To be Argued by:
CRAIG R. BUCKI
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

PAUL NICHOLS, GAVIN WAX and 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.

Appellate Case No.: 2022-02301

BRIEF FOR RESPONDENTS-RESPONDENTS SPEAKER OF THE ASSEMBLY CARL HEASTIE AND SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS

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1. Q. Does laches bar this special proceeding, when, because of Petitioners'-Appellants' ("Petitioners'") three-month delay in commencing it, granting the requested relief would upend the ongoing 2022 elections?

A. The Trial Court correctly answered, "Yes." R. 11.

2. Q. May a successful redistricting challenge be commenced at any time, no matter how long the petitioner has delayed and no matter how much prejudice the delay has caused?

A. The Trial Court implicitly and correctly answered, "No." *Id.*

3. Q. Should this special proceeding be dismissed for failure to name necessary parties, when Petitioners did not name any candidates or local Boards of Elections, even though Petitioners seek to: (i) de-certify primary-election candidacies and (ii) require local Boards of Elections to start this year's election preparations over again from scratch?

A. The Trial Court did not reach this question, to which the correct answer is, "Yes."

4. Q. Is this special proceeding subject to the New York Election Law's requirements regarding standing, timeliness, and petition verification?

A. The Trial Court did not reach this question, to which the correct answer is, "Yes."

5. Q. Should this Court entertain Petitioners' request for a remedy that they did not request, or even mention, in their pleadings or arguments below?

A. No. Petitioners did not plead any such request in their Petition, nor preserve any such request for appellate review.

PRELIMINARY STATEMENT

The Assembly redistricting map for the next ten years was enacted on February 3, 2022. L.2022, c. 14, § 1. Tim Harkenrider and others sued Respondents that very day, seeking to invalidate the Congressional and State Senate maps. Petitioners, by contrast, did nothing. They watched for three months while the State prepared for the June primaries, as required by law. By the time Petitioners decided to act, it was already May. Primary ballots have been finalized and mailed. Voting has begun. This lawsuit is too late.

The Trial Court (Hon. Laurence L. Love, J.S.C.) delivered this message loud and clear. It held that Petitioners' challenge to the Assembly map is "clearly barred by the equitable doctrine of laches"; that Petitioners "r[an] out the clock on themselves"; and that, after "falling asleep at the switch in February when others promptly acted with challenges," Petitioners sought to "upend the entire New York State election process in an impossible manner." R. 11, 13. These findings are correct and should be affirmed.

Seeing the writing on the wall, Petitioners now attempt to escape the consequences of their delay in three ways.

First, they disparage the Legislature with baseless accusations of election-rigging, "scheming," and "brazen acts." Petitioners' Brief dated June 1, 2022, at pp. 10, 20 ("Pet. Br. ___, ___"). These gratuitous insults are irrelevant to

the dispositive issues, and the Trial Court properly scolded Petitioners below for such "hearsay … speculation … and conspiracy theories." R. 6. Unfazed, Petitioners repeat their uncorroborated accusations here. They should be rejected again.

Second, Petitioners ask this Court for a remedy they had never pled, argued for, or even mentioned: Statewide special elections in 2023, or a Court-drawn Assembly map for the 2024 elections. Neither remedy is appropriate, but Petitioners' delay deprived Respondents of an opportunity to develop their arguments before the Trial Court, and failed to preserve their request for appellate review. This tactic, too, should be rejected.

Finally, and perhaps most disturbingly, Petitioners contend that timeliness is irrelevant to redistricting lawsuits. Their position is backwards. Election-law proceedings are among the most time-sensitive, and timeliness doctrines such as laches should be strictly applied. Otherwise, opportunistic and dilatory litigants will do what Petitioners seek to do here: invalidate candidacies, reopen ballot-access windows, disenfranchise voters, and plunge this State's elections into chaos.

The Trial Court was right: "we have already passed [the] point of no return." R. 15. Petitioners' challenge is too little, too late, and they have no one to blame but themselves. This Court should affirm.

STATEMENT OF FACTS

A. The *Harkenrider* Lawsuit begins on February 3, 2022; the Court of Appeals renders its decision in April; and Special Master Jonathan Cervas draws remedial maps for Congress and the State Senate in May

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"), with Hon. Patrick F. McAllister presiding. Their original petition challenged only the Congressional map. R. 269-335. Then, on February 8, the *Harkenrider* Petitioners filed an amended petition adding a challenge to the State Senate map. R. 338-420. The amended petition affirmatively disavowed any challenge to the Assembly map. R. 341-42.

The *Harkenrider* Petitioners challenged the Congressional and State Senate maps on two grounds. Substantively, they argued the maps violated the State Constitution's ban on partisan gerrymandering. R. 364-404. Procedurally, they argued that because the State's Independent Redistricting Commission (the "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. R. 410-12.

Proceedings continued before Justice McAllister in Steuben County for nearly two months. On March 31, 2022, Justice McAllister invalidated the State Senate map on procedural grounds only, and the Congressional map on both procedural and substantive grounds. R. 438. *Sua sponte*, he also invalidated the Assembly map on procedural grounds only. *Id.*

About three weeks later, the Fourth Department affirmed in part and reversed in part. *Matter of Harkenrider v. Hochul*, 204 A.D.3d 1366 (4th Dep't 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." R. 440. The Fourth Department denied the motion. R. 444-45.

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 Justice McAllister, 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 expressly declined, however, to invalidate the Assembly map, which no one had challenged. *Id.* at *11 n.15. It ordered Justice McAllister, with the assistance of Special Master Jonathan Cervas, to draw remedial Congressional and State Senate maps for the 2022 elections, and

to "swiftly develop a schedule to facilitate an August primary election" for Congress and the State Senate. *Id.* at *12.

Justice McAllister originally set a deadline of May 24 for this remedial map-drawing process. R. 447. The State Board of Elections then urged him to "consider expediting the approval process for both Congressional and State Senate lines in any manner possible." R. 448-49. The Board, emphasizing the logistical difficulties of holding an election under the circumstances, also asked that the deadline for finalized maps "not extend past … May 24, 2022." *Id.* In response, Justice McAllister accelerated the deadline from May 24 to May 20. R. 451.

In accordance with the instructions from the Court of Appeals, Justice McAllister authorized parties and the public to submit comments and proposed remedial maps for Special Master Cervas' consideration. R. 447; *Harkenrider*, 2022 WL 1236822, at *10. Between April 22 and May 20, well over 100 such documents were filed on the Steuben County Supreme Court docket. Parties and members of the public also offered comments during a hearing in Steuben County on May 6. Special Master Cervas released proposed Congressional and State Senate maps on May 16 and 17; after receiving additional comments, he released the finalized maps shortly after midnight on May 21. R. 452-82.

B. Gavin Wax's and Gary Greenberg's motions to intervene in the *Harkenrider* Lawsuit — filed on May 1 and 3, 2022 — are denied as untimely

After the Court of Appeals issued its April 27 decision, and as the remedial map-drawing process was ongoing, Petitioner Gavin Wax moved on May 1 to intervene in the *Harkenrider* Lawsuit. R. 483-87. 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. R. 769. From February 3 to March 31 — while proceedings were ongoing in Steuben County — Mr. Wax posted over a dozen messages on Twitter about the *Harkenrider* Lawsuit, New York's redistricting, or both. R. 488-500. For example, 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." R. 489. He tweeted a picture of Justice McAllister's March 31 Order (which originally invalidated the enacted district maps) the day it was issued. R. 492. He also 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. R. 494. The May 1 motion to intervene was his first effort to challenge the Assembly map.

On May 3, 2022 (two days after Mr. Wax's motion), Petitioner Gary Greenberg also moved to intervene. R. 501-19. Mr. Greenberg is "a former New York state political candidate, who may in the future run again for office." R. 178. Specifically, he attempted to run for State Senate in 2020, but failed to obtain sufficient signatures to qualify for the Democratic primary ballot. R. 520-23. He advocates for a public fund to benefit survivors of sexual abuse and, since late April 2022, has criticized the Assembly on Twitter for its support of the Adult Survivors Act, which Mr. Greenberg considers to be a "flawed … hotch-potch" [sic]. R. 524.

Like Mr. Wax, Mr. Greenberg posted numerous Twitter messages about the *Harkenrider* Lawsuit and New York's redistricting. On February 3, for instance, he retweeted an image of the petition in that lawsuit, which challenged only the Congressional map. R. 542. 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 Steuben County on March 3, 2022. R. 555-56. The May 3 motion to intervene was his first effort to challenge the Assembly map.

The motions filed by Mr. Wax and Mr. Greenberg requested essentially the same relief. They asked Justice McAllister to invalidate the Assembly map, and to enjoin use of the map for the 2022 primary and general

elections. R. 486-87, 517-18. They also sought, in Justice McAllister's words, to "invalidate all the [ballot-access] signatures previously gathered [by Assembly candidates], create new time periods for gathering signatures after new maps are enacted, [and] change the signature requirements for both primary and independent petitions." R. 559. Their proposed pleadings focused solely on the 2022 elections; they did not ask, in the alternative, that a remedy be imposed for the 2024 elections or for special elections in 2023. R. 486-87, 517-18.

Justice McAllister denied both motions as untimely. Among other things, he noted that: (1) "[i]t was clear from the Petition and Amended Petition [filed in early February] 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 … yet they chose to do nothing at that time"; and (3) because the 2022 election cycle was well underway, "[t]o permit intervention [at] this time would create total confusion." R. 558-60. Neither Mr. Wax nor Mr. Greenberg has appealed from Justice McAllister's Order denying intervention in the *Harkenrider* Lawsuit.

C. Ballots for the June primaries were finalized and mailed by May 13, 2022

While the *Harkenrider* Lawsuit was ongoing in February, March, April, and May, preparations for the 2022 elections continued as required by law. Beginning on February 3, 2022 (the day the Congressional, State Senate, and

Assembly maps were enacted), New York's local Boards of Elections began establishing new election district boundaries in voter-registration systems "so that New York's 12,982,819 registered voters would be assigned to their correct districts. This is necessary to create poll books for elections, allow voters to receive the correct absentee ballots and to provide data for candidates …." R. 568.

March 1, 2022, was the first day for aspiring candidates to circulate designating petitions. R. 336-37. Candidates must collect hundreds or thousands of designating petition signatures within the geographic unit in which they seek to run, then submit them to the correct Board of Elections to qualify for a place on primary ballots. *Id.* Petitions were due for filing from April 4 through 7, 2022, and signatures are valid only if the signatory resides in the district where the candidate will run. *Id.* Signatures are subject to challenge, which typically requires about a month to adjudicate. N.Y. ELEC. LAW § 6-154; R. 566. The State and local Boards of Elections were required to certify primary-ballot candidates by May 4, 2022. R. 336-37.

The primary elections for all but Congressional and State Senate races are scheduled by law to take place on June 28, 2022. *Id.* The general election, in turn, is scheduled for November 8, 2022. *Id.* Forty-five days before both elections, Federal and State law require New York to mail ballots to military and overseas voters. 52 U.S.C. § 20302(a)(8)(A); N.Y. ELEC. LAW §§ 10-108(1)(a),

11-204(4).[1] So primary ballots were required to be mailed by May 13, and general-election ballots must be mailed by September 23. R. 336-37.

Starting in about 1974, New York State moved its primary elections from June to September. As a result of the late primary, however, the State, after a change in Federal law, failed to mail military and overseas ballots by the mid-September deadline. *See United States v. State of New York*, 2012 WL 254263, at *1 (N.D.N.Y. Jan. 27, 2012). The Federal government sued, and the U.S. District Court for the Northern District of New York ordered the Congressional primary moved to June, after rejecting a request for an August primary instead. *Id.* at *2.

Because of the April 27 Court of Appeals decision that invalidated the Congressional and State Senate maps, Justice McAllister moved those two primaries from June 28 to August 23, 2022. R. 573-74. The U.S. District Court for the Northern District of New York approved the change for the Congressional election. *United States v. State of New York*, 2022 WL 1473259, at *3 (N.D.N.Y. May 10, 2022).

Deadlines and election dates for the remaining elections, including for the Assembly, remain unchanged. Accordingly, on the May 4 statutory deadline, the State Board of Elections certified candidates for the Assembly primaries and for other primaries. R. 575-723. Ballots for the June 28 primaries were finalized,

[1] The deadline under State law is actually 46 days before the election, not 45.

printed, and machine-tested, and they were mailed to military and overseas voters by the May 13 statutory deadline. R. 183. Early voting for these primaries begins next week on June 18, 2022, less than two weeks from now. R. 336-37. Millions of voters have received mail notifications informing them of the primary date and of poll-site locations. R. 872. Absentee votes have been cast. R. 220.

D. Petitioners commence this special proceeding on May 15, 2022

Petitioners — Paul Nichols, Mr. Wax, and Mr. Greenberg — commenced this special proceeding on May 15, a few days after Justice McAllister denied the untimely motions to intervene, and a few days after finalized ballots for this month's primaries were mailed. R. 19-49.

Mr. Nichols, who did not seek to intervene in the *Harkenrider* Lawsuit, claims to be "a candidate for Governor of the State of New York." R. 174. He attempted to qualify for the Democratic gubernatorial primary, but "the Board of Elections removed [him] from the ballot after determining that [his] designating petition contained invalid signatures." *Id.* Mr. Nichols challenged the Board's determination, *pro se*, in Albany County Supreme Court. R. 724-31. The challenge failed, however, because Mr. Nichols did not properly serve the respondents in that proceeding. *Id.* The order dismissing Mr. Nichols's challenge was entered on May 12, 2022 — three days before he and the other Petitioners commenced this special proceeding. *Id.*

The Petition, which is not verified, requests a declaration that the Assembly map is procedurally unconstitutional, although it makes no allegation that the map is somehow substantively unfair or a partisan gerrymander. R. 47. It also seeks to "adjourn" this month's primaries for all "state and local elections" — not just the Assembly elections — to late August or mid-September. R. 48. Further, the Petition seeks to invalidate the candidacies of everyone who qualified for primary elections for "Statewide, Congressional, State Assembly, State Senate, and local offices." *Id.* Then, as requested by the Petition, those thousands of candidates would need to "obtain new designating petition signatures or run independently." *Id.* And potential candidates who did not originally qualify for primaries would receive another chance to gather sufficient signatures; they could "newly qualify" for the primary ballot. *Id.* Like the proposed intervention pleadings in the *Harkenrider* Lawsuit, the Petition does not ask for a remedy with respect to the 2024 elections, or for Court-ordered special elections in 2023. *Id.*

In opposition to the Petition, Assembly Speaker Carl Heastie (the "Speaker") argued that Petitioners' lawsuit was egregiously untimely and prejudicial, and therefore barred by the laches doctrine. R. 196-97. The Speaker also argued the Petition should be dismissed for several other reasons, including for failure to name necessary parties. R. 197-201. Additionally, the Speaker submitted affidavits from 23 Republican Assemblymembers, all of whom attested

they believe the enacted Assembly map is substantively fair. R. 776-835. Based in part on those affidavits, the Speaker argued that, if the Trial Court determined the Assembly map was procedurally unconstitutional, it should simply ratify the enacted Assembly map, whose substance no one has challenged. R. 203-04.

E. The Trial Court denies the Petition on May 25

The Trial Court denied the Petition on May 25, 2022. It held that Petitioners' lawsuit was "clearly barred by the equitable doctrine of laches." R. 11. Petitioners had accused the Board of Elections of "attempting to run out the clock" by continuing to prepare for the June primaries mandated by statute, but the Trial Court determined that Petitioners "r[an] out the clock on themselves" by waiting so long to bring their challenge. *Id.* They "f[ell] asleep at the switch in February when others promptly acted with challenges"; it was "bewildering to even contemplate and is an impossibility" that their challenge could somehow be considered timely. R. 13. "Their last-minute attempt to intervene [in the *Harkenrider* Lawsuit] … 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." *Id.*

The Trial Court also recognized "the chaos that would be wrought by potentially finding the [Assembly] map unconstitutional at this juncture," which would be "devastating in its repercussions." R. 11. One of those "devastating"

repercussions, had Petitioners prevailed, would have been the invalidation of "thousands" of primary-election candidacies throughout the State. R. 11-12. "[A]ll of those candidates are for that reason necessary parties," the Trial Court concluded, "without which the instant action must arguably dismissed." R. 13.

Petitioners filed a direct appeal to the Court of Appeals, invoking CPLR 5601(b)(2). R. 2. That subsection authorizes a direct appeal "where the only question involved on the appeal is the [constitutional] validity of a statutory provision." The Court of Appeals rejected the appeal, and transferred it to this Court, because "questions other than the constitutional validity of a statutory provision are involved." Supp. R. 2.

F. Albany County Supreme Court dismisses a similar lawsuit on June 2, 2022

On May 20, 2022 — while this proceeding was pending before the Trial Court — the League of Women Voters of New York State (the "League") brought an Article 78 proceeding against the State Board of Elections in Albany County Supreme Court (Index No. 903900-22). The League argued that the Assembly map is procedurally unconstitutional, so the Board should not have certified the June 2022 primary ballot under the enacted Assembly map. *Matter of League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections*, ___ N.Y.S.3d ___, 2022 WL 1816345 (Sup. Ct. Albany County June 2, 2022). The League asked the court to "order the [Board] to cease any further actions to facilitate the

June 28, 2022 Assembly primary elections." *Id.* It also requested that "the Assembly primary election be delayed until such time as valid maps are drawn" — the same relief sought by Petitioners here. *Id.*

On June 2, 2022, Albany County Supreme Court (Hon. Henry F. Zwack, J.S.C.) denied the petition.[2] It held that, "in the absence of any judicial directive that it perform otherwise," the Board properly fulfilled its statutory duties by continuing to prepare for the June Assembly primary. *League of Women Voters*, 2022 WL 1816345, at *2. The Court further observed that "neither the League, nor anyone else, made a timely challenge to the Assembly District map[ ]." *Id.* at *3. For that reason, any suggestion by the Court of Appeals in *Harkenrider* "that the Assembly maps suffer a procedural infirmity" is "dicta," rather than a holding of that Court. *League of Women Voters*, 2022 WL 1816345, at *2. Notably, the Albany County Supreme Court also endorsed the findings of the Trial Court here: "In *Nichols*, the Court … determin[ed] that the application was time-barred, and that tremendous prejudice and chaos would result [from] a delay of the Assembly primaries, affecting … Assembly candidates and also state and county-wide races. On this record, the Court makes the same determination." *Id.* at *3.

[2] The League appealed, and the Third Department scheduled oral argument for June 9, 2022 at 10:00 A.M. *See Matter of League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections*, Third Department Dkt. No. 535511, Dkt. No. 3.

ARGUMENT

Petitioners knew about the *Harkenrider* Lawsuit the day it was filed, but they waited three months to bring their own special proceeding. While they watched from the sidelines, the 2022 election cycle continued to progress, and upending the elections now would be catastrophic. Thus, the Trial Court correctly determined that laches bars this proceeding. Petitioners' last-minute request for an alternative remedy — namely, for re-drawn Assembly maps to apply in 2024 or even 2023 — is prejudicially raised for the first time on appeal and should be rejected. Moreover, alternative grounds not reached by the Trial Court also support denial of the Petition. For any or all of these reasons, the Trial Court should be affirmed.

POINT I

THE TRIAL COURT CORRECTLY DETERMINED THAT LACHES BARS THIS LAWSUIT

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). *See also Matter of Schulz v. State of New York*, 81 N.Y.2d 336, 348 (1993) (delay of 11 months sufficient to establish laches); *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, the Trial Court determined that the Petition was "clearly barred by the equitable doctrine of laches." R. 11. It found that Petitioners "r[an] out the clock on themselves" by waiting until May to challenge the Assembly map, which was enacted on February 3. *Id.* They "f[ell] asleep at the switch in February when others promptly acted with challenges." R. 13. And because of their egregious delay, granting the relief they sought would "upend the entire New York State election process in an impossible manner." *Id.* These findings of fact are correct, and this Court should affirm the Trial Court's denial of the Petition under the laches doctrine.

A. The Assembly map was enacted on February 3, 2022, yet Petitioners waited until over three months later to initiate this special proceeding

The first element of laches, delay, is obviously satisfied here. Yet Petitioners somehow contend they "did not delay in bringing their claim." Pet. Br. 24. They assert that as of March 31, 2022 — when Justice McAllister, *sua sponte*, invalidated the Assembly map — they did not have "any reason to act," so they cannot be blamed for waiting until May to challenge the map. *Id.*

This argument is a transparent effort to mislead, which two Courts have already rejected. In short, Petitioners attempt to hide the two-month period from February 3 to March 31, when the *Harkenrider* Lawsuit was ongoing and the Assembly map had not been challenged. Their counsel employed the same sleight of hand at oral argument before the Trial Court, and the Trial Court correctly pointed out that March 31 is "not where the timeline starts. The timeline starts February [3]." R. 924. Then, in its Order, the Trial Court found that "Petitioners were aware, from the filing of said action [on February 3], that the New Assembly Map was not being challenged … Petitioners utterly failed to [timely] intervene in that action." R. 10. In so doing, the Trial Court reaffirmed Justice McAllister's conclusion of a few weeks earlier. Justice McAllister, in denying Mr. Wax's and Mr. Greenberg's motions to intervene, found that "[a]lthough this court's ruling on March 31, 2022 *sua sponte* threw out the Assembly map[ ] 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 map[] w[as] being included in this action." R. 558. Mr. Wax and Mr. Greenberg "were aware of [the Harkenrider Lawsuit] shortly after it was commenced in February, 2022 …. Yet they chose to do nothing at that time." R. 559.

Simply put, Petitioners should have brought their challenge in February. This Court, like the Trial Court and Justice McAllister, should reject their effort to start the timeline on March 31.

B. Because of Petitioners' egregious delay, granting the relief they requested would upend the 2022 elections

Petitioners implicitly acknowledge, as they must, that granting their requested relief would upend the 2022 elections. Pet. Br. 5 (referencing "the present emergency"). Indeed, the Trial Court correctly found that granting the relief Petitioners seek would create "chaos" that would be "devastating in its repercussions." R. 11. Boards of Elections have already certified candidates; finalized, printed, and mailed ballots; informed voters of the primary date and of polling-site locations; and performed numerous other administrative tasks to prepare for the June primary elections. Absentee voting has already begun; absentee ballots received by Board of Elections have already been canvassed under the new Election Law § 9-209 that took effect on January 1, 2022 (L.2021, c. 763); and early voting begins in less than two weeks. R. 220, 336-37. Candidates have built campaigns, raised and spent money, gathered signatures, qualified for primary

ballots, courted voters, and invested countless hours running for office. As the Trial Court observed, we have already passed the "point of no return." R. 15.

With their heads buried in the sand, Petitioners maintain that "no evidentiary foundation" supports the Trial Court's finding. Pet. Br. 27. Not true. The Speaker provided the Trial Court with an affidavit of Todd Valentine, the Republican co-executive director of the State Board of Elections, sworn to on May 9, 2022. Mr. Valentine affirmed that "[i]t is simply too late for new claims related to the invalidity of the Assembly and statewide elections …. Replacing the Assembly map and moving the statewide primaries would create logistical hurdles for the Board and for local boards of elections for which we have no reasonably actionable solutions." R. 738-39. Mr. Valentine reasserted this point in a May 23 affidavit, which was also submitted to the Trial Court: "Cancelling the June Primary election at this time and requiring a complete do-over of all the election processes that have occurred to date would result in a massive upheaval for election officials and voters, and impose unbearable burdens on the State's election system." R. 869.[3] A third affidavit was submitted to the Trial Court, as well — from Kristen Zebrowski Stavisky, the Board's Democratic co-executive director.

[3] In the *Harkenrider* Lawsuit, Mr. Valentine stated on March 22 that moving the Congressional and State Senate primaries from June to August was feasible at that time. R. 218-21. But as he affirmed two months later, "[t]he situation now is materially different, given the passage of time." R. 873.

She concurred with Mr. Valentine, affirming that the "positions expressed in [his May 9] affidavit represent a bipartisan consensus opinion of the New York State Board of Elections." R. 741. In other words, ample evidentiary foundation supports the obvious: moving this month's primaries to August or September, and re-drawing a 150-district Assembly map in the interim, would be terribly ill-advised at this late stage. Perhaps such a monumental effort would have been feasible if Petitioners had timely brought their claim in February. But instead they watched and waited as others litigated the *Harkenrider* Lawsuit.

Even if this Court disagrees — even if it were possible to cancel this month's primaries, re-draw the Assembly map, and move primaries to August or September — laches still bars this proceeding. The laches question is this: Would it be equitable to throw this State's elections into chaos upon the request of these Petitioners, who should have brought their lawsuit three months earlier? This Court's answer should be a resounding "no."

C. Petitioners, not the State, are to blame for the impossibility of their requested remedy

Petitioners continue to assert, as they did before the Trial Court, that "the present emergency is Respondents' fault alone." Pet. Br. 5; R. 227. Obviously not. Petitioners were the ones who failed to challenge the Assembly map in February, despite finding time to tweet prodigiously that month about redistricting and the *Harkenrider* Lawsuit. The Trial Court put it best:

"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." R. 11.

Similarly, Petitioners contend that Respondents have "unclean hands," so they cannot invoke laches. Pet. Br. 23. To make this argument, however, Petitioners construct and attack a straw man. The Legislature did not, as Petitioners claim, "willfully violate[ ] the Constitution for purely partisan ends." *Id.* Nor is the Legislature guilty of "scheming … to embrace illegality for partisan purposes." Pet. Br. 20. In reality, the Legislature faced a difficult choice in early 2022, the first-ever year of the Independent Redistricting Commission's involvement under the New York Constitution in the redistricting process. The Commission announced it was deadlocked and, despite its constitutional obligation to do so, that it would not submit a second redistricting plan to the Legislature. *See Harkenrider*, 2022 WL 1236822, at *3. With the petitioning period fast approaching, and in the absence of the district maps needed to begin the ballot-access process, the Legislature enacted maps of its own. *Id.* That decision was ultimately found unconstitutional, but it was hardly the malicious, "brazen" scheme Petitioners describe (Pet. Br. 20), particularly when six appellate judges (*viz.*, four at the Appellate Division, Fourth Department, and two at the New York Court of Appeals) agreed with the Speaker that "there [was] no procedural error rendering the redistricting legislation *void ab initio*." *Harkenrider*, 2022 WL

1236822, at *24 (Rivera, J. dissenting); *accord*, 204 A.D.3d 1366, 1368, 1379 (4th Dep't 2022).

Nor can the State Board of Elections be blamed for continuing to prepare for the June primaries. It had no choice. As Albany County Supreme Court observed a few days ago, "it simply cannot be held that the [Board] was required to (or had the authority) based on [the Court of Appeals' *Harkenrider* decision] to create new Assembly maps, or refrain from certifying primary ballots based on the 2022 Assembly maps." *League of Women Voters*, 2022 WL 1816345. Stated differently, "in the absence of any judicial directive that it perform otherwise, the [Board] could only act on the 2022 Assembly maps as approved by the Legislature and Governor." *Id.*

For these reasons, Petitioners' finger-pointing should be rejected yet again. They have no one to blame but themselves.

D. The laches doctrine applies to reapportionment challenges

Recognizing that the laches doctrine bars this proceeding (and perhaps stinging from the Trial Court's unflinching rejection of their untimely lawsuit), Petitioners now contend that "the doctrine of laches does not apply to a reapportionment challenge." Pet. Br. 23. The gravity of this assertion cannot be overstated. If Petitioners are correct, then someone could lie in wait until weeks, days, or hours before an election, and then suspend that election by bringing a

reapportionment challenge. What's more, under Petitioners' theory, they apparently could have waited until after the elections to bring their challenge — perhaps if they were unhappy with the election results.

The disturbing implications of Petitioners' position are not some farfetched hypothetical. They are in play here. Thousands of candidates have already qualified for primary ballots. Other aspiring candidates, including Mr. Nichols, tried but failed to obtain enough voter signatures to qualify for the primaries. This lawsuit, if successful, would overturn those results. Mr. Nichols and others would receive another chance to run for office this year. And as Petitioners openly acknowledge, certified candidacies "which become invalid under state law because of redrawn lines" would be annulled. Pet. Br. 24-25 n.5. Thus, notwithstanding their sanctimonious sermons about election integrity and "crocodile tears," Pet. Br. 22, Petitioners' position is the one that would plunge the electoral process into catastrophe.

Relatedly, the breadth of Petitioners' proposed remedy should raise eyebrows. They challenge the Assembly map, yet they asked the Trial Court to reopen "designating and independent nominating petition periods" for all elected offices. R. 48. That includes offices, such as the Governorship, whose elections have nothing to do with Assembly lines. In other words, Petitioners would use the Assembly map as a Trojan Horse to give Mr. Nichols — and anyone else who

might want another chance to run for Governor — a second bite at the apple to run on any party or independent line.

Petitioners' position not only defies common sense, but it also finds no support in the case law. New York Courts have applied the laches doctrine to constitutional cases for well over 100 years. *E.g.*, *Schulz*, 81 N.Y.2d at 347-50; *Saratoga County Chamber of Commerce*, 100 N.Y.2d at 816-19; *Matter of Flushing Ave. in Long Island City*, 101 N.Y. 678, 679 (1886); *Matter of Woolsey*, 95 N.Y. 135, 144 (1884); *Summers v. City of Rochester*, 60 A.D.3d 1271, 1273-74 (4th Dep't 2009); *Burns v. Egan*, 117 A.D.2d 38, 40-41 (3d Dep't 1986). In fact, a case cited by Petitioners — *Badillo v. Katz* — applied laches to a redistricting challenge. There, the plaintiffs sued to invalidate the New York City Council's redistricting map. 73 Misc. 2d 836, 837 (Sup. Ct. Bronx County 1973). But they filed their lawsuit six weeks after the map was enacted, and that "inordinate" delay "had the potential of disrupting the electoral process and thus disenfranchising the entire citizenry." *Id.* at 845. Consequently, although the challenge succeeded on the merits, the court declined to interfere with the upcoming primary elections. *Id.* at 846. This Court affirmed, 41 A.D.2d 829 (1st Dep't 1973), as did the Court of Appeals, 32 N.Y.2d 825 (1973).

To summarize, Petitioners are wrong to assert that "the doctrine of laches does not apply to a reapportionment challenge." Pet. Br. 23. The opposite

is true. Given the time-sensitive nature of such challenges, and the importance of election integrity, the laches doctrine is a critical safeguard that should be applied here without hesitation.

POINT II

SEVERAL ALTERNATE GROUNDS SUPPORT AFFIRMANCE OF THE DENIAL OF THE PETITION

Although the Trial Court denied the Petition based on laches alone, this Court may affirm on any of the alternative grounds raised by the Speaker: failure to join necessary parties, lack of standing, expiration of the statute of limitations, and failure to verify the Petition. *See Parochial Bus Sys. v. Bd. of Educ. of City of N.Y.*, 60 N.Y.2d 539, 545-56, 549 (1983) (affirming order for reason upon which the Court below had not relied); *Sehgal v. DiRaimondo*, 165 A.D.3d 435, 436 (1st Dep't 2018) (same); *Nickerson v. Volt Delta Res., Inc.*, 211 A.D.2d 512, 512-13 (1st Dep't 1995) (same). The Trial Court's Order did not aggrieve Respondents, who therefore were not required or allowed to cross-appeal. *See Parochial Bus*, 60 N.Y.2d at 545-46.

A. Petitioners failed to join 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).

Here, the Trial Court concluded that the Petition "arguably must be dismissed" for failure to name necessary parties. R. 13. Specifically, the Trial Court observed that many political offices are elected based on Assembly districts — including representatives on county political party committees, party District Leaders in New York City, representatives to the New York State Democratic Committee, and delegates and alternate delegates to State Supreme Court nominating conventions. R. 12. If Petitioners prevail, "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." *Id.* Additionally, the State's 58 local Boards of Elections are also necessary parties, because they accepted those candidates' designating petitions for filing and would be responsible for invalidating the current primary ballot certifications upon any annulment of the Assembly map. *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, the Petition fails as a matter of law.

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), *lv. denied*, 37 N.Y.3d 910 (2021). In that case, 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.* This Court affirmed, 197 A.D.3d 1025, and the Court of Appeals denied leave, 37 N.Y.3d 910. Other Courts throughout the State have reached analogous conclusions. *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).

B. Petitioners lack standing, the statute of limitations has expired, and the Petition is not verified

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 candidates or the chairpersons of a party committee.[4] And they do not claim to have filed objections to any designating petitions, so they

[4] Mr. Nichols supposedly is running 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").

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.

Additionally, the Election Law 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 — well over 14 days before Petitioners commenced this special proceeding on May 15. R. 69. Consequently, the Petition is time-barred. It is irrelevant that Petitioners have not framed this special proceeding as a challenge to the candidates' designating petitions. *See Solnick v. Whalen*, 49 N.Y.2d 224, 229 (1980) (holding that 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"); *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).

Finally, a special proceeding to invalidate ballot-access petitions "shall be heard upon a verified petition." N.Y. ELEC. LAW § 16-116. "The Election Law requirement of a verified petition is a jurisdictional condition precedent to commencing a proceeding." *Matter of Callahan v. Russo*, 123 A.D.2d 518, 518 (4th Dep't 1986). *Accord, Matter of Goodman v. Hayduk*, 64 A.D.2d 937, 937 (2d Dep't), *aff'd*, 45 N.Y.2d 804, 806 (1978). Here, Petitioners seek to invalidate the ballot-access petitions — indeed, to invalidate the certified candidacies — for apparently every elected office in this State. R. 47-48. Yet they did not verify their Petition. This lack of verification is a jurisdictional defect, and is another reason why the Petition was properly denied.

POINT III

THIS COURT SHOULD NOT ORDER A REMEDIAL ASSEMBLY MAP FOR ELECTIONS IN 2023 OR 2024

A. The request for remedies in 2023 or 2024 is raised here for the first time on appeal

As explained *supra*, the Trial Court correctly held it is too late to change the 2022 election calendar. Because of Petitioners' egregious delay, "we have already passed [the] point of no return"; the remedies Petitioners seek would be "not just difficult but impossible" to implement. R. 15.

Now, for the first time on appeal, Petitioners tacitly acknowledge this reality and request an alternate remedy. Specifically, they ask this Court to "order that a new Assembly map be adopted for a 2023 special election or the 2024 regular election." Pet. Br. 5. Petitioners had never before requested this relief, whether in the pleadings or elsewhere. In fact, the terms "2024," "2023," and "special election" appear nowhere in the Petition, in Petitioners' memorandum and letters filed with the Trial Court, in Petitioners' memoranda and proposed pleadings in the *Harkenrider* Lawsuit, in the transcript of oral argument held on the *Harkenrider* Lawsuit motions to intervene, in the transcript of oral argument held before the Trial Court, or in the Trial Court's Order.[5]

[5] Counsel for one of the Petitioners made an unrelated reference to a special election held earlier this year. R. 83.

As this Court has done many times under similar circumstances, it should decline to consider this new request. *E.g.*, *M & E 73-75 LLC v. 57 Fusion LLC*, 189 A.D.3d 1, 9 (1st Dep't 2020) ("This relief is sought for the first time on appeal, and we decline to address it."); *Wolman v. Shouela*, 171 A.D.3d 664, 664-65 (1st Dep't 2019) (declining to consider argument raised for the first time on appeal); *Lyons v. Salamone*, 32 A.D.3d 757, 759 (1st Dep't 2006) (same); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Ferrell & Myers, Inc.*, 26 A.D.3d 191, 191 (1st Dep't 2006) (same); *Sosa v. Cumberland Swan, Inc.*, 210 A.D.2d 156, 157 (1st Dep't 1994) (same). The Petition's prayer for "such other and further relief as [the Trial Court] may deem just and proper" makes no difference. *See Leo v. City of New York (Matter of 91st St. Crane Collapse Litig.)*, 112 A.D.3d 476, 476 (1st Dep't 2013) ("[P]laintiff's ritualistic use in the prayer for relief of the language 'and such other and further relief as to this court seems just and proper,' does not change the legal character of the relief demanded.") (citation omitted). Notwithstanding Petitioners' assertion to the contrary, Pet. Br. 19, such cryptic boilerplate does not open the door to all manner of new, surprise arguments raised for the first time on appeal.

Petitioners' failure to raise these issues previously is deeply prejudicial. Because of their delay (which unfortunately has become their calling card), the parties and the Trial Court had no opportunity to develop the arguments.

For instance, with respect to 2024, the Speaker and Senate Majority Leader Andrea Stewart-Cousins would have argued that a Court-drawn remedial map is not the right remedy. The Court of Appeals endorsed that remedy for this year's elections because, "at this juncture," it is too late for the Legislature or Independent Redistricting Commission to re-draw the Congressional and State Senate maps. *Harkenrider*, 2022 WL 1236822, at *10. Not so for 2024. The Court could order the Independent Redistricting Commission to re-convene, in which case the Commission would have ample time to craft proposed remedial maps for the Legislature's consideration. That remedy is best for 2024 — not a judicially imposed map, which should be a last resort. In fact, reconvening the Commission is arguably required under the State Constitution: "[A]t any … time a court orders that congressional or state legislative districts be amended, an independent redistricting commission shall be established." N.Y. CONST. art. III, § 5-b(a). But because Petitioners did not seek a 2024 remedy before the Trial Court, the arguments are undeveloped on this question.

Similarly, by waiting until now to request statewide special elections in 2023, Petitioners deprived Respondents of the ability to assert several counterarguments before the Trial Court. For example, while Petitioners contend that laches and the necessary-parties requirement are irrelevant to a 2023 remedy, they are incorrect. *Contra* Pet. Br. 24-25 n.5. Laches applies with full force to

2023. If, because of Petitioners' three-month delay in challenging the Assembly map, this Court were to order special elections next year, the prejudice would be profound: Assemblymembers' two-year terms would be cut in half; the State (or counties) would have to pay for administering off-year statewide elections; and Assembly candidates would have to raise and spend campaign funds for elections in potentially three consecutive years, with a new system of public campaign financing for Statewide and State Legislative elections set to take effect the day after this year's general election. L.2020, c. 58, Part ZZZ, § 12.

For similar reasons, the Speaker's necessary-parties argument does not simply "fall away" if any potential remedy were to be required for 2023. *Id.* This year's hundreds of Assembly candidates would be "inequitably affected" because they would be running for one-year terms instead of two-year terms. CPLR 1001(a). In all likelihood, some of them might not have decided to run had they known their terms of office would have been truncated. But again, these arguments are undeveloped, because they were not presented to the Trial Court.

B. The Assembly map is fair and should not be re-drawn

When Justice McAllister invalidated the Assembly, Congressional, and State Senate maps in March 2022, he ordered the Legislature to enact new maps with bipartisan support. R. 438. In fact, however, the Assembly map already has bipartisan support. It passed the Assembly by an overwhelming vote of 118 to

29, including 14 Republican votes in favor, one of which was cast by the Assembly Minority Leader. All those 14 Republicans, approximating one third of the Assembly Republican conference, have submitted affidavits affirming they believe the Assembly map is fair. R. 771-73, 776-86, 790-92, 795-805, 812-23, 832-34. Moreover, eight Republican members of the Assembly who voted *against* the Assembly map have also submitted affidavits affirming they believe the map is fair, meaning that at least about half of the *minority* party's Assemblymembers believe the map is fair. R. 787-89, 793-94, 806-11, 824-31, 835-37. No wonder, then, that the *Harkenrider* Petitioners did not challenge the enacted Assembly map.

Petitioners' only substantive challenge to the Assembly map, which does not appear in their pleadings, consists of "hearsay … speculation … and conspiracy theories." R. 6. The Trial Court rejected it, and this Court should as well. R. 929. For example, Petitioners asserted at oral argument before the Trial Court, and assert again in their Brief here, that the Assembly conspired to block the candidacy of Huge Ma (who evidently did not feel aggrieved enough to join this lawsuit). Pet. Br. 9. But in redistricting years like this one, a State Legislative candidate need not have lived in the district where the candidate chooses to run, so long as the candidate has lived in New York State for five years and in the same county for at least 12 months preceding the election. N.Y. CONST. art. III, § 7. Alternatively, Mr. Ma was free to run in his home district. And if, as Petitioners

claim, the Assembly were so determined to protect "high-ranking Democrat" Catherine Nolan — who, as the Trial Court noted, is not even running for re-election (R. 929) — then there were plenty of other candidates it should have thwarted.[6] Pet. Br. 9. The bottom line, as the Trial Court observed, is that Petitioners "can come up with examples where [redistricting] benefitted certain candidates and hurt other candidates, … [but] the same exact argument could be put in place for every single map that the Special Master has put into place for the Senate and Congressional maps." R. 931. No matter where the lines are, and no matter who draws them, there will be people unhappy with the outcome. Petitioners' hand-waving means nothing.

In sum, the Assembly map is fair and bipartisan, and it would make no sense to spend public dollars for a special master to draw a new one. Whether or not this Court sustains any aspect of Petitioners' appeal (which it should not), it should therefore decline to appoint any special master. Instead, this Court can and should fix any procedural flaw by simply re-adopting the enacted bipartisan Assembly map immediately and leaving the election calendar unchanged.

[6] *See* Zach Williams, *The retirement of Cathy Nolan creates an open race for state Assembly*, CITY & STATE (Feb. 11, 2022), https://www.cityandstateny.com/politics/2022/02/retirement-cathy-nolan-creates-open-race-state-assembly/361894/ (last accessed June 4, 2022).

CONCLUSION

This Court should protect the integrity of this year's elections and reinforce the importance of bringing redistricting challenges in a timely manner. The Trial Court's dismissal of the Petition should be affirmed.

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June 6, 2022

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PRINTING SPECIFICATIONS STATEMENT (22 N.Y.C.R.R. § 1250.8(j))

This Brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Typeface: Times New Roman
Point Size: 14
Line Spacing: Double

The total number of words in this Brief, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of authorities, proof of service, and this Printing Specifications Statement, is 8,672, as determined by the word-processing system used to prepare this Brief.