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To be argued by:
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Supreme Court of the State of New York
Appellate Division – First Department

No. 2022-02301

PAUL NICHOLS, GAVIN WAX, GARY GREENBERG,

Petitioners-Appellants,

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,

Respondents-Respondents.

BRIEF FOR RESPONDENT GOVERNOR HOCHUL

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PRELIMINARY STATEMENT

Petitioners-appellants Paul Nichols, Gavin Wax, and Gary Greenberg brought this proceeding to enjoin the use of the State Assembly redistricting map in the upcoming 2022 primary and general elections, on the ground that the map was developed pursuant to an unconstitutional process.[1] This Court should affirm the judgment of Supreme Court dismissing the proceeding.

Petitioners are barred from seeking relief because they waited far too long to bring their challenge. Petitioners did not file their petition and move for emergency relief until May 15, 2022—over three months *after* the Assembly map had been signed into law. By then, preparations for the June 28 primary election were already well underway: ballots had been certified, printed, and sent to military and overseas voters; designating and nominating petition periods had closed; and there was insufficient time to effectuate petitioners' requested relief of postponing

[1] This brief is submitted on behalf of Governor Kathy Hochul. The Senate Majority Leader, Speaker of the Assembly, and State Board of Elections are separately represented.

the primary election to either August 23 or September 13, 2022, so that a new Assembly map could be created and implemented.

Supreme Court therefore properly denied petitioners' emergency application for relief and dismissed their claims as barred by laches, finding, because of petitioners' unreasonable delay, "the chaos that that would be wrought by potentially finding the said map unconstitutional at this juncture would be devastating in its repercussions." (R. 11.) Supreme Court also properly denied the petition on the alternative ground that it had failed to name necessary parties, given that the relief sought by petitioners might have had the effect of invalidating thousands of candidates' petitions. (R. 12-13.) As explained below, petitioner's arguments to the contrary are unavailing.

QUESTIONS PRESENTED

1. Did Supreme Court correctly deny the petition on the ground that it was barred by laches, upon a finding that the relief sought by petitioners was impossible to provide as a result of their unreasonable delay in instituting this proceeding?

2. Did Supreme Court correctly deny the petition on the alternative ground that it failed to join necessary parties, where thousands of

petition candidates could be inequitably affected by the relief sought but were not named as respondents?

3. Should this Court reject petitioners' request for the entry of alternative relief, where petitioners failed to seek such relief in their petition or ask for such relief in the proceedings below, and where Supreme Court's failure to consider such alternative relief was the result of petitioners' request that the court enter final judgment after denying petitioners' motion for a temporary restraining order?

STATEMENT OF THE CASE

A. The *Harkenrider* Proceeding

On February 3, 2022, respondent Governor Kathy Hochul signed into law new Congressional, Assembly, and Senate districts for the State of New York following the 2020 Census. L. 2022, ch. 16. In contrast to the Congressional map, the legislation promulgating the Senate and Assembly maps passed the Assembly with bipartisan support. (R. 777.)

That very same day, petitioners in *Harkenrider v. Hochul*, Index No. E2022-0116CV (Sup. Ct. Steuben County), brought a proceeding challenging the Congressional and, by amended petition shortly thereafter, the Senate maps—but not the Assembly map—on two grounds: the

process by which they were adopted violated the New York Constitution, and that the maps themselves were unconstitutional partisan gerrymanders. The trial court agreed in large part,[2] and further struck the Assembly map because it was enacted pursuant to the same unconstitutional process as were the challenged maps. *See Harkenrider*, NYSCEF No. 243, 2022 N.Y. Slip Op. 22176, at 10 (Mar. 31, 2022). The trial court's rulings as to the Congressional and State Senate maps were ultimately affirmed by the Court of Appeals. *See Harkenrider v. Hochul*, No. 60, 2022 N.Y. Slip Op. 02833, at *9, 2022 WL 1236822, at *11 (N.Y. Apr. 27, 2022). However, while the Court of Appeals agreed that the Assembly map suffered from "procedural infirmity," it declined to invalidate that map because it had not been challenged by the *Harkenrider* petitioners. *See id.*, 2022 N.Y. Slip Op. 02833, at *9 n. 15, 2022 WL 1236822, at *11 n.15.

[2] The court found that petitioners had not met their burden of proof to demonstrate a partisan gerrymander with respect to the State Senate map. *See Harkenrider*, NYSCEF No. 243, 2022 N.Y. Slip Op. 22176, at 14.

B. Petitioners Wax and Greenberg Attempt to Intervene in *Harkenrider*

On remand, Supreme Court established a May 20, 2022, deadline for the completion of remedial Congressional and State Senate maps. *Harkenrider*, NYSCEF No. 291 (Apr. 28, 2022). As requested by the State Board of Elections, Supreme Court also moved the 2022 primary for Congressional and State Senate elections to August 23, 2022. *Harkenrider*, NYSCEF No. 301 (Apr. 29, 2022).

On May 1 and May 3, 2022, respectively, two of the petitioners here—Gavin Wax and Gary Greenberg—moved to intervene in *Harkenrider* for the purpose of invalidating the Assembly map and enjoining its use in the 2022 elections. *Harkenrider*, NYSCEF Nos. 317, 347. Supreme Court denied those motions as untimely, concluding that petitioners were aware as early as February 3, 2022, that the Assembly map was not being challenged in *Harkenrider*, and yet "chose to do nothing at that time." *Harkenrider*, NYSCEF No. 520, at 3. To allow their intervention months later, for the purpose not only of creating a new Assembly map but "invalidat[ing] all the signatures previously gathered" for nominating petitions and "creat[ing] new time periods for gathering

signatures after new maps are enacted" would "create total confusion" as to an election that was already underway. *Id.* at 3, 4.

C. Preparations for the June Election Proceed

Meanwhile, preparations for the June 28, 2022, primary election for all but the State Senate and Congressional contests continued apace. On May 4, 2022, the State Board of Elections certified Assembly and statewide candidates for the primary election.[3] (R. 870.) Local boards of elections then finalized their respective counties' primary ballots, and the process of printing the millions of ballots to be used across the State began. On May 13, 2022, thousands of ballots were mailed to military and overseas voters who had already requested absentee ballots (R. 871), as required by both state and federal law. *See* 52 U.S.C. § 20302(a)(8)(A); Election Law §§ 10-108(1), 11-204(4). By May 20, 2022, at least 700,000 ballots had been printed, and daily printings have continued since then.

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[3] Petitioner Nichols had filed a designating petition in an attempt to qualify for the primary ballot as a candidate for the Democratic nomination for Governor, but did not submit enough valid signatures to obtain access to the ballot. (R. 174, 879.)

By May 23, 2022, approximately 200,000 nonmilitary/overseas absentee ballots had been sent to voters. (R. 871.)

In addition, test ballots have been printed so that the thousands of voting machines in use across the State can be tested in advance of the election. This time-consuming but crucial process is required to ensure that the machines are tabulating ballots correctly. (R. 871.) Any change to the primary election at this late juncture would require discarding and reprinting the (probably) millions of ballots that have been printed to date, and would require the reprogramming and retesting of thousands of voting machines across the State. (R. 871-872.) Even if all this were theoretically possible, it is not clear that there exists sufficient ballot stock to accommodate such a task, as both paper and envelope shortages have been reported. (R. 872.)

Early voting is scheduled to begin June 18, 2022. *See* Election Law § 8-600. Three hundred fifty-six early voting sites have been selected across the State, as have approximately 5,000 election day polling places. Vehicle rentals and transportation contracts have been secured for the purpose of transporting sensitive voting equipment and other election supplies to each of the early voting and election day polling locations

across the State. More than 50,000 poll workers have been hired and scheduled to work during the early voting period and primary election day. Moreover, millions of mail notifications have been sent to voters informing them of the primary date and the location of early voting sites and polling places. (R. 872.)

D. Petitioners Commence the Current Proceeding and Seek Emergency Relief

On May 15, 2022, petitioners commenced this proceeding. The petition named as respondents Governor Hochul, Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins, Speaker of the Assembly Carl Heastie, the New York State Board of Elections, and the New York State Legislative Task Force on Demographic Research and Reapportionment. (R. 22-23.) Petitioners alleged that they are registered and eligible voters in the State of New York, and that one (Nichols) was a Democratic primary candidate for governor before his petition was rejected and another (Greenberg) is a "a potential candidate" for Congress, the Senate or the Assembly. (R. 22.) None of petitioners alleged that he was actually running for the State Assembly.

By way of relief, petitioners sought a declaration that that the Assembly map "is void based upon the constitutional flaws in its adoption previously found by the Court of Appeals," and asked for the appointment of a special master to aid in the development of a new Assembly map. (R. 47.) Petitioners also sought postponement of all elections currently scheduled for June 28, to either August 23 or September 13, 2022, and the reopening of designating and independent nominating petition periods that in some cases have been closed for over a month. (R. 47-48.) However, except for a claim for "such other and further relief as this Court may deem just and proper," petitioners did not seek the alternative relief that they request for the first time in their appeals brief—an order directing a special election in 2023 under a new Assembly map, or the use of a new Assembly map for regularly scheduled elections in 2024.

Simultaneously with the filing of the petition, petitioners sought a temporary restraining order (TRO) enjoining the State from using the current Assembly map in the 2022 election, and effectuating the same relief sought in their petition. (R. 50-65.)

Respondents (including the Governor) opposed the TRO (R. 183, 185, 235), and moved to dismiss the complaint (R. 258-267, 883-885, 906).

In addition, the Governor answered the petition. (R. 886-893.) Among other defenses, the Governor asserted that petitioners' claims were barred by the doctrine of laches and the statute of limitations, and that the proceeding should be dismissed for failure to name necessary parties. (R. 892-893.) These arguments were also made in Speaker Heastie's motion to dismiss (R. 852-862), which the Governor joined (R. 906).

E. Supreme Court Denies the TRO and, at Petitioners' Request, Dismisses the Petition

On May 23, 2022, the Supreme Court held a hearing on petitioners' motion for TRO. (R. 912.) The next day, petitioners requested "that the Court enter a final judgment determining the Petition should it deny Petitioners' emergency motion for a temporary restraining order," so that petitioners "may appeal as of right directly to the Court of Appeals" in the event of a denial. (R. 907 (citing C.P.L.R. 5601(b)(2).)

On May 25, 2022, Supreme Court issued an order denying the petitioners' emergency application and, in accordance with petitioners' request, denying the petition in its entirety. (R. 15.) The court reasoned that, whatever the merits of petitioners' underlying claim, they had "utterly failed to timely intervene in [the *Harkenrider*] action" and had

"run out the clock on themselves, waiting until the week that the new congressional and senate maps were released"—and two days after primary ballots were finalized and mailed to military voters—"to file the instant action." (R. 10-11.) The court found that the delay of more than three months before instituting this action gave rise to "substantial" prejudice to respondents, given that "the chaos that would be wrought by potentially finding the said map unconstitutional at this juncture would be devastating in its repercussions." (R. 11.) The court noted that redrawing the Assembly map after the primary ballots have been certified and mailed to overseas voters would affect thousands of elected positions across the state—not only Assembly positions but other offices tied to a candidate's residency in an Assembly district. (R. 11, 13.)

Moreover, the court held that moving the Assembly primary contests to August 23, 2022 was "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." (R. 14.) And petitioner's alternative request of moving the primaries to September 13, 2022, was an "impossibility" for lack of compliance with federal election deadlines, among other reasons.

(R. 14-15.) Accordingly, Supreme Court concluded that petitioners had failed to satisfy the requirements for preliminary relief. (R. 10-11, 13.) In accordance with their request, the court both denied the emergency application and dismissed the petition in its entirety. (R. 15.)

Petitioners immediately appealed to the Court of Appeals, invoking C.P.L.R. 5601(b)(2). (R. 2.) On May 27, 2022, the Court of Appeals transferred the appeal *sua sponte* to this Court, "upon the ground that a direct appeal does not lie when questions other than the constitutional validity of a statutory provision are involved." *Nichols v. Hochul*, SSD 16, 2022 N.Y. Slip Op. 66543 (N.Y. May 27, 2022).

ARGUMENT

POINT I

SUPREME COURT CORRECTLY CONCLUDED THAT PETITIONERS' CLAIMS WERE BARRED BY LACHES

Petitioners have sought extraordinary relief in the form of the postponement of the June 28, 2022, primary to either August 23 or September 13, 2022, so that a new Assembly map may be implemented, and the reopening of certain ballot-access petition periods. Moreover, they have done so despite waiting *over three months* before commencing this challenge to the Assembly map, until the preparations for the June 28 election were already well underway.

Petitioners do not meaningfully contest Supreme Court's findings that it would be impracticable to postpone the primary election to either of the dates proposed by petitioners in the proceedings below. Nor do they dispute that any effort to do so would wreak havoc on the election. Instead, petitioners contend that laches is unavailable as a matter of law under the State Constitution, article III, § 5 (Br. at 21-23); and that it is unavailable in any event due to the respondents' "unclean hands" (*id.* at 23-24), petitioners' lack of delay in bringing their claims (*id.* at 24), and the lack of prejudice associated with alternative forms of relief that

petitioners did not seek below, but that, in their view, Supreme Court should have considered in adjudicating the application for emergency relief. None of these arguments has any merit.

A. Proceedings Brought Under Article III, § 5 of the New York Constitution Are Subject to the Defense of Laches.

Petitioners' contention that laches is unavailable as a defense to claims brought under article III, § 5, of the Constitution or its implementing statute, McKinney's Uncons. Laws of N.Y. § 4221 (L. 1911, ch. 773, § 1), is raised for the first time in this appeal, and this Court should therefore decline to consider it. *See Mehmet v. Add2net, Inc.*, 66 A.D.3d 437, 438 (1st Dep't 2009) ("declin[ing] to consider" argument "raised for the first time on appeal"); *Serge El. Co. v. Manshul Constr. Corp.*, 257 A.D.2d 478, 479 (1st Dep't 1999). The argument is meritless in any event.

Article III, § 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. In regulating such challenges, the Legislature has provided that "no limitation of the time for commencing an action shall affect any proceeding" challenging a legislative apportion-

ment, "if commenced within the period during which such apportionment is in force." McKinney's Uncons. Laws of N.Y. § 4225 (L. 1911, ch. 773, § 5). But contrary to petitioners' contentions, the absence of a statute of limitations does not foreclose the application of the doctrine of laches.

"Laches and limitations are not the same," and a "suit brought in compliance with the statute of limitations may nonetheless be barred by laches." *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003). Laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." *Id.* Petitioners inveigh against Supreme Court's "impos[ition] [of] a timeliness requirement that has no basis in the text of the Constitution, and that the Legislature saw fit to exclude" (Br. at 22), but the court did no such thing. It held that their claims were barred by laches based on the impossibility of effectuating the relief sought by petitioners (i.e., moving the primary to August 23 or September 13, 2022, and reopening nominating and designating petition periods) arising from their own delay in bringing the case. (R. 7, 12.)

Petitioners' contention that laches could never apply in an article III, § 5 claim would lead to absurd results. For example, challengers could

sit on their rights and bring a challenge to an apportionment on the eve of an election (or even after the election), potentially attempting to overturn the election results. Neither constitutional text nor purposes countenance such a manipulation of timing. If anything, the Constitution's requirement that such challenges should be promptly adjudicated, *see* N.Y. Const. art. III, § 5 (requiring decisions to be rendered within 60 days of the filing of the petition), supports a rule that would prevent such gamesmanship.

B. Respondents Do Not Have Unclean Hands.

Another argument raised for the first time on appeal is petitioners' contention that respondents' "unclean hands" forecloses the availability to them of laches as a defense. This argument, too, is unpreserved and without merit.

Petitioners assert that respondents' hands are "unclean" because they "willfully violated the Constitution for purely partisan ends." Br. at 23. Petitioners seemingly overlook that their challenge is to the Assembly map, which received bipartisan support; indeed, the record contains affidavits from 22 Republican members of the Assembly attesting to the map's "fairness." (R. 776-837.) Regardless, the "unclean hands" doctrine

requires "inequitable conduct," such as a fraudulent transfer of property to avoid the reach of creditors. *See, e.g.*, *Levy v. Braverman*, 24 A.D.2d 430, 430 (1st Dep't 1965). Petitioners cite no authority for the proposition that the alleged procedural infirmity of the Assembly map amounts to the kind of "inequitable conduct" that would foreclose invocation of laches here.

In any event, not all of respondents were implicated in the conduct that petitioners characterize as "inequitable." For example, Governor Hochul did little more than sign the Assembly map into law. And the State Board of Elections had no role whatsoever in the development or promulgation of the Assembly map. Even if petitioners' arguments regarding "unclean hands" were correct (but they are not), they would not preclude Governor Hochul or the State Board of Elections from invoking laches as a defense.

C. Petitioners' Delay in Instituting This Proceeding Was Unreasonable and Inexcusable.

Petitioners also contend that they did not delay in bringing this proceeding, much less engage in the "lengthy neglect or omission" or "unreasonable and inexcusable delay" required for laches to apply. Br. at 24 (quotation marks omitted). But the record reveals otherwise.

The *Harkenrider* proceeding was filed on February 3, 2022—the day the Congressional, Senate, and Assembly maps were signed into law by Governor Hochul. None of the *Harkenrider* petitioners challenged the Assembly map. Nevertheless, petitioners sat on the sidelines for two months before the *Harkenrider* trial court held the Assembly map to be unconstitutional, and then waited again another month before seeking to intervene in that case—after the Appellate Division had reversed the trial court's holding with respect to the Assembly map on April 21, 2022, and after that decision was affirmed by the Court of Appeals on April 27, 2022.

Petitioners assert that they "had no reason to seek to intervene in *Harkenrider*" until the Court of Appeals' decision. Br. at 24. But the *Harkenrider* trial court concluded otherwise when it denied petitioners Wax's and Greenberg's subsequent motions to intervene (*see* R. 8), and

petitioners offer no reason to dispute that conclusion. Nor is there merit to their argument (Br. at 24) that the trial court failed to apply the proper standard for determining whether delay gives rise to a laches defense—i.e., that the delay must be "unreasonable and inexcusable." Petitioners' delay was unreasonable and inexcusable: they waited more than three months to bring a proceeding in which they were seeking to postpone an election that was less than a month-and-a-half away. Indeed, the trial court concluded that it was *impossible* to effectuate the relief sought by petitioners so soon before the election was scheduled to take place. (R. 13-15; *see* R. 15 ("the unfortunate reality is that we have already passed that point of no return").) Moreover, delay need not be of any particular length to qualify as "unreasonable" or "inexcusable" for purposes of laches; instead, "the peculiar circumstances of each case" will determine whether laches may be available. *Groesbeck v. Morgan*, 206 N.Y. 385, 389 (1912). Here, the circumstances are unequivocal: petitioners' delay foreclosed the availability of the relief they were seeking. Supreme Court properly applied laches to bar their claims.

D. Petitioners Cannot Evade Laches by Pointing to Alternative Remedies They Did Not Request.

Supreme Court found that "the prejudice caused by the [petitioners'] delay in this instance is substantial," and allowing their claims to proceed "would be devastating in its repercussions." (R. 11.) The court noted that the Assembly district boundaries affect "literally thousands of other elected positions across the state," and that ballots for those primaries had already been finalized and mailed to military voters. (R. 11.) In short, petitioners' request for postponement of the Assembly primary to August 23 or September 13, 2022, is an "impossibility."

Petitioners do not contest these conclusions. They even concede that the imposition of such an "impossible burden" caused by a plaintiff's delay is grounds for the application of laches. Br. at 25 (quoting *Matter of Cantrell v. Hayduk*, 45 N.Y.2d 925 (1978).) Instead, petitioners assert for the first time on appeal that the lower court erred in finding prejudice because there may have been other remedies, though not advanced by petitioners in this case, that imposed less of a burden on the election and that the court should have considered *sua sponte*. In particular, petitioners suggest (Br. at 24-25) that the court could have voided the Assembly map now and ordered "a special election in 2023 or regular

election in 2024 on a new map drawn by a special master" without prejudice to any party or the election process.

Whether these steps could be taken without prejudice to interested parties or the election process, none of these remedies were before the court when it determined that laches barred the relief that petitioners had actually requested. Petitioners now argue that the lower court should not have denied their petition in its entirety given these other potential remedies. Br. at 25. But they have only themselves to blame for that denial, as they were the ones who requested final judgment so that they could promptly file an appeal.[4] (R. 907-908.) Accordingly, the possibility of ordering other remedies that petitioners did not request cannot be a basis on which to disturb the decision below.

[4] As set forth below, petitioners did not plead for such relief in their petition, waived any claim for such relief in this Court by failing to seek it for the first time below, and in any event are estopped from seeking such relief on appeal. See *infra* at 24-27.

POINT II

PETITIONERS HAVE WAIVED ANY CHALLENGE TO SUPREME COURT'S DENIAL OF THE PETITION ON THE ALTERNATIVE GROUND THAT THEY FAILED TO JOIN NECESSARY PARTIES TO THE ACTION

Supreme Court also correctly denied the petition on the ground that it failed to name necessary parties. (R. 12-13.) As the court noted, county and state party representatives are elected based on their assembly districts, as are delegates to the Supreme Court judicial nominating convention. (R. 12.) All of these positions are listed on designating petitions, and the period for collecting signatures and filing such petitions is now closed. (R. 12.) A new Assembly map entered at this late juncture would have the effect of invalidating not only the petitions of Assembly candidates, but the petitions of these other candidates as well, inequitably affecting a host of candidates. Accordingly, these candidates should have been joined to the action. *See* C.P.L.R. 1001 ("Persons . . . who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants."). The "proper remedy" for a failure to join necessary parties "is dismissal of the proceeding." *Matter of Stephen &*

Mark 53 Assoc., LLC v. New York City Dept. of Envtl. Protection, 168 A.D.3d 440, 440 (1st Dep't 2019).

Petitioners do not challenge this alternative ground for dismissal in their opening brief. Accordingly, they have waived any such challenge, and Supreme Court's dismissal should be affirmed. *See Matter of Correction Officers' Benevolent Assn. v. New York City Dept. of Corr.*, 157 A.D.3d 643, 643 (1st Dep't 2018) ("Petitioners have abandoned any challenge to Supreme Court's determination that the claims of three of the individual petitioners have been mooted by their intervening promotion to Correction Captain, as petitioners failed to discuss the issue in their appellate briefs.").

To be sure, in a footnote, petitioners suggest that the *argument* that there has been a failure to join necessary parties is "frivolous" because it is "premised on a misunderstanding" that "the Petition seeks to invalidate specific candidate petitions." Br. at 24-25 n.5. This reference to a party argument in a footnote is insufficient to preserve the issue for this Court's review. In any event, the argument, far from frivolous, is correct: under C.P.L.R. 1001, parties must be joined so long as they

"might be inequitably affected" by the relief sought, which is the case here with respect to all positions that depend on the Assembly map.

POINT III

THERE IS NO BASIS FOR THIS COURT TO CRAFT ANY FURTHER RELIEF IN THIS CASE

As an alternative to the relief they sought below, petitioners ask that this Court either order (1) that a special election take place in 2023 on a newly adopted Assembly map; or (2) that a new Assembly map be used in the next regular election in 2024.[5] But given that petitioners failed to seek this relief in their petition, failed to raise these alternative requests below in any other form, and affirmatively sought a final disposition from Supreme Court based on the relief that they *did* pursue below (i.e., immediate postponement and rescheduling of the state and local primary elections to August or September 2022), there is no legal basis for reopening the case in this manner. To the contrary, petitioners are

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[5] To the extent petitioners are asking that a special master be appointed to draw new maps to be used in a 2023 or 2024 election, that extraordinary relief is unwarranted. Should a court find that new maps are needed, deference should be given to the Legislature in the first instance to adopt maps that are compliant.

judicially estopped from asking this Court to vacate a final judgment that petitioners affirmatively (and successfully) sought in the lower court so as to enable an immediate appeal.

First, it is well settled that a plaintiff's recovery in a given case is limited to the relief sought in the complaint. *See, e.g.*, *Mt. Hawley Ins. Co. v. American States Ins. Co.*, 139 A.D.3d 497, 498 (1st Dep't 2016) ("As plaintiffs' complaint only sought a declaratory judgment that J&R had breached its obligation to procure insurance, its default judgment may not exceed the relief sought and must be limited to that cause of action.").

Second, petitioners' failure to argue for such relief in the trial court (apart from its absence from their petition) constitutes an independent ground for denial of their request to this Court. This Court regularly declines to consider arguments raised for the first time on appeal—particularly where, as here, the issue raised for the first time "presents factual issues" that "cannot be determined on th[e] record" on appeal. *Matter of Trafelet v. Cipolla & Co., LLC*, 190 A.D.3d 573, 574-75 (1st Dep't 2021). Petitioners' request for alternative relief on appeal raises factual issues that were never developed in the record before the trial court. For example, respondents have had no opportunity to submit

evidence regarding any prejudice that would arise from either of the alternatives advanced by petitioners. Petitioners' effort to obtain relief from this Court that they never sought in the proceedings below should be rejected.

Third and finally, petitioners are judicially estopped from seeking alternative relief from this Court where the lower court denied their petition outright at their request. The doctrine of judicial estoppel "prevents a party who assumed a certain position in a prior proceeding and secured a ruling in his or her favor from advancing a contrary position in another action, simply because his or her interests have changed." *Becerril v. City of N.Y. Dept. of Health & Mental Hygiene*, 110 A.D.3d 517, 519 (1st Dep't 2013).

That is precisely what petitioners attempt here. Petitioners affirmatively asked the court to enter a final judgment denying the petition if it denied their request for a TRO, in the mistaken belief that the procedural maneuver would thereby permit a direct appeal to the Court of Appeals. (R. 907-908.) And the TRO sought only the relief pleaded in the petition: postponing the state and local primary to August or September 2022 so that a new Assembly map can be created, and reopening the nominating

and designating petition periods. (R. 50-53.) Supreme Court denied petitioners' request for TRO, and, in accordance with their request, denied their petition. (R. 15.)

Now, with the June election they sought to postpone just weeks away, petitioners have adopted the contrary position. They contend that Supreme Court should not have denied their petition, despite denying their request for a TRO, because it should have considered whether relief not sought in connection with the TRO may have been available as a remedy for the violations alleged in the petition. Petitioners are judicially estopped from making this request.

CONCLUSION

For all of the foregoing reasons, Supreme Court's denial of the Petition should be affirmed.

Dated: New York, New York
June 6, 2022

Respectfully submitted,

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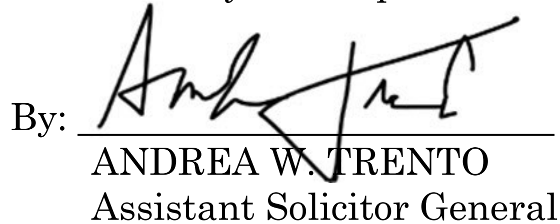

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