]**

FILED: NEW YORK COUNTY CLERK 045282202211197AM

NYSCEF DOC. NO. 290

INDEX NO. E2022-012622

RECEIVED NYSCEF: 05/28/2022

Peter S. Kosinski
Co-Chair

Anthony J. Casale
Commissioner

Todd D. Valentine
Co-Executive Director

Kimberly A. Galvin
Co-Counsel



STATE BOARD OF ELECTIONS
40 NORTH PEARL STREET, 5th FLOOR
ALBANY, N.Y. 12207-2729
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Douglas A. Kellner
Co-Chair

Andrew J. Spano
Commissioner

Kristen Zebrowski Stavisky
Co-Executive Director

Brian L. Quail
Co-Counsel

April 28, 2022

Hon. Patrick F. McAllister
Justice of the Supreme Court
Steuben County
3 East Pulteney Square
Bath, New York 14810

RE: Harkenrider v Hochul et al
Index No: E2022-0116CV (Steuben Supreme)

Dear Justice McAllister

The current schedule for the special master's preparation of new Congressional lines requires them to be promulgated no later than May 24, 2022. (NYSCEF# 258). If the new Congressional and Senate primary were to be held on August 23, 2022, under federal law (52 U.S.C. 20302), primary ballots to military and overseas voters must be transmitted no later than July 9, 2022 (45 days before the primary)¹. There are only 46 days between the May 24th adoption of Congressional lines until the last possible date ballots must be sent under federal law on July 9th. In that 46 day span, boards of elections must update their voter registration systems and implement ballot access procedures and all ballot access issues must be fully resolved.

Accordingly, the New York State Board of Elections respectfully requests that: (i) the time frame for arriving at new State Senate lines not extend past the May 24, 2022 deadline already applicable to Congress, and (ii) the Court consider expediting the approval process for both the Congressional and State Senate lines in any manner possible.

Very truly yours,

s/

Brian L. Quail

s/

Kimberly A. Galvin

¹ Under New York law the deadline to transmit military and overseas ballots is actually one day earlier – 46 days before the primary. See Election Law § 10-108 (1) (1).

FILED: NEWBENKCOUNTYCERRK043282202211197AM

NYSCEF DOC. NO. 290

INDEXNO.E2642101260Y

RECEIVED NYSCEF: 04/28/2022

**Exhibit J to Salcedo Affirmation-
Amended Order of the Honorable Patrick F. McAllister, in
Harkenrider I., dated April 28, 2022
[pp. 450 - 451]**

FILED: NEW YORK COUNTY CLERK 04328220022041487PM

INDEXNO. E282210176CV

NYSCEF DOC. NO. 291

RECEIVED NYSCEF: 05/28/2022

STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

Index No. E2022-0116CV

TIM HARKENRIDER, GUY C. BROUGHT,
LAWRENCE CANNING, PATRICIA CLARINO,
GEORGE DOOHER, JR., STEVEN EVANS, LINDA
FANTON, JERRY FISHMAN, JAY FRANTZ,
LAWRENCE GARVEY, ALAN NEWPHEW,
SUSAN ROWLEY, JOSEPHINE THOMAS, and
MARIANNE VOLANTE,

Petitioners,

-against-

AMENDED ORDER

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,

Respondents.

PRESENT: Hon. Patrick F. McAllister
Acting Supreme Court Justice

Based on the Court of Appeals Opinion dated April 27, 2022 this Court was directed to have an independent special master develop both new Congressional and State Senate maps. By Order dated April 18, 2022 this court appointed Dr. Jonathan Cervas to serve as the special master. In that same Order the court set forth a time line for the parties and other interested persons to submit proposed congressional maps. By this Order those time lines will be modified. The Order further provides everyone time to respond to each others submissions and to have a hearing before the court and Jonathan Cervas on May 6, 2022. Based on the current time pressure and after consulting with special master Cervas and the State Board of Elections this court is issuing this scheduling order with regard to submission of proposed Senate maps.

The time for filing proposed Congressional maps has already expired;

The parties, any other interested parties, and any person seeking to participate as an intervenor or *amicus curiae* shall file and submit any proposed complete State Senate Maps or any proposed single Senate district map, or any community of interest map to the court and Dr. Cervas for consideration by May 5, 2022:

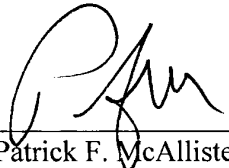
The parties, any other interested parties, and any person seeking to participate as an intervenor or *amicus curiae* shall appear before Dr. Jonathan Cervas for a hearing on May 6, 2022 at 9:30 a.m. in person at the Steuben County Courthouse in Bath, New York. At that time anyone wishing to voice opposition to any previously submitted proposed Congressional or State Senate map may do so;

Dr. Jonathan Cervas shall complete his proposed 2022 preliminary Congressional and Senate redistricting map by May 16, 2022;

The parties, and any other interested parties and any person seeking to participate as an intervenor or *amicus curiae* shall submit to the court and Dr. Cervas any written opposition to the proposed maps by May 18, 2022; and

The final non-partisan Congressional and State Senate redistricting maps shall be issued by May 20, 2022.

Dated: April 28, 2022


Hon. Patrick F. McAllister
Acting Supreme Court Justice

ENTER

**Exhibit K to Salcedo Affirmation-
Decision and Order of the Honorable Patrick F. McAllister, in
Harkenrider I., dated May 20, 2022, with Report of the Special
Master
[pp. 452 - 482]**

FILED: NEW YORK COUNTY CLERK 05/22/2022 12:11:07 AM

NYSCEF DOC. NO. 420

INDEXED. E2022-0116CV

RECEIVED NYSCEF: 05/22/2022

STATE OF NEW YORK
SUPREME COURT : STEUBEN COUNTY

Index No. E2022-0116CV

TIM HARKENRIDER, GUY C. BROUGHT,
LAWRENCE CANNING, PATRICIA CLARINO,
GEORGE DOOHER, JR., STEVEN EVANS, LINDA
FANTON, JERRY FISHMAN, JAY FRANTZ,
LAWRENCE GARVEY, ALAN NEWPHEW,
SUSAN ROWLEY, JOSEPHINE THOMAS, and
MARIANNE VOLANTE,

Petitioners,

-against-

DECISION and ORDER

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,

Respondents.

PRESENT: Hon. Patrick F. McAllister
Acting Supreme Court Justice

Special Master Dr. Jonathan Cervas is releasing a report that will provide you with much detail concerning the process used to draw the redistricting maps. A court rarely explains the reasoning and rationale behind an order. However, a single order rarely directly impacts millions of people. Therefore, the court will also explain parts of the process as well, because so many of you have expressed concern.

First of all the court would like to thank the many New Yorkers who submitted maps and the thousands who responded during the various public comment times, including those comments given before the Independent Redistricting Commission (IRC), at the in-person hearing before this court, and the written submissions. The fact that many of you were concerned enough to drive for hours to get to the courthouse was impressive and demonstrated how concerned you were about your various communities. All of these maps and comments

(there were approximately 3,000 submissions earlier this week) were reviewed by the court and special master. What was clear was that many people are concerned that the maps permit free and fair elections. The court is confident this has been accomplished.

There were several common misconceptions that appeared in many of the public comments which the court feels need to be addressed. Some were negative with respect to the court, some with respect to the special master, some as to the process, and others were just misconceptions.

The court would first like to correct the misconception that the court's redistricting maps are a Republican gerrymander. All three courts that reviewed this matter came to the same conclusion that the Respondents had unconstitutionally produced gerrymandered maps. The fact is that Petitioners/Republicans were successful in proving those maps were gerrymandered. However, the result is not that the Petitioners/Republicans now get to draw their own gerrymandered maps. This is not a situation where to the victor goes the spoils. The result is simply that Petitioners get to have neutral maps drawn by an independent special master as approved by the court. Unfortunately some people have encouraged the public to believe that now the court gets to create its own gerrymandered maps that favor Republicans. Such could not be further from the truth. The court is not politically biased. Yes, the trial judge was elected as a Republican, and the justices on the Court of Appeals were appointed by Democrats. The reason all three courts came to the same conclusion was because the courts applied the applicable rules of law in as fair and impartial a manner as possible.

The 2012 congressional map was drawn by a judge with the aid of a special master. That map was fair and impartial. That map resulted in eight Republicans currently being elected to Congress and over the last ten years sometimes more than eight Republicans were elected. The congressional map that was found to be gerrymandered would have only favored four Republicans being elected. The fact that this map will likely result in more than four Republicans being elected to Congress does not mean or indicate in anyway that this map is gerrymandered to favor Republicans. What this map does do is create eight competitive districts in which either party has a reasonable chance to win and three districts in which the Republicans will likely win. On the other hand the Democrats have 15 safe districts. For Republicans to repeat eight members in congress from New York in 2022 will require that they win over half of the competitive districts.

There is an index (Plan Score) that has been developed to determine whether or not a map favors one party or another. The proposed map that was released on May 16, 2022 had a score on that index of 0.01. A score of zero means the map is perfectly neutral. The court has made a few minor adjustments to that map to accommodate several concerns that were raised by the public, but the court believes the maps remain almost perfectly neutral, meaning the maps do not favor or disfavor any political party.

The court would next like to correct another misconception that showed up frequently in

the comments with regard to this process being rushed and why the court did not simply use one of the prior maps for this election cycle. The simple answer is there were no maps that could be used.

The 2012 Congressional maps are no longer constitutional. They had 27 districts and New York is now only entitled to 26 districts. Therefore the court could not keep the same districts that were used these last 10 years because the voters of one district would be totally unrepresented. Thus new maps had to be created so that these voters would have a representative. Likewise, the 2012 Senate Maps are now unconstitutionally malapportioned. A look at the new map shows there are now two more Senate districts downstate than there were for the last 10 years. This is due to population shifts in the last 10 years. So once again the court could not simply use the 2012 districts. The court understands that you have become accustomed to a certain representative and if you are no longer in his/her district you feel disenfranchised. However, the boundaries absolutely had to be moved. The court did not have the option of just using those old district boundaries.

The two 2022 IRC maps were never enacted. The court and the special master did consider those maps when constructing the new maps, but the court did not find it appropriate to adopt one of those maps to be the base for this year's Congressional and/or Senate maps, primarily because to chose one would mean the court would have to favor either the Democrat proposed IRC maps or the Republican proposed IRC maps. There was no bipartisan IRC maps. Therefore the court thought it best to develop unbiased independent maps.

Finally, the court could not use the maps enacted by the Legislature in 2022, because all three levels of the New York courts found those maps to be unconstitutional.

The time frame for developing new maps was less than ideal, not by choice but by necessity. The court worked with the Board of Elections to develop the maximum amount of time for creation of the new maps and still allow sufficient time for the Board of Elections to be able to conduct elections. Between gathering signatures, challenges to signatures, certifying candidates, mailing out overseas and military ballots, holding primary elections, and everything that has to happen before the primary and before the general election the court and the Board of Elections constructed about the only election calendar time frame that would work.

Frankly it was remarkable that special master Cervas was able to create both the Congressional and State Senate maps in such a short period of time. He and his team are to be commended.

The court would also like to briefly address the criticism that the new maps discriminated against Democrats by placing two incumbents into the same district. The constitution specifically prohibits new maps from being used to ensure a candidate's reelection or to prevent a candidate's reelection. To ensure no bias was shown either way neither the court nor the special master received any information concerning where any candidate or

potential candidate lives prior to the development of the maps. Since the release of the maps several of you have informed the court and the special master where your candidate lives. Location of a candidate received zero consideration from the court. No district was designed to pit one candidate against another. In any event in New York a candidate is not required to live in his or her district. Thus, these maps do not prohibit an incumbent from running in an adjoining district.

To those who expressed concern that the Special Master, Dr. Jonathan Cervas was too inexperienced or too unfamiliar with New York to be the special master the court makes the following comment:

Dr. Cervas has solid credentials in redistricting matters. He established a team which included amongst others, Dr. Bernard Grofman. Dr. Grofman is widely considered one of the leading experts in redistricting and has now worked on New York's redistricting in three separate decades. Dr. Cervas also has working under him several assistants born and raised in New York. New Yorkers should be very thankful that Dr. Cervas was willing to take on this task.

Another voiced concern involved moving district boundaries and maintaining cores of districts. Maintaining cores of districts is an important part of the constitution. However, when the court must eliminate a district as was required with the congressional map or move two senate districts from upstate to downstate because of population shifts, district lines must change significantly.

From the comments it appears many citizens think that when drawing maps the court must start with and identify communities of interest and create districts around those cores — then fill-in such a district with whatever is left over with anyone else. New York has so many geographic regions and communities that the “what’s left” often times is a massive meandering district or districts. It is impossible primarily because of the geography of New York. The special master and the court either need to start on the eastern tip of Long Island and proceed westward across Long Island to the city and then expand northward and westward, or the court could start near Niagra Falls and proceed eastward and southward. In either case you have to start populating your districts from your starting point. The law requires exactly equal population in each district. So if a district is already half or two-thirds populated before reaching a given community there is often nothing that can be done but to split the geographic region or community. It is not because the court wants to split up the region or community but because the law does not permit unequal populations within districts.

Some comments voiced concerns about multiple primaries diluting the voter turnout. As explained above, this court had no choice but to move the primary to August. The governor and legislature have the prerogative to move the June primary to August so that there was just one primary, but to do so would affect the candidates for supreme court positions in November.

Attached are the maps that this court hereby certifies as being the 2022 Congressional and 2022 New York State Senate maps. The court will instruct LATFOR to review the maps for compliance with block-on-border and town-on-border compliance and to certify to the New York State Board of Elections the precincts, districts, etc. for each Congressional and State Senate district. If LATFOR finds any technical violations it is instructed to inform the court so that appropriate modifications can be made.

NOW, therefore, upon consideration of all papers and proceedings heretofore had herein, and after due deliberation, it is

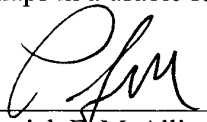
ORDERED, ADJUDGED, and DECREED that the attached maps be, and hereby are certified as being the official approved 2022 Congressional map and the 2022 State Senate map; and it

ORDERED, ADJUDGED, and DECREED that LATFOR be and hereby is directed to review the maps for the purpose of determining compliance with the block-on-border and town-on-border rules and then to certify to the New York State Board of Elections the precincts, districts, etc. for each Congressional and New York State Senate district; and it is further

ORDERED, ADJUDGED, and DECREED that in the event LATFOR determines there to be some technical violation of one of these rules that LATFOR immediately notify the court of the violation so that appropriate corrective action can be taken by the court; and it is further

ORDERED, ADJUDGED, and DECREED that Dr. Jonathan Cervas provide to LATFOR and the New York State Board of Elections files of these maps in a usable format.

Dated: May 20, 2022


 Hon. Patrick F. McAllister
 Acting Supreme Court Justice

ENTER

FILED: NEWBENKCOUNTYCLERK05522220022121107AM

NYSCEF DOC. NO. 620

INDEXNO.E2642101260Y

RECEIVED NYSCEF: 05/22/2022

Report of the Special Master
May 20, 2022

Jonathan Cervas
Special Master

Harkenrider v. Hochul

Jonathan Cervas Short Bio

I am a postdoctoral fellow at Carnegie Mellon University in the Institute for Politics and Strategy. I have been involved in drawing maps for three federal courts in voting rights and redistricting cases. Three cases involved questions related to the Voting Rights Act and the U.S. Constitution. In *Navajo Nation v. San Juan County, UT*, D.C. No. 2:12-CV-00039-RJS (2018), the district court ruled that the election districts for school board and county commission violated the Fourteenth Amendment to the United States Constitution. After the court rejected the county's remedial map, the court retained Prof. Bernard Grofman as special master. I was employed as assistant to the special master and helped to prepare remedial maps. The court selected the illustrative maps I helped prepare for immediate use in the next election. These maps were upheld by the Tenth Circuit Court of Appeals *Navajo Nation v. San Juan County*, No.18-4005 (10th Cir. 2019). In *Bethune-Hill v. Virginia State Bd. of Elections*, 141 F. Supp. 3d 505 (ED Va. 2015) the federal court ruled that twelve of Virginia's 100 House of Delegates districts were unconstitutional gerrymanders under precedent set in *Shaw v. Reno* 509 US 630 (1993). Eventually reaching the United States Supreme Court (SCOTUS) the first time, the court remanded *Bethune-Hill v. Virginia State Board of Elections*, 580 U.S. ____ (2017). The district court then ruled eleven of the twelve districts were unconstitutional racial gerrymanders and ordered them redrawn. *Bethune-Hill v. Virginia State Bd. of Elections*, 326 F. Supp. 3d 128 (2018). The district court retained Prof. Grofman as special master. I worked with Prof. Grofman as assistant to the special master. Together we created ten map modules; three in Norfolk, two in the peninsula area, three in Petersburg, and two in Richmond. The court selected module combinations that adjusted the boundaries of twenty-five districts. The case was heard for a second time on appeal to SCOTUS, who remanded on standing. *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. ____ (2019). These districts were used in the 2019 election, and because of census delays, again used in 2021. In *Wright v. Sumter County Board of Elections and Registration* (1:14-CV-42 (WLS) U.S. District Court, Middle District of Georgia (2020)), the district court ruled that Sumter County's voting districts diluted the voting power of Blacks in violation of section 2 of the Voting Rights Act. The court retained Prof. Grofman in his capacity as special master. I again served as assistant to the special master. Working with Prof. Grofman I helped craft four seven-district illustrative plans and one five-district illustrative plan. The court choose one of the plans I helped to prepare. Defendants appealed to the eleventh circuit court, who reviewed the entire record and found the district court did not err in concluding a section 2 violation and that the special master "expressly found an easily achievable remedy available". *Wright v. Sumter County Board of Elections and Registration*, No. 15-13628 at 45 (11th Cir. 2020). In July of 2021, I entered into contract with the Pennsylvania Legislative Reapportionment Commission to provide consulting work relating to the creation of the PA state House of Representatives and PA Senate districts to be used during elections held between 2022 and 2030. This work involved numerous aspects of the reapportionment process, not limited to map drawing. The maps drafted by the commission passed with a bi-partisan vote on February 4, 2022. The Pennsylvania Supreme Court unimously affirmed the final reapportionment plan. My work with the commission is ongoing.

1. In *Harkenrider v. Hochul* (2022), the State of New York Supreme Court ruled that the congressional and state senate plan passed by the Legislature and signed by the Governor had bypassed the Redistricting Commission and thus were not enacted through a constitutionally valid process. For the congressional plan, the Court also held that the Respondents "engaged in prohibited gerrymandering when creating the districts" (2022.03.21 [243] *Harkenrider v. Hochul* DECISION and ORDER at 1). The findings that there were no constitutional maps for either New York's Congressional delegation or for the New York State Senate triggered the new provision of the State Constitution that shifted the burden to state courts to specify a process for creating constitutional maps for each body. On April 18, 2022, I was asked by Judge and Acting Supreme Court Justice Patrick McAllister to serve as Special Master in preparing a remedial plan for the New York congressional delegation to be considered by the Court; after the State of New York Court of Appeals heard the case on appeal, my responsibilities were extended by Justice McAllister to include preparing a remedial plan for the state senate for the Court's consideration on April 27, 2022.

2. In proposing maps for the Court's consideration, Justice McAllister Court instructed me to fully adhere to all the provisions of the New York State Constitution, such as the strict equal population requirement for Congress and the block-on-the-border rule and town-on-the border rule for the state senate.¹ In my map making I avoided fragmenting existing political subunits such as counties and cities and I sought to draw districts that were reasonably compact. I was also instructed by the Court to draw proposed maps in a fashion that was blind to the location of incumbents and I followed that injunction. **The predominant motive of these proposed maps was to fully comply with federal and state law.** Race-based districting is strictly prohibited by the U.S. constitution, and therefore I did not use race as a preponderant criterion. Later in this Report, I discuss in more detail how I dealt with each of the many relevant provisions in the New York Constitution, including the one dealing with communities of interest.

3. The failure of the Commission to agree on lawful maps and the time consumed by subsequent litigation meant that, even after an initial postponement of the date for the primaries, the Court was operating under extremely severe time constraints. The Court provided a timetable for my work which included deadlines for submission of comments and expert witness reports to me and the Court, a deadline for the dissemination of a preliminary proposal and report, deadlines for submission of comments and expert witness reports pertaining to this preliminary proposal, and a deadline for the preparation and dissemination of a final map adopted by the Court.

4. The urgency of the tasks confronting me, the great volume of suggestions made to the Court (and previously to the Redistricting Commission), and the time pressure made it impossible for a single individual to do everything that was needful. I employed research assistants to whose work I am greatly

¹ The latter rules are found in Article III, section 4(c).

indebted (Marissa Zanfardino²; Jason Fierman³, and Zachary Griggy⁴) to work under my direction. In addition, with the approval of the Court, I brought in the distinguished redistricting scholar, Bernard Grofman (University of California, Irvine), as a consultant. I had previously worked with him in other cases where Grofman had been the Special Master.⁵ All decisions as to what recommendations were to be given to the Court vis-a-vis proposed remedial maps were ones made by me.

5. I did not begin my map drawing process *de novo*. There was a considerable volume of information and public comment that had been compiled by the Redistricting Commission that I was able to draw upon. In preparing my preliminary proposed maps for the Court, I (with the help of my research assistants) poured over thousands of pages of court records and testimony that was presented to the Redistricting Commission. In addition, I reviewed the several hundred submissions of testimony via email or through the court docket that came after or just before my appointment, along with several dozen complete or near complete plans directly submitted to me. While I received roughly two dozen congressional map submissions that were fully compliant with one-person, one-vote, relatively few senate maps were submitted that fully satisfied the strict block-on-border and town-on-border rules for equalizing population. Among those, several appear to build off one

² Zanfardino completed her JD from New York Law School in 2022. She is currently a Legal Fellow at the New York Census and Redistricting Institute. Zanfardino graduated from Tulane University in 2019 with a bachelor's degree in Economics and Sociology. She is a lifelong New York resident, living in Massapequa, Brooklyn, and Manhattan at various stages.

³ Fierman graduated from The George Washington University with a bachelor's degree in Political Science and Criminal Justice in 2011, and from George Mason University with an MPA in 2016. Fierman has worked as an associate at Princeton University working on issues of redistricting and as a consultant at DailyKos working on elections. Fierman grew up in Westchester, NY.

⁴ Griggy is an undergraduate at the University of California, Irvine. He is expected to graduate in 2023 with a degree in Political Science and Urban Studies. He previously worked as an assistant to the Special Master and has assisted in the map-drawing process for several remedial court maps.

⁵ Grofman was indispensable in drafting this report and in his consultation throughout the process of producing these maps. Grofman taught for six years at SUNY Stony Brook before he took a tenured position at the University of California, Irvine. He also spent a full academic year as a Straus Fellow at New York University Law School and two other academic quarters as a visiting scholar there. Some time ago, in two different decades, Grofman was chosen by federal courts as a senior consultant on New York redistricting (Congress and state legislature). He also once served as a consultant on New York City redistricting for a redistricting commission. Over the past seven years, Grofman's work as a Special Master or senior consultant to federal or state courts has been in southern and western states, including North Carolina (Congress), Virginia (Congress and state legislature), Georgia (local districting), and Utah (local redistricting). In the past he has been a consultant to both political parties and to minority legal groups as well as to the U.S. Department of Justice.

another. I borrowed pieces of maps as the base of both the congressional and senate map, but adopted no map in full. And I had available to me the maps enacted in 2012, along with plans proposed by the Redistricting Commission. I also benefited from hearing in person from around 30 citizens in Bath, NY on May 6, 2022. Because of these inputs, I was able to complete my task of preparing a proposed map for the Court in the time frame required. In so doing, I looked for good ideas from the many submissions by concerned citizens and groups and, to the extent feasible given the time constraints, incorporated them when they allowed for integration into a complete map drawn fully according to constitutional principles. I evaluated suggestions based on the merits of the proposal not on who (or which political party) was suggesting the change.

6. To the extent feasible given the severe time constraints, in addition to the considerable body of information previously integrated into the initial map-making process, the Court solicited further comments from the public and concerned groups on the proposed preliminary maps. After the dissemination of a map on May 16, 2022, I was pleased to receive additional extensive input from the public and concerned groups, most of which was specifically directed to the proposed maps. This feedback included over 800 e-mails and messages directed at me through social media. Additionally, I estimate that over 3,000 comments were submitted to the Court directly, pursuant to the Court's stipulation of time periods to receive suggestions for map revisions and briefs or expert witness reports.⁶ My team and I read all these suggestions and they were organized and categorized by my research assistants. With respect to these comments, of necessity, the ones to which I paid the greatest attention were those which the political scientists Peter Miller and Bernard Grofman refer to as *mappable suggestions*, i.e., ones that were based on the existing map proposals and made specific suggestions for how changes could be made to improve them.⁷

7. At this stage of the map-making process my attention was focused on suggestions for changes in the proposed maps that involved the treatment of particular communities of interest. However, in a number of cases, either the submission was not sufficiently well articulated in a mappable way as to allow consideration of how its ideas it might be incorporated into the proposed maps, or submissions proposed changes that were inconsistent with changes proposed in other submissions so as to suggest a lack of public consensus on where particular communities of interest were located. Some submissions were simply infeasible to implement without ripple effects that would force dramatic changes in the maps, affect other constitutional criteria, or suggestions were infeasible in practice because of the very binding population equality constraints imposed by the New York Constitution. Also, suggestions to reconfigure the map to benefit the reelection chances of a particular party or incumbent or to unpair particular incumbents were disregarded as inappropriate in a map drawing process entirely based on the good government strictures embedded in the Redistricting Amendment to the New

⁶ I want to extend a debt of gratitude to the Court staff, especially Brenda Wise, for receiving and promptly posting submissions to the court docket.

⁷ Miller, Peter, and Bernard Grofman. 2018. "Public Hearings and Congressional Redistricting: Evidence from the Western United States 2011-2012." *Election Law Journal: Rules, Politics, and Policy* 17(1): 21-38.
<http://www.liebertpub.com/doi/10.1089/elj.2016.0425>.

York State Constitution, and the requirement that maps neither favor nor disfavor any political party or incumbent. However, as before, I evaluated suggestions based on the merits of the proposal, not on who (or which political party) was suggesting the change. In particular, if a change was advocated to unify neighborhoods or for community of interest reasons and had few or no partisan consequences and it was feasible to implement, I examined it very carefully and sometimes proposed it to the Court for adoption in the final map (see discussion of changes from the preliminary map to the final map discussed at the end of the report).

8. The preliminary maps were each accompanied by a one-page report highlighting its key features. In this Report I describe the criteria used in devising a constitutional map and review the key features of the final map adopted by the Court. At the end of this Report, I also identify some issues having to do with communities of interest that were brought to the Court's attention in multiple submissions, and discuss how those suggestions for improvement were dealt with in the final revisions to the initial proposed maps.

9. Any constitutional map requires the satisfaction of the multiple criteria laid out in the New York State Constitution that are not fully consistent with one another and that necessarily require tradeoffs. Because of this fact there cannot be a "perfect" map. The New York State Constitution does not clearly rank order criteria. Here we list them in the order given in the Constitution.⁸

9A. VOTING RIGHTS.

"(1) When drawing district lines, the commission shall consider whether such lines would result in the denial or abridgement of racial or language minority voting rights, and districts shall not be drawn to have the purpose of, nor shall they result in, the denial or abridgement of such rights. Districts shall be drawn so that, based on the totality of the circumstances, racial or minority language groups do not have less opportunity to participate in the political process than other members of the electorate and to elect representatives of their choice."

In map drawing I have adhered to the instructions for treatment of minority groups laid down in the New York State constitution. I have taken the groups whose rights need be paid special attention to be the same racial and linguistic minorities that are identified by the U.S. Congress in the Voting Rights Act of 1965 and in its subsequent amendments. Other groups I consider under the category of communities of interest. In New York, the largest minority groups -- African-Americans, those of Spanish heritage, and Asian-Americans -- are almost always highly geographically concentrated. Even in a completely race blind process there will be many districts (both for Congress and especially for the State Senate) that have a large minority population,

⁸ Our federal system of government places criteria found in the U.S. Constitution as highest priorities, federal law next, and then provisions of the state constitution and state law.

and these demographic and geographic realities are fully reflected in the maps that I drew for the Court. I did not use race as a preponderant criterion. As indicated earlier, the standard good government criteria laid down in the New York State Constitution were the dominant considerations in my map-making.⁹

9B. EQUAL POPULATION.

"(2) To the extent practicable, districts shall contain as nearly as may be an equal number of inhabitants. For each district that deviates from this requirement, the commission shall provide a specific public explanation as to why such deviation exists."

"(6) In drawing senate districts, towns or blocks which, from their location may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants. The requirements that senate districts not divide counties or towns, as well as the 'block-on-border' and 'town-on-border' rules, shall remain in effect."

While the language in (2) above suggests that the New York State constitutional standard for equal population is essentially the same as that in the federal constitution (as interpreted by federal courts), that is wrong. There are other more specific requirements for population equality laid down elsewhere in the NY Constitution that make it much harder to satisfy one person, one vote standards in New York than is the case in other states.

In particular, while federal case law allows for some deviations from perfect equality for Congress when there is compelling justification (with plans with a total population deviation of less than 0.75% sometimes found acceptable)

⁹ Time did not permit a full analysis of the Section 2 VRA factors. However, (a) in order to bring a Section 2 claim it must be demonstrated that an additional compact 50%+ citizen voting age district can be created (*Bartlett v. Strickland*, 556 U.S. 1, 2009), and (b) any requirement to create a 50%+ citizen voting age district can be rebutted by a showing that the challenged district also gives minorities a realistic equal opportunity to elect candidates of choice. The Court maps contain so many districts with substantial minority populations whose candidate of choice is likely to be able to win primary victories and then go on to win general elections with non-Hispanic White crossover support in districts that are very heavily Democratic in political leaning that litigants would be unlikely to be able to satisfy the *Gingles* requirement that the candidate of choice of the minority community would be expected to regularly lose in the reconfigured district. It is the rights of minority communities, not the rights to office of individual candidates that are protected. This view of the potential for a successful Section 2 challenge to the Court imposed remedial maps is shared by Professor Grofman. Let me reiterate, however, that race was not a preponderant motive in my line drawing; rather, the heavily minority districts I have drawn simply reflect the population concentrations visible to citizens of the state New York or to someone who has studied demographic information about the state.

the New York standard is plus or minus one-person. This is a very demanding standard, especially in New York City where precincts (and blocks) are often rather large. As a consequence, satisfying New York's congressional one person, one vote requirement can force some irregularity in a district perimeter and may limit the potential for fully incorporating particular neighborhoods or communities of interest in a single district.

Similarly, while federal case law generally allows for a total population deviation of plus or minus five percent, and relatively few states require more restricting population constraints than those laid down in federal law, and even when they do, do not require perfect population equality, the block-on-border and town-on-border rules (see (6) above) force very strict population constraints on most of the districts. For example, in New York City all of the Senate districts within NYC must essentially be identical in population.¹⁰

9C. CONTIGUITY.

"(3) Each district shall consist of contiguous territory."

The mathematical definition of contiguity is straightforward: "Is it possible to proceed from any part of the district to any other party of the district without leaving the district?" I have sought, however, to avoid contiguity that is only "technical," i.e., generated only at a point or only via a

¹⁰ The block-on-border rule requires any district that includes only part of a city to have exactly the same population as every other district in that city. The 'town-on-border' rule requires population to be balanced between districts found in the same county, by ensuring that no town or city can be moved to an adjacent district which would lower the deviation between the two. These requirements are mandated by the text of the constitution and by state case law.

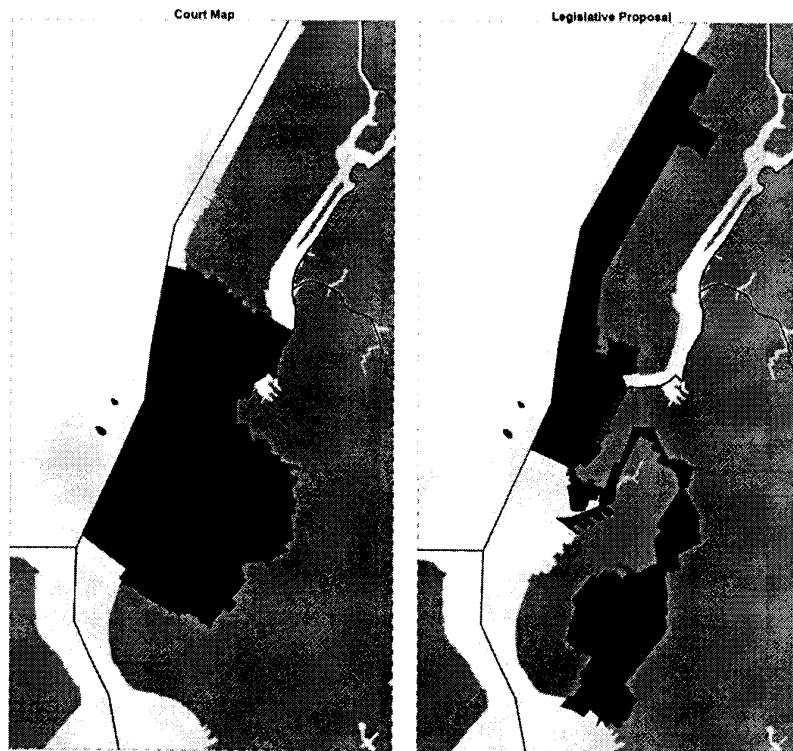
narrow wedge or a thin string of connecting blocks,¹¹ or contiguity that is not *functional contiguity*.¹²

9D. COMPACTNESS.

"(4) Each district shall be as compact in form as practicable."

¹¹ For example, one of the several problems with the way in which Congressional District 10 was configured in the unconstitutional map was that it achieved contiguity only in a very ill-compact way.

District 10 in Legislative Proposal and in Court Map



¹² *Functional contiguity* is generally taken to require that there be a way to traverse the district on foot or by car that does not require using a boat (or an airplane). As I note in identifying changes in the preliminary map later in the Report, one change that the Court did make at my recommendation was to ensure functional contiguity over water in District 17. (I am indebted to Steven Dunn for calling that issue to my attention.) There are, however, some states in which contiguity by water is permitted, but I prefer to avoid that option if possible.

Standard measures of compactness are defined in terms of area or perimeter and these can be measured in various ways, but two standard measures are *Polsby-Popper* (for area) and *Reock* (for perimeter).¹³ There is no dispute that the Court maps are compact on both measures, and more compact (and in the case of the congressional map, much more compact) than the maps found unconstitutional. (See summary table in section 10).

9E. COMPETITION, PARTISAN OR INCUMBENT BIAS, DISTRICT CORES, PRE-EXISTING POLITICAL SUBDIVISIONS, AND COMMUNITIES OF INTEREST

"(5) Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties. The commission shall consider the maintenance of cores of existing districts, of pre-existing political subdivisions, including counties, cities, and towns, and of communities of interest."

I discuss each of these clauses separately below.

9E1. RESPONSIVENESS AND POLITICAL COMPETITION.

Representative democracy requires elections that are free, open, and equal, with representatives ultimately accountable to the voters for their actions in office. One way in which such accountability is assured is in limiting the duration of office holding so that the will of the people is repeatedly assessed. Another way in which responsiveness is fostered is to have districts that are sufficiently competitive that they might realistically change in outcome in response to a change in voter preferences. In the U.S., since early in the Republic, elections are mediated by political parties serving as gatekeepers to organize voters for collective action. In the maps I drew for the Court's consideration, I reviewed whether those maps allowed for state-wide partisan outcomes to be responsive to changes in voter preferences by having a reasonable number of politically competitive districts.

Future election outcomes are hypothetical, and no crystal ball exists to perfectly predict elections, and political contexts change over time. Nonetheless, plausible expectations can be developed about which districts might be politically competitive in future elections by projecting past elections into the new districts. Political polarization has made outcomes more predictable and party orientation and vote choice more stable. Of course, projections can depend on which elections are incorporated into the model. I preferred data averaged from the presidential elections of 2016 and 2020. Political scientists have found that increasingly, congressional elections tend to mirror presidential ones, and even state elections are

¹³ See e.g., Niemi, Richard G., Bernard Grofman, Carl Carlucci, and Thomas Hofeller. 1990. "Measuring compactness and the role of a compactness standard in a test for partisan and racial gerrymandering." *Journal of Politics*, 52(4):1155-1181. This essay, written from a purely academic and non-partisan point of view, has one co-author who would be regarded as a Republican expert and another who would be regarded as a Democratic expert.

increasingly affected by national forces. For comparison purposes, I also examined projections based on a composite of 6 statewide elections over the period 2016-2020 (President 2016, U.S. Senate 2016, U.S. Senate 2018, Governor 2018, Attorney General 2018, President 2020). Because this set includes several rather idiosyncratic elections won overwhelmingly by the Democratic candidate, it shows projected outcomes to be more Democratic leaning than is the case for the presidential elections. Conclusions as to competition can also vary depending on exactly how a competitive district is defined. I use a definition that is standard in the political science literature: an average (of past recent elections) with a two-party vote share between 45% and 55%. Both the congressional and state senate maps have a substantial number of competitive seats (far more than in the unconstitutional maps) and are going to be responsive to the public will. Exact comparisons are provided in the Table in numbered section 10 of this Report and in the one page summary document released simultaneously with the new map and this Report.

9E2 PARTISAN OR INCUMBENT BIAS

Neither the proposed maps nor the final maps adopted by the Court were "drawn ... for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." (emphasis added) This statement cannot be a matter of dispute. I served the Court as a non-partisan expert. These maps were drawn blind to the homes of incumbents, using the good government criteria set down in the New York State Constitution.

Most of the attention has been devoted to the congressional map. As far as I can judge, the issues raised vis-a-vis the Senate map almost all have to do with the configuration of particular districts in terms of communities, so I will only focus on the congressional map with respect to partisanship. The Petitioners claim that the congressional plan does not give Republicans enough districts, while Respondents complain that the map does not allow them to keep the expected gains in congressional seats given to them by the map found unconstitutional, and incumbents complain about reconfiguring of their districts or about pairings.

There are many metrics that can be used to evaluate partisan neutrality. Most of these indicators show a slight Republican bias to the Court's congressional map, although a few show a pro-Democratic bias, and some essentially no statistically significant bias at all. Since this Report is not a Ph.D. dissertation, I will not try to explicate why measures for partisan gerrymandering such as *seats bias*, *votes bias*, *declination*, the *efficiency gap*, the *mean minus median gap*, and various results based on ensembles using particular instructions to a computer using a limited set of criteria and parameters that give specific weight to each criteria and can not reach the threshold levels of population equality to be completely unbiased do not give the exact same answers. Suffice it to note that some of these metrics can be unreliable in a state like New York where one party is dominant¹⁴; they work best in states in evaluating gerrymandering in states that are competitive at the state-wide level.

¹⁴ Nagle, John F., and Alec Ramsay. 2021. "On Measuring Two-Party Partisan Bias in Unbalanced States." *Election Law Journal: Rules, Politics, and Policy* 20(1): 116-38. <https://www.liebertpub.com/doi/10.1089/elj.2020.0674>.

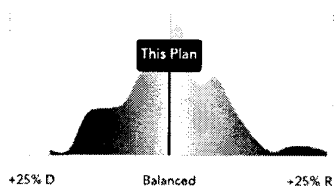
To the extent that we find pro-Republican bias in New York even in maps drawn by Democrats, Democratic voting strength is inefficiently distributed largely because of highly concentrated Democratic voting strength in almost all of New York City - that is, Democrats can be expected to win around 90% of the votes in districts centered in New York City, but the most overwhelmingly Republican districts will only reach around 60%. Common sense tells us that this lopsided difference will necessarily penalize Democrats in their translations of votes into seats.

The average Democratic congressional winner projected in the Court map (based on past presidential elections averaged in 2016 and 2020) are expected to win with 70% of the vote and the average Republican winner projected to win with only 56% of the vote. But it is equally clear that this is an overwhelmingly Democratic leaning state in terms of recent statewide elections (Democratic presidential candidates average 61.75% of the statewide Democratic vote, compared with 38.25% Republican vote); accordingly, non-dilutive treatment of the two parties argues that this fact should be reflected in the congressional and legislative maps. The second simple point I would make is that the maps I proposed have a substantial proportion of competitive seats. In a good year for Republicans, the Republicans can pick up seats; in a more typical Democratic year, it is likely that seats will remain in the hands of the incumbent party in the district, though now, because of an eliminated upstate district, there is one less congressional district being held by a Republican.

I show below the *Plan Score* evaluations of the final congressional map and the final Senate map (Results for the preliminary maps are essentially identical.) *Plan Score* is a project of the Campaign Legal Center, a nonpartisan organization, whose stated goal is to advance democracy through law.

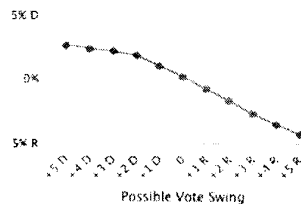
Congress:

Efficiency Gap: 0.1% D



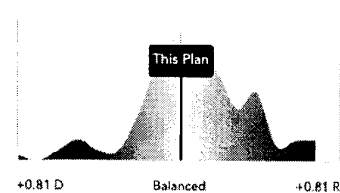
Votes for Democratic candidates are expected to be inefficient at a rate 0.1% D lower than votes for Republican candidates, favoring Democrats in 52% of predicted scenarios. [Learn more >](#)

Sensitivity Testing



Sensitivity testing shows us a plan's expected efficiency gap given a range of possible vote swings. It lets us evaluate the durability of a plan's skew.

Declination: 0 R

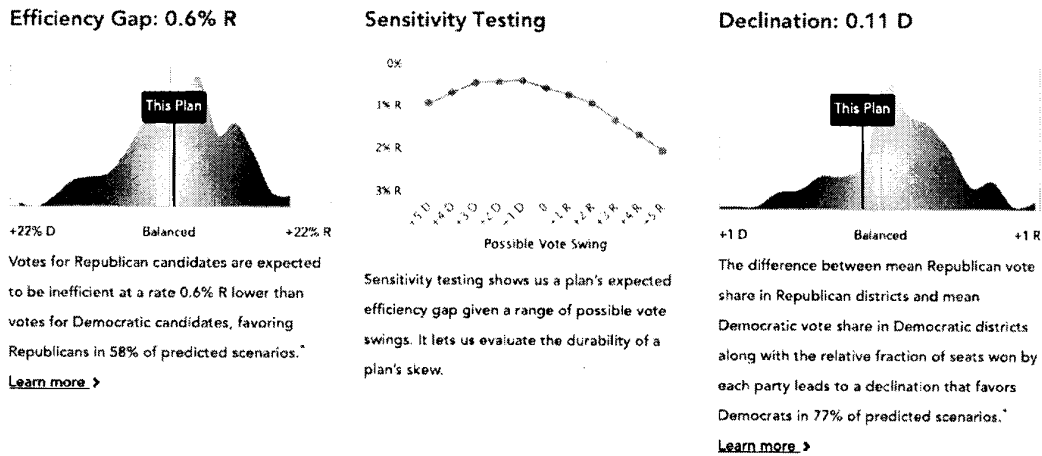


The difference between mean Democratic vote share in Democratic districts and mean Republican vote share in Republican districts along with the relative fraction of seats won by each party leads to a declination that favors Republicans in 56% of predicted scenarios. [Learn more >](#)

View PlanScore here:

<https://planscore.campaignlegal.org/plan.html?20220520T183242.680480746Z>

Senate:



View PlanScore here:

<https://planscore.campaignlegal.org/plan.html?20220521T024453.892105205Z>

The Plan Score evaluations find the final Court maps to be almost perfectly politically neutral for both the congressional and the state senate plans.

9E3 CORES OF EXISTING DISTRICTS.

After the 2020 census, state specific shifts in relative population share meant that New York lost one of its congressional districts. Moreover, the regional distribution of population within the State of New York has changed, with upstate losing population relative to downstate – requiring a shift that is roughly the equivalent of one full congressional seat. As a consequence, direct comparisons between the 2012 congressional map and any 2022 proposed congressional maps can be quite misleading.

Similarly, loss of population upstate relative to downstate led to a loss of two Senate seats upstate. As a consequence, direct comparisons between the 2012 State Senate map and any proposed 2022 State Senate maps can also be quite misleading. Moreover, the 2012 State Senate map was drawn with partisan goals as thus comparisons to a map satisfying the new constitutional requirements for State Senate maps can be misleading on that ground alone.

Nonetheless, despite population shifts, core retention was actually quite high. According to the analysis done by Sean Trende, congressional core retention in the preliminary congressional map was 70.9% and that percentage should not be expected to change drastically in the final map.¹⁵ I take this

¹⁵ See 2022.05.18 [646] Harkenrider v. Hochul – Moskowitz Aff Ex. 2 SUPPLEMENTAL REPORT OF SEAN P. TRENDÉ ON THE SPECIAL MASTER'S PROPOSED CONGRESSIONAL MAP May 18, 2022.) Professor Trende's map, which is tilted toward Republicans, has 73.3% core retention. At the level of individual districts, Professor Trende's map has a higher core retention in 11 districts; the proposed map has higher core retention in 9 districts; and 6 districts are ties.

to be clear evidence that despite all the changes made in the Court drawn congressional map to improve compactness and limit county and city cuts, the Court's Congressional map clearly takes core retention into consideration -- which is all that is required by the language of the New York State Constitution.

9E4 PRE-EXISTING POLITICAL SUBDIVISIONS

Very specific population equality provisions in the New York Constitution are completely inflexible and therefore were given the most weight. Among the factors listed in the New York constitution, I regard maintenance of pre-existing political subdivisions as an important consideration.

Some comments have objected to the apparent weight I gave to political subdivision boundaries. But there are what I believe to be six strong reasons why maintenance of these borders should be an important consideration in good government map-making.

First, there can be no disagreement that the constitutional amendment on redistricting was intended to limit the potential for partisan gerrymandering.

"The People of the State of New York have spoken clearly. ... [I]n the 2014 Constitutional Amendment not only did the People include language to prevent gerrymandering, but they also set forth a process to attain bipartisan redistricting maps." (2022.03.21 [243] Harkenrider v. Hochul DECISION and ORDER at 10)

- (1) While maintaining pre-existing county and city borders is not a guarantee against gerrymandering, since what I (and Bernard Grofman) have called "stealth gerrymandering" i.e., plans that adhere closely with traditional redistricting criteria but nonetheless are carefully to still egregiously favor one party over another,¹⁶ still remain possible, imposing a rule limiting county and city cuts makes it harder to gerrymander.
- (2) If we treat jurisdictional boundaries as non-constraining and allow maps to wander, it becomes easy for mapmakers to make claims that they are simply preserving communities of interest as a mask for what is actually partisan or incumbency preservation gerrymandering. As I note in our discussion of the community of interest criterion below, there is a certain looseness to the concept, except when communities are defined in racial or linguistic terms. But thinking of communities of interest only in racial or linguistic terms brings me to another compelling reason to maintain county and municipal boundaries.
- (3) Political subunits are *cognizable* to ordinary citizens, to use Professor Bernard Grofman's terminology, because they have a clear geographic location that is usually marked by signage, often including that on road or parkway exits, and a long-standing history. In thinking

¹⁶ Cervas, Jonathan R., and Bernard Grofman. 2020. "Tools for Identifying Partisan Gerrymandering with an Application to Congressional Districting in Pennsylvania." *Political Geography* 76: 102069.

about what is where, political subunits are a natural way to demarcate space.¹⁷

- (4) Prioritizing respect for fixed and known boundaries immediately renders highly implausible any claim that race was a preponderant motive in the way in which maps were drawn, and thus limits the potential for a constitutional challenge to a map under the *Shaw v. Reno* (509 U.S. 630, 1993) constitutionally rooted prohibition of "race serving as a preponderant motive" in the line drawing process.
- (5) Units, such as cities and counties, are units of governance and thus have an inherent political relevance.
- (6) Relatedly, units such as cities and counties are also cognizable communities and can readily be viewed as themselves communities of interest in that residents of such units have interests in common.

Of course, given strict 'one-person, one-vote' requirements in both the congressional and senate maps, some political subdivisions will have to be divided. Nonetheless in the congressional map I have sought to limit the number of county splits to near to $N-1$, where N is the number of constituencies.¹⁸ Similarly, in the Senate map I have sought to limit the number of municipality splits to no more than one per district. But, given the geography and the size of the different cities, completely eliminating all municipality splits is simply impossible.

9E5 COMMUNITIES OF INTEREST

Communities of interests are notoriously difficult to precisely define.¹⁹ Even within a specific minority community there may be issues of what are the boundaries of particular neighborhoods and which neighborhoods most appropriately belong together. In reading through testimony submitted to the IRC or to the special master about communities of interest, some testimony has been contradictory, and the same tends to be true in other jurisdictions with which I am familiar. Also, while there are certainly historic communities, community definitions can be constantly evolving, especially as the racial or ethnic population of neighborhoods changes. Since communities of interest are often smaller than a single Congressional district or even a State Senate district, some combining of communities of interest will be

¹⁷Chen, Sandra J. et al. 2022. "Turning Communities Of Interest Into A Rigorous Standard For Fair Districting." *Stanford Journal of Civil Rights and Civil Liberties* 18: 101-89, provides a brief discussion of the idea of cognizability.

¹⁸It can be shown mathematically that $N-1$ is the lowest mathematically feasible number of splits except where there are whole counties or cities or aggregates of cities and counties that exactly meet population requirements. This result has been shown by Professor Grofman and demonstrated in a mathematically elegant fashion by Professor John Nagle (personal communication).

¹⁹See discussion in Chen, Sandra J. et al. 2022. "Turning Communities Of Interest Into A Rigorous Standard For Fair Districting." *Stanford Journal of Civil Rights and Civil Liberties* 18: 101-89, and references therein.

necessary. Finding the appropriate communities to combine is often more art than science and there will almost never be one absolutely correct answer, especially given the other constraints that need to be satisfied for a constitutional map.

10. Below is a summary chart showing key features of the Court's final congressional map and the Court's final Senate map, with a comparison to the corresponding unconstitutional maps.

CONGRESS	Court Map	Legislative Proposal
Number of Counties Split	16	34
Total Number of County Splits	26	56
Reock Compactness	41	32
Polsby-Popper Compactness	35	25
Competitive Districts ²⁰	8	3
For splits, lower is better. For compactness and competitive districts, higher numbers are better.		

SENATE	Special Master Proposal	Legislative Proposal

²⁰ As measured using the 2016/2020 Presidential election PVI on DRA; districts between 45% and 55%.

Number of Counties Split	25	30
Total Number of County Splits	66	71
Reock Compactness	39	35
Polsby-Popper Compactness	34	28
Competitive District	12	6
For splits, lower is better. For compactness and competitive districts, higher numbers are better.		

11. CHANGES TO PROPOSED MAPS

I was very pleased to see the high level of civic engagement and interest reflected in the volume of comments this Court (and the Redistricting Commission earlier) had received, and particularly pleased with the many suggestions for improvements in the preliminary maps I prepared for the Court. And I sought to be very responsive to citizen concerns in my recommendations to the Court for the shape of the final maps. But there are several realities that must be understood that made it impossible to incorporate most of the suggestions.

First, some of those suggestions were mutually contradictory.

Second, while I was quite successful in limiting the number of counties and cities that were split, some splits are simply inevitable given the geography of the state and the population constraints, and the need to take into account other of the multiple competing criteria for redistricting identified in the state constitution that I listed earlier in this Report. I can assure you that if yours was one of these units that were split it was not because of any kind of animus but was essentially due to the mathematical necessity of splitting some units, though I have tried especially hard to limit splits of smaller units.²¹

²¹ Professor Bernard Grofman has joked that there are so many different criteria that a Special Master must pay attention to that it's like being asked to simultaneously juggle things as diverse as tires, tea pots, and burning torches, with some pennies to juggle (population equality constraints) thrown in for good measure.

Third, under federal law, it is unconstitutional for race to be a preponderant motive in redistricting, and I did not do so. Some of the changes that were proposed involved moving pockets of concentrated minority populations from one district to another simply to increase minority influence without a clear justification in terms of unifying long-established geographically defined neighborhoods and communities.

Fourth, changes to a proposed map needed to be geographically feasible in terms of changes to the proposed map that reflects the spirit and rules set out in the constitution.

Fifth, perhaps, most importantly, any change has a ripple effect that can force substantial redrawing of lines. In particular, even small changes in one part of the map can force more substantial changes overall due to the strict population constraints in the New York State Constitution.

Finally, and relatedly, changes which seem desirable from the standpoint of one community of interest may have fewer desirable consequences for other communities of interest.

Nonetheless, despite the important caveats in the paragraphs above about why it was simply impossible to address all the public's concerns, I am pleased to report that I was able to incorporate into the final maps a very large proportion of the most serious and most often repeated suggestions about changes needed in the preliminary maps. Below I have sought to explain my reasons for key changes I did or did not make - often involving a hard choice between two options, each of which could be supported with good reasons. There are 28 proposed changes that had some substantial support that I reference below. Of these 28 changes, I was able to adopt in whole or in part 21.

My preliminary proposed maps were informed by testimony before the Redistricting Commission, evidence in the court record, and suggestions given directly to me prior to my drafting of a preliminary map. But I find the present round of citizen submissions of particular usefulness to me as a mapmaker, since they were directly offering what they believe to be improving changes in a map whose main features were likely to be adopted by the Court. Having a map to work from allows the public to be better informed about how their recommendations might be made compatible with concerns of other citizens and groups in a lawful map.

Several changes to the Proposed Maps have been made based on the comments of citizens and interest groups. I am thankful for the time invested by those citizens in helping me to identify areas for improvement from the Proposed map I delivered to the court on May 16, 2022. I provide in the following section reasons why some suggested changes were or were not made in the revised map.

CONGRESSIONAL MAP

NEW YORK CITY

11A. BROOKLYN - BEDFORD-STUYVESANT

In the draft congressional map, I inadvertently split the community of Bedford-Stuyvesant while trying to create compact, legally compliant districts in Brooklyn. In the final version of the map, I have placed this community in full in district 8. Bedford-Stuyvesant is now the core of district 8, as has historically been the case.

11B. BROOKLYN - CROWN HEIGHTS

In the draft congressional map, I inadvertently split the community of Crown Heights while trying to create compact, legally compliant districts in Brooklyn. In the final version of the map, I have placed this community in full in district 9. Crown Heights is now the core of district 9, as has historically been the case.

11C. SUNSET PARK, MANHATTAN CHINATOWN, RED HOOK

Several changes from the proposed map were made to Congressional District 10 to reflect numerous public comments concerning preserving communities of interest. There were many comments about maintaining the community of interest between Manhattan Chinatown, the Lower East Side, Sunset Park, and Red Hook within one congressional district. More specifically, many comments cited to the language in the federal case Diaz v. Silver, 978 F. Supp. 96 (E.D.N.Y.) (per curiam), aff'd, 522 U.S. 801 (1997), which recognized that Manhattan Chinatown and Brooklyn's Sunset Park were a community of interest and should be kept together within the then 12th Congressional District. This configuration has been followed in the last two redistricting cycles. The Unity Map Coalition, APA Voice Redistricting Task Force, Common Cause New York, as well as many other members of the public, provided comments concerning the maintenance of this community of interest. There were also many comments about including Red Hook, Carroll Gardens, Gowanus, and Sunset Park within one congressional district, which is also reflected in Congressional District 10. Comments also requested to keep Park Slope with Red Hook, which was also reflected in the congressional map. While many comments addressed maintaining Red Hook, Sunset Park, and Manhattan Chinatown in Congressional District 7 with Bushwick and Williamsburg, this was not possible given the population constraints.

11D. MANHATTAN

There are clearly multiple ways in which communities on Manhattan Island are conceptualized. One conceptualization is the east side and the west side, with the focus on Central Park as a divider. Others have said that they appreciate the way my proposed map creates upper, middle, and lower Manhattan districts, which is another common way to think about NYC in spatial terms. And other observations were that Central Park is an area that, rather than being seen as a barrier, can be viewed as a green space for shared activities that unite uptown Manhattan. Moreover, the proposed uptown congressional district includes more than just areas bordering on Central Park for which the East Side versus West Side distinction may be most relevant. Furthermore, looking at Manhattan as a whole, the East Side versus West Side distinction tends to break down as we move further south. Also, even the areas of the city bordering on opposite sides of Central Park do not appear to be as strongly distinguished in terms of economic and demographic differences as they once were. Thus, while this is a hard choice, I do not find a compelling

community of interest argument for changing the configurations of Manhattan congressional districts in the proposed map.

11E. NORTH BRONX/WESTCHESTER - CO-OP CITY

There is conflicting testimony as to the appropriate portion of the Bronx that would be included in district 16. All former parts of district 16 cannot be included because of population constraints. Co-Op City, which was previously in Congressional District 16, had to be moved out of the 16th because the population loss in upstate required CD 16 to take in more population to the north. Unfortunately, even though many hundreds of citizens sent me requests for Co-Op City to be placed into the 16th CD, this is not possible given the constraints imposed by the combination of population and other criteria. I am pleased to note that Co-Op City is maintained wholly within Congressional District 14, an adjacent district that is also majority-minority in character.

11F. BROOKLYN - BENSONHURST

In the proposed congressional map, Bensonhurst was inadvertently divided between two congressional districts. Bensonhurst is now united in Congressional District 11. This reflects comments about keeping Bensonhurst whole and within Congressional District 11.

11G. BROOKLYN - BENSONHURST, BATH BEACH, NEW UTRECHT

The area of south Brooklyn was unintentionally divided in the proposed congressional map. Numerous comments were made about keeping the South Brooklyn areas of Bensonhurst, Bath Beach, and New Utrecht together in one congressional district and uniting these areas with Staten Island. I made changes to reflect these comments and now unite Bay Ridge, New Utrecht, Bensonhurst, and Bath Beach in CD 11 with Staten Island.

11H. QUEENS - BAYSIDE

Several comments related to the neighborhood of Bayside being included in Congressional District 6 instead of Congressional District 3 on the proposed map. Given population constraints, including all of Bayside in CD 6 is not possible. However, I have taken the suggestion of APA Voice and added the southern portion by making population exchanges.

LONG ISLAND

11I. LONG ISLAND COMMUNITIES

Several changes were made to Long Island districts in both the Senate and Congressional maps. Testimony by the League of Women Voters Long Island chapter, and others, suggested that splitting Long Island in a way that respects the north shore and south shore communities would be more appropriate. The congressional map now reflects that change.

11J. NASSAU/QUEENS COUNTY BORDER

Common Cause reported that there was community activist sentiment for Congressional District 5 not to cross the Nassau County border. This feature is maintained in the final congressional map.

11K. WESTBURY/NEW CASSEL

Although there were numerous comments about including Westbury and New Cassel with Hempstead within a congressional district, Westbury and New Cassel were not included in Congressional District 4 in order to maintain the district within the city line.

UPSTATE**11L. DISTRICT 17 - CONTIGUITY**

Rockland County was inadvertently left discontinuous in the Proposed congressional map. The city of Greenburgh is now split in such a way that the Mario M. Cuomo Bridge connects Rockland to the rest of CD 17. I thank Steve Dunn for bringing this error to my attention.

11M. CAPITAL REGION

Congressional District 20, which is centered on the capital city of Albany, initially did not include the culturally and economically connected city of Saratoga Springs. In the final Court map, all of Saratoga County is included, along with the city of Troy in Rensselaer County. I was not able to include Amsterdam given population constraints and the requirement to consider county subdivision boundaries.

11N. ERIE COUNTY THREE WAY SPLIT

Several changes have been made to Erie County. First, objections to the additional split of Erie County have been corrected in the congressional map. Erie County now consists of parts of CD 23 and 26. CD 24 now includes the more rural parts of Niagara County. This configuration better reflects the map submissions made to me and the testimony I have received since the release of the Proposed maps.

11O. KINGSTON CITY SPLIT

Some cities are necessarily split in the process of equalizing the population between districts. The Court map minimizes the impacted cities by only splitting one city in each district (in accordance with N-1 splitting criteria laid out above, and in the preservation of political sub-divisions). The residents of Kingston were clear about the particular harm splitting their community would cause, and therefore I maintained the entirety of Kingston in the final map.

SENATE**NEW YORK CITY****11P. BROOKLYN - BENSONHURST/SUNSET PARK**

In the final senate map, changes were made to reflect numerous testimony about keeping the neighborhoods of Sunset Park and Bensonhurst whole and together in one Senate District. This comment was received by APA Voice Redistricting Task Force, The Unity Map Coalition, Common Cause, as well as many other individuals. This is reflected in Senate District 17.

11Q. BROOKLYN - BAY RIDGE

Bay Ridge was unintentionally split in the proposed State Senate map. Several comments were made about keeping Bay Ridge whole within a Senate District. The Senate map changes reflect these comments and keep Bay Ridge whole and with Dyker Heights within Senate District 26.

11R. BROOKLYN - PARK SLOPE

In the proposed map, I inadvertently excluded a northern triangular portion of Park Slope from other districts that contained the Park Slope neighborhood. Given the difficulties in obtaining equal population in these highly dense areas, I was unable to unite this portion of the neighborhood.

11S. QUEENS - BAYSIDE, OAKLAND GARDENS, AUBURNDALE

Several comments related to the neighborhoods of Bayside, Oakland Gardens, and Auburndale being included in Senate District 16 instead of Senate District 11. To keep neighborhoods together, comments also reflected requests to add part of the "Hillside Corridor" to Senate District 11 instead of its inclusion in proposed Senate District 16. These comments are reflected in written submissions from APA Voice Redistricting Task Force, The Unity Map Coalition, and Common Cause. I prioritized written comments to make changes to the map to include more of Bayside, Oakland Gardens, and Auburndale into senate district 16 while including areas of what is classified as the "Hillside Corridor" into Senate District 11.

11T. QUEENS - RICHMOND HILL/OZONE PARK

Numerous comments requested the inclusion of more of Richmond Hill within Senate District 15 with Ozone Park. I changed Senate District 15 to reflect these comments. I was not, however, able to get all of South Ozone Park into Senate District 15 due to population constraints. These district changes were made in an effort to preserve neighborhood boundaries as best as possible. Unfortunately, Forest Hills is slightly split in this new configuration.

11U. QUEENS - WOODSIDE/ELMHURST

Numerous statements from APA Voice Redistricting Task Force provided support for keeping Woodside and Elmhurst together in Senate District 15. Based on this testimony, I made the decision to unite these two communities and maintain Senate District 15.

11V. NORTH BRONX/WESTCHESTER - CO-OP CITY

I was able to follow the guidance of numerous testimony regarding the North Bronx/Westchester region, proposing uniting the neighborhoods of Co-Op City, Edenwald, and Williamsbridge with Mount Vernon, Eastchester, and Wakefield in one senate district. This is now achieved in Senate District 36.

LONG ISLAND

11W. SENATE DISTRICT 4

According to Article III, Section 4(c)(1) of the New York Constitution, when drawing district lines one must "...consider whether such lines would result in the denial or abridgment of racial or language minority voting rights, and districts shall not be drawn to have the purpose of, nor shall they result in, the denial or abridgement of such rights." Here, following the injunctions of the State Constitution to respect communities of interest (NYS Const. Art. III, Section 4(c)(5)) and to not draw districts that would result in the denial or abridgement of racial or language minority voting rights, the final map includes a district similar to one suggested by Common Cause.²²

11X. LAKEVIEW/ROCKVILLE CENTRE

In the proposed state Senate map, Lakeview was inadvertently divided. I have made a change to keep Lakeview whole in Senate District 6. Rockville Centre is also kept whole in a senate district, as requested by public feedback to the preliminary map.

11Y. WESTBURY/NEW CASSEL

There were numerous comments about including Westbury and New Cassel with Hempstead in a district. The map was changed such that it includes this community of interest in Senate District 6.

UPSTATE

11Z. SYRACUSE/AUBURN

²² Whether failing to create this district would be a federal Voting Rights Act violation is unclear, as federal law on whether or not the Voting Rights Act applies to combined minority groups is currently unsettled. In any case, we have relied on state law, not federal law here.

FILED: NEWBURGH COUNTY CLERK 05322220022121107AM

INDEX NO. E28421012622

NYSCEF DOC. NO. 620

RECEIVED NYSCEF: 05/22/2022

There were many requests to keep Auburn and Syracuse together in one senate district. Comments highlighted the shared interests of Cayuga County and Onondaga County. I changed the Syracuse area to reflect this and keep these two cities together within Senate District 48. Cayuga County is kept whole within Senate District 48.

11AA. UTICA/ROME

There were also numerous requests to keep the cities of Utica and Rome together in one district. This change is reflected in Senate District 53 that unites these two cities.

11AB. BUFFALO

In the proposed map, I inadvertently split the city of Buffalo to join it with the more rural area of Erie County. There were comments that the previous split between a more urban district and a more rural district did not respect neighborhood interests. The configuration has been changed to provide a clearer separation between more urban and rural populations of the county.

11AC. ROCHESTER

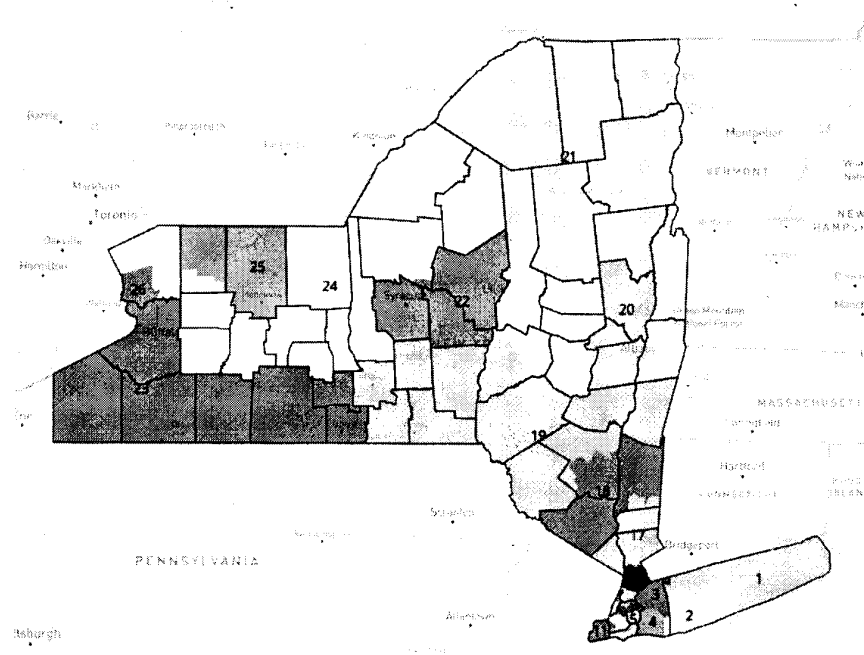
At least one group has questioned the split in the senate map of Rochester. However, for Senate Districts 55 and 56, the maps submitted by the Petitioners and the Respondents each had identical lines and I saw no reason to not propose that same configuration to the Court for the final map.

11AD. GREENE/COLUMBIA

I received testimony that requested to join Greene and Columbia Counties in the senate map. I have made a change in the final map to reflect this.

2022 NY Congressional Court Ordered Map

Jonathan Cervas, Carnegie Mellon University



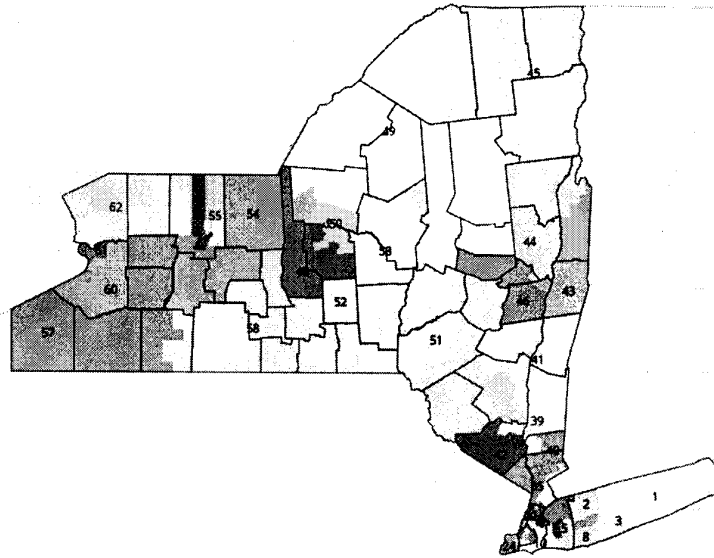
View Here: <https://davesredistricting.org/join/a3a223ed-54cf-4b54-8ea3-6f9312d7c405>

	Court Map	Legislative Proposal
Number of Counties Split	16	34
Total Number of County Splits	26	56
Reock Compactness	41	32
Polsby-Popper Compactness	35	25
Competitive Districts ¹	8	3
For splits, lower is better. For compactness and competitive districts, higher numbers are better.		

¹ As measured using the 2016/2020 Presidential election PVI on DRA; districts between 45% and 55%.

2022 NY Senate Court Ordered Map

Jonathan Cervas, Carnegie Mellon University



View Here: <https://davesredistricting.org/join/db25a7a8-477a-4443-bc68-9a157f9b2cc8>

	Court Map	Legislative Proposal
Number of Counties Split	25	30
Total Number of County Splits	66	71
Reock Compactness	39	35
Polsby-Popper Compactness	34	28
Competitive Districts ¹	12	6

For splits, lower is better. For compactness and competitive districts, higher numbers are better.

Senate district numbers are provisional and based on an attempt to match the 2012-2020 map numbering as closely as possible. Because of relative population loss, two districts have been shifted and there are necessary changes throughout the state to reflect the population changes.

¹ As measured using the 2016/2020 Presidential election PVI on DRA; districts between 45% and 55%.

**Exhibit L to Salcedo Affirmation-
Petitioner-Intervenor Gavin Wax's Proposed Answer to Amended
Petition with Additional Cause of Action seeking to invalidate
State Assembly Maps, dated May 1, 2022
[pp. 483 - 487]**

FILED: NEWBURGH COUNTY CLERK 053022022091107PM

NYSCEF DOC. NO. 339

INDEX NO. E2022-0116CV

RECEIVED NYSCEF: 05/02/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

-----X
:
TIM HARKENRIDER, GUY C. BROUGHT, :
LAWRENCE CANNING, PATRICIA CLARINO, :
GEORGE DOOHER, JR., STEPHEN EVANS, :
LINDA FANTON, JERRY FISHMAN, JAY :
FRANTZ, LAWRENCE GARVEY, ALAN :
NEPHEW, SUSAN ROWLEY, JOSEPHINE :
THOMAS, AND MARIANNE VIOLANTE, :

Petitioners, :

v. :

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, :

Respondents. :
-----X

Index No.: E2022-0116CV

**PROPOSED ANSWER TO
AMENDED PETITION WITH
ADDITIONAL CAUSE OF ACTION
SEEKING TO INVALIDATE
STATE ASSEMBLY
MAPS**

PLEASE TAKE NOTICE that Petitioner-Intervenor Gavin Wax ("Petitioner-Intervenor") alleges as follows and for his Proposed Answer to the Amended Petition with Additional Cause of Action Seeking to Invalidate State Assembly Maps:

1. Admit paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 32-119, 121-217, 219-223, and 234-274.
2. Admit paragraph 10, but deny the second sentence of footnote 6, and with respect to footnote 7, (a) deny the allegations that "Petitioners do not challenge [the state Assembly] map or ask for its invalidation" and (b) deny the allegations that, "Therefore, the Court need not

consider any procedural failures related to enactment of the 2022 state Assembly map.”

3. Admit paragraph 120, but deny the content of footnote 23.
4. Deny paragraph 27.
5. Upon information and belief, admit paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 218, and 224-233.

NEW CAUSE OF ACTION SEEKING TO INVALIDATE STATE ASSEMBLY MAPS

(N.Y. Const. art. III, § 4(b); N.Y. Legis. Law § 93(1) – Failure to Follow Constitutional And Statutory Procedures For Redistricting)

6. Petitioner-Intervenor incorporates each of the foregoing paragraphs as if fully set forth herein.

7. Article III, Section 4(e) of the New York Constitution provides that “[*t*]he process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article *shall govern* redistricting in this state,” with limited exceptions not relevant here. N.Y. Const. art. III, § 4(e) (emphases added); *see* N.Y. Legis. Law § 93(3) (same).

8. Section 4(b) of Article III requires that, should the Legislature “fail to approve the legislation implementing the first redistricting plan” prepared by the IRC, the IRC then “*shall* prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan,” and that “[s]uch legislation *shall* be voted upon, without amendment.” N.Y. Const. art. III, § 4(b) (emphases added); *see also* N.Y. Legis. Law § 93(1).

9. Only then, after having considered and rejected such a *second* redistricting plan, or, after the Governor vetoes any such second plan after the Legislature approved it, may the Legislature “introduce” its own “implementing legislation” along with “any amendments” that comply with Article III, Section 4. N.Y. Const. art. III, § 4(b); *see also* N.Y. Legis. Law § 93(1).

10. Because the Legislature never received, let alone considered and acted upon, a

second redistricting plan from the Commission, it never obtained redistricting authority under the *exclusive* process established by the New York Constitution for introducing and adopting its own redistricting maps. *See* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196, A.9039-A, A.9040-A, and A.9168.

11. After the Legislature rejected the first-round maps introduced by the IRC out of hand, the Commission did not adopt and introduce second-round maps to the Legislature within 15 days, leaving the Legislature with no maps to act on within the scope of its limited constitutional role.

12. As a result, the Legislature did not consider a second map or maps from the IRC, which mandatory consideration was required before the Legislature was constitutionally permitted to adopt its own congressional map. N.Y. Const. art. III, § 4(b).

13. The 2021 legislation enacted by the Legislature and Governor purporting to give the Legislature authority to circumvent the Constitution, to adopt its own maps if the Commission failed to vote on second-round maps, L.2021, c. 633, § 1, is unconstitutional. There is no provision of law that allows the Legislature to sidestep the Constitution’s exclusive process for redistricting in New York via legislative enactment.

14. The Legislature enacted L.2021, c. 633, § 7150 in an effort to avoid the effect of the People voting down a constitutional amendment to provide for what L.2021, c. 633, § 7150(1) purports to do. But, of course, a constitutional amendment is necessary to make the changes to New York’s exclusive, constitutionally enshrined redistricting process.

15. The Legislature cannot act contrary to the Constitution’s restrictions on the respective duties and responsibilities allocated to it and other entities responsible for redistricting. Because the Legislature acted contrary to the Constitution when it enacted L.2021, c. 633, § 7150,

the 2022 state Assembly maps are invalid.

16. Since the Legislature had and has no constitutional authority to draw state Assembly districts given the IRC's failure to follow the exclusive, constitutionally mandated procedures, this Court cannot give the Legislature another opportunity to draw curative districts.

17. Thus, this Court should draw its own state Assembly district maps.

18. This Court should enter judgment declaring that the 2022 state Assembly maps violate the New York Constitution.

PRAYER FOR RELIEF

WHEREFORE, Petitioner-Intervenor respectfully demands that this Court enter judgment and order against Respondents as follows:

A. Declaring, pursuant to CPLR § 3001, that the 2022 congressional map, 2022 state Assembly map, and 2022 state Senate map, *see* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196, A.9039-A, A.9040-A, and A.9168, all constitute unconstitutional maps enacted without complying with the mandatory constitutional procedures for redistricting in Article III, Section 4(b) of the New York Constitution, and that the 2021 legislation, L.2021, c. 633, § 7150, enacted by the Legislature and Governor in an attempt to give the Legislature authority to circumvent the Constitution and adopt these unlawful maps, is unconstitutional;

B. Enjoining Respondents from conducting any elections under the 2012 congressional map, 2012 state Senate map, or 2021 state Assembly map;

C. Enjoining Respondents from conducting any elections under the 2022 congressional map, 2022 state Senate map, or 2022 state Assembly map;

D. Adopting new, legally compliant congressional, state Senate, and state Assembly maps;

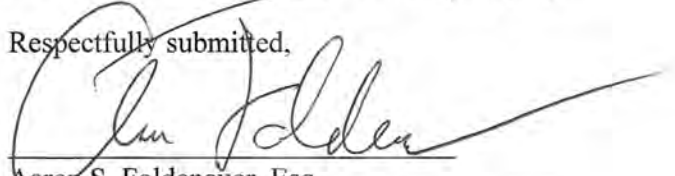
F. Suspending or enjoining the operation of any other state laws that would undermine this Court's ability to offer effective and complete relief to Petitioner-Intervenor for the November 2022 elections and related primaries;

G. Awarding Petitioner-Intervenor all of his reasonable attorneys' fees and costs; and

H. Awarding such other and further relief as this Court may deem just and proper.

Dated: May 1, 2022
New York, NY

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

Counsel for Petitioner-Intervenor Gavin Wax

Exhibit M to Salcedo Affirmation-
Twitter messages posted by Mr. Wax related to New York's
redistricting process and the Harkenrider Lawsuit
[pp. 488 - 500]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 44

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/22/2022



Gavin Mario Wax 🇺🇸 🇺🇸 @GavinWax · Jan 31

Replying to @NYSYD

Your profile picture is so stupid.

Also on topic, is it only gerrymandering when Republicans do it?

Hypocrites proud of their work....



2

16



Gavin Mario Wax 🇺🇸 🇺🇸 @GavinWax · Feb 2

Democrats love to ramble on for their love of the 'Democratic process' but in all Democrat jurisdictions it is one-party rule.

The minority parties in blue states & cities are shut out completely from the legislative process through parliamentary procedure tricks & other regs.

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14





Gavin Mario Wax 🇺🇸 🇺🇸
@GavinWax

...

Why are Republicans so weak in New York?

Well apparently 15 GOP members of the Assembly voted in favor of the Democrats gerrymandering proposal.

If you can't even stick with your caucus on the easiest of issues what use are you?

12:12 PM · Feb 3, 2022 · Twitter for Android

92 Retweets 8 Quote Tweets 445 Likes



Tweet your reply

Reply



Gavin Mario Wax 🇺🇸 🇺🇸 @GavinWax · Feb 3
Replying to @GavinWax
Easiest*

...



13



Gavin Mario Wax 🇺🇸 🇺🇸 @GavinWax · Feb 3

...

It's pathetic how little transparency there is in the New York State Legislative process.

Why can't it be easy & simple to find out who the 15 Republican turncoats were who voted to support the Democrat gerrymandering plan?

All these guys care about is keeping their pension.



3



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39





Gavin Mario Wax 🇺🇸 🇺🇸 @GavinWax · Feb 3

Republicans are so weak and pathetic.

Masters of snatching defeat from the jaws of victory.



Dave Wasserman 🇺🇸 @Redistrict · Feb 3

NEW: for the first time, Dems have taken the lead on @CookPolitical's 2022 redistricting scorecard. After favorable developments in NY, AL, PA et. al., they're on track to net 2-3 seats from new maps vs. old ones.*

[Show this thread](#)





Gavin Mario Wax 🇺🇸 🇪🇺 @GavinWax · Feb 3

...

I'd love to hear the Congressman go on record that neither he nor his office or campaign had anything contact or interaction with Democrats in the State legislature or their staff, party officials regarding these maps.

📻 **WGXC: Radio for Open Ears** @WGXC · Feb 3

Fact check: @repdelgado had nothing to do with redistricting in New York, and @marcmolinaro has not been protesting each time a Republican-led state does the same gerrymandering.
twitter.com/marcmolinaro/s...



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13



Gavin Mario Wax 🇺🇸 🇪🇺 @GavinWax

...

Republicans in NY who voted to support the maps for Assembly/Senate supported unconstitutional maps. Should have voted party line!

5:08 PM · Mar 31, 2022 · Twitter Web App

11 Retweets 66 Likes





Gavin Mario Wax 🇺🇸 🇺🇸 @GavinWax · Mar 31

...

The Democrats are going to appeal this but thanks to 15 Republicans in the **Assembly** who voted for these unconstitutional & illegal lines, our chances to win the appeal are weaker.

RINOs are dangerous to the party.

🇺🇸 **National Republican Redistricting PAC** @GOPRedistrict · Mar 31



New York's Congressional, Senate, and Assembly Districts have been enjoined for 2022

The New York Legislature has been ordered to submit "bipartisanly supported" maps by April 11, 2022.

ORDERED, ADJUDGED, and DECREED that in order to grant appropriate relief the court hereby grants to Petitioners a permanent injunction restraining and enjoining the Respondents, their agents, officers, and employees or others from using, applying, administering, enforcing or implementing any of the recently enacted 2022 maps for this or any other election in New York, included but not limited to the 2022 primary and general election for Congress, State Senate and State Assembly; and it is further

ORDERED, ADJUDGED, and DECREED that the Legislature shall have until April 11, 2022 to submit bipartisanly supported maps to this court for review of the Congressional District Maps, Senate District Maps, and Assembly District Maps that meet Constitutional requirements; and it is further

ORDERED, ADJUDGED, and DECREED that in the event the Legislature fails to submit maps that receive sufficient bipartisan support by April 11, 2022 the court will retain a neutral expert at State expense to prepare said maps; and it is further

ORDERED, ADJUDGED, and DECREED that any request for attorneys' fees and costs is denied; and it is further

ORDERED, ADJUDGED, and DECREED that this Court retains jurisdiction to issue any and all further orders which shall be necessary to comply with the mandates set forth herein.

Dated: March 31, 2022


Hon. Patrick F. McAllister
Acting Surrogate Court Justice



Gavin Mario Wax 🇺🇸 🗳️ @GavinWax · Mar 31

...

I only wish their 15 colleagues in the **Assembly** Republican Conference held the line and voted no on the state maps.



• **Michael Kracker** @makracker · Mar 31

Replying to @GavinWax

Every Senate Republican voted no on these gerrymandered lines.



↻ 2

♥ 13



Gavin Mario Wax 🇺🇸 🗳️ @GavinWax · Mar 31

...

Someone tried to tell me that "there was no lawsuit" as it pertained to **Assembly** and Senate lines in New York.

Thankfully we got lucky with the courts this time and the ridiculous gerrymandering of New York is prevented.



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↻ 3

♥ 18







Gavin Mario Wax 🇺🇸 🗳️ @GavinWax · Sep 15, 2021

Thoughts on these **maps**?



Josh Rosenblatt 🗳️ @JRosenblattTV · Sep 15, 2021

BREAKING: Here is the first look at NY's redistricting map(s). The @NYS_IRC says it couldn't come to a consensus, leading to the dueling maps.

Analysis to follow, but at first glance Upstate will look very different under each of these maps @WBNG12News



3

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7



Gavin Mario Wax 🇺🇸 🗳️ @GavinWax · Mar 31

I only wish their 15 colleagues in the Assembly Republican Conference held the line and voted no on the state **maps**.



Michael Kracker @makracker · Mar 31

Replying to @GavinWax

Every Senate Republican voted no on these gerrymandered lines.



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13





Gavin Mario Wax 🇺🇸 🗳️ @GavinWax · Mar 31

...

Someone tried to tell me that "there was no lawsuit" as it pertained to Assembly and Senate lines in New York.

Thankfully we got lucky with the courts this time and the ridiculous gerrymandering of New York is prevented.



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18



Gavin Mario Wax 🇺🇸 🗳️ @GavinWax · Mar 31

...

WOW!



RRH Elections @RRHElections · Mar 31

Republicans have won the New York redistricting lawsuit (appeal pending). All three of the legislature's maps have been struck down as illegal Democratic gerrymanders, and they have 12 days to redraw. A stunner, as the judge initially said it was too late to order a '22 redraw. [twitter.com/GOPRedistrict/...](https://twitter.com/GOPRedistrict/)

[Show this thread](#)



4



23





Gavin Mario Wax @GavinWax · Mar 31

Remember when 15 NY Republicans in leadership voted to support the Democrats' unlawful & unconstitutional gerrymandering?

They also voted to limit debate right before the vote! Sad!

Thankfully the courts ruled in our favor.

Establishment takes the L.

breitbart.com/politics/2022/

National Republican Redistricting PAC @GOPRedistrict · Mar 31



New York's Congressional, Senate, and Assembly Districts have been enjoined for 2022

The New York Legislature has been ordered to submit "bipartisanly supported" maps by April 11, 2022.

ORDERED, ADJUDGED, and DECREED that in order to grant appropriate relief the court hereby grants to Petitioners a permanent injunction restraining and enjoining the Respondents, their agents, officers, and employees or others from using, applying, administering, enforcing or implementing any of the recently enacted 2022 maps for this or any other election in New York, included but not limited to the 2022 primary and general election for Congress, State Senate and State Assembly, and it is further

ORDERED, ADJUDGED, and DECREED that the Legislature shall have until April 11, 2022 to submit bipartisanly supported maps to this court for review of the Congressional District Maps, Senate District Maps, and Assembly District Maps that meet Constitutional requirements, and it is further

ORDERED, ADJUDGED, and DECREED that in the event the Legislature fails to submit maps that receive sufficient bipartisan support by April 11, 2022 the court will retain a neutral expert at State expense to prepare said maps, and it is further

ORDERED, ADJUDGED, and DECREED that any request for attorneys' fees and costs is denied, and it is further

ORDERED, ADJUDGED, and DECREED that this Court retains jurisdiction to issue any and all further orders which shall be necessary to comply with the mandates set forth herein.

Dated: March 31, 2022


Hon. Roshick R. Mitchell



Gavin Mario Wax @GavinWax · Feb 3

Weak Republican legislators work harder to cut deals with corrupt Democrats to keep their own districts and pensions than they do to fight for protecting the salaries of laid off nurses, firefighters, and police officers due to vaccine mandates.

Cowards.





Gavin Mario Wax 🇺🇸 🗳️ @GavinWax · Apr 27

Big blow to the RINOs in the New York Assembly led by @WillABarclay who cut a deal with the Dems to approve the state **maps** to the detriment of members of his own caucus.

-Good thing those in the Senate led by @OrttforSenate & supported by people like @EliseStefanik fought back



Yancey Roy 🗳️ @YanceyRoy · Apr 27

ALSO: Court rules State Senate districts are unconstitutional as well.

[Show this thread](#)



11



59



209



Gavin Mario Wax 🇺🇸 🗳️ @GavinWax · Apr 27

Another blow to the RINOs in the Assembly who cut a deal with the Democrats to push these unconstitutional and gerrymandered maps forward.

Disgusting.



Yancey Roy 🗳️ @YanceyRoy · Apr 27

ALSO: Court rules State Senate districts are unconstitutional as well.

[Show this thread](#)



2



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21







Gavin Mario Wax 🇺🇸 🇺🇸 @GavinWax · Apr 28

The Assembly lines in New York will sadly stay gerrymandered & hyper partisan in favor of the Dems for the next decade. Thanks RINOs!

This also impacts the **Election** Districts that fall under the ADs. Thus even new maps for Senate and Congress must follow gerrymandered EDs. Sad!



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Gavin Mario Wax 🇺🇸 🇺🇸 @GavinWax · Apr 28

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Gavin Mario Wax 🇺🇸 🇺🇸 @GavinWax · Apr 28

If the primary in New York is bifurcated between Gubernatorial and Senatorial/Congressional primaries then many establishment candidates with primaries are gonna be in trouble without a gubernatorial candidate helping them drive up turnout.



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14



Gavin Mario Wax 🇺🇸 🇺🇸 @GavinWax · Apr 28

A bifurcated primary season in NY could also potentially benefit non-party endorsed gubernatorial candidates.

Without Senate or Congressional races down ballot to generate turnout, theoretically an anti-establishment candidate can pad their #s with a smaller/more engaged bloc.



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