

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

PAUL NICHOLS, GAVIN WAX, GARY GREENBERG,

Petitioners-Appellants,

—against—

CASE NO.

2022-04649

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 II OF II (Pages 724 to 1368)

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FILED: NEW YORK COUNTY CLERK 05064220202041090PMPM

INDEXED 015903422022

NYSCEF DOC. NO. 53

RECEIVED NYSCEF: 05/04/2022

SUPREME COURT OF THE STATE OF NEW YORK
ALBANY COUNTY

-----X

PAUL NICHOLS, DAVID ENGLERT

Petitioners

-against-

LYNNE C. BOECHER, JOSEPH COE, TODD
M. KERNER, AND MATTHEW MALIN

Respondent(s)-Objectors(s)

-and-

NEW YORK STATE BOARD OF
ELECTIONS

Respondent

VERIFIED PETITION

Index No.:

Date Purchased

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

Petitioners, representing himself respectfully alleges:

1. At all times hereinafter mentioned, Petitioners-Candidate Paul Nichols and David Englert ("Petitioners") is a candidate within the meaning of Section 16-102 of the Election Law, having duly filed a Designating Petition with Respondent New York State Board of Elections ("Board of Elections") naming Petitioners and David Englert as a candidates of the Democratic Party for the public office of Governor of the State of New York and Lieutenant Governor of the State of New York for the Primary Election to be held on the day of June 28, 2022, ("Designating Petition").
2. Respondent Board of Elections is charged with the responsibility of the supervision of the conduct of official elections held in the State of New York, including the duties of receiving and filing designating petitions for public office and party position in political subdivisions located

entirely within the State of New York, the review and determination of Objections and Specifications of Objections to such designating petitions, notification of a determination of non-compliance, maintaining the permanent personal voter registration poll records of voters and official maps for all election districts located within the State of New York, and the preparation of official Primary Election ballots for use in the State of New York.

3. Upon information and belief, on or about April 11, 2022, the Designating Petition was filed with Respondent Board of Elections naming Petitioners and David Englert as candidates of the Democratic Party for the public office of Governor and Lieutenant Governor of the State of New York in the Primary Election to be held on the day of June 28, 2022.

4. Petitioners and David Englert are, in all respects, duly qualified for the said designations.

5. The Designating Petition was and still is in due and proper form as prescribed by law, and contains more than the minimum number of signatures of duly enrolled voters of the Democratic Party in the State of New York for which said designation was made, and the Designating Petition is otherwise valid, proper, sufficient and legally effective.

6. Upon information and belief, after the filing of the Designating Petition, written Objections to the Designating Petition were filed with Respondent Board of Elections by the following persons referred to herein as the Respondent-Objectors, each of whose purported residence was indicated on said written Objections, and Petitioners is therefore aggrieved:

NAME OF OBJECTORS	ADDRESS OF OBJECTORS SET FORTH ON OBJECTIONS
LYNNE C. BOECHER	9 OAKWOOD DRIVE QUEENSBURY, NY 12804
JOSEPH COE	4 VILLAGE MILL HAVERSTRAW, NY 10927
TODD M. KERNER	49 SPRUCE STREET CLIFTON PARK, NY 12065

MATTHEW MALIN

3640 WOODBRIDGE LANE N.
WANTAGH, NY 11793

7. Upon information and belief, Specifications of Objections in support of the aforesaid written Objections to the Designating Petition were filed with the Respondent Board of Elections.

8. (a) Upon information and belief, the aforesaid Objections and Specifications of Objections are insufficient, deficient as a matter of law and do not comply with the Rules of Respondent Board of Elections, and many of the allegations contained therein are without merit in law or in fact;

9. Upon information and belief, Respondent Board of Elections has made a determination with regard to the aforesaid Objections and Specifications of Objections.

10. Upon information and belief, the aforesaid Specifications of Objections came on for a preliminary hearing before Respondent Board of Elections on April 28, 2022, and sustained on a public hearing May 2, 2022 and many of the allegations in the Specifications of Objections will, of necessity, have to come before this Court for determination.

11. Petitioners believe that Respondent Board of Elections made an erroneous determination of the several questions of law and fact raised by the aforesaid Objections and Specifications of Objections, which determinations would, according to law and the principles of equity, be subject to review by this Court and, that Respondent Board of Elections determinations sustaining the aforesaid Objections and Specifications of Objections, Petitioners were aggrieved by such a determination.

12. Petitioners respectfully request this Order to Show Cause be granted so that proceeding may be commenced in a timely fashion due to Respondent Board of Elections' determination adverse to Petitioners, and so that Petitioners may resuscitate signatures that were erroneously sustained by the Board of Elections.

1 13. Some of the matters raised in the said preliminary hearing on April 28, 2022 and

2 Specifications of Objections are exclusively within the jurisdiction of this Court and should be
3 heard and determined by this Court.

4 14. Respondent Board of Elections has rendered a determination adverse to Petitioners, and said
5 determination is arbitrary, capricious, and in violation of the provisions of the Election Law so as
6 to be reviewable pursuant to Election Law Section 16-102.

7 15. Petitioners intend to prove to this Court that the decision rendered by Respondent Board of
8 Elections in favor of the Respondent-Objector(s) on particular Specifications of Objections filed
9 with Respondent Board of Elections are erroneous and the Respondent Board of Elections lacked
10 jurisdiction to review the Specifications of Objections.
11

12 16. In accordance with prior decisions of this and other Courts, whose decisions are controlling,
13 Petitioners retains the right to submit proof establishing the Respondent Board was without
14 jurisdiction to consider the Specifications of Objections filed with Respondent Board, and to
15 establish the validity of individual signatures and sheets on the Designating Petition, and of the
16 Designating Petition itself, for reasons not heretofore specified, and Petitioners intends to
17 exercise such right.
18

19 17. Petitioners request leave and reserve the right to submit upon the argument and hearing of
20 this application, evidence by way of affidavits, testimony, and documentary proof to substantiate
21 and support this application.
22

23 18. Petitioners request that Respondent Board of Elections produce upon request by the trial
24 judge upon the argument and hearing of this application the aforesaid Designating Petition, with
25 cover sheet and any amended cover sheet(s), identification number application form and any
26 other documents designating and/or nominating Petitioners-Candidates Paul Nichols and David
27
28

Englert; together with the Objections and Specifications of Objections relating to the aforesaid Designating Petition; any written notification of a determination of non-compliance together with proof of service upon Petitioners and/or contact person designated therein; any writing purporting to cure or correct said determination of non-compliance; the permanent personal voter registration poll records of voters, computer generated registration lists for the last four (4) years and official maps for the State of New York; the report of the Clerk(s) of Respondent Board of Elections made on such Objections and Specifications of Objections; the minutes and proceedings of any meeting of Respondent Board of Elections made for the purpose of ruling upon Objections and/or Specifications of Objections filed by any person herein to the aforesaid Designating Petition of Petitioners-Candidates; such other records of Respondent Board of Elections as may relate to this matter for examination by this Court; and the records provided for in the annexed Order to Show Cause.

19. Petitioners has no adequate remedy at law.

20. No previous application has been made for the relief sought herein or for the Order to Show Cause hereto annexed, or for any similar relief.

WHEREFORE, Petitioners respectfully prays that the annexed Order to Show Cause be granted, for a final Order and Judgment granting the relief prayed for in the Order to Show Cause, and for such other and further relief as this Court deems just and proper.

Dated: Albany, New York
May 2, 2022

Pro Se Litigant/Attorney for Petitioner *Englert*

By: 

Paul Nichols
111-08 133rd St. So. Ozone Pk. NY
516-903-8790

FILED: NEWARK COUNTY CLERK 050642202020410907PM

INDEXED NO 15403422022

NYSCEF DOC. NO. 53

RECEIVED NYSCEF: 05/02/2022

VERIFICATION

STATE OF NEW YORK)

) ss:

COUNTY OF Albany)

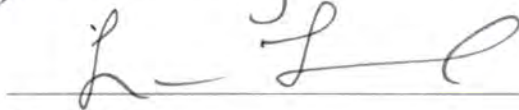
Paul Nichols

_____, being duly sworn, says as follows:
 I am the Petitioner and also represent Petitioner David Englert in the within proceeding, have read the foregoing Petition and know the content thereof; the same is true to my own knowledge, except as to matters stated to be alleged upon information and belief, and as to those matters, I believe it to be true.



Sworn to before me this

4th day of May, 2022.

Notary Public

LATOYA LATISHA LEGRAND
 Notary Public, State of New York
 Reg. No. 01LE63643099
 Qualified in Queens County
 Commission Expires September 11, 2025

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

PAUL NICHOLS, DAVID ENGLERT,

Petitioners,

PROPOSED ORDER

-against-

Index No. 903427-22

LYNNE C. BOECHER, JOSEPH COE,
TODD KERNER, AND MATTHEW MALIN

Respondent-Objectors,

-and-

NEW YORK STATE BOARD OF ELECTIONS,

Respondent.

Richard J. McNally, Jr.

PRESENT: _____,
Supreme Court Justice

NOW, therefore, upon consideration of all papers and proceedings heretofore had herein, including oral argument held on the record May 10, 2022 in this proceeding commenced pursuant to Election Law § 16-102 (2) to validate the designating petition filed by petitioners, and after due deliberations it is

ORDERED that the respondent-objector Todd Kerner's motion to dismiss the instant validating petition is granted as service was made by mail only on the last day of the limitations period pursuant to Election Law § 16-102 (2), which is jurisdictionally defective;

ORDERED that the respondent State Board of Elections' motion to dismiss the instant validating petition is granted as service was not made on the New York State Board of Elections by delivery of the Order to Show Cause dated May 5, 2022 to the offices of the New York State Board of Elections at 40 North Pearl Street, Albany, New York as required by said Order to Show Cause;

ORDERED that the petitioners' motion to validate their designating petitions is accordingly denied, and it is further

ORDERED that the instant validating petition is denied and dismissed by reason of the foregoing.

This constituted the decision, judgment and final order of the court.

FILED: NEW YORK COUNTY CLERK 05/22/2022 1:36 PM PM

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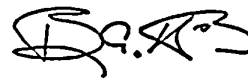
NYSCEF DOC. NO. 26

RECEIVED NYSCEF: 05/22/2022

ENTER

Dated: May 11, 2022

Hon. _____, J.S.C.

Richard J. McNally, Jr.

05/12/2022

**Exhibit W to Salcedo Affirmation-
Affidavit of Todd D. Valentine, in Harkenrider I., sworn
to May 9, 2022
[pp. 732 - 741]**

FILED: NEWBENKCOONNYCCERRK08309220022011107PEM

INDEXNO.E20221012002

NYSCEF DOC. NO. 440

RECEIVED NYSCEF: 05/09/2022

STATE OF NEW YORK
SUPREME COURT : 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 VOLANTE,

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.

**AFFIDAVIT OF
TODD D. VALENTINE**

Index No.
E2022-0116CV

Hon. Patrick F. McAllister

STATE OF NEW YORK)
) SS:
COUNTY OF ALBANY)

TODD D. VALENTINE, being duly sworn, deposes and says:

1. I serve as Co-Executive Director for the New York State Board of Elections ("Board"). I have held this position since 2008. From 1997 to 2008 I was Special Counsel to the Board. Accordingly, I am familiar with county board of elections practices and capabilities. I make this affidavit based on my personal knowledge.

2. I respectfully submit this affidavit in opposition to Gavin Wax's and Gary Greenberg's motions to intervene. The positions expressed in this affidavit represent a consensus opinion of the New York State Board of Elections.

Background

3. On February 3, 2022, the Legislature enacted two laws that, collectively, established New York's legislative-district maps for Congress, the State Senate, and the State Assembly.

4. On April 27, 2022, the Court of Appeals invalidated the congressional and State Senate maps. It left the Assembly map in place as it not challenged by anyone in any court as of that date.

5. Two days later, this Court ordered that (1) Special Master Dr. Jonathan Cervas will release his proposed remedial congressional and State Senate maps by May 16, 2022; (2) after considering any comments submitted in opposition to his proposed maps, Special Master Cervas will finalize the maps by May 24, 2022; (3) congressional and State Senate primary elections, which had been scheduled by law for June 28, 2022, will occur on August 23, 2022; and (4) the deadline for local boards of elections to mail military and overseas ballots for the August 23 primaries is July 8, 2022 (Doc. Nos. 296, 301).

6. Initially, this Court had set a deadline of May 24, 2022 to finalize the congressional map (Doc. No. 258). The Board then asked this Court to "consider expediting the approval process . . . in any manner possible" (Doc. No. 290). Later that day, this Court moved the deadline from May 24 to May 20 (Doc. No. 291).

7. Non-parties Gavin Wax and Gary Greenberg moved to intervene in this lawsuit on May 1 and 3, respectively (Doc. Nos. 316, 346). They ask this Court to strike down the Assembly map, which Petitioners did not challenge, and to enjoin use of that map for the 2022 primary and general elections. If this Court grants their request, the Assembly primaries would likely be moved from June 28 to August 23.

8. The motions should be denied. The Board, and local boards of elections, are already under unprecedented strain preparing for the August congressional and State Senate primaries ordered by this Court. They have been aware of this change for some time now and have been preparing for those offices to be contested at an August primary. 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 150 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 28 election as provided for by Election Law 10-108.

Danger to the June Primaries

9. Replacing the Assembly map at this even later date would endanger all other elections scheduled for June 28 primaries.

10. On May 4, 2022, the Board certified Assembly candidates for the June 28 primaries. In response, local boards of elections finalized their primary ballots. The primary ballot for each party is a unified ballot that would include candidates for any Assembly primary,

Governor, Lieutenant Governor, and other elected offices (except for Congress and State Senate, which this Court moved to August 23).

11. The statutory deadline to mail these primary ballots to military and overseas voters is Friday, May 13, 2022. Elec. Law §§ 10-108(1), 11-204(4). To prepare for mailing, local boards of elections are printing ballots now. Local boards are also programming their voting systems and extensively testing those ballots for compatibility with vote-counting machinery.

12. If the Assembly primaries are moved from June to August, then these ballots would have to be thrown away. New primary ballots (without Assembly candidates) would need to be created, printed, tested, addressed, and mailed by the May 13 deadline. That would almost certainly be impossible, and I do not make that averment lightly. Further, boards of elections have reported unprecedented supply-chain issues resulting in paper and envelope shortages, so the printing of replacement ballots would prove challenging.

Judicial-Nominating Conventions and Party Committees

13. Far more so than congressional and State Senate districts, Assembly districts affect several other aspects of New York's election infrastructure. Accordingly, replacing the Assembly map would create even more burdens than replacing the congressional and State Senate maps.

14. For example, Supreme Court elections depend on Assembly districts.

15. Parties' candidates for the Supreme Court are not chosen through primary elections. Instead, delegates choose them at party conventions. Those judicial delegates, in turn,

are elected by voters in the primaries—and much like candidates for other offices, they must collect designating-petition signatures to appear on primary ballots.

16. The judicial delegates who win the primaries attend a nominating convention of their party, which by law must occur between August 4 and 10, 2022. Elec. Law § 6-158(5). At the conventions, delegates decide who will appear for their party on the general-election ballot as candidates for the Supreme Court.

17. Critically, judicial delegates are elected from Assembly districts. Elec. Law § 6-124. So, if the Assembly map is replaced, judicial-delegate elections (like Assembly primaries) would have to be moved to August 23, and judicial-nominating conventions could not occur between August 4 and 10 as presently required by law. Instead, judicial-nominating conventions probably could not be held until September, after the results of judicial-delegate elections are certified. This would imperil the ability of New York's election machinery to complete the party nominating processes in time to meet the critical and unalterable requirement to transmit military and overseas ballots prior to 46 days before the general election on November 8, 2022.

18. Specifically, general-election ballots must be mailed to military and overseas voters by September 23, 2022. Elec. Law §§ 10-108(1), 11-204(4). If Supreme Court candidates are chosen at conventions in September, it would be extremely difficult to finalize, print, program voting machines, test, address, and mail general-election ballots (which include Supreme Court candidates) by the September 23 deadline.

19. Additionally, members of the Democratic Party's state committee, are elected from Assembly districts this year. Elec. Law §§ 2-102(1), 2-104(1). Therefore, if the Assembly map is replaced, elections for these positions cannot occur on June 28 as scheduled.

These elections would also have to be moved to August 23, creating an additional burden in the already-challenging process of preparing for the unexpected August primaries. Similarly, current law permits that a member of a county committee need not reside in the election district he or she represents, but rather the member of county committee may represent any election district in the Assembly District in which the member of county committee resides. If the Assembly districts are changed at this late date it would likely be necessary to redo petitioning for members of county committees as well given this residency requirement.

Election Districts

20. Finally, if the Assembly map is replaced as Mr. Wax and Mr. Greenberg propose, many more election districts will also have to change.

21. Election districts are the foundational unit of New York's political geography. Local boards of elections must sort New York's approximately 13 million active voters into 15,587 election districts before a primary or general election can occur. This sorting is necessary because voters' election districts determine what ballot they receive and where they vote.

22. Every voter in a given election district receives the same ballot, with the same candidates for the same races. As a result, election districts cannot be bisected by Assembly districts, State Senate districts, congressional districts, county boundaries, or municipal boundaries. Stated differently, everyone in a given election district must reside in the same Assembly district, State Senate district, congressional district, county, and municipality. If any of those boundaries change, election districts must change.

23. This year, after the redistricting that occurred on February 3, local boards of elections spent virtually all their time for about one month, working with their voter registration vendors, to sort voters into their correct election districts.

24. If the Assembly map is replaced, election districts will have to be re-drawn, and voters will have to be re-sorted. This process could take weeks, given that boards of elections would have to simultaneously complete the other steps necessary to prepare for primaries in June and August.

Statewide Primaries on June 28

26. Presently, all statewide primaries are proceeding at the June 28, 2022 primary. This should not be disturbed, as this Court's prior order on April 29, 2022 articulated. All necessary steps for ballot access for statewide primaries have been completed, and nothing in the current litigation touches on the validity of those processes. Significantly, under state law the deadline to challenge primary designations passed on April 21, 2022 as provided by Election Law 16-102. And the courts have uniformly held that this deadline applies even to challenges of a Constitutional dimension. *See Scaringe v Ackerman*, 119 AD 2d 327 (3rd Dept 1986) (holding petitioners' claims that candidate was barred by the constitutional residency requirement from seeking office was subject to limitations period of the Election Law: "[i]rrespective of the label given to the proceeding or the words used to describe the issue, the late relief sought by petitioners seeks judicial intervention in the election process to remove a candidate from the ballot...they cannot avoid the time requirement of the statute by initiating a new and different proceeding...". Accordingly, it is simply too late for new claims related to the invalidity of the Assembly and statewide elections to be entertained.

Conclusion

27. 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. For this reason, the motions to intervene should be denied.

Dated: Albany, New York
May 9, 2022


TODD D. VALENTINE

Sworn to before me this
9 day of May, 2022


Notary Public

BRIAN L. QUAIL
Notary Public, State of New York
Reg. No. 02QU6395806
Qualified in Schenectady County
Commission Expires 08/05/2023

STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE
CANNING, PATRICIA CLARINO, GEORGE DOOHER,
JR., STEPHEN EVANS, LINDA FANTON, JERRY
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THOMAS, and MARIANNE VOLANTE,

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-against-

GOVERNOR KATHY HOCHUL, LIEUTENANT
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BOARD OF ELECTIONS, and THE NEW YORK STATE
LEGISLATIVE TASK FORCE ON DEMOGRAPHIC
RESEARCH AND REAPPORTIONMENT,

Respondents.

**AFFIDAVIT OF
KRISTEN ZEBROWSKI
STAVISKY**

Index No.
E2022-0116CV

Hon. Patrick F. McAllister

STATE OF NEW YORK)
) SS:
COUNTY OF ALBANY)

KRISTEN ZEBROWSKI STAVISKY, being duly sworn, deposes and says:

1. I serve as Co-Executive Director for the New York State Board of Elections ("Board"). I have held this position since 2021. I previously served as Commissioner of Elections at the Rockland County Board of Elections. I am familiar with the practices and capabilities of boards of elections and make this affidavit based on my personal knowledge.

2. I respectfully submit this affidavit in opposition to Gavin Wax's and Gary Greenberg's motions to intervene.

3. I have read the affidavit of Todd D. Valentine in this matter dated May 9, 2022, and I agree with its contents. The positions expressed in that affidavit represent a bipartisan consensus opinion of the New York State Board of Elections.

Conclusion

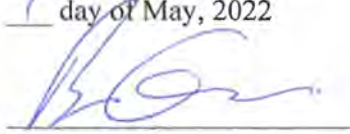
4. Replacing the Assembly map and moving the Assembly and statewide primaries to August would create logistical hurdles for the Board and for local boards of elections for which we have no reasonably actionable solutions. For this reason, the motions to intervene should be denied.

Dated: Albany, New York
May 9, 2022



KRISTEN ZEBROWSKI STAVISKY

Sworn to before me this
day of May, 2022



Notary Public

BRIAN L. QUAIL
Notary Public, State of New York
Reg. No. 02QU6395806
Qualified in Schenectady County
Commission Expires 08/05/2023

**Exhibit X to Salcedo Affirmation-
Rules of the Democratic Party of the State of New York
[pp. 742 - 768]**

FILED: NEWBENKCOONNYCCERRK06302220022011007PM

INDEXNO.E26221012022

NYSCEF DOC. NO. 465

RECEIVED NYSCEF: 05/02/2022

**RULES OF THE
DEMOCRATIC PARTY OF THE STATE OF NEW YORK**

The Democratic State Committee of the State of New York hereby adopts the following rules for the government of the Democratic Party of the State of New York:

Preamble

The purpose of these rules is to inspire and encourage the greatest number of Democrats to participate in the affairs of the Democratic Party of the State of New York, to insure the continuing success of the Democratic Party, and to provide the best possible responsible government for the people of the State of New York.

ARTICLE I**GENERAL****PROVISIONS****Section 1: Party Membership**

(a) The membership of the Democratic party of the State of New York shall consist of the duly enrolled Democrats within the State.

(b) No test for membership in, nor any oath of loyalty to, the Democratic Party of New York shall be required or used that has the effect of requiring prospective or current members of the Democratic Party to acquiesce in, condone, or support discrimination on the grounds of race, sex, age, color, creed, national origin, religion, ethnic identity, sexual orientation, disability, or economic status.

Section 2: Public Notice and Meetings

(a) All public meetings at all levels of the Democratic Party of New York are open to all members of the Democratic Party of New York regardless of race, sex, age, color, creed, national origin, religion, ethnic identity, sexual orientation, disability, economic status or philosophical persuasion.

(b) The time and place for all public meetings of the Democratic Party of New York on all levels shall be publicized fully and in such manner as to assure timely notice to all interested persons. Such meetings shall be held in places accessible to all Party members and large enough to accommodate all interested persons.

(c) The Democratic Party on all levels, shall support the broadest possible registration without discrimination on grounds of race, sex, age, color, creed, national origin, religion, ethnic identity, sexual orientation, disability or economic status.

(d) The Democratic Party of New York shall publicize fully and in such manner as to assure notice to all interested parties a full description of the legal and practical procedure for selection of the Party's officers and representatives on all levels. Publication of these procedures shall be made in such fashion that all prospective and current members of the Party in the State of New York will be fully and adequately informed of the pertinent procedures in time to participate in each selection procedure at all levels of the Party's organization.

(e) The responsible officers of the Democratic Party of New York shall publicize fully and in such manner as to assure notice to all interested parties a complete description of the legal and practical qualifications for all officers and representatives of the Democratic Party of the State of New York. Such publication shall be effected in timely fashion so that all prospective candidates or applicants for any elected or appointed position within the Party will have full and adequate opportunity to compete for office.

(f) Any place in these Bylaws where written notice of a meeting is required, providing notice via electronic means is sufficient to satisfy the notice requirement. If anyone would prefer to receive such notice via the U.S. mail, they may contact the state party offices to request it, and such notice will be provided as a courtesy.

ARTICLE II

PARTY ORGANIZATION

Section 1: State Committee

(a) The State Committee shall be the official organization of the Democratic Party of the State of New York, and shall possess such powers and perform such duties as may be fixed by statute or prescribed by these rules.

(b) The Unit of representation of the State Committee shall be the Assembly District, from which the members of the State Committee shall be elected. Except upon the vote for the designation of candidates for any office to be filled by the voters of the entire state, each Assembly District shall be entitled to two votes.

(c) Members of the State Committee shall be elected as follows:

- i. In each Assembly District which comprises a whole county or is entirely within a county, there shall be elected two members of the State Committee, each of whom shall have one vote.
- ii. In each Assembly District which comprises two or more whole counties, two members shall be elected from each whole county, and each member so elected to cast a proportionate part of the two votes to which the Assembly District is entitled.
- iii. In each Assembly District which comprises one or more whole counties and one or more parts of counties, each whole county shall be entitled to elect two members and each part of the county shall be entitled to elect two members and the members so elected shall be entitled to cast a proportionated share of the vote to which the Assembly District is entitled.
 - a. In all cases in which provision is made in this Section for the election of two members, one shall be a male and the other a female.
 - b. The vote of each member elected under the foregoing provisions of this Section 1 shall be that portion of the two votes to which the Assembly District is entitled which is represented by a fraction, to the nearest tenth, of which the

numerator is the total vote cast for the Democratic candidate for Governor at the last election for that office in that portion of the Assembly District from which the member was elected and the denominator of which shall be the total vote cast at such election for the office of Governor in the entire Assembly District. If a portion of an Assembly District from which the member was elected is represented by two members, then each member shall be entitled to cast one-half of the vote to which such portion of the Assembly District is entitled.

(d) All votes carried out in State Committee Meetings except for those prescribed in Article II Section 4, 5, and 6 in Article VI of the Party Rules will adhere to the following rules and procedures.

- i. At the registration for the meeting, each State Committee member will receive a colored voting credential and each State Committee member holding a proxy from an AD will receive a colored proxy credential for each proxy he or she holds. The proxy credential will have a different color than the voting credential.
- ii. The voting process will commence with the presiding officer asking for yeas and nays. The presiding officer will announce the outcome, but before proceeding to the next agenda item, will allow sufficient time for a member of the body to request a division. If a division is requested, the name of the person(s) requesting it will be recorded in the minutes and the presiding officer will immediately carry out the division. No motion will be in order until the division is completed.
- iii. The presiding officer will call for a show of yeas and nays of members present by displaying their voting credential and then call for a show of ayes and nays by displaying their proxy credentials. Two State Committee officers will enumerate the yeas and nays of members present and by proxy separately and report them to the Secretary, who will immediately report the results to the body. The numbers for the yeas and nays of members present and by proxy separately will be reported in the minutes.

Section 2: County Committee

The County Committees in each county shall be constituted by the election in each Election District within such county of at least two members and such additional members not in excess of two (2) as the rules of the County Committee within the county or the statements filed pursuant to section 2-104 of the Election Law may provide for such district, proportional to the party vote in the district for Governor at the past preceding gubernatorial election, pursuant to statute.

Section 3: Other Party Committees

(a) District or party committees in and for each of the other political subdivisions of the State other than towns, villages and school districts shall be comprised as follows:

- i. If a political subdivision is coterminous with or less than the limits of, but wholly within, one county, then the members of the County Committee from such political subdivision shall constitute the committee in and for such political subdivision.
- ii. If a political subdivision consists of more than one county, then the district or party committee for such subdivision shall be composed of the Chair of the County Committees of the various counties, or parts of counties, situated within the political subdivisions.

(b) For purposes of the New York State Election Law, including without limit section 6-120 thereof, the committees identified in this Article II shall constitute the party committee in their respective political subdivisions.

(c) In addition to the committees to which this section refers, the committees identified in Article III as well as the following shall be recognized as party committees for all purposes under the Election Law, including, but not limited to, the purposes of sections 2-100 and 14-100 thereof: (i) Democratic National Committee; (ii) DNC Non-Federal Programs/New York Committee; (iii) DNC Non-Federal Individual Account No. 1.; (iv) Democratic Senate Campaign Committee/New York; and (v) Democratic Congressional Campaign Committee/New York.

Section 4: National Delegates and Alternates.

Delegates and alternates to the National Convention shall be selected in accord with the plan and rules which the State Committee shall adopt from time to time, which plan and rules shall be separately available at the office of the State Committee and, upon adoption, incorporated into this Section by reference.

Section 5: State and Judicial District Convention Delegates.

Delegates and Alternate Delegates to a State Convention and to the Judicial District Convention for the nomination of Party Candidates for the office of Justice of the State Supreme Court shall be chosen by the election of such Delegates and Alternate Delegates from each Assembly District in the State as follows: One Delegate and one Alternate Delegate from each Assembly District in the State, and one additional Delegate and one additional Alternate Delegate from each Assembly District in the State for each two thousand five hundred votes or fraction of two thousand five hundred votes cast on the Democratic line in such Assembly District for the Party candidate for Governor at the last preceding general State Election.

Section 6: Election of Members of the Democratic National Committee

(a) In a year in which a presidential election is held, the State Committee shall elect the total number of members of the Democratic National Committee that shall have been apportioned to New York State pursuant to Article Two, Section 2(b) of the By-Laws of the Democratic National Committee.

(b) The meeting of the State Committee that is held to elect members of the Democratic National Committee shall be open and shall take place within the calendar year of the Democratic National Convention, after notice thereof.

(c) When the number of members of the Democratic National Committee apportioned to New York State pursuant to Article Two, Section 2(b) of the By-Laws is an even number, there shall be an equal division of members between men and women. In such cases where the number is odd, the variance between men and women shall not be greater than one.

(d) All members of the Democratic National Committee elected pursuant to this section shall be chosen according to the standards of non-discrimination and affirmative action incorporated into the Charter of the Democratic Party of the United States, and such members shall be elected so as to reflect representation of the various regions of New York State and of the various groups and constituents within the New York State Democratic Party.

ARTICLE III**ORGANIZATION OF THE STATE COMMITTEE****Section 1: Election of Officers.**

(a) The members of the State Committee shall meet within fifteen (15) days after their election, and shall organize at such meeting by the election of the following persons: State Chair, Executive Committee Chair, First Vice Chair, such number of Vice Chairs as determined by the Executive Committee, Treasurer, Assistant Treasurer, Secretary, Assistant Secretary, and Sergeant-at-Arms, none of whom need be members of the State Committee. The positions of State Chair and Executive Committee Chair may, but need not, be occupied by one person. In the event that different persons occupy the positions, then such persons shall be considered the two highest ranking officers of the State Committee. In the event that the same person occupies the positions, then the State Chair and the First Vice Chair shall be considered the two highest ranking officers of the State Committee.

(b) In electing officers in accord with Section 1(a) of this Article, the State Committee shall assure that the two highest-ranking officers of the State Committee are of the opposite gender; that the Vice Chairs are equally divided by gender; that the

Assistant Secretary and Assistant Treasurer are of the opposite gender from the Secretary and Treasurer, respectively; and that the officers, as a whole, reflect the diversity of the Democratic Party of New York State.

Section 2: Standing Committees.

(a) There shall be the following standing committees of the State Committee: Executive Committee, Finance Committee, Law Committee, Campaign Committee, Committee on Resolutions, and Policy Committee. At least two (2) members of the State Committee shall be a member of each standing committee.

(b) Except as otherwise herein provided, the State Chair shall appoint the chair and members of all standing committees.

(c) To the extent feasible, each standing committee shall have equal representation from both genders.

Section 3: Executive Committee

(a) The Executive Committee shall consist of the State Chair, the Executive Committee Chair, the First Vice Chair, the Vice-Chairs, the Executive Director, the Secretary, the Treasurer, the Chair of the Law Committee, the Chair of the Finance Committee, the Assistant Secretary, the Assistant Treasurer, the Sergeant-at-Arms, a Labor Representative appointed by the State Chair, the Co-Chairs of the Policy Committee, the President of the New York State Young Democrats, two (2) members from each of the thirteen (13) Judicial Districts in the State, one male and one female, to be elected at the organizational meeting by the State Committee members from each of such Judicial Districts, and eight (8) at-large members, four male and four female, to be elected by the entire membership of the State Committee upon nomination by the State Chair. For purposes of this provision:

- i. The representatives of the Judicial Districts shall be members of the State Committee, or Chairs, or Co-Chairs or Vice-Chairs of county Committees, or County Executive Committees, or officials of County Committees who occupy positions having similar duties and responsibilities.
- ii. Except in a Judicial District consisting of only one county, no more than one of the Judicial District representatives shall be from the same county. If one county has more than a majority of the members of the State Committee from a Judicial District, then the State Committee members from such county shall elect one (1) of the Executive Committee members, and the State Committee members from other counties of such Judicial District shall elect the other member of the Executive Committee.

(b) The Executive Committee Chair and Secretary of the State Committee shall be the Chair and the Secretary of the Executive Committee, respectively. Regular meetings of the Executive Committee shall be held at least twice each year on such days at such hours and places as the State Chair or Executive Committee Chair shall designate.

(c) Special meetings of the Executive Committee shall be held at the call of the Executive Committee Chair or upon written request of ten of the members of the Executive Committee addressed to the Executive Committee Chair or Secretary.

(d) The Secretary shall give written notice of regular meetings of the Executive Committee to each member of the Committee not less than seven (7) days prior to the date of each meeting. Special meetings of the Executive Committee held upon the call of the Executive Committee Chair shall be upon such written notice as the Chair may direct. Special meetings of the Executive Committee held upon the written request of ten (10) of the members shall take place within twenty (20) days after such request and upon at least seven (7) days prior written notice. For purposes of this Rule 3(e), the Executive Committee Chair shall accept facsimile signatures for any such written request.

(e) A member of the Executive Committee may authorize as his proxy only another member of the Executive Committee, but in no event shall a member of the Executive Committee hold more than one proxy.

(f) Fifteen (15) members of the Executive Committee present in person, shall constitute a quorum for the transaction of business. Less than a quorum may adjourn the meeting and notice of adjournment shall be given in the same manner as notice of meeting. Any meeting of the Executive Committee to which this section refers may be held by teleconferencing call, and a quorum may be satisfied by the presence of the requisite number of members on such a call.

(g) Except in matters which require the action of the State Committee under the provisions of the Election Law, or in matters otherwise specifically provided for in these Rules, the Executive Committee shall have power to act for the State Committee between meetings of the State Committee and any action of the Executive Committee may be overruled by the State Committee.

Section 4: Finance Committee

There shall be a Finance Committee which shall have the responsibility for raising funds for the State Committee.

Section 5: Law Committee

There shall be a Law Committee, chaired by the General Counsel of the State Committee, the members of which may include one representative from each Judicial District appointed by the State Chair.

Section 6: Campaign Committees

(a) There shall be a General Campaign Committee which shall have responsibility on a (year round) day-to-day basis for the planning, organization, and conduct of Statewide election campaigns and shall assist local and County Committees in their election campaigns. The chair of such committee shall be the State Chair of the New York State Committee and such chair shall appoint the treasurer and, other members of the committee.

(b) There shall be a Democratic Senate Campaign Committee which shall have responsibility on a day-to-day basis for the planning, organization, financing and conduct of election campaigns for the office of State Senator. The chair of such committee shall be the Democratic leader of the State Senate and such leader shall appoint the treasurer and other members of the committee.

(c) There shall be a Democratic Assembly Campaign Committee which shall have responsibility on a day-to-day basis for the planning, organization, financing and conduct of election campaigns for the office of Member of Assembly. The Chair of such committee shall be the Democratic leader of the State Assembly and such Leader shall appoint the treasurer and other members of the committee.

Section 7: Policy Committee.

There shall be a Policy Committee, the members of which shall be appointed jointly by the Co-Chairs of the Policy Committee and the State Chair.

Section 8: Committee on Resolutions.

There shall be a Committee on Resolutions which shall prepare, consider and report on all resolutions.

Section 9: Special Committees.

The State Chair shall have power to appoint from time to time such Special Committees as may be necessary or appropriate, including, but not limited to, on Civil Rights, Platforms and Education.

Section 10: Executive Director.

There shall be an Executive Director appointed by the State Chair, and such staff members as shall be appropriate on a full-time, year-round basis, for the administration of the State Committee and its affairs.

Section 11: Term of Office.

All officers elected under these Rules and members of the Executive Committee shall hold office during the term of the State Committee which elected them until their successors are elected. Officers may be removed by a vote of a majority of the members of the State Committee at any meeting where notice under Article IV of such business has been given.

Section 12: Filling of Vacancies.

(a) In case of the death, declination, disqualification, resignation, removal from district or removal from office of a member of the State Committee, or failure to elect a member, as by reason of a tie vote, the vacancy of such State Committee member caused thereby shall be filled by the remaining members of such State Committee by the selection of an enrolled voter of the Democratic Party qualified for election from the unit of representation as to which such vacancy shall have occurred.

(b) In the event of death, declination, disqualification, resignation, or removal from office of officer, such vacancy shall be filled by a vote of the members of the State Committee at the meeting where such vacancy shall occur or be reported, or at a subsequent meeting.

(c) If the office of Executive Committee Chair, First Vice-Chair, Vice-Chair, Treasurer, Assistant Treasurer, Secretary, Assistant Secretary or Sergeant-at-Arms, becomes vacant, for any reason, then the State Chair may fill such vacancy by appointment, and the person so appointed shall hold office until the vacancy shall be filled as provided in Section 12(b) of this Article. If the office of State Chair becomes vacant, for any reason, then the Executive Committee Chair shall become State Chair for all purposes under these Rules and under statute until the vacancy shall be filled as provided in Section 12(b) of this Article. If pursuant to Section 1(a) of this Article the State Chair and Executive Committee Chair are the same person, or if for any other reason the Executive Committee Chair is unable to become State Chair, then the First Vice Chair shall become State Chair for all purposes under these Rules and under statute until the vacancy shall be filled as provided in Section 12(b) of this Article.

Section 13: Holdover.

Until the meeting of the State Committee for organization, the officers of the outgoing Committees shall continue in office until the election of their respective successors.

ARTICLE IV.**MEETINGS OF THE STATE****COMMITTEE****Section 1: Regular Meetings.**

At least two (2) regular meetings of the State Committee shall be held each year, one (1) in the spring and one (1) in the fall, at such times and places as the State Chair may fix, but in the alternative locations downstate and upstate. At least 25 days prior to a regular meeting, the Secretary shall announce the date and location of such meeting via posting on the State Party website and an email or written announcement sent to each State Committee member. A written Notice of Meeting shall be given at 10 days prior to the date of such meeting and shall include the itemized meeting agenda.

Section 2: Special Meetings.

Special meetings of the State Committee may be called by the State Chair at any time on ten (10) days prior written notice. Special meetings shall also be called by the State Chair upon the written request of at least one-sixth of the State Committee members, which request shall state the purposes thereof. Meetings shall be held on the date designated in the request, provided such date is not less than ten (10) days following receipt of the request. The State Chair shall call the meeting and give at least ten (10) days prior written notice thereof.

Section 3: Quorum.

(a) Except as provided in Article II, Section 4 of these Rules, one hundred (100) members of the State Committee present in person or by proxy in conformity with these rules shall constitute a quorum for the transaction of business.

(b) Less than a quorum may adjourn the meeting and notice of adjournment shall be given in the same manner as notice of meeting.

Section 4: Proxies.

The use of proxies at meetings of the State Committee shall be limited as follows:

- (a) A proxy holder must be a resident of the same Judicial District as the State Committee members giving the proxy;
- (b) No individual may hold more than five (5) proxies at any meeting;
- and
- (c) Proxies shall be non-transferable.

Section 5: Order of Business

At all meetings of the State Committee, the following shall be the order of business unless the State Chair otherwise directs:

- Calling of the roll;
- Filling of vacancies;
- Reading and approval of minutes;
- Election of officers (at the organizational meeting or if otherwise necessary);
- Unfinished business;
- Reports of officers;
- Reports of committees; and
- New business

Section 6: Agenda

(a) There shall be included on the agenda of any meeting of the State Committee any item or resolution that shall have been requested in writing of the State Chair or the Secretary signed by ten (10) or more members of the State Committee at least fifteen (15) days prior to the date of such meeting. Any such resolution shall be sent with the Notice of Meeting required by Section 1 hereof. For purposes of this Rule 6(a), the State Committee shall accept facsimile signatures on any written request to place an item or resolution on the agenda.

(b) Other than matters involving amendments to these By-Laws and removal of officers, special provisions for which are herein otherwise provided, all other business may be brought to the floor at each duly constituted meeting of the State Committee upon motion duly seconded by two (2) members of the State Committee. A proposed resolution a written copy of which has not accompanied the Notice of Meeting may not be adopted by a vote of less than two-thirds (2/3) of the members attending in person or by proxy.

Section 7: Voting

The following method shall be used when there is voting by roll call:

(a) The roll shall be called by Assembly District starting with the 1st Assembly District and continuing in order to the 150th Assembly District.

(b) The member present or the proxy shall cast the vote allocated, at the time the district is called, or shall be recorded as "passed."

(c) Upon completion of the roll, the State Chair shall order the roll to be called once again in order of Assembly Districts for just those members or proxies who are recorded as passed or who were not present during the first call.

(d) Upon the conclusion of the Roll Call in "c" above, the balloting is closed for that Roll Call.

ARTICLE V.

DUTIES OF OFFICERS AND STATE COMMITTEE MEMBERS

1: General Duties.

(a) The State Chair, Executive Committee Chair, Secretary, Treasurer and other officers provided for in these rules shall perform the duties usually incident to their respective offices or as may be assigned to them.

(b) In addition to the duties, powers and functions prescribed by the Election Law and these Rules, it shall be the responsibility of members of the State Committee to disseminate, within their respective Assembly Districts, information with respect to State Committee policies and programs; for the purpose of effectuating such policies and programs.

Section 2: Duties of the State Chair

In addition to the duties usually incident to the office, the State Chair is empowered:

(a) to convene binding arbitration panels for consideration of intra-party disputes submitted by contending parties within the Party which are not capable of being settled in Primaries;

(b) to act, and be recognized as the top leader of the Democratic Party in New York State, and to serve as formal Chair of all state-wide election campaigns; and

(c) to challenge or expose the errors or inadequacies of any Republican officials of the State.

Section 3: Duties of the Vice-Chairs.

The Vice-Chairs shall have such duties and responsibilities as may be determined by the State Committee or the State Chair.

Section 4: Duties of the Treasurer

(a) The Treasurer shall cause to be conducted an annual written audited financial report, which report shall be filed in the office of the State Committee and shall be available for inspection at any time by any member thereof.

(b) Expenditures shall be made by order of and upon voucher signed by the State Chair or the Treasurer, or such persons as the State Chair or the Treasurer may designate in writing.

(c) The State Chair and the Treasurer may prepare an annual administrative budget to be submitted to the Executive Committee.

ARTICLE VI.**NOMINATIONS FOR PUBLIC OFFICE****Section 1: Nominations by the State Committee**

At a meeting of the State Committee for the designation of candidates for any office to be filled by the voters of the entire state, in voting for the designation of such candidates the State Committee members, in each Assembly District, shall cast in the aggregate a number of votes equal to the number of votes cast for the Party candidate for Governor on the Democratic line or column at the last preceding General State Election ("the last gubernatorial vote") in such Assembly District; and the vote to which each State Committee member in such Assembly District is entitled shall be as follows:

(a) In each Assembly District which comprises a whole county or is entirely within a county each State Committee member elected therefrom shall cast a number of votes equal to one-half of the last gubernatorial vote cast in such Assembly District.

(b) In each Assembly District which comprises two or more whole counties each of the State Committee members elected from such a county shall cast a number of votes equal to one-half of the last gubernatorial vote cast in such Assembly District.

(c) In each Assembly District which comprises one or more whole counties and one or more parts of counties, each of the State Committee members elected from such a whole county shall cast a number of votes equal to one-half of the last gubernatorial vote cast in such county and each of the State Committee members elected from such part of a

county shall cast a number of votes equal to one-half of the last gubernatorial vote cast in such part of the county.

(d) In each Assembly District which comprises only parts of two or more counties and no whole county or counties, each State Committee member elected from such a part of a county shall cast a number of votes equal to one-half of the last Democratic gubernatorial vote cast in such part of a county.

Section 2: Other Nominations

(a) Nominations for an office to be filled at a special election, nominations for election to fill a vacancy, or nominations to fill a vacancy in a nomination, shall be made:

- i. if for an office to be filled by the voters of the entire state, then by the State Committee;
- ii. if for a county office, then by the County Committee or, if the rules of the County Committee otherwise provide, then in such manner as the rules of the County Committee provide; and
- iii. if for an office in any other political subdivision of the State,
- iv. then by the district or party committee thereof, or if wholly within a county, then in such other manner as the rules of the County Committee shall provide.

(b) Unless the law or rules of the applicable committee otherwise provides, all voting for nominations shall be by weighted vote.

ARTICLE VII.

ETHICS CODE

Section 1: Statement of Principles

Public trust in party leadership is essential if the Democratic Party in New York State is to achieve continued success and deserve it. Rules of ethical guidance for the conduct of party leaders can help earn that public trust.

It is essential that party leadership not be used for private gain. It is also essential that the Democratic Party attract those citizens best qualified to serve, and not impede unreasonably or unnecessarily their recruitment and retention or unfairly deny to them the economic rights and opportunities available to all other citizens.

It is the intent of this Code of Ethics to implement these objectives of promoting both the integrity of the Democratic Party and the recruitment and retention of qualified

party leadership by prescribing restrictions against abuses of political position for private financial gain without creating unnecessary barriers to party service.

Section 2: Definitions.

"Code of Ethics "—The Democratic Party Code of Ethics, as set forth in this Article V and as may be amended from time to time.

"Committee "—The New York State Democratic Committee.

"Committee Ethics "—The State Committee Ethics Commission, as created pursuant to this Code of Ethics.

"Compensation"—Any money, thing of value or financial benefit conferred in return for services rendered or to be rendered. With regard to matters undertaken by a firm, corporation or association, Compensation shall mean net revenues, as applied in accordance with generally accepted accounting principles as applied by the State Ethics Commission.

"Legislative Body "—The New York State Assembly or Senate, any county or municipal legislative body or any board of estimate.

"Licensing"—Any State Agency or Local Agency activity, other than before the Division of Corporations and State Records in the Department of State, respecting the grant, denial, renewal, revocation, enforcement, suspension, annulment, withdrawal, recall, cancellation or amendment of a license, permit or other form of permission conferring the right or privilege to engage in (i) a profession, trade, or occupation or (ii) any business or activity regulated by a Regulatory Agency, which in the absence of such license, permit or other form of permission would be prohibited.

"Local Agency "—Any county, city, town, village, school district or district corporation, or any agency, department, division, board, commission or bureau thereof; and any public benefit corporation or public authority not included in the definition of State Agency.

*"Ministerial Matter "*An administrative act carried out in a prescribed manner not allowing for substantial personal discretion.

"Party Leader"—(i) Each Chair or acting Chair of the Committee, (ii) each officer serving the Committee in a full-time capacity and (iii) each managerial employee and professional employee performing duties of a policy-making nature and serving the Committee in a full-time capacity.

"Regulatory Agency "—The Banking Department, Insurance Department, State Liquor Authority, Department of Agriculture and Markets, Department of Education, Department of Environmental Conservation, Department of Health, Division of Housing and Community Renewal, Department of State (other than the Division of Corporations

and State Records), Department of Public Service, the Industrial Board of Appeals in the Department of Labor and the Department of Law.

"Representative"—The representation of the interests of a client or other person pursuant to an agreement, express or implied, for Compensation for services.

"State Agency"—Any state department, or division, board, commission, or bureau of any state department, any public benefit corporation, public authority or commission at least one of whose members is appointed by the Governor, or the State University of New York or the City University of New York, including all their constituent units except community colleges and the independent institutions operating statutory or contract colleges on behalf of the State. "State Ethics The Ethics Commission of the State Commission" of New York established pursuant to Section 94 of the Executive Law.

Section 3: State Committee Ethics Commission.

(a) Structure

- i. The Committee Ethics Commission shall consist of five enrolled Democrats, residing within the State of New York, serving terms of four years each (except that the first terms of two of the initial members shall be six years each) with no more than three terms expiring during the same year. No Party Leader, no more than one member of the Executive Committee of the Committee and no more than one officer of the Committee shall serve as a member of the Committee Ethics Commission. Committee Ethics Commission members shall be nominated by the State Chair and appointed with the approval of the Committee or its Executive Committee. The State Chair shall designate a Commission chair from among the Committee Ethics Commission members and act promptly to nominate persons to fill vacancies on the Committee Ethics Commission as they arise. The members of the Committee Ethics Commission may be removed by the State Chair for substantial neglect of duty, gross misconduct in office, inability to discharge the powers or duties of office or violation of this Code of Ethics, after written notice and opportunity for a reply. The Committee Ethics Commission may appoint a counsel to serve at its discretion and may employ other employees or consultants within the budget set by the Committee.
- ii. The Committee Ethics Commission shall be bound by this Code of Ethics in the administration of hearings and the rendering of decisions and shall maintain for public inspection all disclosures filed under Section 4 of this Code. The Committee Ethics Commission may establish rules for the Commission governing standing, jurisdiction and the right of appeal.

(b) Complaints

- i. Any enrolled Democrat (the "Complainant") may submit to the Committee Ethics Commission (privately and without any public release or announcement with respect thereto) a written complaint (a "Complaint") alleging a specific violation of the Code of Ethics by a Party Leader (the "Respondent").
 - ii. The Committee Ethics Commission may independently initiate a Complaint alleging a specific violation of the Code of Ethics by a Party Leader (the "Respondent").
- (c) Hearings
 - i. Upon receipt or initiation of a Complaint, the Committee Ethics Commission shall promptly give the Respondent a copy thereof.
 - ii. Within 15 days of receipt of the copy of such Complaint, the Respondent may submit a written response to the Committee Ethics Commission. Promptly thereafter (and in no case later than 30 days after the conclusion of such 15-day period), the Committee Ethics Commission may, in its discretion, dismiss the Complaint, issue a reprimand or admonition to the Respondent or schedule a hearing on the merits of the Complaint, except that if the Respondent, in his or her response, requests that a hearing be held, then the Committee Ethics Commission shall schedule such a hearing. The Committee Ethics Commission shall dismiss and take action to discourage unfounded or frivolous Complaints.
 - iii. If a hearing is to be held, then, at least 15 days prior to the date scheduled by the Committee Ethics Commission, the Complainant, if any, and Respondent shall each be notified of the time, date and place of such hearing.
 - iv. Hearings shall be private, unless the Respondent requests otherwise, but all reprimands, admonitions, penalties and other determinations adverse to the Respondent shall be made public by the Committee Ethics Commission.
 - v. In conducting a hearing, the Committee Ethics Commission may request written or oral testimony. The Respondent may present written or oral testimony on his or her behalf and will be entitled to have counsel present at such hearing.
 - vi. A quorum of at least four members of the Committee Ethics Commission shall be present at any hearing.
 - vii. A majority vote of all the members of the Committee Ethics Commission shall be required to make any determination with respect to a Respondent, including determinations made as a result of a hearing.
 - viii. If the Committee Ethics Commission has made an adverse determination with respect to a Respondent, and the vote for such determination was not unanimous, the Respondent may, within 30 days of such

determination, appeal such determination to the Committee or, at the Respondent's election, to its Executive Committee.

(d) Advisory Opinions

- i. The Committee Ethics Commission may, in its discretion, issue public or private advisory opinions with respect to questions of ethical conduct, conflicts of interest and other matters arising under this Code of Ethics. Records of all public advisory opinions shall be kept by the Committee Ethics Commission for consultation, as appropriate, by enrolled Democrats.
- ii. Any Party Leader may request in writing a public or private advisory opinion regarding conduct relating to his or her public or party responsibilities. Private advisory opinions shall be treated as confidential by the Committee Ethics Commission.

Section 4: Conflict of Interest.

(a) No Party Leader, no firm or association in which such Party Leader is a member and no corporation, ten percent or more of the stock of which is owned or controlled directly or indirectly by such Party Leader, during the Party Leader's tenure in office and for two years thereafter, shall:

- i. Receive, directly or indirectly, or enter into any agreement express or implied for, any Compensation, in whatever form, for the appearance or rendition of services (whether by such Party Leader, firm, association, corporation or another) (x) in relation to any resolution, bill or other matter before any Legislative Body or (y) in relation to any case, proceeding, application or other matter before any State Agency or Local Agency where such appearance or rendition of services before such State Agency or Local Agency is in connection with:
 - a. the purchase, sale, rental or lease of real property, goods or services, or a contract therefor, from, to or with any such Agency;
 - b. any proceeding relating to rate-making;
 - c. the adoption or repeal of any rule or regulation having the force and effect of law;
 - d. the obtaining of grants of money or loans;
 - e. Licensing; or
 - f. any proceeding relating to a franchise provided- for in the Public Service Law; *provided, however*, that:
 - (i) nothing contained in this Subsection 4(a)i. shall prohibit a Party Leader, firm, corporation or association from

appearing before a State Agency or a Local Agency in a Representative Capacity if such appearance in a Representative Capacity is in connection with a Ministerial Matter;

- (ii) a Party Leader who is a member, associate, retired
- (iii) member, of counsel to, or shareholder of any firm, association or corporation shall not be deemed to have made an appearance under the provisions of this Subsection 4(a)(i) solely by the submission to a State Agency or Local Agency of any printed material or document bearing his or her name, but unsigned by him or her, such as by limited illustrations the name of the firm, association or corporation or the letterhead of any stationery, which pro forma serves only as an indication that lie or she is a member, associate, retired member, of counsel to or shareholder;

- ii. Sell any goods or services having a value in excess of \$25 to any State Agency or Local Agency or contract for or provide such services with or to any private entity where the power to contract, appoint or retain on behalf of such private entity is exercised, directly or indirectly, by a State Agency or Local Agency or officer thereof, unless such goods or services are provided pursuant to an award or contract let after public notice and competitive bidding. This Subsection 4(a)(ii) shall not apply to the publication of resolutions, advertisements or other legal propositions or notices in newspapers designated pursuant to law for such purpose and for which the rates are fixed pursuant to law; or accept, directly or indirectly, for such Party Leader's personal gain, anything of value, whether in the form of a service, loan, gift, promise, or contribution to his or her campaign for party office in excess of \$100, from any person, firm, association, corporation or other entity which to his or her knowledge has a financial interest in the outcome of any pending Committee decision, contract, policy or appointment; *provided, however,* that nothing contained in this Section 4(a) shall be construed or applied to prohibit any such firm, association or corporation from appearing, practicing, communicating or otherwise rendering services in relation to any matter before, or transacting business with, any State Agency, Local Agency or Legislative Body, where such Party Leader does not share in the net revenues (as defined in accordance with generally accepted accounting principles as defined by the State Ethics Commission) resulting therefrom, or, acting in good faith, reasonably believed that lie or she would not share in the net revenues as so defined.

- (b) Notwithstanding and in addition to the foregoing provisions of Section 4(a):

- i. no Party Leader who is a member, associate, retired member, of counsel to or shareholder of any firm, association or corporation which is appearing or rendering services in connection with any case, proceeding, application or other matter listed in Subsection (4)(i) shall orally communicate, with or without Compensation, as to the merits of such cause with an officer or an employee of the Agency concerned with the matter; and
- ii. no Party Leader shall use or attempt to use his or her party position as a means of undue or improper influence to secure from any State Agency or Local Agency for him or herself or others with whom he or she has a family, employment or business or financial relationship any benefits, privileges or exemptions not generally available to members of the public.

Section 5: Dual Office-Holding

No Party Leader (and, with regard to subsection .5(d) only, no other officer or member of the Committee and no member of the Democratic National Committee elected by the Committee), during his or her tenure in such office, shall simultaneously:

- (a) hold any appointive office of a policy-making nature in the executive branch of either the federal or state government; or
- (b) hold or seek any state-wide elective public office; or
- (c) hold or seek any of the following offices: County Executive (or the equivalent chief executive office, by whatever title designated) of any county with population greater than 300,000 or of Albany County; Comptroller of any such county, if elective public office; or mayor or supervisor of any city or town with population greater than **300,000**; or
- (d) serve as a judge of any court of record, attorney general or deputy or assistant attorney general or solicitor general, district attorney or assistant district attorney.

Section 6: Financial Disclosure

Each Party Leader covered by Section 73—a of the Public Officers Law with respect to financial disclosure shall comply with the provisions thereof.

Section 7: Certification of Party Leaders

- (a) Promptly after a Party Leader's election or appointment to party office, the Committee Ethics Commission shall provide such Party Leader with a copy of this Code of Ethics together with such other material as the Committee Ethics

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INDEXNO. E2642101260Y

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RECEIVED NYSCEF: 05/02/2022

Commission may prepare related thereto. Within 10 days of receipt of the Code of Ethics, a Party Leader shall file with the Committee Ethics Commission a certificate in the form set forth 'below acknowledging receipt of the Code of Ethics and any other materials prepared by the Committee Ethics Commission related thereto, and that he or she has read the same and undertakes to conform to the provisions, purposes and intent thereof and to the nouns of conduct for leaders of the Democratic Party:

DEMOCRATIC PARTY OF THE STATE OF NEW YORK

Certificate of Party Leader

COUNTY OF
STATE OF NEW YORK

, having been duly sworn, hereby certify that I am currently an enrolled member of the Democratic Party; that I am qualified under the Constitution and laws of the State of New York and the Rules of the New York State Democratic Party to hold the party office to which I have been elected; that I acknowledge receipt of a copy of the Code of Ethics of the State Committee of the Democratic Party of the State of New York; that I have read the same and undertake to conform to the provisions, purposes and intent thereof and to the norms of conduct for leaders of the Democratic Party.

Sworn to and subscribed to
before me this day
of ,
2016 at
County, New
York.

Signature of
Notary Public

Section 8: Penalties

(a) The Committee Ethics Commission, within two weeks of its being notified or otherwise learning of the issuance, filing or serving of a complaint, information, indictment or other instrument charging a Party Leader with any criminal offense, shall, after notice to the Party Leader, hold a hearing as to whether such offense is of the type that, upon conviction thereof and pursuant to Section 8(b), the party office of such Party Leader would automatically become vacant, and, upon a determination that such crime or offense is of such type, such Party Leader shall automatically and immediately be suspended from party office pending final adjudication of his or her case.

(b) The party office of any Party Leader convicted in any state or federal court of a criminal offense that constitutes (or, had such offense occurred in New York, would have constituted) a felony under the laws of the State of New York shall automatically become vacant immediately upon such conviction.

(c) Pursuant to the procedures set forth in Section 3 above, a Party Leader may, in the Committee Ethics Commission's discretion, be reprimanded, admonished or suspended or removed from party office by a determination by the Committee Ethics Commission of a violation by such Party Leader of the Code of Ethics.

(d) A Party Leader who, pursuant to this Section 8, is removed from office for a violation of the Code of Ethics, or for conviction of a crime included in Section 8(b), may not hold party office for five years from the date of removal, or, if later and if such Party Leader was convicted of such a crime and sentenced to imprisonment, from the date of expiration of his or her maximum sentence of imprisonment or discharge from parole.

Section 9: Revision and Amendment.

The Committee Ethics Commission shall review the provisions of the Code of Ethics from time to time and recommend to the Committee such changes or additions as it may consider appropriate or desirable.

Section 10: Effective Date

The provisions of this Code of Ethics shall apply to a Party Leader effective January 1, 1989; *provided, however*, that (1) the provisions of Subsection 4(a)(i) shall not apply to the appearance or rendition of services before a State Agency or Local Agency where the Party Leader, firm, association or corporation subject to such provisions was substantially and actively involved in the case, proceeding, application or other matter, or transaction of business as of January 1, 1988 and substitution of new counsel would impose substantial hardship on the client and (2) nothing contained in Subsection 5(c) shall be applied to prohibit a Party Leader from simultaneously holding any of the public offices specified therein if such Party Leader holds such party office

and public office as of the date on which this Code of Ethics is adopted and continued to hold each such office for consecutive successive Lewis thereafter.

ARTICLE VIII

AMENDMENTS

These Rules may be amended from time to time by a majority of the members of the Committee present in person, or by proxy, at a meeting at which there is a quorum, provided a copy of the proposed amendment shall be sent with the notice of the meeting at which such amendment is to be proposed.

ARTICLE IX

MISCELLANEOUS

Section 1: Rules of Procedure

In all cases not provided for by law or by the Rules, the authority for parliamentary procedure for the State Committee and the Executive Committee shall be the latest edition of "Robert's Rules of Order," insofar as such rules of order may be appropriately applied.

Section 2: Minutes

Minutes of the meeting of the State Committee and the Executive Committee shall be recorded and sent to all members of these committees.

Section 3: Copy of Rules

A copy of these Rules shall be on file in the office of the State Committee and shall be made available on request to arty duly enrolled Democrat.

Section 4: Salary

The State Committee or the Executive Committee in its place may fix a . salary for the State Chair and other officers and employees of the State Committee in an amount as may be determined from time to time.

Section 5: Funds and Borrowing

(a) The funds of the State Committee shall be deposited from time to time in such financial institutions authorized to do business in the State of New York as may be determined by resolution of the State Committee or the Executive Committee, or by the certificate of the State Chair and the Treasurer of the State Committee and all withdrawals from any such bank accounts shall be by check or draft signed by the State Chair, the Treasurer, the Assistant Treasurer, or such other person as the State Chair may designate in writing.

(b) The State Chair and the Treasurer, jointly, are authorized and empowered to borrow from any financial institution authorized to do business in the State of New York, or from any partnership or individual, from time to time, as in their judgment may be deemed appropriate or necessary to the business and affairs of the State Committee, such sum or sums of money, upon such terms and for such periods of time as they may deem appropriate, for proper expenses in connection with the conduct of an election campaign (but not a primary campaign) or for the expenses of maintaining and carrying on the business of the State Committee between election campaigns; provided, however, that such authorization and power to borrow funds shall be subject to such restrictions as the State Committee or Executive Committee may from time to time determine. Any such borrowing shall be evidenced by the promissory note or notes or written evidence of indebtedness and obligation of the State Committee, signed by the State Chair and Treasurer. Money so borrowed by the State Chair and Treasurer, jointly, shall be deposited in the name of the State Committee. In the absence or unavailability of the Treasurer or Assistant Treasurer, the Secretary may perform any of the duties or functions hereinabove provided for in this subdivision (b) of Section 5 of Article VI.

Section 6: Indemnity

To the extent not prohibited by law, the Committee shall indemnify any person who is, was, or is threatened to be made a party in any proceeding, or is otherwise made subject to legal process or in need of legal representation, by reason of the fact that such person (or a person, of whom such person is a legal representative) is or was an officer or employee of the Committee, or arising out of any action or nonaction of such person in connection with the activities of the Committee, against all sums, fees, and expenses of any kind (including, but not limited to, judgments, amounts paid in settlement, and attorneys' fees and costs), except that such person shall not be indemnified if a final adjudication establishes either (1) that such person's actions were committed in bad faith or were the result of active and deliberate dishonesty, or (2) that such person gained a personal financial profit to which such person was not legally entitled. To the extent not prohibited by law, the Committee shall advance or reimburse any funds to any person entitled to an indemnity for the payment of such sums, fees, and expenses of any kind (including, but not limited to, judgments, amounts paid in settlement, and attorneys' fees and costs), and shall have the power to purchase and maintain insurance to indemnify itself for any obligation incurred as a result of this indemnification and to indemnify any officer or employee of the Committee in instances when such a person is entitled to an indemnification.

Section 7: Obligation of Candidates seeking or Holding Party or Public Office

All of those persons seeking or holding party or public office under the Democratic Party label or Democratic Party name, thereby undertake, while so serving or seeking to serve, not to oppose publicly the election of any Democratic nominee for the office in New York State.

Section 8: Historical Archives

The Rare Book & Manuscript Library of Columbia University in the City of New York is hereby designated as the repository for "The New York State Democratic Committee" which shall consist of documents, materials, correspondence, and other papers of interest to social and political scientists, including, but not limited to, the Committee's by-laws, lists of officers, executive and State Committee members, official minutes of meetings and proceedings of state conventions, county chairs, and other items which the State Chair shall from time to time, determine to be important original resources regarding the work of the Committee and the county chairs throughout the State of New York. After each state Committee meeting and/or convention, the Secretary is hereby directed to file the official minutes with the Library. At least once each year, the State Chair shall report to the State Committee what documents have been delivered to the Library.

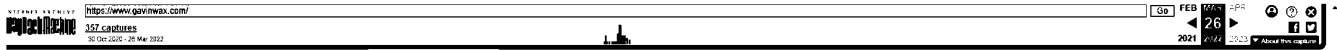
Exhibit Y to Salcedo Affirmation-
Screenshots of the website www.gavinwax.com
[pp. 769 - 770]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 56

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RECEIVED NYSCEF: 05/22/2022



Gavin Wax

Hi, I'm Gavin Wax. I am a New York-based conservative political commentator and columnist.

I am the 76th President of the New York Young Republican Club, Chairman of the New York Republican Liberty Caucus, Chairman of the Association of Young Republican Clubs, Digital Director of the Young Republican National Federation, Corresponding Secretary of the Association of New York State Young Republican Clubs, National Spokesman of Republicans for National Renewal, Ambassador for Turning Point USA, Associate Fellow at the London Center for Policy Research, and a Writing Fellow for America's Future Foundation.

I have appeared on Fox News, One America News, Bold TV, Newsmax, America Voice News, The First TV, and Compound Media.

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Gavin Wax

Gavin Mario Wax is a New York-based conservative political activist, commentator, and columnist.

Gavin serves as the 76th President of the New York Young Republican Club, the oldest and largest Young Republican club in the country. He was elected unanimously in April of 2019 and re-elected unanimously to a second term in December of 2020.

Gavin is also a Turning Point USA Ambassador, a Newsmax Insider, and the Corresponding Secretary of the Association of New York State Young Republican Clubs.

In 2020, Gavin was awarded the Republican Youth of the Year Award by the Queens Village Republican Club, the oldest Republican club in the country. In 2021, Gavin was recognized as a Rising Star by the Association of New York State Young Republican Clubs.

**Exhibit Z to Salcedo Affirmation-
Affidavit of Assemblyman Andrew Goodell, in Harkenrider I., sworn
to May 5, 2022
[pp. 771 - 773]**

FILED: NEWBENKCOONNYCCERRK08302220022011287PM

INDEXNO.E2622101260Y

NYSCEF DOC. NO. 495

RECEIVED NYSCEF: 05/02/2022

STATE OF NEW YORK
SUPREME COURT : 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
VOLANTE,

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.

**AFFIDAVIT OF
ASSEMBLYMAN
ANDREW GOODELL**

Index No.
E2022-0116CV

Assigned Justice:
Hon. Patrick F.
McAllister, A.J.S.C.

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

ANDREW GOODELL, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 150th Assembly District. My District includes all of Chautauqua County.

2. I was first elected to the Assembly in November 2010 and have served as a member of the Assembly ever since.

3. I am currently a member of several Assembly standing committees including Governmental Operations Committee.

4. I currently serve as Assembly Minority Leader Pro Tempore.

5. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

6. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

7. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

8. The Bill passed in the Assembly by a vote of 118 to 29.

9. I voted in favor of the Bill, as did 14 of my Republican colleagues: Representatives Angelino, Barclay, Brabenec, Fitzpatrick, Giglio, Hawley, Jensen, Lalor, Lemondes, Miller, Morinello, Norris, and Tague. Thus, the Bill was enacted with bipartisan support in the Assembly.

10. I voted in favor of the Bill because I believe the Assembly district maps contained therein to be fair.

FILED: NEWBENKCOUNTYCERRK053022022031257PM

INDEXNO. E2842101260Y

NYSCEF DOC. NO. 495

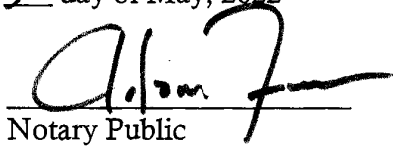
RECEIVED NYSCEF: 05/02/2022

11. When I voted for the Bill, I recognized the possibility that this lawsuit would be filed. I was and remain unaware of any intention for the lawsuit to challenge the Assembly map.

Dated: Albany, New York
May 5, 2022


Andrew Goodell

Sworn to before me this
5 day of May, 2022


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-20 23

**Exhibit AA to Salcedo Affirmation-
Affidavit of Gavin Wax, in Harkenrider I.,
sworn to July 15, 2022
[pp. 774 - 775]**

FILED: NEW YORK COUNTY CLERK 05/20/2022 03:13 PM

INDEXED NO. E2022-016CV

NYSCEF DOC. NO. 583

RECEIVED NYSCEF: 05/20/2022

**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,

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.: E2022-016CV

**AFFIDAVIT OF
GAVIN WAX**

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

I, 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 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.

3. I am a supporter of the Parent Party of New York (the "Parent Party"). I understand that two of the core issues promoted by the Parent Party of New York are school choice and supporting local law enforcement. I have always supported parents' right to choose where their children go to school. In addition, I oppose so-called "Defund the Police" efforts. Accordingly, I strongly support several of the core principles of the Parent Party.

4. The entire redistricting process and the ongoing litigation has interfered with the Parent Party's ability to circulate petitions which would (a) allow Parent Party candidates to get on the ballot and (b) enable the Parent Party to become a ballot access party in the State of New York. This dilutes the power of my vote based on my political beliefs and diminishes the effect of my political advocacy work.

5. I seek to intervene in this action so that my rights will be protected. I previously intervened in this action seeking the State Assembly map to be invalidated, but now, my current request for relief focuses only on the independent nominating petitioning process based on the Court's May 11, 2022 Ballot Access Order.

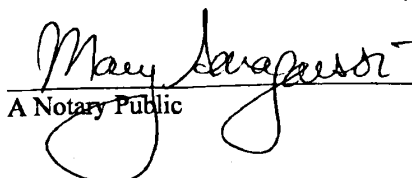


Gavin Wax

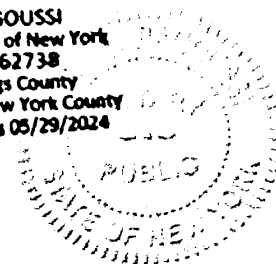
STATE OF NEW YORK
COUNTY OF NEW YORK

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 Assemblyman Joseph Angelino in Support of Motion
to Dismiss, sworn to May 20, 2022**

[pp. 776 - 778]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 59

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
JOSEPH ANGELINO**

Index No.
154213/2022

Respondents.

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

JOSEPH ANGELINO, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 122nd Assembly District. My District includes parts of Delaware, Broome,
Chenango, and Otsego Counties.

2. I was first elected to the Assembly in November 2020 and am currently
running for my second term.

3. I am currently the Ranking Minority Member on the Committee on Oversight, Analysis and Investigation and serve as member of several other Assembly standing committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

8. I voted in favor of the Bill, as did 14 of my Republican colleagues: Representatives Barclay, Brabenec, Fitzpatrick, Giglio, Goodell, Hawley, Jensen, Lalor, Lemondes, Miller, Morinello, Norris, and Tague. Thus, the Bill was enacted with bipartisan support in the Assembly.

9. I voted in favor of the Bill because I believe the Assembly district maps contained therein to be fair.

10. When I voted for the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

11. I make this affidavit in support of the respondents' Motion to

Dismiss.

Dated: Albany, New York
May 20, 2022


Joseph Angelino

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication technology


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

**Affidavit of Assemblyman William A. Barclay in Support of Motion
to Dismiss, sworn to May 19, 2022
[pp. 779 - 781]**

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 60

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
WILLIAM A.
BARCLAY**

Index No.
154213/2022

Respondents.

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

WILLIAM A. BARCLAY, being duly sworn, deposes and says:

1. I am a Republican member of the New York State Assembly,
representing the 120th Assembly District. My District includes parts of Oswego, Onondaga,
and Jefferson Counties.

2. I was first elected to the Assembly in November 2002 and have served
as Assemblyman ever since.

3. In January 2020, I was elected unanimously by my colleagues as the Leader of the Assembly Minority Conference, a position I still hold today.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

8. I voted in favor of the Bill, as did 14 of my Republican colleagues: Representatives Angelino, Brabenec, Fitzpatrick, Giglio, Goodell, Hawley, Jensen, Lalor, Lemondes, Miller, Morinello, Norris, Palmesano, and Tague. Thus, the Bill was enacted with bipartisan support in the Assembly.

9. I voted in favor of the Bill because I believe the Assembly map is fair. I do not believe it was drawn with the purpose of favoring or disfavoring incumbents or other particular candidates or political parties, or to discourage competition.

10. When I voted for the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

11. I make this affidavit in support of the respondents' Motion to Dismiss

Dated: Albany, New York
May 19, 2022

William A. Barclay
William A. Barclay

Sworn to before me this
19th day of May, 2022

This remote notarial act involved the use of communication technology

Adam Fusco
Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

**Affidavit of Assemblyman Karl Brabenec in Support of Motion to
Dismiss, sworn to May 20, 2022
[pp. 782 - 784]**

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 61

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
KARL BRABENEC**

Index No.
154213/2022

Respondents.

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

KARL BRABENEC, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 98th Assembly District. My District includes parts of Orange and
Rockland counties.

2. I was first elected to the Assembly in 2014 and have served as a
member of the Assembly ever since.

3. I currently serve as the Ranking Minority member on the Labor Committee and as a member of several other Assembly standing committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

8. I voted in favor of the Bill, as did 14 of my Republican colleagues: Representatives Angelino, Barclay, Fitzpatrick, Goodell, Giglio, Hawley, Jensen, Lalor, Lemondes, Miller, Morinello, Norris, and Tague. Thus, the Bill was enacted with bipartisan support in the Assembly.

9. I voted in favor of the Bill because I believe the Assembly district maps contained therein to be fair.

10. When I voted for the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

INDEX NO. 154213/2022

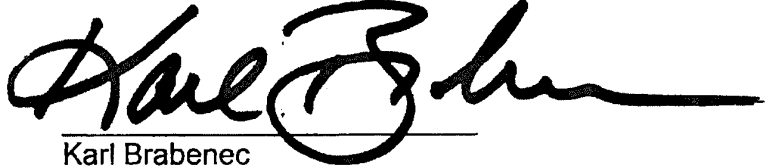
NYSCEF DOC. NO. 61

RECEIVED NYSCEF: 05/22/2022

11. I make this affidavit in support of the respondents' Motion to

Dismiss.

Dated: Albany, New York
May 20, 2022


Karl Brabenec

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication technology


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

**Affidavit of Assemblyman Eric "Ari" Brown in Support of Motion
to Dismiss, sworn to May 19, 2022**

[pp. 785 - 786]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 62

RECEIVED NYSCEF: 05/22/2022

STATE OF NEW YORK

SUPREME COURT IN 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,

AFFIDAVIT OF

ASSEMBLYMAN ERIC "ARI" BROWN

Index No.
154213/2022

Respondents,

STATE OF NEW YORK)

COUNTY OF ALBANY)

ERIC "ARI" BROWN, being duly sworn, deposes and

says:

1. I am a Minority member of the New York State Assembly, representing the 20th Assembly District. My District includes part of Nassau County, including the incorporated Village of Cedarhurst.

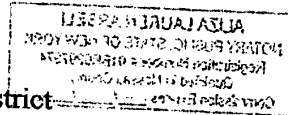
2. I was first elected to the Assembly in a special election in April 2022 and have served as a member of the Assembly ever since.

3. I am currently the Ranking Minority Member on the People with Disabilities Committee and serve as member of several other Assembly standing committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting



Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

8. When the Bill came up for a vote I was not yet a member of the Assembly.

9. Had I been a member of the Assembly I would have supported the Assembly district maps.

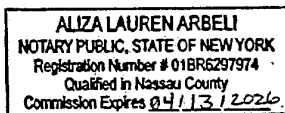
10. In any event, I believe the Assembly district maps contained in the Bill are fair.

11. Once elected to the Assembly, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge an Assembly map.

12. I make this affidavit in support of the respondents' Motion to Dismiss.

Dated: Albany, New York

May 19, 2022



Eric "Ari" Brown

Sworn to before me this

19th day of May, 2022

**Affidavit of Assemblyman Kevin B. Byrne in Support of Motion
to Dismiss, sworn to May 20, 2022
[pp. 787 - 789]**

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 63

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
KEVIN M. BYRNE**

Index No.
154213/2022

Respondents.

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

KEVIN M. BYRNE, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 94th Assembly District. My District includes portions of Putnam and
Westchester counties.

2. I was first elected to the Assembly in November 2016 and have served
as a member of the Assembly ever since.

3. I am currently the Ranking Minority Member on the Health Committee and serve as a member on several other Assembly standing committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

8. I voted against the Bill, as did 28 of my Republican colleagues. While I voted against the bill; I did so due to concerns regarding the redistricting process.

9. Nonetheless, I believe the Assembly district maps contained therein to be fair.

10. When I voted on the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

11. I make this affidavit in support of the respondents' Motion to
Dismiss.

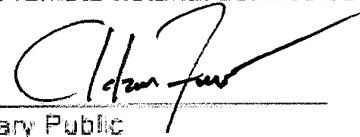
Dated Albany, New York
May 20, 2022



Kevin M. Byrne

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication technology



Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

**Affidavit of Assemblyman Michael J. Fitzpatrick in Support of
Motion to Dismiss, sworn to May 20, 2022
[pp. 790 - 792]**

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 64

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
MICHAEL J.
FITZPATRICK**

Index No.
154213/2022

Respondents.

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

MICHAEL J. FITZPATRICK, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 8th Assembly District. My District includes parts of Suffolk County.
2. I was first elected to the Assembly in November 2002 and have been a
member of the Assembly ever since.

3. I am currently the Ranking Minority Member on the Housing Committee and serve as member of several other Assembly standing committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

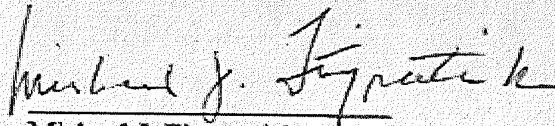
8. I voted in favor of the Bill, as did 14 of my Republican colleagues: Representatives Angelino, Barclay, Brabenec, Giglio, Goodell, Hawley, Jensen, Lalor, Lemondes, Miller, Morinello, Norris, and Tague. Thus, the Bill was enacted with bipartisan support in the Assembly.

9. I voted in favor of the Bill because I believe the Assembly district maps contained therein to be fair.

10. I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

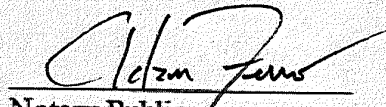
11. I make this affidavit in support of the respondents' Motion to Dismiss.

Dated: Albany, New York
May 20, 2022


Michael J. Fitzpatrick

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication technology


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

**Affidavit of Assemblyman Jarett Gandolfo in Support of Motion
to Dismiss, sworn to May 20, 2022**

[pp. 793 - 794]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 65

RECEIVED NYSCEF: 05/22/2022

STATE OF NEW YORK
SUPREME COURT : 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,

**AFFIDAVIT OF
ASSEMBLYMAN
JARETT GANDOLFO**

Index No.
154213/2022

Respondents.

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

JARETT GANDOLFO, being duly sworn, deposes
and says:

1. I am a Minority member of the New York State
Assembly, representing the 7th Assembly District. My District
includes portions of Suffolk County.

2. I was first elected to the Assembly in November
2020 and have served as a member of the Assembly ever since.

3. I am currently the Ranking Minority Member on the
Mental Health Committee and serve as a member on several
other Assembly standing committees.

4. I make this affidavit based on my personal
knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting
Commission announced it would not submit a second set of
proposed legislative-district maps, despite its constitutional

obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

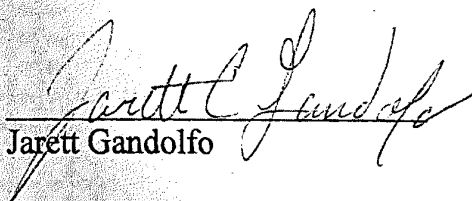
8. I voted against the Bill, as did 28 of my Republican colleagues. While I voted against the bill; I did so due to concerns regarding the redistricting process.

9. Nonetheless, I believe the Assembly district maps contained therein to be fair.

10. When I voted on the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

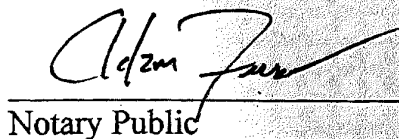
11. I make this affidavit in support of the respondents' Motion to Dismiss.

Dated: Albany, New York
May 20, 2022


Jarrett Gandolfo

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication technology


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

**Affidavit of Assemblyman Joseph M. Giglio in Support of Motion
to Dismiss, sworn to May 20, 2022**

[pp. 795 - 796]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 66

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
JOSEPH M. GIGLIO**

Index No.
154213/2022

Respondents.

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

JOSEPH M. GIGLIO, being duly sworn, deposes and
says:

1. I am a Minority member of the New York State
Assembly, representing the 148th Assembly District. My
District includes all of Cattaraugus and Allegany counties, and
parts of Steuben County.

2. I was first elected to the Assembly in 2013 and have
served as a member of the Assembly ever since.

3. I currently serve as the Ranking Minority member
on the Corrections Committee and as a member of several
Assembly standing committees.

4. I make this affidavit based on my personal
knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting
Commission announced it would not submit a second set of
proposed legislative-district maps, despite its constitutional
obligation to do so.

6. In response, on February 3, 2022, the Assembly

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RECEIVED NYSCEF: 05/22/2022

passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

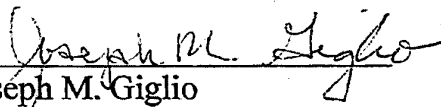
8. I voted in favor of the Bill, as did 14 of my Republican colleagues: Representatives Angelino, Barclay, Brabenec, Fitzpatrick, Goodell, Hawley, Jensen, Lalor, Lemondes, Miller, Morinello, Norris, and Tague. Thus, the Bill was enacted with bipartisan support in the Assembly.

9. I voted in favor of the Bill because I believe the Assembly district maps contained therein to be fair.

10. When I voted for the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

11. I make this affidavit in support of the respondents' Motion to Dismiss.

Dated: Albany, New York
May 20, 2022


Joseph M. Giglio

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication technology


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

**Affidavit of Assemblyman Stephen Hawley in Support of Motion
to Dismiss, sworn to May 20, 2022**

[pp. 797 - 799]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 67

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
STEPHEN HAWLEY**

Index No.
154213/2022

Respondents.

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

STEPHEN HAWLEY, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 139th Assembly District. My District includes all of Genesee and parts of
Monroe and Orleans counties.

2. I was first elected to the Assembly in February 2006 and have served
as a member of the Assembly ever since.

3. I currently serve as member of several Assembly standing committees including the Ways and Means Committee.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

8. I voted in favor of the Bill, as did 14 of my Republican colleagues: Representatives Angelino, Barclay, Brabenec, Fitzpatrick, Giglio, Goodell, Jensen, Lalor, Lemondes, Miller, Morinello, Norris, and Tague. Thus, the Bill was enacted with bipartisan support in the Assembly.

9. I voted in favor of the Bill because I believe the Assembly district maps contained therein to be fair.

10. When I voted for the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

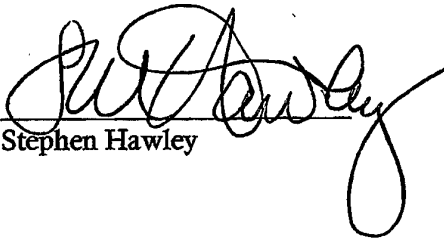
INDEX NO. 154213/2022

NYSCEF DOC. NO. 67

RECEIVED NYSCEF: 05/22/2022

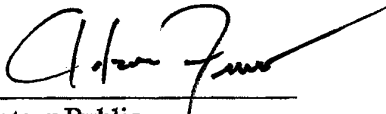
11. I make this affidavit in support of the respondents' Motion to Dismiss.

Dated: Albany, New York
May 20, 2022


Stephen Hawley

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication technology


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

**Affidavit of Assemblyman Joshua Jensen in Support of Motion to
Dismiss, sworn to May 20, 2022
[pp. 800 - 802]**

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 68

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
JOSHUA JENSEN**

Index No.
154213/2022

Respondents.

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

JOSHUA JENSEN, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 134th Assembly District. My District includes parts of Monroe County.
2. I was first elected to the Assembly in 2020 and have served as a
member of the Assembly ever since.

3. I currently serve as the Ranking Minority member on the Libraries and Education Technology Committee and as a member of several Assembly standing committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

8. I voted in favor of the Bill, as did 14 of my Republican colleagues: Representatives Angelino, Barclay, Brabenec, Fitzpatrick, Goodell, Giglio, Hawley, Lalor, Lemondes, Miller, Morinello, Norris, and Tague. Thus, the Bill was enacted with bipartisan support in the Assembly.

9. I voted in favor of the Bill because I believe the Assembly district maps contained therein to be fair.

10. When I voted for the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

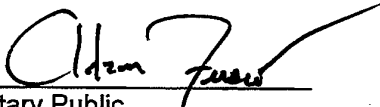
11. I make this affidavit in support of the respondents' Motion to Dismiss.

Dated: Albany, New York
May 20, 2022


Joshua Jensen

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication technology


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

**Affidavit of Assemblyman John Lemondes in Support of Motion to
Dismiss, sworn to May 22, 2022
[pp. 803 - 805]**

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 69

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RECEIVED NYSCEF: 05/22/2022

STATE OF NEW YORK
SUPREME COURT : 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,

**AFFIDAVIT OF
ASSEMBLYMAN
JOHN LEMONDES**

Index No.
154213/2022

Respondents.

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

JOHN LEMONDES, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 126th Assembly District. My District includes parts of Cayuga, Chenango,
Cortland, and Onondaga counties.

2. I was first elected to the Assembly in 2020 and have served as a
member of the Assembly ever since.

3. I currently serve as the Ranking Minority member on the Corporations Committee and as a member of several Assembly standing committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.


8. I voted in favor of the Bill, as did 14 of my Republican colleagues: Representatives Angelino, Barclay, Brabenec, Fitzpatrick, Goodell, Giglio, Hawley, Jensen, Lalor, Miller, Morinello, Norris, and Tague. Thus, the Bill was enacted with bipartisan support in the Assembly.

9. I voted in favor of the Bill because I believe the Assembly district maps contained therein to be fair.

10. I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

11. I make this affidavit in support of the respondents' Motion to
Dismiss.

Dated: Albany, New York
May 22, 2022


John Lemondes

Sworn to before me this
22nd day of May, 2022

This remote notarial act involved the use of communication technology


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

**Affidavit of Assemblyman Brian Manktelow in Support of Motion
to Dismiss, sworn to May 20, 2022**

[pp. 806 - 808]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 70

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
BRIAN MANKTELOW**

Index No.
154213/2022

Respondents.

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

BRIAN MANKTELOW, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 130th Assembly District. My District includes all of Wayne County and
parts of Oswego County and Cayuga County.

2. I was first elected to the Assembly in November 2018 and have served
as a member of the Assembly ever since.

3. I am currently serving as a member on several Assembly standing committees including the Local Governments and Small Business Committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

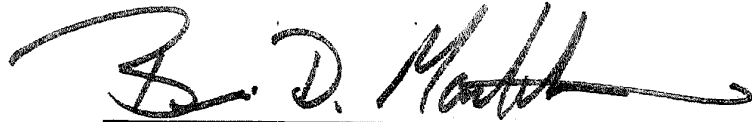
8. I voted against the Bill, as did 28 of my Republican colleagues. While I voted against the bill; I did so due to concerns regarding the redistricting process.

9. Nonetheless, I believe the Assembly district maps contained therein to be fair.

10. When I voted on the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

11. I make this affidavit in support of the respondents' Motion to Dismiss.

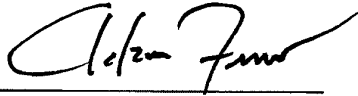
Dated: Albany, New York
May 20, 2022



Brian Manktelow

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication technology



Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

**Affidavit of Assemblyman John K. Mikulin in Support of Motion
to Dismiss, sworn to May 20, 2022
[pp. 809 - 811]**

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 71

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
JOHN K. MIKULIN**

Index No.
154213/2022

Respondents.

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

JOHN K. MIKULIN, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 17th Assembly District. My District includes parts of Nassau County.
2. I was first elected to the Assembly in November 2018 and have served
as a member of the Assembly ever since.

3. I am currently the Ranking Minority Member on the Consumer Affairs Committee and a member on several other Assembly standing committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

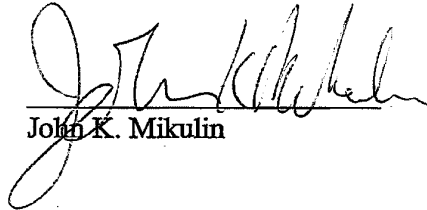
8. I voted against the Bill, as did 28 of my Republican colleagues. While I voted against the bill; I did so due to concerns regarding the redistricting process.

9. Nonetheless, I believe the Assembly district maps contained therein to be fair.

10. When I voted on the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

11. I make this affidavit in support of the respondents' Motion to Dismiss.

Dated: Albany, New York
May 20, 2022



John K. Mikulin

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication technology



Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

**Affidavit of Assemblyman Brian D. Miller in Support of Motion
to Dismiss, sworn to May 20, 2022**

[pp. 812 - 814]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

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NYSCEF DOC. NO. 72

RECEIVED NYSCEF: 05/22/2022

STATE OF NEW YORK
SUPREME COURT : 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,

**AFFIDAVIT OF
ASSEMBLYMAN
BRIAN D. MILLER**

Index No.
154213/2022

Respondents.

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

BRIAN D. MILLER, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 101st Assembly District. My District includes parts of Oneida, Herkimer,
Otsego, Delaware, Ulster, Sullivan, and Orange counties.

2. I was first elected to the Assembly in 2016 and have served as a
member of the Assembly ever since.

3. I currently serve as the Ranking Minority member on the Real Property Tax Committee and as a member of several Assembly standing committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

8. I voted in favor of the Bill, as did 14 of my Republican colleagues: Representatives Angelino, Barclay, Brabenec, Fitzpatrick, Goodell, Giglio, Hawley, Jensen, Lalor, Lemondes, Morinello, Norris, and Tague. Thus, the Bill was enacted with bipartisan support in the Assembly.

9. I voted in favor of the Bill because I believe the Assembly district maps contained therein to be fair.

10. When I voted for the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM


INDEX NO. 154213/2022

NYSCEF DOC. NO. 72

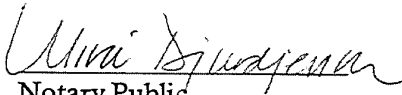
RECEIVED NYSCEF: 05/22/2022

11. I make this affidavit in support of the respondents' Motion to Dismiss

Dated: Albany, New York
May 20, 2022


Brian D. Miller

Sworn to before me this
20th day of May, 2022


Notary Public

MIRA DJURDEVICH
Notary Public, State of New York
Otsego County Reg. No. 01DJ5000618
Commission Expires Aug. 17, 2022

**Affidavit of Assemblyman Angelo J. Morinello in Support of Motion
to Dismiss, sworn to May 20, 2022
[pp. 815 - 817]**

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 73

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
ANGELO J.
MORINELLO**

Index No.
154213/2022

Respondents.

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

ANGELO J. MORINELLO, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 145th Assembly District. My District includes parts of Niagara and Erie
counties.
2. I was first elected to the Assembly in November 2016 and re-elected in
2018 and again in 2020.

3. I am currently the Ranking Minority Member Codes Committee and serve as member of several other Assembly standing committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

8. I voted in favor of the Bill, as did 14 of my Republican colleagues: Representatives Angelino, Barclay, Brabenec, Fitzpatrick, Giglio, Goodell, Hawley, Jensen, Lalor, Lemondes, Miller, Norris, and Tague. Thus, the Bill was enacted with bipartisan support in the Assembly.

9. I voted in favor of the Bill because I believe the Assembly district maps contained therein to be fair.

10. When I voted for the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

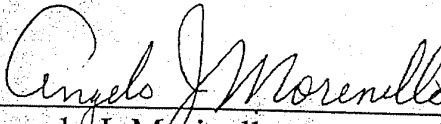
INDEX NO. 154213/2022

NYSCEF DOC NO. 73

RECEIVED NYSCEF: 05/22/2022

I make this affidavit in support of the respondents.
Motion to Dismiss.

Dated: Albany, New York
May 20th, 2022


Angelo J. Morinello

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication
technology


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

**Affidavit of Assemblyman Michael J. Norris in Support of Motion
to Dismiss, sworn to May 20, 2022
[pp. 818 - 820]**

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 74

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
MICHAEL J. NORRIS**

Index No.
154213/2022

Respondents.

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

MICHAEL J. NORRIS, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 144th Assembly District. My District includes parts of Niagara, Erie, and
Orleans counties.

2. I was first elected to the Assembly in November 2016 and re-elected in
2018 and again in 2020.

3. I am currently the Chairman of the Minority Conference and the Ranking Minority Member on the Election Law Committee and serve as member of several other Assembly standing committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

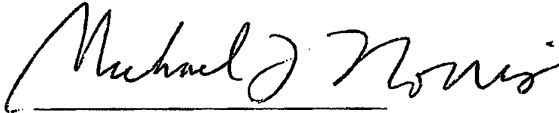
8. I voted in favor of the Bill, as did 14 of my Republican colleagues: Representatives Angelino, Barclay, Brabenec, Fitzpatrick, Giglio, Goodell, Hawley, Jensen, Lalor, Lemondes, Miller, Morinello, and Tague. Thus, the Bill was enacted with bipartisan support in the Assembly.

9. I voted in favor of the Bill because I believe the Assembly district maps contained therein to be fair.

10. When I voted for the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

11. I make this affidavit in support of the respondents' Motion to Dismiss.

Dated: Albany, New York
May 20, 2022


Michael Norris

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication technology


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-20 **23**

**Affidavit of Assemblyman Philip A. Palmesano in Support of Motion
to Dismiss, sworn to May 19, 2022
[pp. 821 - 823]**

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 75

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
PHILIP A.
PALMESANO**

Index No.
154213/2022

Respondents.

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

PHILIP A. PALMESANO, being duly sworn, deposes and says:

1. I am a Republican member of the New York State Assembly,
representing the 132nd Assembly District. My District includes parts of Steuben, Chemung,
and Seneca Counties, as well as all of Schuyler and Yates Counties.

2. I was first elected to the Assembly in November 2010 and was re-
elected to my sixth term in 2020.

3. In 2020, I was appointed Assistant Minority Leader, and I currently
serve on multiple committees.

4. I am also a member of the New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR"). LATFOR, which consists of six members, aids the Legislature by providing technical plans for meeting the requirements of legislative timetables for the reapportionment of Senate, Assembly, and congressional districts.

5. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

6. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

7. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

8. The Bill passed in the Assembly by a vote of 118 to 29.

9. I voted in favor of the Bill, as did 14 of my Republican colleagues: Representatives Angelino, Barclay, Brabenec, Fitzpatrick, Giglio, Goodell, Hawley, Jensen, Lalor, Lemondes, Miller, Morinello, Norris, and Tague. Thus, the Bill was enacted with bipartisan support in the Assembly.

10. I voted in favor of the Bill because I believe the Assembly map is fair. I do not believe it was drawn with the purpose of favoring or disfavoring incumbents or other particular candidates or political parties, or to discourage competition.

11. I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

12. I make this affidavit in support of the respondents' Motion to Dismiss.

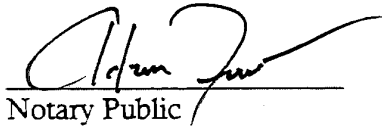
Dated: Albany, New York
May 19, 2022



Philip A. Palmesano

Sworn to before me this
19th day of May, 2022

This remote notarial act involved the use of communication technology


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-20 **23**

Affidavit of Edward P. RA, sworn to May 20, 2022

[pp. 824 - 825]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 76

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.

-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.

AFFIDAVIT OF
ASSEMBLYMAN
EDWARD P. RA

Index No.
154213/2022

Respondents.

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

EDWARD P. RA, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly, representing the 19th Assembly District. My District includes parts of Nassau County.

2. I was first elected to the Assembly in November 2010 and have served as a member of the Assembly ever since.

3. I am currently the Ranking Minority Member on the Ways and Means Committee and a member on several other Assembly standing committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of

proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

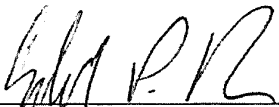
8. I voted against the Bill, as did 28 of my Republican colleagues. While I voted against the bill; I did so due to concerns regarding the redistricting process.

9. Nonetheless, I believe the Assembly district maps contained therein to be fair.

10. When I voted on the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

11. I make this affidavit in support of the respondents' Motion to Dismiss.

Dated: Albany, New York
May 20, 2022



Edward P. Ra

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication technology



Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

Affidavit of Assemblyman Doug Smith, sworn to May 20, 2022
[pp. 826 - 828]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 77

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,

-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,

**AFFIDAVIT OF
 ASSEMBLYMAN
 DOUG SMITH**

Index No.
 154213/2022

Respondents.

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

DOUG SMITH, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
 representing the 5th Assembly District. My District spans the townships of Brookhaven, Islip,
 and includes Holbrook, Holtsville, Ronkonkoma, Lake Ronkonkoma, Lake Grove, Centereach,
 Selden, and Farmingville, Islandia, North Patchogue, and Stony Brook.

2. I was first elected to the Assembly in April 2018 and have served as a
 member of the Assembly ever since.

3. I am currently the Ranking Minority Member on the Education Committee and serve as a member on several other Assembly standing committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

8. I voted against the Bill, as did 28 of my Republican colleagues. While I voted against the bill; I did so due to concerns regarding the redistricting process.

9. Nonetheless, I believe the Assembly district maps contained therein to be fair.

10. When I voted on the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

10. When I voted on the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

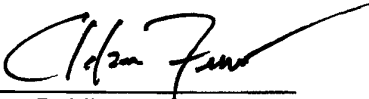
11. I make this affidavit in support of the respondents' Motion to Dismiss.

Dated: Albany, New York
May 20, 2022


Doug Smith

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication technology


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

Affidavit of Assemblyman Robert Smullen, sworn to May 20, 2022

[pp. 829 - 831]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 78

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
ROBERT SMULLEN**

Index No.
154213/2022

Respondents.

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

ROBERT SMULLEN, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 118th Assembly District. My District includes all of Fulton and Hamilton
counties and parts of Herkimer, Oneida, and St. Lawrence counties.

2. I was first elected to the Assembly in November 2018 and have served
as a member of the Assembly ever since.

3. I am currently the Ranking Minority Member on the Environmental Conservation Committee and a member on several other Assembly standing committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

8. I voted against the Bill, as did 28 of my Republican colleagues. While I voted against the bill; I did so due to concerns regarding the redistricting process.

9. Nonetheless, I believe the Assembly district maps contained therein to be fair.

10. When I voted on the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

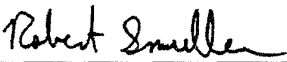
NYSCEF DOC. NO. 78

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/22/2022

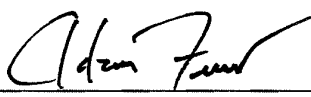
11. I make this affidavit in support of the respondents' Motion to Dismiss.

Dated: Albany, New York
May 20, 2022


Robert Smullen

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication technology


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-20**23**

**Affidavit of Assemblyman Christopher Tague, sworn to May 20,
2022**

[pp. 832 - 834]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 79

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
CHRISTOPHER
TAGUE**

Index No.
154213/2022

Respondents.

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

CHRISTOPHER TAGUE, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 102nd Assembly District. My District includes Greene and Schoharie
counties and parts of Delaware, Columbia, Albany, Otsego, and Ulster counties.

2. I was first elected to the Assembly in April 2018 and re-elected to a full
term in November 2018 and have served as a member of the Assembly ever since.

3. I am currently the Ranking Minority Member on the Agriculture Committee and serve as member of several other Assembly standing committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

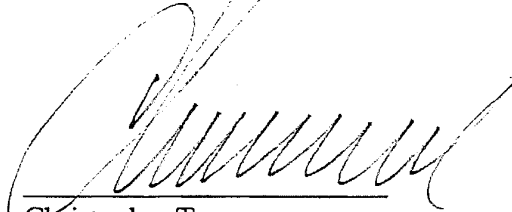
8. I voted in favor of the Bill, as did 14 of my Republican colleagues: Representatives Angelino, Barclay, Brabenec, Fitzpatrick, Giglio, Goodell, Hawley, Jensen, Lalor, Lemondes, Miller, Morinello, and Norris. Thus, the Bill was enacted with bipartisan support in the Assembly.

9. I voted in favor of the Bill because I believe the Assembly district maps contained therein to be fair.

10. When I voted for the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

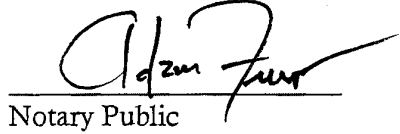
11. I make this affidavit in support of the respondents' Motion to Dismiss.

Dated: Albany, New York
May 20, 2022


Christopher Tague

Sworn to before me this
20 day of May, 2022

This remote notarial act involved the use of communication technology


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

**Affidavit of Assemblyman Mary Beth Walsh,<
sworn to May 20, 2022**

[pp. 835 - 837]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

NYSCEF DOC. NO. 80

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,

-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,

**AFFIDAVIT OF
ASSEMBLYMAN
MARY BETH WALSH**

Index No.
154213/2022

Respondents.

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

MARY BETH WALSH, being duly sworn, deposes and says:

1. I am a Minority member of the New York State Assembly,
representing the 112th Assembly District. My District includes parts of Saratoga and
Schenectady counties.

2. I was first elected to the Assembly in November 2016 and have served
as a member of the Assembly ever since.

3. I currently serve as a member on several Assembly standing committees including the Education and Judiciary Committees.

4. I make this affidavit based on my personal knowledge.

Bipartisan Enactment of the Assembly Map

5. On January 24, 2022, the Independent Redistricting Commission announced it would not submit a second set of proposed legislative-district maps, despite its constitutional obligation to do so.

6. In response, on February 3, 2022, the Assembly passed Bill Number A09040A (the "Bill"), which established the Assembly and State Senate district maps for the 2022 and subsequent elections.

7. The Bill passed in the Assembly by a vote of 118 to 29.

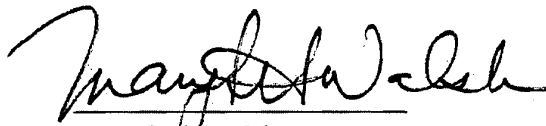
8. I voted against the Bill, as did 28 of my Republican colleagues. While I voted against the bill; I did so due to concerns regarding the redistricting process.

9. Nonetheless, I believe the Assembly district maps contained therein to be fair.

10. When I voted on the Bill, I recognized the possibility that a lawsuit would be filed challenging the Senate and Congressional maps. I was unaware of any intention for a lawsuit to challenge the Assembly map.

11. I make this affidavit in support of the respondents' Motion to Dismiss.

Dated: Albany, New York
May 20, 2022


Mary Beth Walsh

Sworn to before me this
20th day of May, 2022

This remote notarial act involved the use of communication technology


Notary Public

Adam Fusco, Esq.
NOTARY PUBLIC, State of New York
Qualified in Fulton County
No. 02FU6325525
MCE 5-26-2023

**Respondent Speaker of the Assembly Carl Heastie's Memorandum
of Law in Support of Motion to Dismiss, dated May 22, 2022**

[pp. 838 - 866]

FILED: NEW YORK COUNTY CLERK 05/22/2022 11:07 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 81

RECEIVED NYSCEF: 05/22/2022

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NEW YORK

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG,

Petitioners,

Index No. 154213/2022

v.

Assigned Justice:
Hon. Laurence L. Love

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 SUPPORT OF SPEAKER HEASTIE'S
MOTION TO DISMISS**

Respectfully submitted,

GRAUBARD MILLER
The Chrysler Building
405 Lexington Avenue, 11th Floor
New York, New York 10174
Telephone No. (212) 818-8800

C. Daniel Chill
Elaine M. Reich
-- Of Counsel --

PHILLIPS LYTLE LLP
One Canalside, 125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-8400

Craig R. Bucki
Steven B. Salcedo
Rebecca A. Valentine
-- Of Counsel --

Attorneys for Respondent Speaker of the Assembly Carl Heastie

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Respondent Carl Heastie, Speaker of the New York State Assembly (the “Speaker”), respectfully submits this memorandum of law in support of his motion to dismiss the Petition (Dkt. No. 1).¹

PRELIMINARY STATEMENT

This is Petitioners’ second attempt to invalidate the Assembly district map enacted by the Legislature in February 2022. The first time, a few weeks ago, they tried to intervene in the nearly concluded lawsuit that challenged the Congressional and State Senate maps. Steuben County Supreme Court denied that motion as untimely, correctly recognizing two undeniable facts: Petitioners should have brought their challenge in February, not May; and to grant the relief Petitioners seek would throw the 2022 elections into “total confusion.”

Rather than appeal that decision, Petitioners decided to try again in a different venue. They ask this Court to do what Steuben County Supreme Court refused to do: sustain an egregiously late challenge to the Assembly map; invalidate thousands of candidacies (or, at a minimum, require candidates to run in districts other than those where they originally planned to run, and to face new primary challenges); erase candidates’ and Boards of Elections’ months of preparation for the June primaries; push those primaries to August (or even September); and force the State’s election infrastructure to start from scratch on an impossibly compressed timeline. This Court should decline the invitation.

Petitioners insist election integrity compels a ruling in their favor. But if they truly cared about election integrity, rather than personal gain and media attention, they

¹ “Dkt. No.” and any associated page citations refer to the document and page numbers assigned by NYSCEF in this proceeding.

would have challenged the Assembly map shortly after its enactment. Instead, while the election cycle continued as required by law, Petitioners watched and waited. Now, at the eleventh hour, they bring a purely procedural challenge to a map that no one has accused of substantive unfairness, and that the Legislature enacted with bipartisan support. In fact, 23 Assembly Republicans — including eight who voted *against* the Assembly map for procedural reasons — have submitted affidavits attesting that the map is fair.

Election integrity compels a ruling for Respondents, not Petitioners. The only way to ensure orderly, secure elections for 2022 is to leave the Assembly map in place, to leave the election calendar undisturbed, and to dismiss this proceeding.

STATEMENT OF FACTS

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

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 (Salcedo Aff. Ex. B).² Then, on February 8, the *Harkenrider* Petitioners filed an amended petition adding a challenge to the State Senate map (Salcedo Aff. Ex. D). The amended petition affirmatively disavowed any challenge to the Assembly map (*id.* ¶ 10 nn. 6-7).

² “Salcedo Aff.” refers to the affirmation of Steven B. Salcedo, Esq., dated May 22, 2022.

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 (Salcedo Aff. Ex. D ¶¶ 121-212). 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.* ¶¶ 234-245).

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 (Salcedo Aff. Ex. E at 18). *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*, Index. No. CAE 22-00506, 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” (Salcedo Aff. Ex. F ¶ 6). The Fourth Department denied the motion (Salcedo Aff. Ex. G).

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 (Salcedo Aff. Ex. H at 3). 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” (Salcedo Aff. Ex. I). 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 (Salcedo Aff. Ex. J at 3).

Justice McAllister authorized parties and the public to submit comments and proposed remedial maps for Special Master Cervas’ consideration (Salcedo Aff. Ex. H at 3). 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 (Salcedo Aff. Ex. K). Justice McAllister ordered the New York State Legislative Task Force on Demographic Research and Reapportionment (“LATFOR”) to do the following two things: (1) “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 (2) “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” (*id.* at 6).

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 (Salcedo Aff. Ex. L). 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.³ 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 (Salcedo Aff. Ex. M). 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” (*id.* at 3). He tweeted a picture of Justice McAllister’s March 31 Order (which originally invalidated the enacted district maps) the day it was issued (*id.* at 6). 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 (*id.* at 8). The May 1 motion to intervene was his first effort to challenge the Assembly map.

³ See Gavin Wax, <https://www.gavinwax.com/> (last accessed May 21, 2022). Mr. Wax’s self-description as an “activist” first appeared on his website shortly after he moved to intervene (*see* Salcedo Aff. Ex. Y).

On May 3, 2022 — two days after Mr. Wax’s motion — Petitioner Gary Greenberg also moved to intervene (Salcedo Aff. Ex. N). Mr. Greenberg is “a former New York state political candidate, who may in the future run again for office” (Dkt. No. 11 ¶ 1). Specifically, he attempted to run for State Senate in 2020 but failed to obtain sufficient signatures to qualify for the Democratic primary ballot (Salcedo Aff. Ex. O). 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 expected enactment of the Adult Survivors Act, which Mr. Greenberg considers to be a “flawed ... hotch-potch” [sic] (Salcedo Aff. Ex. P at 2). 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 (Salcedo Aff. Ex. Q at 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 Steuben County on March 3, 2022 (*id.* at 15-16). 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 — which neither the *Harkenrider* Petitioners nor anyone else had challenged — and to enjoin use of the map for the 2022 primary and general elections (Salcedo Aff. Ex. L at 5-6; Salcedo Aff. Ex. N at 18-19). 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” (Salcedo Aff. Ex. R at 4).

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” (*id.* at 3-5). Neither Mr. Wax nor Mr. Greenberg has appealed.

C. Ballots for the June primaries are 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. Beginning on February 3, 2022 — the day the congressional, State Senate, and State Assembly maps were enacted — New York’s county boards of elections began entering the new district boundaries into 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” (Salcedo Aff. Ex. S ¶ 16).

March 1, 2022 was the first day for aspiring candidates to collect ballot-access signatures (Salcedo Aff. Ex. C). Candidates must collect hundreds or thousands of these signatures, then submit them to the relevant 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, *see* N.Y. ELEC. LAW § 6-154, which typically

requires about a month to adjudicate (Salcedo Aff. Ex. S ¶ 9). The State Board of Elections was required to certify primary-ballot candidates by May 4 (Salcedo Aff. Ex. C).

The primary elections are scheduled by law for June 28, 2022, with early voting from June 18 through 26 (*id.*). The general election, in turn, is scheduled for November 8, with early voting from October 29 through November 6 (*id.*). Forty-five days before the June 28 and November 8 elections, federal law requires States to finalize and mail ballots to military and overseas voters. 52 U.S.C. § 20302(a)(8)(A). So primary ballots were required to be mailed by May 13, and general-election ballots must be mailed by September 23 (Salcedo Aff. Ex. C).

Since about 1974, New York State held primaries in September instead of June. As a result of the late primary, however, the State violated Federal law by failing to mail military and overseas ballots by the September 23 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 the State, and the U.S. District Court for the Northern District of New York ordered the congressional primary moved to June, after rejecting a request to move the primary to August instead. *Id.* at *2.

Because of the Court of Appeals' April 27 decision, which invalidated the congressional and State Senate maps, Justice McAllister moved those two primaries from June 28 to August 23, 2022 (Salcedo Aff. Ex. T). 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 (Salcedo Aff. Ex. U). Ballots for the June 28 primaries were finalized, printed, and machine-tested, and they were mailed to military and overseas voters by the May 13 statutory deadline (Dkt. No. 14). Early voting for these primaries begins on June 18, less than one month from now (Salcedo Aff. Ex. C).

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

Petitioners — Mr. Wax, Mr. Greenberg, and Paul Nichols — commenced this special proceeding on May 15, a few days after Justice McAllister denied the untimely motions to intervene (Dkt. No. 1).

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” (Dkt. No. 9 ¶ 2). 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 (Salcedo Aff. Ex. V). 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 (*id.*) — three days before he and the other Petitioners commenced this special proceeding.

The Petition, which is not verified, requests a declaration that the Assembly map is procedurally unconstitutional (Dkt. No. 1 at 29), although it 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” — not just the Assembly elections — to late August or mid-September (*id.* at 30). 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.*). If Petitioners prevail, those thousands of candidates would need to “obtain new designating petition signatures or run independently” (*id.*). Additionally, potential candidates who did not originally qualify for primaries would receive another chance to gather sufficient signatures and “newly qualify” for the primary ballot (*id.*).

ARGUMENT

This Court should dismiss the Petition under CPLR 404(a). Just like the unsuccessful motions to intervene in Steuben County, this special proceeding is patently untimely. In fact, tacitly acknowledging that the timeliness issue was already decided against them, Petitioners do not address it in their papers (Dkt. Nos. 1, 3, 23). Because of Petitioners’ untimeliness, along with the unprecedented prejudice that would result if they prevail, this proceeding is barred by the doctrine of laches. The Petition should also be dismissed because Petitioners failed to join necessary parties, they lack standing, the statute of limitations has expired, and the Petition is unverified.

POINT I

THE DOCTRINE OF LACHES BARS THIS PROCEEDING

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); *accord*, *Matter of Cantrell v. Hayduk*, 45 N.Y.2d 925, 927 (1978) (*per curiam*) (delay of two months).⁴

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 — even though they challenged the constitutionality of a statute. *Id.* at 348, 350.

Similarly here, Petitioners' egregious delay threatens unprecedented prejudice to New York's elections, candidates, and voters, so the Petition should be dismissed.

A. The Assembly map was enacted over three months ago, yet Petitioners waited until now to commence this proceeding

Petitioners are unquestionably guilty of egregious delay. The Assembly map was enacted on February 3, 2022. The *Harkenrider* Lawsuit began that same day — and, as Justice McAllister correctly found, “[i]t was clear from the Petition and the Amended Petition that the Assembly Districts were not being challenged” (Salcedo Aff. Ex. R at 3). Indeed, the *Harkenrider* Lawsuit was well-publicized from Day One — in part by Mr. Wax and Mr. Greenberg themselves.

⁴ According to some courts, another element of laches is “lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief.” *Kverel v. Silverman*, 172 A.D.3d 1345, 1348 (2d Dep't 2019). That element is satisfied here. Before the motions to intervene in Steuben County, Petitioners did not notify Respondents that they would challenge the Assembly map.

These Petitioners, in particular, cannot claim ignorance. As explained above, Mr. Wax is a “conservative political activist,” Mr. Greenberg recently ran for public office, and Mr. Nichols claims to be running for Governor. Mr. Wax and Mr. Greenberg even tweeted — prodigiously — about the *Harkenrider* Lawsuit and redistricting in February and March. None of these three individuals has offered a valid excuse for waiting more than three months to bring this special proceeding.

Further, their personal histories suggest they are acting not out of a sincere concern for how the Assembly map was enacted, but rather out of self-interest: Mr. Wax wants 15 minutes of fame; Mr. Greenberg wants to raise his political profile and coerce the Assembly into enacting the legislation he wants; and Mr. Nichols wants to resurrect his failed primary bid. If they truly cared so deeply about the Assembly map, they would have challenged the map months ago. Instead, they tweeted from the sidelines while Respondents and the *Harkenrider* Petitioners litigated in Steuben County, at the Fourth Department, and at the Court of Appeals.

B. Because of Petitioners’ egregious delay, granting the relief they seek is virtually impossible and would jeopardize this State’s elections

The other element of laches — prejudice — is satisfied here, as well. Because of Petitioners’ three-month delay, the State’s elections, candidates, and voters will all suffer unprecedented harm if the Petition is granted.

If the Assembly map is re-drawn and the 2022 election calendar is upended again, it is unclear how this State could conduct orderly, secure elections. Boards of Elections have already certified candidates; finalized, printed, and mailed ballots; and performed numerous other administrative tasks to prepare for the June primaries. In fact, on May 9, Board of Elections Co-Executive Director Todd 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” (Salcedo Aff. Ex. W ¶¶ 26-27). And that was two weeks ago. The Board’s other Co-Executive Director, Kristen Zebrowski Stavisky, concurred with Mr. Valentine. She affirmed that the “positions expressed in [his] affidavit represent a bipartisan consensus opinion of the New York State Board of Elections” (*id.* ¶ 3). Justice McAllister, moreover, moved the deadline to finalize remedial maps from May 24 to May 20 — implicitly recognizing that a later deadline would leave Boards of Elections in an impossible position.

Additionally, because of Petitioners’ egregious delay, granting the relief they request would cause severe prejudice to candidates and voters. Candidates have built campaigns, raised and spent money, gathered signatures, qualified for primary ballots, courted voters, and invested countless hours running for office. If Petitioners prevail, these candidates will have to qualify again for the primaries. Their districts will change. Some of them may find themselves running against a powerful incumbent rather than for an empty or vulnerable seat. Many voters, furthermore, will suddenly live in a re-drawn district with different candidates seeking their support.

One subset of voters will suffer particular harm if Petitioners prevail: the men and women who defend our freedoms as members of the military. 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.

Recognizing UOCAVA's importance, the U.S. District Court for the Northern District of New York wrote, correctly, that "[i]t is unconscionable to send men and women overseas to preserve our democracy while simultaneously disenfranchising them while they are gone." *United States v. State of New York*, 2012 WL 254263, at *1. But in their quest for personal gain, Petitioners carelessly endanger this critical voting right. They casually ask this Court to move every single primary to September 13 (Dkt. No. 3 at 6; Dkt. No. 23 at 4), which is only ten days before the deadline under UOCAVA to mail general-election ballots. To be clear, when New York held September primaries, it was unable to comply with UOCAVA, was sued by the Federal government, and was ordered to move its primaries to June. *United States v. State of New York*, 2012 WL 254263, at *1-3. And under this year's circumstances — with three Court-ordered redistrictings, if Petitioners get their wish — military disenfranchisement would be a near certainty. That result would be "unconscionable." *Id.* at *1.

In any event, this Court likely has no authority to move the Congressional and State Senate primaries to September. Such an order would conflict with Justice McAllister's order setting those primaries for August 23, and with the Northern District of New York's Court Order approving that date. It would also conflict with the Court of Appeals' instructions to hold August primaries for those two offices.

Petitioners also ask for all primaries to be moved to August, if this Court declines to move them to September (as it should) (Dkt. No. 1 at 30). Their request is a non-starter. To hold August primaries for Congress and the State Senate, Justice McAllister

determined that remedial maps needed to be in place by May 20, and that even May 24 would be too late. Developing those two maps — which contain 89 districts combined, compared to the Assembly’s 150 districts — took about one month. In fact, the process was not even complete by the May 20 deadline. Final maps were released early on May 21, and Justice McAllister then ordered LATFOR to review those maps for “technical violation[s]” and to certify “precincts, districts, etc.” for the Board of Elections (Salcedo Aff. Ex. K at 6). It is obviously impossible, then, to responsibly develop a new Assembly map by May 20 or 24, or even by early to mid-June. And if an Assembly map is not in place until June, there is no way to complete the ballot-access process, finalize primary ballots, and mail them to military and overseas voters by the July 8 deadline (Salcedo Aff. Ex. T at 3). Moving the June primaries to August is simply out of the question.

In short, because of Petitioners’ egregious delay, the relief they request is virtually impossible. Even if granting such relief were technically possible, doing so would cause unprecedented harm to the elections, to candidates, and to voters, including military voters. Consequently, the Petition should be dismissed under the laches doctrine.

POINT II

PETITIONERS FAIL TO SATISFY VARIOUS OTHER REQUIREMENTS TO MAINTAIN THIS PROCEEDING

A. Petitioners did not 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).

This requirement applies with particular force 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), *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.* The First Department 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).

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,” 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); Salcedo Aff. Ex. X at Art. II § 1(b));
- 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 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 or run in new districts, 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 the current primary ballot certifications 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.

B. 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 candidates or the chairpersons of a party committee.⁵ 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 this proceeding must be dismissed.

C. 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.

⁵ 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”).

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 (Salcedo Aff. Ex. C) — well over 14 days before Petitioners commenced this special proceeding on May 15. Consequently, the Petition is time-barred.

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.” *Solnick v. Whalen*, 49 N.Y.2d 224, 229 (1980). It is therefore irrelevant that Petitioners have not framed this special proceeding as a challenge to the candidates’ designating petitions. *See 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). For example, in *Matter of ISCA Enterprises v. City of New York*, the petitioners challenged the constitutionality of the notice procedure in tax foreclosure proceedings. 77 N.Y.2d 688, 696 (1991). The foreclosure proceedings were subject to a two-year limitation period. *Id.* The petitioners were aware of the foreclosure proceedings with more than a year left to bring their claims, but they waited four years to sue. *Id.* The Court of Appeals disapproved of their delay, stating that “[h]aving itself delayed commencement of its action for nearly four years from notice, [petitioners] cannot be heard to complain of a constitutional infirmity.” *Id.* at 697. The Court did not even reach the question of the constitutionality of the foreclosure procedure, so important is the question of notice and adherence to the time limitations period. *Id.*

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.

D. The Petition is not verified

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). *Matter of Goodman v.*

Hayduk, in which aspiring candidates brought a special proceeding to validate their ballot-access petition, is on point. 64 A.D.2d 937, 937 (2d Dep’t 1978). The petition that commenced the special proceeding was not verified, but Supreme Court allowed the aspiring candidates to correct the error by filing an amended (verified) petition. *Id.* The Second Department reversed and dismissed the proceeding, holding that the verification requirement “is jurisdictional in nature, and cannot be cured by amendment.” *Id.* at 938. The Court of Appeals affirmed, determining that “[t]o find an unverified petition ... acceptable to institute the special proceeding would not serve practical purposes or advance the policy behind [Election Law § 16-116].” 45 N.Y.2d 804, 806 (1978).

Here, Petitioners seek to invalidate the ballot-access petitions — indeed, to invalidate the certified candidacies — for every single elected office in this State (Dkt. No. 1 at 30). Yet they did not verify their Petition. This lack of verification is a jurisdictional defect, and the Petition therefore must be dismissed.

POINT III

THE ASSEMBLY MAP IS FAIR AND SHOULD NOT BE RE-DRAWN

Behind Petitioners’ supposed newfound interest in election integrity, they neglect to mention 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, 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.⁶ In fact, eight Republican members of the Assembly who voted *against* the Assembly map have also submitted affidavits affirming they believe the map is fair,⁷ meaning that at least about half of the *minority* party's Assemblymembers believe the map is fair. No wonder, then, that the *Harkenrider* Petitioners did not challenge the enacted Assembly map. And the Petitioners' complaints here about the map are procedural only; they do not claim the map is substantively flawed. Neither Petitioners here, nor anyone else, has ever alleged that the Assembly map enacted by the Legislature in February 2022 has been unconstitutional as a matter of substance.

It would make no sense to further upend this year's elections by granting an untimely, flawed Petition and striking down a fair Assembly map. Whether or not this Court grants any aspect of the Petition (which it should not), it should decline to appoint any special master, and fix any procedural flaw by simply re-adopting the enacted Assembly map immediately and leaving the election calendar unchanged.

⁶ See accompanying affidavits of Assemblymembers William A. Barclay, Philip A. Palmesano, Joseph M. Giglio, Michael J. Norris, Michael J. Fitzpatrick, Angelo J. Morinello, Karl Brabenec, Stephen Hawley, Christopher Tague, Brian D. Miller, Joseph Angelino, John Lemondes, and Joshua Jensen, each of which were sworn to between May 19 and 22, 2022. Assemblymember Andrew Goodell submitted a similar affidavit in opposition to Mr. Wax's and Mr. Greenberg's motions to intervene in the *Harkenrider* Proceeding (Salcedo Aff. Ex. Z). Recently elected Republican Assemblymember Eric "Ari" Brown also offers his affidavit sworn to on May 19, 2022, in which he states he would have supported the Assembly district lines enacted in February 2022, had he been a member of the State Assembly at that time.

⁷ See accompanying affidavits of Assemblymembers Edward Ra, Doug Smith, Jarett Gandolfo, Robert Smullen, John K. Mikulin, Kevin M. Burne, Brian Manktelow, and Mary Beth Walsh, each of which were sworn to on May 20, 2022.

CONCLUSION

This Court should decline Petitioners' selfish, last-minute invitation to upend the 2022 elections. The Petition should be dismissed, and this Court should ratify and adopt the Assembly district map enacted on February 3, 2022 (L.2022, c. 14, § 1).

Dated: New York, New York
May 22, 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 6,542 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

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Doc #10433886

**Affidavit of Todd D. Valentine in Opposition to Petitioners'
Petition and Emergency Motion by Order to Show Cause for a Temporary
Restraining Order, sworn to May 22, 2022
[pp. 867 - 881]**

FILED: NEW YORK COUNTY CLERK 05/23/2022 05:58 AM

NYSCEF DOC. NO. 82

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/23/2022

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NEW YORK

PAUL NICHOLS, GALVIN WAX, GARY GREENBERG

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,

**AFFIDAVIT OF
TODD D. VALENTINE**

Index No.
E154213/2922

Hon. Laurence Love

Respondents.

STATE OF NEW YORK)
) SS:
COUNTY OF ALBANY)

TODD D. VALENTINE, being duly sworn, deposes and says:

1. I serve as Co-Executive Director for the New York State Board of Elections ("Board"). I have held this position since 2008. From 1997 to 2008 I was Special Counsel to the Board. Accordingly, I am familiar with county board of elections practices and capabilities. I make this affidavit based on my personal knowledge.

2. I respectfully submit this affidavit in opposition to Paul Nichols', Gavin Wax's and Gary Greenberg's petition herein. The positions expressed in this affidavit represent a consensus opinion of the New York State Board of Elections.

Background

3. On February 3, 2022, the Legislature enacted two laws that, collectively, established New York's legislative-district maps for Congress, the State Senate, and the State Assembly.

4. On April 27, 2022, the Court of Appeals invalidated the congressional and State Senate maps. It left the Assembly map in place as it had not been challenged by anyone in any court as of that date.

5. Two days later, the Court in *Harkenrider v Hochul et al* (NYSCEF E20222-0116cv, Steuben County Supreme Court) ordered that (1) Special Master Dr. Jonathan Cervas will release his proposed remedial congressional and State Senate maps by May 16, 2022; (2) after considering any comments submitted in opposition to his proposed maps, Special Master Cervas will finalize the maps by May 24, 2022; (3) congressional and State Senate primary elections, which had been scheduled by law for June 28, 2022, will occur on August 23, 2022; and (4) the deadline for local boards of elections to mail military and overseas ballots for the August 23 primaries is July 8, 2022 (*Harkenrider* Doc. Nos. 296, 301).

6. Initially, the *Harkenrider* Court had set a deadline of May 24, 2022 to finalize the congressional map (*Harkenrider* Doc. No. 258). The Board then asked the Court to "consider expediting the approval process . . . in any manner possible" owing to the short time to make an August primary feasible (*Harkenrider* Doc. No. 290). Later that day, the Court moved the deadline from May 24 to May 20 (*Harkenrider* Doc. No. 291).

7. On May 20, 2021 the *Harkenrider* Court did indeed promulgate new State Senate and Congressional lines.

8. Gavin Wax and Gary Greenberg moved to intervene in *Harkenrider* on May 1st and 3rd respectively (*Harkenrider* Doc. Nos. 316, 346). Their application to intervene to strike down the Assembly map and to enjoin use of that map for the 2022 primary and general elections was denied on May 11, 2022 (*Harkenrider*, Doc. No. 520). The court held, *inter alia*, with the ballot for June 28'th primary election already certified, intervention "would create total confusion." The same day the *Harkenrider* Court issued a political calendar for the August primary and independent nominations for Congress and State Senate.

9. By Order to Show Cause issued on May 19, 2022, this matter has now come before this Court.

10. The instant application should be denied. The Board, and local boards of elections, are already under unprecedented strain preparing for the August Congressional and State Senate primaries ordered in *Harkenrider*. They have been aware of this change for some time now and have been preparing for those offices to be contested at an August primary. Cancelling the June Primary election at this time and requiring a complete do-over of all of 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. There is insufficient time to draw new Assembly district lines, provide a do-over of all ballot access processes and complete the

primaries and subsequent judicial nominating conventions in time for the General Election on November 8.

11. Because the June 28 primary has already been certified by state and local boards of elections, ballots have been prepared across the state based on that certification and ballots have been issued for the June primary, including statewide primaries and primaries being held within the 150 Assembly Districts across the state, and all manner of other election preparations are completed or are underway.

June Primary Elections Are Underway

12. As of the hearing date in this matter, the June 28, 2022 Primary (June Primary) will be thirty-six days away, with *early voting to begin in twenty-six days*. The June Primary presently includes all statewide contests for which there are primaries, as well as primaries for state assembly, various party positions and many local offices. Absentee voting has begun.

13. On May 4, 2022, as required by section 4-110 of the Election Law, the Board certified Assembly and statewide candidates for the June 28 primary. No court proceeding enjoined that certification. In response, local boards of elections finalized their primary ballots. The primary ballot for each party is a unified ballot that would include candidates for any Assembly primary, Governor, Lieutenant Governor, and other elected offices (except for Congress and State Senate, which the *Harkenrider* Court moved to August 23).

14. The statutory deadline to mail these primary ballots to military and overseas voters was Friday, May 13, 2022. Elec. Law §§ 10-108(1), 11-204(4).

Collectively thousands of such ballots were prepared and sent by that date by all of New York's local boards of elections.

15. Boards of elections thus began preparing their ballots and setting in place the highly integrated mechanics of holding an election, and much of this work is done.

16. Absentee ballots for more than 200,000 non-military voters as of the hearing date will have been printed and many have already been sent to voters.

17. Test ballots for pre-election testing voting machines have been printed for many, if not most counties, including New York City.

18. Early voting / election day primary election ballots are already printed for many counties. In all, upon information and belief, *at least* 700,000 ballots had been printed as of Friday of last week. And substantially more than that will have been printed by the hearing date of this matter, as printing occurs seven days a week in election season.

19. If the statewide candidates were to change now, the ability of boards of elections to timely test election machines for the remaining primaries would be imperiled (9 NYCRR 6210.2). New York requires every voting machine to be programmed then tested with paper ballots to ensure the machines are tabulating ballots correctly. This is a time consuming but crucial process to ensure election integrity. A

change to the ballot requires reprogramming voting machines, reprinting ballots and retesting machines.

20. Already, 356 early voting sites to host nine days of early voting (N.Y. Election Law 8-600 et seq) have been selected and engaged, as have approximately 5,000 thousand election day poll sites for June 28, 2022.

21. More than 50,000 poll workers have been hired and scheduled to work on the early voting days and/or primary day.

22. Temporary staff allocations and vehicle rentals and / or transport contracts to send voting equipment to poll sites have been already arranged.

23. Mail notification to New York's voters informing them of the primary date and location of the early voting sites and poll sites has occurred (N.Y. Election Law 4-117) or is in final production, as is the case for 4.7 million notifications to New York City voters. New York City and other boards have engaged media campaigns to inform voters about the multiple primaries and what contests will appear at which election. Undoing these communications will cause massive voter confusion.

24. If all primaries are moved from June to August, a vast inventory of printed ballots would have to be thrown away. In addition to the wasteful expense, boards of elections will have difficulty printing new ballots as they have reported unprecedented supply-chain issues resulting in paper and envelope shortages.

25. Cancelling the June primary, which is well underway, would be confusing to voters and give rise to chaos.

26. To be clear, as of now, late May, there is no time to reconfigure the August 23, 2022 primary to include all other primary contests, and a September 13 primary would not be compliant with federal law as there is no way to have a primary on September 13, hold a judicial nominating convention thereafter and send military ballots required by federal law to be sent no later than September 24, 2022.

27. Moreover, there is a standing Court Order from the United States District Court of the Northern District of New York specifically placing the Congressional Primary in New York on August 23, 2022 as an exception to the normal timeframe which is the fourth Tuesday in June. On May 10, 2022 that Court:

ORDERED that New York's federal primary for Members of the United States House of Representatives in 2022 shall be held on August 23, 2022 to accommodate New York's congressional redistricting process, and that such primary shall be conducted in a manner in which ballots for UOCAVA voters shall be duly transmitted for such primary and the subsequent general election in conformance with federal law

United States v State of New York (NDNY 1:10-cv-01214-GLS, ECF # 104, May 10, 2022) For the reasons stated in the preceding paragraph, it is inconceivable that the United States District Court for the Northern District of New York would permit that primary to be held on September 13, 2022, as sought by the petitioners herein. A unified September primary is a nonstarter.

28. Petitioners have cited my first affidavit in *Harkenrider* -- signed in March -- that said a separate Senate and Congressional primary was possible. The situation now is materially different, given the passage of time, as I have described herein.

29. As of now, there are no new Assembly maps. Deriving maps would take weeks before ballot access could *even begin*.

Judicial-Nominating Conventions and Party Committees

30. Far more so than Congressional and State Senate districts, Assembly districts affect several other aspects of New York's election infrastructure. Accordingly, replacing the Assembly map would create even more burdens than replacing the congressional and State Senate maps.

31. For example, Supreme Court elections depend on Assembly districts.

32. Parties' candidates for the Supreme Court are not chosen through primary elections. Instead, delegates choose them at party conventions. Those judicial delegates, in turn, are elected by voters in the primaries—and much like candidates for other offices, they must collect designating-petition signatures to appear on primary ballots.

33. The judicial delegates who win the primaries attend a nominating convention of their party, which by law must occur between August 4 and 10, 2022. Elec. Law § 6-158(5). At the conventions, delegates decide who will appear for their party on the general-election ballot as candidates for the Supreme Court.

34. Critically, judicial delegates are elected from Assembly districts. Elec. Law § 6-124. So, if the Assembly map is replaced, judicial-delegate elections (like Assembly primaries) would have to be moved to August 23, and judicial-nominating

conventions could not occur between August 4 and 10 as presently required by law. Instead, judicial-nominating conventions probably could not be held until September, after the results of judicial-delegate elections are certified. This would imperil the ability of New York's election machinery to complete the party nominating processes in time to meet the critical and unalterable requirement to transmit military and overseas ballots prior to 46 days before the general election on November 8, 2022.

35. Specifically, general-election ballots must be mailed to military and overseas voters by September 23, 2022. Elec. Law §§ 10-108(1), 11-204(4). If Supreme Court candidates are chosen at conventions in September, it would be extremely difficult to finalize, print, program voting machines, test, address, and mail general-election ballots (which include Supreme Court candidates) by the September 23 state law deadline.

36. Additionally, members of the Democratic Party's state committee, are elected from Assembly districts this year. Elec. Law §§ 2-102(1), 2-104(1). These elections would also have to be moved to August 23, creating an additional burden in the already-challenging process of preparing for the unexpected August primaries, given the huge volume of ballot access documents these office generate. Similarly, current law permits that a member of a county committee need not reside in the election district he or she represents, but rather the member of county committee may represent any election district in the Assembly District in which the member of county committee resides. If the Assembly districts are changed at this late date it will be necessary to redo petitioning for members of county committees as well given this residency requirement. And this

petitioning cannot happen until election districts—the most granular unit of representation—are reconfigured as described herein.

Election Districts

37. Finally, if the Assembly map is replaced as petitioners propose, many more election districts will also have to change.

38. Election districts are the foundational unit of New York’s political geography. Local boards of elections must sort New York’s approximately 13 million active voters into 15,587 election districts before a primary or general election can occur. This sorting is necessary because voters’ election districts determine what ballot they receive and where they vote.

39. Every voter in a given election district receives the same ballot, with the same candidates for the same races. As a result, election districts cannot be bisected by Assembly districts, State Senate districts, congressional districts, county boundaries, or municipal boundaries. Stated differently, everyone in a given election district must reside in the same Assembly district, State Senate district, congressional district, county, and municipality. If any of those boundaries change, election districts must change.

40. This year, after the redistricting that occurred on February 3, local boards of elections spent virtually all their time for about one month, working with their voter registration vendors, to sort voters into their correct election districts.

41. If the Assembly map is replaced, election districts will have to be redrawn, and voters will have to be re-sorted. This process could take weeks, given that

boards of elections would have to simultaneously complete the other steps necessary to prepare for an August primary.

Statewide and local Primaries on June 28

42. Presently, all statewide primaries and all others except Congressional and State Senate primaries are proceeding at the June 28, 2022 primary. This should not be disturbed. All necessary steps for ballot access for statewide primaries have been completed, and nothing in the current litigation touches on the validity of those processes.

Purpose of the Congressional District Distribution Requirement

43. There are 26 Congressional Districts in New York. A statewide designating petition filer must demonstrate that they have collected at least 100 signatures from at least 13 Congressional Districts. This distribution requirement applies to *1,300 of the 15,000* required signatures. The purpose of the Congressional Distribution requirement is entirely straight forward. It requires some modest level of geographic distribution of a candidate's signature collection effort.

44. As of the beginning of the designating petition period for statewide candidates on March 1, New York had congressional districts in place. With a week to go before the end of the petitioning period, the congressional lines were struck down by court order, but the order was expressly stayed precisely so ballot access processes could

continue. On April 1, 2022, a stay was issued from New York’s Appellate Division Fourth Department as a decretal paragraph in an Order to Show Cause, providing “pending the hearing and determination of this motion, said judgment is STAYED in its entirety.” Thereafter on April 8, 2022 a decision was issued by Hon. Stephen K. Lindley of the Appellate Division, Fourth Department, permitting ballot access to continue, expressly providing the stay applied to “provisions of the order [below] that enjoin respondents and their agents, including officials from the various boards of elections, from ‘using, applying, administering, enforcing or implementing any of the recently enacted 2022 maps for this or any other election...”

45. After the Court of Appeals ruling on April 27, 2022, congressional lines clearly could not be used to elect representatives, but the lines in place during the statewide designating petition process were more than sufficient to ensure geographic distribution of statewide designating petitioning.

No harm to candidates or voters

46. Significantly, under state law the deadline to challenge primary designations passed on April 21, 2022 as provided by Election Law 16-102. And the courts have uniformly held that this deadline applies even to challenges of a Constitutional dimension. *See Scaringe v Ackerman*, 119 AD 2d 327 (3rd Dept 1986) (holding petitioners’ claims that candidate was barred by the constitutional residency requirement from seeking office was subject to limitations period of the Election Law: “[i]rrespective of the label given to the proceeding or the words used to describe the

issue, the late relief sought by petitioners seeks judicial intervention in the election process to remove a candidate from the ballot...they cannot avoid the time requirement of the statute by initiating a new and different proceeding...”. Accordingly, it is simply too late for new claims related to the invalidity of the Assembly and statewide elections to be entertained.

47. No candidate’s designating petition was disqualified in 2022 for not having an adequate congressional distribution of their signatures. No candidate suffered any injury thereby.

48. Throughout the petitioning process, the State Board advised all candidates to file their petitions on the statutory schedule. There is no actual averment by the plaintiffs that any candidate declined to file because of the *Harkenrider* decision.

Petitioner Paul Nichols

49. Petitioner Paul Nichols’s designating petition was found by the board on May 2, 2022 to be invalid because it contained only 11,767 valid signatures where 15,000 were required.

50. The invalidity of Mr. Nichols petition had nothing to do with the requirement that 1,300 signatures, in the aggregate, of the required 15,000 be derived of 100 signatures collected in each of at least half of New York’s congressional districts.

51. On May 4, 2022, Mr. Nichols brought a validating proceeding against the board of elections (since dismissed) which did not raise any of the theories now advanced (*Nichols v New York State Board of Elections*, E903472-2022, Albany

County Supreme Court) and his time to bring a validating proceeding has lapsed as of May 5, 2022 (Election Law 16-102).

52. Mr. Nichols opportunity to seek an independent nomination was in no way effected by the *Harkenrider* decision invalidating congressional and state senate district lines, as the period for such ballot access activity was not changed and in fact is still on-going, with independent nominating petitions due on May 31, 2022.

Independent Nominating Process

53. The independent nominating signature collection period pursuant to the Election Law for 2022 spans from April 19 to May 31, with filings permitted between May 24 and May 31.

54. As a result of the invalidation of New York's congressional lines and state senate district lines on April 27, during the independent nominating period, and with new lines not to be promulgated until May 20, the *Harkenrider* court issued a new political calendar setting a full independent nominating period for congress and state senate to run from May 21, 2022 to July 5, 2022. (*Harkenrider*, Doc. No. 524).

55. The *Harkenrider* court expressly did not alter the political calendar for statewide or other independent candidates, observing at *Harkenrider*, Doc No. # 409 on May 5, 2022 that "this court does not intend to alter the time frame for gathering signatures for Independent Nominating Petitions for statewide elections. Election Law § 138 (4) sets a six-week time period for the gathering of signatures for Independent petitions Once the Congressional map has been established it will be up to the

candidate to make sure he/she has the appropriate number of signatures from the appropriate number of different districts.”

56. For statewide independent nominating petitions, the requirement is 45,000 signatures with 500 from each of 13 congressional districts. The congressional district distribution requirement thus applies to 6,500 of the total number of signatures required to be collected.

Conclusion

57. 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. For this reason, the instant petition should be denied.

Dated: Albany, New York
May 22, 2022


TODD D. VALENTINE

Sworn to before me this
22 day of May, 2022


Notary Public

BRIAN L. QUAIL
Notary Public, State of New York
Reg. No. 02QU5395806
Qualified in Schenectady County
Commission Expires 08/05/2023

Letter from Brian Quail to the Honorable Laurence L. Love, dated
May 23, 2022

Peter S. Kosinski
Co-Chair

Anthony J. Casale
Commissioner

Todd D. Valentine
Co-Executive Director



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ALBANY, N.Y. 12207-2109
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Douglas A. Kellner
Co-Chair

Andrew J. Spano
Commissioner

Kristen Zebrowski Stavisky
Co-Executive Director

May 23, 2022

Hon. Laurence L. Love
Justice of the Supreme Court
80 Centre Street
New York, New York 10007

Re: Nichols et al v Hochul et al (154213/2022 New York County Supreme Court)

Your Honor:

The New York State Board of Elections joins in the motion to dismiss brought by Speaker Heastie filed herein at NYSCEF Doc. No. 30 *et seq.*

Very Truly Yours,

s/Brian Quail

Brian L. Quail
Co-Counsel
New York State Board of Elections
40 North Pearl Street – Suite 5
Albany, New York 12207
(518) 473-5088
Brian.quail@elections.ny.gov

**Respondents Speaker of the Assembly Carl Heastie and Senate Majority
Leader Andrea Stewart-Cousins' Notice of Motion to Dismiss,
dated May 23, 2022
[pp. 883 - 884]**

FILED: NEW YORK COUNTY CLERK 05/23/2022 07:19 AM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 84

RECEIVED NYSCEF: 05/23/2022

STATE OF NEW YORK
SUPREME COURT: COUNTY OF NEW YORK

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG,

Petitioners,

NOTICE OF MOTION

v.

Index No. 154213/2022

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,

Assigned Justice:
Hon. Laurence L. Love

Respondents.

Upon the papers filed by Respondent Speaker of the Assembly Carl Heastie, Respondent Senate Majority Leader Andrea Stewart-Cousins 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.

Dated: May 23, 2022
New York, New York

CUTI HECKER WANG LLP

By: /s/ Eric Hecker
Eric Hecker
Alexander Goldenberg
Alice G. Reiter

305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600

*Attorneys for Respondent Senate Majority
Leader Andrea Stewart-Cousins*

TO:

Jim Walden
Walden Macht & Haran LLP
250 Vesey Street, 27th Floor
New York, NY 10281
(212) 335-2030

Attorneys for Petitioners

**Affirmation of Eric Hecker for Respondent Senate Majority Leader
Andrea Stewart-Cousins, in Support of Motion to Dismiss, dated
May 23, 2022**

FILED: NEW YORK COUNTY CLERK 05/23/2022 07:19 AM

NYSCEF DOC. NO. 85

INDEX NO. 154213/2022

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.

**AFFIRMATION OF
ERIC HECKER**

Index No. 154213/2022

Assigned Justice:
Hon. Laurence L. Love

ERIC HECKER 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. I am a partner at
Cuti Hecker Wang LLP, counsel for Respondent Senate Majority Leader Andrea Stewart-
Cousins.

2. The Senate Majority Leader joins in all of the arguments made by Respondent
Speaker of the Assembly Carl Heastie and hereby moves to dismiss the Petition on the same
bases.

Dated: New York, New York
May 23, 2022

By:



Eric Hecker

FILED: NEW YORK COUNTY CLERK 05/23/2022 08:17 AM

NYSCEF DOC. NO. 86

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/23/2022

**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

**ANSWER OF GOVERNOR
HOCHUL**

Respondent Governor Kathy Hochul ("Governor Hochul") by her attorney, LETITIA JAMES, Attorney General of the State of New York, as and for her answer to the Petition herein, responds to the allegations in the Petition as follows:

1. To the extent that the allegations of paragraph 1 set forth Petitioners' legal arguments and/or their characterization of this proceeding and the grounds therein, submits that no response is required; to the extent a response is required, denies.

2. With respect to the allegations contained in paragraphs 2, 3 and 4, respectfully refers the Court to the record and decisions in the trial court and appellate courts in *Harkenrider v. Hochul*, Steuben County Sup. Ct., Index No. E2022-0116CV, as the best evidence of their contents, provisions and requirements, and denies to the extent that Petitioners' allegations are inconsistent therewith.

3. To the extent that the allegations of paragraphs 5, 6, 7 and 8 set forth Petitioners' legal arguments and/or their characterization of this proceeding and the grounds therein, submits that no response is required; to the extent a response is required, denies.

4. Denies the allegations contained in paragraph 9.

5. To the extent that the allegations of paragraph 10 set forth Petitioners' legal arguments and/or their characterization of this proceeding and the grounds therein, submits that no response is required; to the extent a response is required, denies.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 11, 12 and 13.

7. Admits the allegations contained in paragraphs 14, 15, 16, 17 and 18.

8. With respect to the allegations contained in paragraphs 19, 20, 21 and 22, respectfully refers the Court to the applicable constitutional provision and statutes recited therein (Article III, Section 5 of the New York Constitution, Unconsolidated Laws §§ 4221 and 4225, and CPLR 503(a) and 3001), and denies to the extent that Petitioners' allegations are inconsistent therewith.

9. To the extent that the allegations of paragraphs 23, 24, 25, 26, 27, 28 and 29 set forth Petitioners' legal arguments and/or their characterization of this proceeding and the grounds therein, submits that no response is required; to the extent a response is required, denies.

10. With respect to the allegations contained in paragraphs 30, 31, 32, 33 and 34, respectfully refers the Court to the record and decisions in the trial court and appellate courts in *Harkenrider v. Hochul*, Steuben County Sup. Ct., Index No. E2022-0116CV, as the best

evidence of their contents, provisions and requirements, and denies to the extent that Petitioners' allegations are inconsistent therewith.

11. Denies the allegations contained in paragraph 35.

12. With respect to the allegations contained in paragraphs 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84 and 85, respectfully refers the Court to the record and decisions in the trial court and appellate courts in *Harkenrider v. Hochul*, Steuben County Sup. Ct., Index No. E2022-0116CV, and/or the record of the State's redistricting process as the best evidence of their contents, provisions and requirements, and denies to the extent that Petitioners' allegations are inconsistent therewith.

13. To the extent that the allegations of paragraphs 86, 87, 88, 89 and 90 set forth Petitioners' legal arguments and/or its characterization of this proceeding and the grounds therein, submits that no response is required; to the extent a response is required, denies.

14. With respect to the allegations contained in paragraph 91, respectfully refers the Court to the record and decisions in the trial court and appellate courts in *Harkenrider v. Hochul*, Steuben County Sup. Ct., Index No. E2022-0116CV, as the best evidence of their contents, provisions and requirements, and denies to the extent that Petitioners' allegations are inconsistent therewith.

15. With respect to the allegations contained in paragraph 92, respectfully refers the Court to the applicable statute recited therein (N.Y. Election Law § 5-134) and denies to the extent that Petitioners' allegations are inconsistent therewith.

16. To the extent that the allegations of paragraphs 93, 94, 95, 96, 97, 98 and 99 set forth Petitioners' legal arguments and/or its characterization of this proceeding and the grounds therein, submits that no response is required; to the extent a response is required, denies.

17. With respect to the allegations contained in paragraph 100, respectfully refers the Court to the applicable statute recited therein (N.Y. Election Law § 6-138) and denies to the extent that Petitioners' allegations are inconsistent therewith.

18. To the extent that the allegations of paragraphs 101, 102, 103, 104 and 105 set forth Petitioners' legal arguments and/or its characterization of this proceeding and the grounds therein, submits that no response is required; to the extent a response is required, denies.

19. With respect to the allegations contained in paragraphs 106, 107, 108, 109, 110, 111, 112, 113 and 114, respectfully refers the Court to the record and decisions in the trial court and appellate courts in *Harkenrider v. Hochul*, Steuben County Sup. Ct., Index No. E2022-0116CV, as the best evidence of their contents, provisions and requirements, and denies to the extent that Petitioners' allegations are inconsistent therewith.

20. To the extent that the allegations of paragraphs 115 and 116 set forth Petitioners' legal arguments and/or its characterization of this proceeding and the grounds therein, submits that no response is required; to the extent a response is required, denies.

21. With respect to the allegations contained in paragraphs 117 and 118, respectfully refers the Court to the record and decisions in the trial court and appellate courts in *Harkenrider v. Hochul*, Steuben County Sup. Ct., Index No. E2022-0116CV, as the best evidence of their contents, provisions and requirements, and denies to the extent that Petitioners' allegations are inconsistent therewith.

22. To the extent that the allegations of paragraph 119, 120, 121, 122, 123 and 124 set forth Petitioners' legal arguments and/or its characterization of this proceeding and the grounds therein, submits that no response is required; to the extent a response is required, denies.

23. With respect to the allegations contained in paragraphs 125 and 126, respectfully refers the Court to the record and decisions in the trial court and appellate courts in *Harkenrider v. Hochul*, Steuben County Sup. Ct., Index No. E2022-0116CV, as the best evidence of their contents, provisions and requirements, and denies to the extent that Petitioners' allegations are inconsistent therewith.

24. To the extent that the allegations of paragraph 127, 128 and 129 set forth Petitioners' legal arguments and/or its characterization of this proceeding and the grounds therein, submits that no response is required; to the extent a response is required, denies.

25. Denies the allegations contained in paragraph 130.

26. To the extent that the allegations of paragraphs 131, 132, 133, 134 and 135 set forth Petitioners' legal arguments and/or its characterization of this proceeding and the grounds therein, submits that no response is required; to the extent a response is required, denies.

27. Denies the allegations contained in paragraphs 136, 137, 138, 139, 140, 141, 142, 143, 144, 145 and 146.

28. With respect to the allegations contained in paragraphs 147 and 148, respectfully refers the Court to the record and decisions in the trial court and appellate courts in *Harkenrider v. Hochul*, Steuben County Sup. Ct., Index No. E2022-0116CV, as the best evidence of their contents, provisions and requirements, and denies to the extent that Petitioners' allegations are inconsistent therewith.

29. To the extent that the allegations of paragraph 149 set forth Petitioners' legal arguments and/or its characterization of this proceeding and the grounds therein, submits that no response is required; to the extent a response is required, denies.

30. Repeats and realleges her responses to the allegations contained in paragraphs 1 through 149 as her response to paragraph 150.

31. With respect to the allegations contained in paragraph 151, respectfully refers the Court to the record and decisions in the trial court and appellate courts in *Harkenrider v. Hochul*, Steuben County Sup. Ct., Index No. E2022-0116CV, as the best evidence of their contents, provisions and requirements, and denies to the extent that Petitioners' allegations are inconsistent therewith.

32. With respect to the allegations contained in paragraphs 152, 153 and 154, respectfully refers the Court to the applicable constitutional provisions recited therein (New York Constitution, Article III, Sections 4(b) and 4(e)) as the best evidence of their contents, provisions and requirements, and denies to the extent that Petitioners' allegations are inconsistent therewith.

33. Denies the allegations contained in paragraphs 155 and 156.

34. With respect to the allegations contained in paragraphs 157, 158, 159 and 160, respectfully refers the Court to the record and decisions in the trial court and appellate courts in *Harkenrider v. Hochul*, Steuben County Sup. Ct., Index No. E2022-0116CV, as the best evidence of their contents, provisions and requirements, and denies to the extent that Petitioners' allegations are inconsistent therewith.

35. Denies the allegations contained in paragraphs 161.

36. Repeats and realleges her responses to the allegations contained in paragraphs 1 through 161 as her response to paragraph 162.

37. To the extent that the allegations of paragraph 163 set forth Petitioners' legal arguments and/or its characterization of this proceeding and the grounds therein, submits that no response is required; to the extent a response is required, denies.

38. Denies the allegations contained in paragraphs 164, 165, 166 and 167.

39. Denies any averment of the Petition not specifically responded to above.

40. With respect to the prayer for relief, denies that Petitioners are entitled to any relief in this proceeding.

**AS AND FOR HER DEFENSES TO THE PETITION
HEREIN, RESPONDENT GOVERNOR HOCHUL
ALLEGES:**

41. As further set forth in her accompanying Memorandum of Law in Support of her Answer and in Opposition to the Order to Show Cause, the Petition is barred by the doctrine of laches and thus fails to set forth grounds warranting the relief sought therein.

42. Governor Hochul properly performed the duties imposed upon her by law. The applicable decisions were made in accordance with lawful procedure; were affected by no error of law; were neither arbitrary nor capricious nor an abuse of discretion.

43. The petition on its face fails as a matter of law to set forth grounds warranting the relief sought therein. Petitioners are not entitled to such relief and the petition should be dismissed.

44. Petitioners' claims against Governor Hochul are barred by the doctrine of legislative immunity.

45. Some or all of Petitioners' claims against Governor Hochul are barred by the applicable statute of limitations.

46. The Petition is barred insofar as it raises non-justiciable questions.

47. Petitioners lack standing to assert some or all of their claims.
48. Some or all of Petitioners' claims are barred by the doctrine of mootness.
49. The Court lacks subject matter jurisdiction over Governor Hochul with respect to some or all of Petitioner's claims.
50. The Petition fails to name necessary parties.

WHEREFORE, the Respondents respectfully submit that the proceeding should be dismissed as a matter of law, and for such other and further relief as to this Court seems just and proper.

Dated: New York, New York
May 23, 2022

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Respondent Governor Hochul
By:

/s/ Seth J. Farber
SETH J. FARBER
Special Litigation Counsel
28 Liberty Street
New York, New York 10005
(212) 416-8029

**Respondent Governor Kathy Hochul's Memorandum of Law in Support
of Verified Answer and in Opposition to the Petition and Petitioner's
Motion by Order to Show Cause,
dated May 23, 2022
[pp. 894 - 905]**

FILED: NEW YORK COUNTY CLERK 05/23/2022 08:17 AM

NYSCEF DOC. NO. 87

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/23/2022

**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 SUPPORT
OF HER ANSWER AND IN OPPOSITION TO THE PETITION AND
PETITIONERS' MOTION BY ORDER TO SHOW CAUSE**

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 Governor Kathy Hochul (“Governor Hochul”) respectfully submits this memorandum of law in support of her accompanying Answer and in opposition to the petition and motion by Petitioners Paul Nichols (“Nichols”), Gavin Wax (“Wax”) and Gary Greenberg (“Greenberg”) by Order to Show Cause (“OSC”) signed by Justice Laurence Love on May 19, 2022 (the application (*see* NYSCEF No. 25). In the OSC, the Court struck the portion of the OSC presented (NYSCEF No. 2) that sought a temporary restraining order (“TRO”) that would have enjoined respondents from using the 2022 State Assembly map in administering the 2022 primary and general elections, and immediately appointed a special master to begin proceedings to evaluate and draft a State Assembly map for the 2022 primary and general elections.

Petitioners Nichols, Wax and 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). None of the Petitioners allege that they are actually running for the State Assembly.

In the present OSC, Petitioners seek the following extraordinary relief at a time after the June primary election (that includes Statewide races, races for all 150 seats in the State Assembly and numerous other election contests) is already underway:

“Judgment ... 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 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.

As Governor Hochul advised the Court in her Memorandum in Opposition to the TRO (NYSCEF No. 26), similar challenges by two of the three Petitioners have already been rejected by the Steuben County Court that has been handling New York's redistricting litigation for several months, (*Harkenrider v. Hochul*, Steuben County Sup. Ct., Index No. E2022-0116CV, "*Harkenrider*," NYSCEF No. 520). As Judge McAllister noted in denying Petitioners Motion for Intervention, to change the Assembly maps now would "create total confusion" as "a change in the Assembly Districts would impact several elected officials – and that was on May 11th, twelve days ago. This would include delegates to the State Supreme Court judicial nominating convention, representatives to county party committees and the New York State Democratic Committee." *Id.*, at 4.

Furthermore, the Statewide and Assembly primary election that Petitioners are again seeking 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. Hence, if the relief sought in the OSC and the petition were granted, this would not only disrupt a primary election that is already in progress but would 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.

For their part, Petitioners flippantly assert that "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.” See Jim Walden and Aaron Foldenauer letter to the Court of May 18, 2022 (NYSECF No. 23). The Court should soundly reject Petitioners’ cavalier suggestion to disenfranchise voters as a result of Petitioners’ own late filing.

The impact of moving Assembly and other Statewide and local races and of reopening the designating and independent petition process will cause 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 military ballots have already been sent out. Furthermore, the signature gathering period for independent candidates has been open for over a month and petitions are due to be submitted in a matter of days. 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.

ARGUMENT

A. The Present Application is barred by doctrine of laches.

Petitioners’ challenge to the Assembly map (and the other attendant extraordinary relief they seek herein, discussed below including canceling the June 28, 2022 primary and reopening designating and independent nominating petition periods) 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 Petitioners' 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 with local county boards of election throughout the State preparing for the election to go forward on June 28 (at significant effort and expense), with early voting and absentee balloting taking place before that date. 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, if any, could go forward in June (and of course, Petitioners seek to cancel and reschedule the entire June 28 primary in any event). Similarly, Petitioners gratuitously seek to open the independent nominating petition period after the period for collection of signatures has elapsed. They give no explanation for why they require that extraordinary relief, much less a reason why they sat on their "rights" while the election process was underway.

The proposed relief 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 entirely new Congressional and State Senate districts, let alone Assembly districts that have yet to be even drawn (and a new primary in August). This Court should decline to entertain this application.

B. Changing assembly districts would cause chaos for candidates and voters and place additional, untenable burdens on boards of elections.

Granting the relief demanded in the Petition of 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

¹ See <https://www.elections.ny.gov/NYSBOE/Elections/2022/Primary/Jun282022PrimaryCertification.pdf>.

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 application as requested would cause chaos statewide.

The Election Law requires judicial delegates to be elected from Assembly districts. Election 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 relief requested by Petitioners here would upend the Assembly and numerous other races and would have a severe if not incalculable impact on election administration. A further dramatic change to New York's election cycle at this late point in time risks grave harm to candidates, voters, and elections officials.

C. Petitioners' Challenges to Designating Petitions are Time-Barred and Lack Any Legal Basis.

Petitioners are seeking to use this case to get a second bite at the apple to get on the ballot after failing to obtain ballot access during the now concluded petitioning process. They are also asking this court to set a stricter standard for statewide petitions than for the races for State Senate and for Congress – one that would demand the collection and submission of new designating petitions

well after the election has already begun. Specifically, in order to effectuate these requests, Petitioners are asking the court for extraordinary relief in the form of

[3] Enjoining Respondents to adjourn the primary election date for state and local elections to August 23, 2022, or, alternatively, September 13, 2022; and [4] Enjoining Respondents to open designating and independent nominating petition periods, *see* N.Y. Elec. Law §§ 6-134, 6-138, for Statewide, Congressional, State Assembly², 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

Functionally, Petitioners here³ seek to leverage their already untimely challenge into an excuse to *cancel the June 28th primary for all primary races*. Specifically, Petitioners ask the Court to upend both the party designation process and the independent nominating petition process “for Statewide, Congressional, State Assembly, State Senate and local offices,” *i.e.* what appears to be every single federal, state and local office in New York.

First, Petitioners’ last-ditch challenge to nominating petitions and designating petitions is clearly time-barred. The Election Law deadlines are strict, and with good reason, lest challenges like this result in the kind of chaos described in Point B, above. The period for obtaining signatures on independent nominating petitions has been open since April 19th and independent petitions must be submitted between May 24th and May 31st (*see* Election Law §§ 6-138(4) and 6-158(9); *see also* NYSCEF No. 5, State 2022 Political Calendar, Ex. 1 to Devlin Aff.).

² Petitioners Wax and Greenberg sought to intervene in the *Harkenrider* case, seeking *inter alia*, to invalidate signatures already gathered, change the dates for new petition signature gathering and submission for Assembly races. The Supreme Court, Steuben County, rejected their intervention motion, finding, *inter alia*, that it was untimely. *Harkenrider*, Steuben County Sup. Ct., Index No. E2022-0116CV, NYSCEF No. 520 at 3-4.

³ Petitioner Nichols, acknowledges that he himself is a candidate for governor, a statewide office, and his designating petitions for the Democratic primary were rejected for an insufficient number of valid signatures, and he is collecting signatures to run as an independent candidate. *See* Nichols Affidavit dated May 16, 2022, ECF No. 9, at paras. 2-4.

Designating petitions have also already been filed and certified. Petitioners' challenge to the validity of designating petitions that have already been filed and certified is clearly time-barred by the statutory deadlines for filing objections.

Election Law 6-154(2) provides, in relevant part, that:

"Written objections to any certificate of designation or nomination or to a designating petition or a petition for opportunity to ballot for public office or to a certificate of acceptance, a certificate of declination or a certificate of substitution relating thereto shall be filed with the officer or board with whom the original petition or certificate is filed within three days after the last day to file such a certificate to which objection is made, or within three days after the last day to file such a certificate, if no such certificate is filed except that if any person nominated by an independent nominating petition, is nominated as a party candidate for the same office by a party certificate filed, or a party nomination made after the filing of such petition, the written objection to such petition may be filed within three days after the filing of such party certificate or the making of such part nomination. When such an objection is filed, specifications of the grounds of the objections shall be filed within six days thereafter with the same officer or board and if specifications are not timely filed, the objection shall be null and void."

Election Law 16-102(2) provides in relevant part:

"A proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition, or within three business days after the officer or board with whom or which such petition was filed, makes a determination of invalidity with respect to such petition, whichever is later."

In the present case, as designating petitions were received by April 7, 2022, objections were due to the State Board of Elections by April 11, 2022, and aggrieved parties had to commence legal action by April 21, 2022. *See Harkenrider v. Hochul*, CAE 22-506, NYSCEF No. 24 at 1 (4th Dep't, April 8, 2022).

Second, Petitioners have no legal basis to assert that the already submitted and certified nominating petitions are not legally sufficient. Providing the Petitioners relief here would result in a stricter standard for petitioning for statewide candidates than the requirements set forth in *Harkenrider* for Congressional and State Senate candidates. (*See Harkenrider*, Steuben County Sup. Ct., Index No. E2022-0116CV, NYSCEF No. 524 at 2.) In particular, candidates who already

qualified for the ballot succeeded in obtaining the required number of signatures in the broad swath of Congressional districts as required by law. For example, a number of candidates for statewide office, including three Democratic candidates and four Republican candidates for governor and three Democratic candidates for lieutenant governor, successfully accumulated enough designating petitions from across the state to appear on the certified ballot for the June 28th primary, and a new Congressional map does not change that candidates who have been certified on the ballot demonstrated the required breadth of support from across the state by obtaining the required signatures. To set a different standard here for statewide candidates would be inconsistent and incongruous with that decision and detrimental to both voters and candidates.⁴

Ultimately, Petitioners have timed their application for this relief in as highly prejudicial a manner as their other requests: the independent nominating process began over a month ago, and we are now just days before the period when petitions are due to be submitted. Further, although the Petition itself is replete with references to the Court of Appeals decision in *Harkenrider v. Hochul*, 2022 WL 1236822 (N.Y. Apr. 27, 2022), Petitioners fail to offer any explanation for why they waited until three weeks after that decision to bring the present application despite the clear prejudice that would result to election officials, candidates and voters throughout the State. Indeed, Petitioners' own tardiness should absolutely preclude Petitioners from voiding the petition signatures already obtained by candidates, including those who successfully qualified for the June 28th primary election ballot.

Under these circumstances, the extraordinary if not unprecedented relief sought by Petitioners of canceling an entire primary and reopening designating and independent nominating petition

⁴ Even assuming Petitioners were correct, the appropriate remedy would be to mirror what the *Harkenrider* court decided for petitioning in the Congressional races. Instead of creating a new, more restrictive rule for statewide races in the form of a new petitioning period, or restarting the prior petitioning period, candidates would simply rely on the existing petitions that collected to submit the statutory requirements. *Harkenrider*, Steuben County Sup. Ct., Index No. E2022-0116CV, NYSCEF No. 524 at 2.

periods (and thereby dramatically altering the State's entire election landscape) here at this late point in New York's election cycle risks extraordinarily grave harm to candidates, voters, and elections officials, and should be denied by this Court in all respects.

CONCLUSION

For the reasons set forth above, Governor Hochul respectfully submits that Petitioners' motion by OSC should be denied in its entirety and the Petition denied, together with such further relief as the Court may order.

Dated: New York, New York
May 23, 2022

LETITIA JAMES

Attorney General
State of New York
Attorney for Respondent Governor Hochul

s/ Seth Farber

SETH FARBER
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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 2,746 words.

Dated: New York, New York
May 23, 2022

/s/ Seth Farber
By: Seth Farber
Special Litigation Counsel

Letter from Seth J. Farber to the Honorable Laurence L. Love, dated
May 23, 2022



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF STATE COUNSEL
LITIGATION BUREAU

Writer's Direct Dial: (212) 416-8029

By NYSCEF

May 23, 2022

Honorable Laurence L. Love, J.S.C.
Supreme Court, New York County
80 Centre Street
New York, NY 10013

Re: *Nichols v. Hochul*, Index No.154213/2022

Dear Justice Love:

This Office submits this letter on behalf of Governor Kathy Hochul ("Governor Hochul"), named as a respondent in the above-captioned matter. Governor Hochul respectfully joins in the motion to dismiss filed by Assembly Speaker Carl Heastie (NYSCEF No. 30, *et seq.*).

Respectfully submitted,

Seth J. Farber /s/
Seth J. Farber
Special Litigation Counsel

cc: All Counsel (via NYSCEF)

**Letter from Petitioners' Counsel to the Honorable Laurence L.
Love, dated May 24, 2022**

[pp. 907 - 908]



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May 24, 2022

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 the above action. We write to respectfully ask that the Court enter a final judgment determining the Petition should it deny Petitioners' emergency motion for a temporary restraining order ("TRO"). The Attorney General has answered the Petition on behalf of Governor Hochul, *see* NYSCEF No. [86](#), and all arguments were heard on May 23, 2022, which was the return date of the Petition and deadline for answering papers that the Court set in its order to show cause, *see* NYSCEF No. [25](#). Petitioners make this request because the Court and all parties recognize that the passage of time is critical to the relief sought in the Petition and a fair resolution of this action. In these circumstances, an expeditious appeals process is warranted. Under CPLR 5601(b)(2), Petitioners may appeal as of right directly to the Court of Appeals "from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States." Should the Court deny the Petition, Petitioners will therefore seek a direct appeal to the Court of Appeals.

Petitioners additionally write to oppose the motion to dismiss filed on May 22, 2022, by Respondent Heastie (mot. seq. #002) and the motion to dismiss filed on May 23, 2022, by Respondent Stewart-Cousins (mot. seq. #003). Petitioners oppose the motions to dismiss on the same grounds argued in their reply letter to Respondents' opposition to Petitioners' requested TRO. *See* NYSCEF No. [23](#). Petitioners further oppose the motions to dismiss for the reasons Petitioners argued on the record at the show-cause hearing on May 23, 2022, at 10:00 am. To the extent the motions to dismiss make arguments that were not addressed in Petitioners' reply letter or during oral argument at the hearing, Petitioners reject those arguments as well.¹

¹ In the motions to dismiss, Respondents argue that the Petition should be dismissed because N.Y. Election Law § 16-116 requires that a special proceeding to invalidate ballot-access petitions must be initiated by a verified petition. *See* Heastie Mem. Of Law at 20–21, NYSCEF No. [81](#). This argument fails for the same reason Respondents' arguments regarding necessary parties, statute of limitations, and standing fail: the Petition does not seek to invalidate any ballot-access petitions. The Petition asserts a constitutional claim under Article III and a claim for declaratory judgment that the State Assembly map is unconstitutional. The

Respondents have no basis to oppose this request. They have already moved to dismiss the Petition, and argument was conducted on the record. Thus, all arguments to grant or deny the Petition have been heard. Any opposition by Respondents would further betray the delay-by-design tactics Respondents have leaned on throughout this and related litigation.

For these reasons, and without waiving opposition to Respondents' motions to dismiss, Petitioners respectfully ask that the Court decide the Petition and enter a final judgment in order to facilitate a speedy appeals process.

Respectfully submitted,



Jim Walden
Peter A. Devlin
Attorneys for Petitioners

cc: All Counsel (via NYCSEF and E-Mail)

Petition requests as relief ancillary to the constitutional claim that the State Assembly map be invalidated, that state and local primary elections be moved to August 23 or September 13, and that a ballot-access petition period be reopened—without necessarily invalidating any of those petitions. This is the same relief that was sought and ultimately granted in Steuben County in *Harkenrider v. Hochul*, Index No. E2022-0116CV. Petitioners further oppose Respondents' motions to dismiss to the extent they fail to comply with New York's Civil Practice Law and Rules, including, but not limited to, CPLR 2214 and/or CPLR 406.

Letter from Steven B. Salcedo to the Honorable Laurence L. Love, dated
May 25, 2022
[pp. 909 - 911]



Phillips Lytle LLP

Via NYSCEF

May 25, 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 (the "Speaker") in the above-captioned proceeding, we respond to the letter filed electronically last evening on behalf of counsel for Petitioners (NYSCEF Dkt. No. 89).

We reiterate the petition should be dismissed for any of the reasons set forth among the papers supporting the Speaker's motion to dismiss (Dkt. Nos. 30-81), and/or other Respondents' papers moving to dismiss (Dkt. Nos. 84-85) or otherwise opposing the petition (Dkt. Nos. 82-83, 86-88). This Court already denied Petitioners' application for a temporary restraining order ("TRO") when it struck the TRO language set forth in the order to show cause Petitioners proposed (*see* Dkt. No. 25, at p. 3), and should not award any TRO to Petitioners now. Further, we reserve the Speaker's arguments in relation to any appeal that may ensue from the requested dismissal of the Petition, and will respond to such appeal at the appropriate time and in the appropriate forum.

The Speaker's notice of its motion to dismiss the petition was proper. In a special proceeding such as this one, "[m]otions ... made before the time at which the petition is noticed to be heard, shall be noticed to be heard at that time." CPLR 406. "[P]ursuant to CPLR 406, any motion in a special proceeding may be made on little or no notice as long as it is made returnable when the petition is scheduled to be heard." *50 E. 191st St. Assocs. v. Gomez*, 148 Misc. 2d 560, 561 (N.Y. City Civ. Ct. Bronx County 1990) (citing *Goldman v. McCord*, 120 Misc. 2d 754, 755 (N.Y. City Civ. Ct. N.Y. County 1983)). Because this Court's order to show cause (Dkt. No. 25) noticed the petition to be

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ATTORNEYS AT LAW



Hon. Laurence L. Love
Page 2

May 25, 2022

heard on Monday, May 23, 2022, at 10:00 a.m., with answering papers due by 9:00 a.m. that day, the Speaker's dismissal motion e-filed Sunday evening, May 22, 2022, and noticed to be heard on May 23 at 10:00 a.m. was timely.

Once again, Petitioners claim their "Petition does not seek to invalidate any ballot-access petitions" (Dkt. No. 89, at p. 1 n.1). The order to show cause and the Petition belie this inaccuracy. Absent a timely challenge pursuant to New York Election Law § 16-102 on or before April 21, 2022, the candidacy of every person who filed designating petitions to run for office in territory based upon New York State Assembly districts — *i.e.*, for State Assembly, for representatives to county party committees, for party District Leaders in New York City, for representatives to the New York State Democratic Committee, and for delegates and alternate delegates to State Supreme Court judicial nominating conventions — has been valid, particularly in view of the determination of the New York Court of Appeals not to invalidate the Assembly districts enacted in Chapter 14 of the New York Laws of 2022. *Matter of Harkenrider v. Hochul*, ___ N.Y.3d ___, 2022 WL 1236822, at *11 n.15 (Apr. 27, 2022). Yet the order to show cause and the Petition demonstrate that, weeks after the April 21 deadline to commence a challenge, Petitioners seek an Order that would require those candidates to "obtain new designating petitions," and run for office in new districts other than the ones where they were originally designated (Dkt. No. 1, at p. 30; Dkt. No. 25, at p. 2). Petitioners also seek to "vacat[e] any certifications" of those candidates for the primary ballot, including certifications made by 57 county Boards of Elections and the New York City Board of Elections which are not parties to this proceeding (*id.*). Without question, therefore, Petitioners seek a remedy conditioned upon satisfying the requirements of Election Law § 16-102 and naming all those candidates and boards of elections as necessary parties to this proceeding, which Petitioners have not done. No such conditions pertained to the remedy in *Matter of Harkenrider v. Hochul* (Steuben County Index No. E2022-0116CV), because that proceeding was commenced months before the designation of any candidates to run in this year's elections, and any Congressional or State Senate candidate collected and filed designating petitions to run in districts that they knew had been challenged and were subject to change.



Hon. Laurence L. Love
Page 3

May 25, 2022

Finally, should the Speaker's motion to dismiss be denied (which it should not), the Speaker respectfully requests the opportunity to answer the Petition upon such terms as may be just, pursuant to CPLR 404(a).

Respectfully,

Phillips Lytle LLP

By 

Steven B. Salcedo

SBS3CRB
Doc #10443835

Transcript of Proceedings, dated May 23, 2022
[pp. 912 - 1015]

FILED: NEW YORK COUNTY CLERK 05/31/2022 08:24 PM

NYSCEF DOC. NO. 95

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/31/2022

1

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK - CIVIL TERM - PART 63
3 -----X
4 PAUL NICHOLS, GAVIN WAX, and GARY GREENBERG,
5
6 Petitioners,
7
8 -against- Index No. 154213/22
9
10 GOVERNOR KATHY HOCHUL, SENATE MAJORITY LEADER AND
11 PRESIDENT PRO TEMPORE OF THE SENATE ANDREA
12 STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL
13 HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, and
14 THE NEW YORK STATE LEGISLATIVE TASK FORCE ON
15 DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,
16
17 Respondents.
18 -----X
19 60 Centre Street
20 New York, New York
21 May 23, 2022
22
23 B E F O R E: HONORABLE LAURENCE LOVE
24 Supreme Court Justice
25
26
27 A P P E A R A N C E S:
28
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30 Attorneys for the Petitioners
31 PAUL NICHOLS and GARY GREENBERG
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33 New York, New York 10281
34 BY: JIM WALDEN, ESQ.
35 BY: PETER A. DEVLIN, ESQ.
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39 Attorney for the Petitioner
40 GAVIN WAX
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43 BY: AARON S. FOLDENAUER, ESQ.

(Continued)

dk

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18

19 NEW YORK STATE

BOARD OF ELECTIONS

20 40 North Pearl Street

Albany, New York 12207

21 BY: BRIAN QUAIL, ESQ.

22

23 Diane Kavanaugh, RMR, CRR, CRC

Senior Court Reporter

24

25

dk

Proceedings

1 THE COURT: Good morning to all sides.

2 We're here in the action Paul Nichols, Gavin Wax,
3 and Gary Greenberg against Governor Kathy Hochul, et al.,
4 Index No. 154213 of 2022.

5 First, if I could have appearances from all
6 counsel, starting with the Petitioner.

7 MR. WALDEN: Yes, sir. My name is Jim Walden. I'm
8 here with my colleague, Peter Devlin, on behalf of
9 Petitioners.

10 MR. FOLDENAUER: Good morning, Your Honor. Aaron
11 Foldenauer, on behalf of Gavin Wax.

12 THE COURT: Anyone else for Petitioner?
13 For Respondents.

14 MR. BUCKI: Good morning, Your Honor. Craig Bucki,
15 B-U-C-K-I, from the law firm of Phillips Lytle, in Buffalo,
16 New York, on behalf of New York State Assembly Speaker Carl
17 Heastie, H-E-A-S-T-I-E. And with me in court today is my
18 co-counsel, C. Daniel Chill, from the law firm of Graubard
19 Miller, in New York City.

20 THE COURT: Thank you.

21 MR. FARBER: Good morning, Your Honor. Seth
22 Farber, special litigation counsel, from the office of
23 Attorney General Letitia James, New York, New York,
24 appearing on behalf of Governor Hochul.

25 MR. HECKER: Good morning, Your Honor. My name is

dk

Proceedings

1 Eric Hecker, Cuti Hecker Wang, on behalf of the Senate
2 Majority Leader.

3 THE COURT: Good morning, all.

4 Just as a brief procedural matter, I did receive a
5 request on Friday from the press seeking to have cameras in
6 the courtroom, which is a request that is being denied at
7 this time. Obviously the courtroom is certainly open to the
8 public. Anyone from the press or anyone else can be here.

9 I'm just waiting on the technical piece, in terms
10 of some of the Respondents that have already answered, we
11 have some representatives here from the New York City Board
12 of Elections who are joining us virtually. I believe they
13 have had some issues they were dealing with.

14 Who is here on behalf of the State Board of
15 Elections?

16 MR. QUAIL: Good morning. Brian Quail, from the
17 New York State Board of Elections. I am also joined by my
18 colleague, Kevin Murphy.

19 THE COURT: Good morning.

20 You are the only ones who are participating in the
21 process obviously. We will obviously keep track on the
22 technical end the best we can on our side. If we run into
23 some issues on your side, please let us know as soon as
24 possible.

25 With that said, good morning. I'm Judge Love. I

dk

Proceedings

1 know you are obviously here with an order to show cause that
2 came before me the middle of last week.

3 I'm certainly aware, as everyone else who is here
4 is aware as well, I wasn't the first judge that the case got
5 assigned to.

6 I know the initial order to show cause was uploaded
7 on Sunday and went through whatever the technical stuff was
8 through the court system. Even though we obviously move a
9 lot quicker now that many things go through electronically,
10 it still takes a couple of days to be properly processed and
11 to go to two of my other colleagues before the case came
12 before me.

13 As you also know, obviously I signed off on the
14 order to show cause with a return date this morning. I'm
15 certainly very cognizant of the time constraints that we're
16 all dealing with in real time in this entire situation.

17 Although I know Petitioner was seeking an initial
18 TRO in this matter as well, I did strike that provision
19 pending hearing from everyone in detail today. Frankly,
20 recognizing that even at the time that this proposed order
21 to show cause was submitted, military ballots and things had
22 already been processed, and certainly cognizant from
23 documents that had already been uploaded on NYSCEF in this
24 matter that the Board of Elections was already actively in
25 the process of things. And I did not want to add an

dk

Proceedings

1 additional potential delay that could have some significant
2 ramifications over the course of the weekend.

3 I will also say, and then I will hear from counsel
4 on both sides momentarily, this obviously is not occurring
5 in a vacuum. This process here today is not occurring in a
6 vacuum.

7 Everyone here is certainly aware of the process
8 that occurred with one of my colleagues upstate, with the
9 initial lawsuit that was filed back on February 2nd after
10 the lines were initially put out by the Legislature and
11 signed by the Governor, and all of the process that's gone
12 on through the Fourth Department's review and the
13 Court of Appeals decision culminating with the new
14 Congressional and State Senate lines that were released over
15 the course of this weekend.

16 So with that said, I guess I'll first turn to
17 Petitioners' counsel and give you an opportunity to be heard
18 in this matter.

19 MR. WALDEN: Thank you, Your Honor.

20 I am going to argue for all three Petitioners,
21 although if I miss anything, I think Mr. Foldenauer would
22 like to reserve a little bit of time.

23 THE COURT: That's fine.

24 MR. WALDEN: My remarks, Your Honor, won't delay
25 the Court long because I'm going to get right to the point.

dk

Proceedings

1 The constitutional amendment that's at issue in
2 this case passed overwhelmingly by the voters. They passed
3 it by a margin of 58 percent to 41 percent. The mandate in
4 that constitutional amendment was clear and resounding. And
5 the purpose behind it was clear as well.

6 As Senator Nozzolio said on the Floor, when
7 advocating for passage, to ignore the constitutional process
8 we are envisioning today in any way I believe certainly
9 would be contrary to the public interest.

10 Well, the New York State Legislature did just that.
11 They ignored the Constitution and went ahead with their own
12 maps.

13 It doesn't matter what I think because the
14 Court of Appeals has already spoken clearly. The Assembly
15 map is unconstitutional. That much nobody can possibly
16 dispute.

17 But it begs an important question, Your Honor.

18 And if you don't mind, I'm just going to move my
19 chair back for a second.

20 It begs an important question, which is, why are
21 the leaders of the Democratic and Republican parties and
22 their BOE appointees aligned here together advocating for an
23 unconstitutional map, defending it based on a conflict with
24 the oath of office they took to uphold the Constitution, in
25 defiance of the Court of Appeals, and at two great costs?

dk

Proceedings

1 One cost, to the confidence in our electoral system
2 with voters already feeling deeply cynical and voter turnout
3 at an epic low.

4 And a second one is a financial cost because it has
5 cost a queen's ransom to hire lawyers to defend these
6 litigations, defending an unconstitutional map all across
7 the state, and the litigation continues.

8 And basically in the papers, Your Honor, the
9 Respondents give you three answers.

10 Answer number one, the Assembly map is bipartisan.

11 Now, constitutionally that's irrelevant, obviously,
12 because the constitutional amendment was not only
13 bipartisan, it was overwhelming, even in the Legislature.
14 The Assembly, I think, passed it 23 to -- I can't remember
15 what the numbers were, Your Honor, but it was overwhelming.

16 But only in an environment that is as cynical and
17 craven, as we are in America today, could someone say the
18 Assembly map was bipartisan with a straight face.

19 Two-thirds of the Republicans and the Assembly
20 voted against it, and every single member of the Senate on
21 the Republican side voted against the Assembly map.

22 THE COURT: Okay.

23 Counsel, one-third of the Assembly Minority voted
24 in favor of the map.

25 MR. WALDEN: Fourteen members. You're right,

dk

Proceedings

1 Your Honor. And that has become, as we've seen even in
2 Congress, the touchstone for saying something's bipartisan,
3 which is when you get a couple of people to sign on from the
4 other side.

5 That is not a bipartisan in the context of American
6 democracy. And it's certainly not an argument that matters
7 or should constrain the Court when we're talking about a
8 violation of constitutional proportions.

9 But because they can't sell the bipartisan
10 argument, in part because it is legally irrelevant, they
11 then move to the chaos argument. And they say that voiding
12 the Assembly map will throw the election into chaos.

13 Now, three things, Your Honor, important to note.

14 The Courts rejected that argument already. And
15 we're not that far down the road from April 27th, which is
16 when the Court of Appeals came out with its decision.

17 THE COURT: Counsel, I might take issue with
18 exactly the way you word that. I mean, the Court of Appeals
19 issued the decision that they did in terms of their findings
20 on the Congressional maps and the State Senate maps.

21 As to the Assembly maps, they certainly referenced
22 that they had some constitutional infirmities related to
23 that map, but for the reasons that we're all aware of, they
24 issued a ruling that essentially they weren't in a position
25 to make the determination on the Assembly maps at that time

dk

Proceedings

1 and left it open-ended for how anyone wanted to proceed.

2 MR. WALDEN: So, Your Honor, I did you a
3 disservice. I apologize. I think that I didn't phrase my
4 argument carefully enough. So you thought I was saying one
5 thing. I was trying to say something else.

6 THE COURT: That's fine. I'll give you a chance to
7 clarify.

8 MR. WALDEN: I can do both.

9 First of all, Your Honor, you're absolutely right
10 that the Court of Appeals did something that nobody really
11 could have predicted, right. No one knew what the
12 Court of Appeals was going to do.

13 What we know is that Judge McAllister declared the
14 maps sua sponte unconstitutional for the same reason that
15 the Congressional and Senate maps were declared
16 unconstitutional.

17 THE COURT: Even that, counsel, I'll just correct
18 you. There was a finding between him, and then when it went
19 to the Fourth Department, that the Congressional maps were
20 certainly clearly unconstitutional with the gerrymandering
21 issues and all of that.

22 But as to the Senate maps, he found that they were
23 unconstitutional. He did not, on the technical issues
24 because of what happened with the 2014 Commission and the
25 two maps, and what was and wasn't filed, but I don't believe

dk

Proceedings

1 even he made reference that those maps were unconstitutional
2 in terms of gerrymandering or other issues. And, as you
3 said, he sua sponte added the Assembly maps into the mix as
4 well.

5 MR. WALDEN: So, Your Honor, let me just very
6 precisely say to you, so that if there's any lack of clarity
7 in what I'm arguing here, our petition is all about the
8 procedural constitutional violation. And we call it
9 procedural. Respondents minimize the significance of it.

10 And when I tried to explain the constitutional
11 consequences and why it was important to American democracy,
12 I was accused of giving a civics lecture. So I won't give
13 one to the Court. I'm more than happy to go into that.

14 THE COURT: I think I've had enough civics lessons
15 through the years. My mother was a history teacher. Plus I
16 occasionally paid attention in school.

17 You can go ahead from there.

18 MR. WALDEN: But, Your Honor, we're not talking
19 about the fact that all three maps were declared
20 unconstitutional. You're correct that the Congressional one
21 was also gerrymandered, but they were all declared
22 unconstitutional for the same procedural reason that is
23 imbedded in the Constitution, which is, they were all done,
24 they were all drawn in violation of the Constitution.

25 So when I say that the Court of Appeals rejected

dk

Proceedings

1 the argument that it was impossible that it would cause
2 chaos, what I meant was on April 27th, very, very shortly
3 ago, the Court of Appeals said, with respect to the Senate
4 and the Congressional maps, I trust you are going to be able
5 to work it out.

6 In point of fact, we can work it out, Your Honor.

7 This chaos argument is ridiculous because, although
8 this is not before the Court right now, we have a very
9 simple solution, and we put that solution forward.

10 And what you've got are generalized, exaggerated
11 adjectives as to why it's overly burdensome. When all we're
12 saying is let's move all the State races back to September,
13 which is the historic date for party primaries. Until 2014,
14 all party primaries were on September 14th. Leave the
15 Congressional race where it is. That eliminates any Federal
16 issues whatsoever. And move the primaries to September.
17 That gives the Board of Elections even more time to get it
18 right, which is what matters.

19 And so this notion of chaos is illusory. But, more
20 importantly, who caused the chaos? They go to great lengths
21 in their papers to blame us for delay. Seriously,
22 Your Honor?

23 On March 31st, Judge McAllister declared the
24 Assembly map void and unusable. His words could not have
25 been more clear.

dk

Proceedings

1 The Respondents had no idea what was going to
2 happen. I assume they had no idea. I certainly hope they
3 had no idea what was going to happen in the
4 Fourth Department and Court of Appeals. For all they knew
5 that judgment would be sustained.

6 THE COURT: But, counsel, that's not where the
7 timeline starts. The timeline starts February 2nd.

8 MR. WALDEN: Yes.

9 THE COURT: February 2nd was the date that the
10 proposed lines from the Legislature were completed on the
11 2nd and signed off on by the Governor on March 2nd. And the
12 lawsuit that was before Judge McAllister was literally filed
13 on that same day.

14 And once that was filed on the March 2nd date, and
15 I think the initial petition was amended on March 8th to
16 include the State Senate lines, and very clear, when it was
17 filed at that time, the parties made clear they were not
18 seeking to take any action related to the Assembly lines.
19 That's when the clock started.

20 So I agree with you, nobody would have had any way
21 of knowing what Judge McAllister's decision would have been,
22 what the Fourth Department was going to do, or what the
23 Court of Appeals was going to do between February and the
24 April 27th decision from the Court of Appeals.

25 But the opportunity for your clients or anyone else

dk

Proceedings

1 to add the issue, the potential issue, of the Assembly maps,
2 the clock on that started to run on that same February 2nd
3 date.

4 MR. WALDEN: Well, Your Honor, I was not addressing
5 that point. But I take Your Honor's -- I take what you are
6 saying, Your Honor, but I respectfully disagree. This is
7 why.

8 There are two reasons, Your Honor. There's a legal
9 reason and there's a factual reason.

10 The legal reason is clear. The Respondents made
11 this argument in the context of our intervention motions.
12 Fair enough. The intervention statute has a timeliness
13 requirement.

14 The last time I looked, Your Honor, the
15 apportionment provision of article 3 section 5 does not have
16 a time provision. It says that the Court shall hear a case.
17 That it shall be decided promptly. And that any citizen in
18 the State can file one.

19 And they cite not a single case where a judge in
20 this state applied a judicially created timeliness
21 requirement to apportionment litigation.

22 So, Your Honor, just from a legal perspective,
23 we're not in intervention land here. And they have to show
24 you -- this is not my burden. They have to show you that
25 there is authority for creating one in an apportionment case

dk

Proceedings

1 where the consequences for our democracy are epic.

2 And they argue all of these equitable doctrines.

3 And that's what I was trying to get to, Your Honor, which is
4 this timeliness.

5 It wouldn't be fair, Judge, for you to count
6 timeliness for us, and I can walk through why we were timely
7 for sure, but it wouldn't be fair for you to count that
8 against us and not recognize the fact that they
9 intentionally stood on their -- sat on their hands.

10 They did it on purpose, Your Honor, because the
11 whole point here is to run out the clock. That's why we
12 were trying to get in front of the Court so quickly because
13 they're saying every day that passes, it's more pandemonium.
14 And every single time, even with today, today they filed a
15 motion to dismiss. When you asked for papers in response to
16 our TRO, they didn't even have a return date on their
17 papers. The Court bounced them. And then two minutes later
18 they re-filed them with a return date that violated the
19 Court's order because you said give eight days and they
20 noticed it for today.

21 Judge, going back to the chaos argument, which is
22 really important, they were on notice as of March 31st.

23 Talk about us sitting on our hands? The Board of
24 Elections has a responsibility to the voters of New York to
25 make sure that they're prepared for an election. And this

dk

Proceedings

1 whole problem was a problem of the people that appointed
2 them to their positions. And I hope that they're going to
3 act independently and not just simply at the whim of the
4 people that appointed them.

5 And they did nothing. They could have developed a
6 contingency plan on March 31st to today. What if somebody
7 knocks down the Assembly maps, what are we going to do?
8 They haven't. They put their heads down and rushed forward.

9 Ask them, Your Honor, did you prepare a contingency
10 plan for the election if some Court shut down the Assembly
11 on March 31st, can you tell me that you were preparing for a
12 different scenario on March 31st?

13 They did nothing, because that's what they wanted
14 all along, Your Honor.

15 So it's like the kid who said, I would have done my
16 homework if only, fill in the blank. That's exactly what
17 happened here. And their delay was of constitutional
18 significance. Ours was an equitable consideration, I guess,
19 which doesn't matter in this context when the enabling
20 constitutional provision and the statute do not require
21 timeliness.

22 But when the bipartisan argument fails, and when
23 the chaos argument fails, and, Judge, here is where the
24 rubber meets the road, they actually make the argument that
25 the maps that they drew unconstitutionally are fair.

dk

Proceedings

1 I mean, I obviously couldn't believe that I saw
2 that in the papers, Your Honor, because I really hope that
3 whatever questions you have for me, you are equally direct
4 with them.

5 How they can --

6 THE COURT: I am definitely equal opportunity.

7 MR. WALDEN: Thank you, Judge.

8 THE COURT: And whoever is standing in front of me,
9 there will be some questions, I assure you.

10 MR. WALDEN: Thank you.

11 They said the same thing about the Senate map. And
12 the Court of Appeals struck it down. And the Special Master
13 redrew.

14 And, lo and behold, what happened, it did the one
15 thing, the one thing that's critical to the protection of
16 our democracy, which is it did not protect incumbent
17 Independents.

18 The Special Master redrew the Congressional map.
19 Also deemed fair. All throughout this litigation, it's
20 fair, it's fair, you should uphold it. New lines were
21 drawn.

22 Guess what, Your Honor? The same quality to the
23 maps. It didn't protect the incumbents. The Assembly map
24 was drawn specifically to protect Democratic incumbent
25 candidates. It is antidemocratic at its core. And this is

dk

Proceedings

1 not speculation or guesswork, Your Honor. When I say that
2 it was rigged, I can give you examples.

3 There was an Assembly man -- an Assembly challenger
4 in the 37th district in Queens. His name is Huge Ma,
5 H-U-G-E, M-A.

6 And among other things that he's done, Your Honor,
7 he actually created a website to allow people to find COVID
8 vaccine sites. Obviously that's someone that deserves a run
9 at the polls.

10 And guess what happened to Mr. Ma in these fair
11 lines that the Legislature crammed through in an
12 unconstitutional way? Exactly what the voters of New York
13 were trying to get them not to do from the beginning. They
14 played with the maps and they rigged the game against
15 Mr. Ma.

16 Suddenly Mr. Ma wakes up one day and realized that
17 he can no longer run in the 37th district because his house
18 has been drawn outside the line.

19 And, Judge, this is all about winners and losers.
20 Please, we all understand that. Who won in that
21 circumstance? An incumbent Democrat named Catherine Nolan,
22 high-ranking person in the Democratic Party, served for
23 almost 40 years. She won. Who lost?

24 THE COURT: But, I'm sorry, just for that specific
25 example, isn't she retiring?

dk

Proceedings

1 MR. WALDEN: I was just going to get there. Thank
2 you.

3 THE COURT: Not a problem.

4 MR. WALDEN: Mr. Ma can now no longer run in the
5 37th district. She's retiring for medical reasons. It was
6 announced after the maps came out. And Mr. Ma now can't run
7 in the 37th district, even though he would be a leading
8 candidate there. That was done to protect the Democrats.

9 So who lost? The voters lost.

10 And another candidate -- they talk so much about
11 candidate protection. Every time they say it, Your Honor, I
12 hope that what burns in your ears is not candidate
13 protection. They don't care at all about challengers. They
14 care about incumbents. That's what they're here for.

15 That did not protect the candidate, who was a
16 quality candidate from the 37th district. But he wasn't
17 alone. Go up to Albany. Sam Fein was trying to run in the
18 108th district. Somehow the map magically moved his house
19 out of the 108th into another district. And he had to take
20 himself off the ballot.

21 THE COURT: But, counsel, the concept of when lines
22 are drawn, whoever draws them, whether they are from a
23 special commission, by the Legislature in the past, by a
24 Special Master, whoever draws the line at a certain point,
25 the line is drawn within a community, on a county line, or

dk

Proceedings

1 meandering up and down in certain sections, where the
2 criteria that went into how those lines are drawn take in
3 numerous items in terms of population and trying to, you
4 know, preserve fairness in terms of racial, you know,
5 coherence, to keep things -- not coherent, but to keep
6 things cohesive in terms of certain communities that
7 hopefully still have a voice.

8 But the bottom line is, even on the current maps
9 that the Special Master has put out for both the State
10 Senate and the Congressional, we all know there have been
11 numerous decisions that were made in that where individual
12 candidates, whether they are incumbents or just candidates
13 for the first time planning to run, have found their homes
14 to be just outside of a certain district, or that they have
15 now been lumped together with a neighboring district where
16 the political decisions on whether someone's running in one
17 place or another have changed.

18 So I guess I'm just questioning the argument to say
19 that because the Assembly and Legislature, if the
20 Legislature drew up lines where you're coming up with -- you
21 can come up with examples where it benefited certain
22 candidates and hurt other candidates, I guess I'm trying to
23 say the same exact argument could be put in place for every
24 single map that the Special Master has put into place for
25 the Senate and Congressional maps at this time.

dk

Proceedings

1 There are still -- you know, there are still
2 candidates out there for some of those offices who are
3 claiming that there are issues with those maps. And I'm
4 certainly not looking to dive into that. I'm enjoying
5 myself just dealing with what's in front of me.

6 But I just think it's a little bit of an unfair
7 argument to say that the maps were drawn specifically to
8 keep one person out of one specific district.

9 With that said, you may proceed.

10 MR. WALDEN: Thank you, Your Honor. I appreciate
11 your perspective.

12 And if your perspective was actually the way the
13 Respondents were acting, I would be happy with democracy and
14 I would be moving on to some other pro bono case, right.
15 That would be great.

16 But, Your Honor, there are two things that are
17 important. First of all, I have used this adage before, but
18 I find it useful in these circumstances, if it walks like a
19 duck, and it talks like a duck, it's a duck.

20 And when you have candidates, and I guess I won't
21 go through all the list of them, Your Honor, where in race
22 after race after race and district after district after
23 district where it just happens to be that the incumbent is
24 staying in the district and a strong challenger is moved
25 outside, I think that it does not take a cynical mind to see

dk

Proceedings

1 that there's a bad purpose.

2 So their argument that it's fair will require me to
3 go into lots of examples that will challenge your notion,
4 Your Honor, but, as a legal matter, again, getting back to
5 the law, even if that is your presumption, even if you give
6 Respondents more credit than I did based on the
7 circumstances, generally, you can't possibly do that here,
8 Your Honor. You can't cut them slack here. You can't
9 presume that they operated from good motives because they
10 intentionally violated the Constitution and then spent
11 millions of dollars from the public trough to defend an
12 unconstitutional map, even when there was time to say to the
13 Fourth Department, no, you know what, you're right, this was
14 wrong, we did it the wrong way, we've got an obligation to
15 uphold the Constitution, we're going to go back and do it
16 right.

17 Instead, what's happening in these courts across
18 the state is a game. It's blood sport. They're trying to
19 run out the clock until they create so much delay that the
20 Court of Appeals even throws up their hands and says, okay,
21 there's not enough time.

22 I don't think the Court of Appeals is going to do
23 that, Your Honor. This case is going to go to the
24 Court of Appeals. And I think the Court of Appeals is going
25 to hold the Democrats and the Republicans accountable for

dk

Proceedings

1 their rhetoric because they stand up and they decry voter
2 suppression in the south and decry rigging in the south, and
3 they decry ID laws that suppress the vote, particularly
4 among poor and minority communities in the south, and then
5 they rig the maps here.

6 And, Your Honor, the manipulations in the map are
7 not just candidates. And if the Respondents are deluding
8 themselves into thinking that the intrepid young prosecutors
9 at the Public Corruption Unit at the US Attorney's Office in
10 this city are not paying attention to what's going on here,
11 they're crazy.

12 Your Honor, look at district 61. That was a tried
13 and true, there's no demographic changes there, right. It's
14 the same district demographically than it was before. And
15 they decided to change the map.

16 And what did they do?

17 They snaked along, out of Staten Island, along the
18 Brooklyn Waterfront, and then went into Manhattan. And,
19 Judge, do you know how many voters they picked up in
20 Brooklyn by snaking along the Waterfront? Four. Four
21 voters. And do you know where they live? On a houseboat.
22 They picked up four voters on a houseboat.

23 Do you know what they got for that, Your Honor?
24 Two new Legislative leaders.

25 And do you know who is going to elect those two

dk

Proceedings

1 Legislative leaders? The four people on the houseboat.

2 Your Honor, this is something of a Banana Republic.

3 This is not the America or the New York that I know.

4 And so this is going to be examined, not just by
5 this Court, but for all of the deals that resulted in all of
6 these things that all seem to line up to what every
7 editorial board in this state knows to be true, which is
8 this is another Albany game.

9 We've seen it again and again and again. And this
10 is just the latest incarnation of we're not accountable.
11 The ends justify the means.

12 So, Your Honor, what I had been saying is that they
13 have three primary arguments; bipartisan, chaos, fair.

14 None of them are true. None of them are accurate.
15 And it still begs the question, why are we here, why are
16 they defending an unconstitutional map?

17 We all know the answer, Your Honor. The editorial
18 boards have published this again and again and again, and
19 every corner of the state, Conservative, Democratic,
20 Liberal, Progressive, whatever you want to say, they're all
21 lying. They know that this is the incumbent protection
22 game.

23 The Assembly map was the key prize all along. That
24 is why it was not challenged in Steuben County.

25 Whatever else happened in the courts, the parties

dk

Proceedings

1 agreed they did not want anyone reviewing the Assembly map
2 because the Democrats, for whatever reason, wanted it to be
3 inviolable.

4 THE COURT: Counsel, which begs the question, and
5 I'm sure I'll come to this on the other side as well, but
6 why do you believe they had a different view on the Assembly
7 maps than the other maps?

8 MR. WALDEN: Well, Your Honor, I don't want to take
9 too much of your time, but I'll give you the easiest answer.

10 Of all the people who voted against, and, Judge,
11 again, I'm not giving a civics lesson, so if I go over my
12 skis, just do this, and I'll shut up. I'm very respectful
13 in that way.

14 Obviously this amendment grew from, right, it
15 wasn't some elected official that woke up one day and was,
16 like, you know what, what we do with these maps is really
17 unfair, right.

18 There's a long, long history to the amount of
19 cynicism and anger at the game playing around these lines.

20 It culminated in 2012. But it was 20 years before
21 that, Judge. And I can go through the history.

22 THE COURT: It's fair to say every time we've gone
23 through a census and redistricting --

24 MR. WALDEN: I won't.

25 THE COURT: There's a long history in New York and

dk

Proceedings

1 around the country on that.

2 MR. WALDEN: Yes.

3 THE COURT: We don't need to go through all of
4 that.

5 MR. WALDEN: But, Judge, yes. I'll leave that
6 alone.

7 But what is true is New York has positioned itself
8 as a leader on the anti-voter suppression effort. And in
9 2012, New York made good on that promise, right, made good
10 on it by initiating the very long process of two separate
11 votes in the Legislature, by the voters, enabling statutes
12 and changes to numerous state laws to make this all happen
13 and line up. And then they threw it away over the Assembly
14 maps.

15 And your question is why. And I only have one
16 answer.

17 You would think that every lover of democracy would
18 vote for something like that. Who is the one person on the
19 Democratic, or one of the people on the Democratic side who
20 cast a vote against this is the current Speaker, Carl
21 Heastie. He voted against it.

22 So, Your Honor, we all know the history of three
23 men in a room and all of these manipulations. I can't tell
24 you, because I'm not in the Assembly, why that line was
25 drawn, but what I do know is that line is very consistent

dk

Proceedings

1 with Mr. Heastie's vote in 2013.

2 THE COURT: Okay. I'll just take a step back.

3 The Commission that was created, and passed by the
4 voters of New York, that created a Commission of ten
5 members, five Democrats and five Republicans, to do a
6 certain job that they -- I don't think anyone is arguing
7 they didn't do the job they were supposed to do, correct?

8 MR. WALDEN: No, Your Honor. They weren't given
9 the chance to do the job. The job required a very clear
10 process that was laid out, an alternative. The job was,
11 submit one map. It gets up or down voted. It got down
12 voted. Okay. Do another map.

13 THE COURT: Right.

14 MR. WALDEN: And if, and if, and this is the escape
15 valve that they wrote in to the Constitution, if that
16 doesn't pass, then there can be an action brought to make
17 the IRC take a series of actions.

18 Now, I didn't write that, Your Honor. They did.

19 THE COURT: Right.

20 MR. WALDEN: They're just trying to sidestep it.

21 So the idea that I don't think we can blame the
22 Commission for not doing its job when their job was taken
23 away from them midstream. We don't know what would have
24 happened with that second map. We don't know if they would
25 have hired a Special Master, like Cervas, to say, listen, we

dk

Proceedings

1 need you to cut through all this political nonsense and put
2 the voters of the State of New York first and stop our
3 jockeying for the Incumbent Protection Act.

4 But they decided to do something different. They
5 snatched it.

6 THE COURT: All right.

7 Counsel, I am going to hear from Respondents
8 momentarily. I don't want to cut you off. I will let you
9 finish up if you have any additional argument you want to
10 make.

11 MR. WALDEN: I do.

12 THE COURT: Go ahead. I'll come back.

13 MR. WALDEN: Let me go to their defenses,
14 Your Honor. They have a number of defenses; not just one,
15 but several.

16 They've essentially used every technicality in the
17 book. Putting aside this is an issue of the constitutional
18 amendments on which the Court of Appeals has spoken and
19 rejected many of the arguments they put forward, let's put
20 that aside, they have so many technicalities I'm really
21 surprised that they didn't find a way to challenge or use
22 semicolons, right. Some of these defenses, Your Honor, are
23 just ridiculous.

24 Honestly, me, as a private lawyer, if I did it in
25 court papers and I cited an authority that had nothing to do

dk

Proceedings

1 with the issues, I think the judges would be very, very
2 critical and cynical, and maybe even yell at me for doing
3 it.

4 But I've been surprised, this has nothing to do
5 with you, that they did this in Steuben County and basically
6 no repercussions at all.

7 So this -- but one they didn't try in Steuben
8 County, which is kind of interesting in and of itself, is
9 the statutory bar issue. They didn't raise that one in
10 Steuben County. That was an innovation for this one, the
11 delay tactic.

12 They cite CPLR 6313 for the notion that a Court is
13 prohibited from restraining a public officer's duties.
14 Okay. Simple enough.

15 Does that seriously mean that a Court can't direct
16 a public officer or agency to act within the law, to act
17 according to the Constitution? Of course not, right.

18 Now, the funny thing about this, Your Honor, it
19 would be funny, I guess, if the stakes weren't so high, when
20 they cited this, of course, you know, Mr. Devlin and I were,
21 like, wait a minute, they didn't cite any case authority.
22 This is a new argument. We're vaguely aware of this
23 provision, but we went and looked it up. Oh, there's a lot
24 of case law. They didn't cite any of it.

25 Let's look at it.

dk

Proceedings

1 Case after case after case after case says Courts
2 have the power to direct agencies to act lawfully and
3 constitutionally despite CPLR 6313.

4 So we said in our reply papers, they didn't cite
5 any law. But here's the law. Here's the law dating back
6 even before the CPLR, because this is imbedded in New York
7 jurisprudence since the 19th century. We actually cited two
8 cases from the late 1900s.

9 So what do they do? They submit a reply paper.

10 In the reply paper they cite one case, one case
11 only, DiFare versus Shek. D-I-F-A-R-E, S-H-E-K. It's a
12 Second Department case from 1974.

13 I'm guessing, Your Honor, in relying on this so
14 prominently in defense of this they didn't really read the
15 case. I have a copy of it if you would like.

16 DiFare actually stands for the opposite
17 proposition. In that case a Yonkers police officer decried
18 his lowly position on a list for the position of sergeant.
19 And so he filed an injunction to prevent the appointing
20 commission in Yonkers from appointing any sergeants from the
21 people on this list. Okay.

22 There was a problem. The problem is that there
23 were already two appointments made at the time he filed his
24 petition. So the lower court dismissed the petition
25 outright.

dk

Proceedings

1 The Second Department reinstated the petition. And
2 then commented in dicta on something that was in the order
3 to show cause that the Petitioner had filed. And it cited
4 6313. And it said, you can't request an injunction this
5 way. It makes reference to an ex parte. But they quote the
6 language accurately. The problem is it's dicta because the
7 Court wasn't actually reviewing a decision from the lower
8 court.

9 But you have to read on, Your Honor.

10 The very next paragraph in the opinion, and I am
11 going to quote it because it's so clear, the
12 Second Department did order an injunction against any
13 further appointments on the list other than the other two,
14 and the words that they used are, quote, we think it
15 necessary to restrain further appointments from the
16 challenged list of eligibles until Petitioner's challenge
17 thereto has been rebutted.

18 So whatever the force and effect of this seminal
19 case that is the only one that they cite for their
20 interpretation of 6313, the case says the exact opposite.

21 But, Your Honor, let's go through the other
22 defenses. I'll try to do it more quickly. As you can tell,
23 Your Honor, I love citing cases. I love going through
24 cases. But I know that your time is important. So I will
25 answer any -- I've read every single one of their cases.

dk

Proceedings

1 Any one ask me about and I can discuss it.

2 But they go to this failure to join necessary
3 parties. This is actually another innovation. They didn't
4 use this in Steuben County. They only use it here. Here is
5 their argument.

6 Their argument is that we're effectively trying to
7 invalidate petitions for specific candidates. Hmmm. Okay.
8 Where? Where do we say that?

9 The language that they quote is a partial and
10 misleading quote from something that we said in Steuben
11 County.

12 Here, we asked for no such relief, Your Honor. You
13 can look at the order to show cause, paragraph 4. You can
14 look at the fourth request for relief that's on, I think
15 it's also on page 4 of our petition. I could be wrong about
16 that.

17 We don't ask for any petitions to be decertified.

18 What we ask is, and this is completely consistent
19 with what Judge McAllister did in Steuben County with
20 respect to the Senate and the Congressional maps, when the
21 lines are going to be redrawn, candidates are going to be in
22 very different positions.

23 There are some candidates that may have completely
24 valid signatures because all of the people that signed
25 happened to be in the district. There may be other people

dk

Proceedings

1 that are also okay because they got so many signatures in
2 addition to the statutory requirements that if they lose
3 2 percent or 5 percent, it won't make a difference, they
4 still have a valid petition. Then there will be other
5 candidates who lose some signatures.

6 And all we were trying to do is give those
7 candidates a short petitioning period to get additional
8 signatures to replace the ones that they lost because,
9 honestly, Your Honor, that's going to happen mostly to
10 challengers as opposed to incumbents, because the incumbents
11 get five times the number of signatures and little known
12 challengers have a little bit more trouble with the
13 petitioning process.

14 THE COURT: Right. I mean, I think everyone would
15 say it's fair to say the group that would be most
16 detrimentally impacted by having to go through petitioning
17 again will be grass roots or local people, potentially
18 making a first run or doing it on a limited budget. It's
19 not a trade secret that incumbents usually have a lot more
20 support and experience on doing what they need to for the
21 petitioning process and all of that.

22 So I agree with you, doing this will hurt, for lack
23 of a better term, it has a potential to hurt the little guy
24 more than incumbents.

25 MR. WALDEN: What will hurt the little guy more,

dk

Proceedings

1 Your Honor?

2 THE COURT: Throwing this out and going through the
3 whole process again and having everyone do new petitions.

4 MR. WALDEN: No, no, Your Honor. No matter what --
5 first of all, the little guy that you're talking about.

6 THE COURT: Right.

7 MR. WALDEN: They're already harmed by these maps.
8 Please don't misunderstand. We're talking about a
9 completely different set of candidates.

10 There are a set of candidates. This is the one I
11 was going to go through, the laundry list. There are a set
12 of candidates that were taken off the ballot because the
13 lines were redrawn. Those are the people that were harmed,
14 in addition to the voters, by this manipulation with the
15 Assembly map. All we were trying to --

16 THE COURT: But, also, when you are dealing
17 specifically with the Assembly maps and the petitioning for
18 the Assembly maps, it's very rare that you are dealing with
19 just an Assembly candidate.

20 You're dealing with other candidates for local
21 positions and to be judicial delegates. There's a host, and
22 I think that's part of the argument that you're kind of
23 going through now in terms of Respondents' arguments on lack
24 of joinder on some parties. I mean, there are literally
25 thousands of positions across the state that are directly

dk

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1 tied to the Assembly map and the petitioning and everything
2 that we need to go through.

3 MR. WALDEN: Totally agree, Your Honor. I'm not --
4 I apologize if I'm losing the thread here a little bit,
5 Your Honor.

6 Let me say a couple of things.

7 First of all, this issue about joining, you're
8 right, if they're correct, then the next time that someone
9 wants to challenge the maps, they put up a completely
10 artificial barrier that the Court of Appeals is never going
11 to agree with. And that is that you have to join candidates
12 that might be, might be adversely affected.

13 We have no idea who could be adversely affected yet
14 because we haven't seen the maps, right. We haven't seen
15 the redrawn maps.

16 If you look at the Senate and the Congressional
17 maps, there were plenty of district lines where there was no
18 need to change anything at all.

19 What are we supposed to do? What is a Petitioner
20 supposed to do when carrying out the constitutional mandate
21 of holding them to the process that the voters agreed on?
22 Like, literally just everyone.

23 First of all, Your Honor, understand, again, I hope
24 that you -- I trust that you see through this. They didn't
25 raise this in Steuben County. There are a lot of candidates

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1 there that would have had to have been joined.

2 So whether they waived it or not, it's clear that
3 they are raising new arguments that for some strange reason
4 they didn't raise in the one proceeding where they all
5 colluded on keeping the Assembly sacrosanct.

6 Also, the solution doesn't fit the problem. The
7 problem is not the petitions. And no matter what they say,
8 they cannot point you to language in anything that we've
9 filed in this proceeding that says invalidate a single
10 petition. We didn't. Their argument is, well, you may
11 impact candidates. And that is not the standard,
12 Your Honor.

13 If you look at their cases, and I can go through
14 them in great detail, the standard for joining a necessary
15 party is very clear across the cases.

16 The Court requires that there is -- someone has an
17 identified arm that is inextricably interwoven with the
18 litigation. And if there is a candidate that doesn't know
19 whether he or she will be impacted because they haven't seen
20 the lines, they have not suffered any sort of injury that is
21 inextricably interwoven such that reapportionment litigation
22 will essentially turn into a free-for-all where every single
23 one that wants to hold up the Constitution has to name
24 thousands and thousands of candidates as necessary parties.

25 Can you imagine what that's going to do to the

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1 Court? Can you imagine what that's going to do to the
2 resource of these candidates that now don't even know if
3 they're impacted, but they've got to use campaign finance
4 funds to come into court to appear because now they've been
5 named? That would be completely unworkable. And there's
6 not a single case to support it, not one.

7 So, Your Honor, these defenses that they talk
8 about, the laches case, this is, like, the idea that they're
9 citing Schultz for laches -- again, Judge, I'm really
10 getting close to the end.

11 THE COURT: Go ahead.

12 MR. WALDEN: I'm really getting close to the end.

13 The laches argument is kind of a funny one. Again,
14 they have to prove prejudice for laches to apply. And they
15 have no prejudice.

16 They talk about burden. But burden is not
17 prejudice within the meaning of the law. Prejudice is their
18 rights were adversely affected, not it's going be harder.

19 Somebody is not prejudiced when the Court orders
20 them to pay a \$10,000 fine that the judge thinks is
21 appropriate. They're burdened, but they're not prejudiced.
22 They have to spend money and they have to do a lot of things
23 over again. That's burden. That's not prejudice in the
24 legal sense of the word.

25 So laches is off the table for that reason and that

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1 reason alone.

2 But they cite Schultz, like Schultz, the only case
3 for laches. And I'm sure Your Honor read it. I read it as
4 well. A case where there was a law that allowed public
5 financing for many agencies across the state. The law went
6 into effect. The government amassed this incredible
7 infrastructure, spent millions of dollars to issue these
8 bonds. And the bonds were issued. Hundreds of millions of
9 dollars, including bonds that went to some of the most
10 sophisticated financial institutions in America.

11 Money came into the State of New York, hundreds of
12 millions of dollars, from these bonds. Petitioner sat on
13 their hands. Petitioner sat on their hands and waited until
14 all of the bonds were issued and only then brought a
15 constitutional challenge that ultimately the Court found
16 they had not shown. They had not preserved, right.

17 So the constitutional issue wasn't addressed in the
18 merits in the decision they cited. But there is a
19 corresponding opinion where the Court says, and, by the way,
20 now we want to say something about this. They didn't even
21 preserve this constitutional challenge all along.

22 In those circumstances, the Court applied the
23 laches doctrine and said, listen, there's been -- there will
24 be so much financial and reputational damage to the State of
25 New York for your delay, right, because it was their delay.

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1 They waited until all this was done. That's where they
2 apply laches.

3 The damage, financial and otherwise, that is being
4 done to the State of New York now was done by the
5 Respondents because they acted unconstitutionally and in the
6 manner that was intended to benefit incumbents.

7 They raise some other defenses. If you have any
8 questions about any of them, I'm more than happy to address
9 them.

10 I would, Your Honor, because you've been very
11 patient with me, I would like to conclude.

12 THE COURT: I am going to ask one other brief
13 topic. Then I will turn to Respondents and may come back to
14 you.

15 You wave your magic wand and I grant everything
16 that you're looking for, okay. And it goes up --

17 MR. WALDEN: Judge, my legal pen, not my magic
18 wand.

19 THE COURT: It goes up to the Appellate Division,
20 and in all likelihood the Court of Appeals, and you get
21 everything that you are looking for. And so the
22 Special Master now has to be appointed, go through all of
23 this in detail again, and come up with appropriate maps, go
24 through some level, even if it is an expedited process, some
25 level of an expedited review with some public comment, and

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1 puts out that, congratulations, these are the new maps for
2 the State Assembly and everything now needs to get started.

3 As you know, at this point, military ballots were
4 issued on the 13th.

5 MR. WALDEN: Not relevant here. That's
6 Congressional.

7 THE COURT: Correct.

8 Election processes have already begun. I think
9 even you would have difficulty standing here today and
10 arguing that if you got everything that you were hoping to
11 get, that it would be realistic to do the primary on the
12 August date that is currently out there for the
13 Congressional and the State Senate.

14 So you are probably talking about, even in a best
15 case scenario, of something being done in September. Is
16 that fair to say?

17 MR. WALDEN: Well, you said a lot there,
18 Your Honor. You said something like I would have trouble
19 arguing something. The answer to that question is no, I
20 won't have trouble arguing at all.

21 Again, Your Honor, you have a lot of discretion.
22 And they want to make it seem like, oh, my God, this is
23 going to be a train wreck. Of course they want you to buy
24 that argument, because that goes along with dragging this
25 out, putting the burden and expense on us to go up the

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1 chain, when we all know what the Court of Appeals is going
2 to say because they've said it already.

3 THE COURT: Counsel, it was essentially a
4 three-month plus process from when the initial lawsuit was
5 filed in February in this matter until there was a decision
6 by the Court of Appeals on April 27th, that then resulted in
7 a fairly quick process with the Special Master releasing
8 Congressional and Senate maps over the course of this
9 weekend. It's today, May 23rd, the first working day since
10 that has occurred. So all of March, all of April, all the
11 way through May. So it's three plus months to get that done
12 with an August date being set as a primary.

13 MR. WALDEN: Your Honor, we can get to maps. And
14 if you order a TRO today -- first of all, Your Honor, please
15 don't count the week since we filed against us.

16 And, honestly, the intervention was on our rights.
17 So a lot happened in that period of time. And you know full
18 well that some measure of those things they did in order to
19 be able to make this argument. So I hope you hold them to
20 account for that.

21 THE COURT: I understand. And I've also read
22 Judge McAllister's decision in detail when he turned down
23 the intervention request because, in short, I am not going
24 to quote through all of it now, but in short a lot of what
25 he had to say was allowing this issue to be dealt with at

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1 the same time by a Special Master, who was already up to
2 speed and dealing with a Congressional and State Senate map,
3 he said there simply would not be enough time and that doing
4 all of that would further delay the process. And, as he
5 pointed out, it all still goes back to that March 2nd date
6 when the first actions began.

7 MR. WALDEN: Your Honor, I don't think that's what
8 Judge McAllister said respectfully, Your Honor. What he
9 said was, it would cause too much confusion in light of this
10 case. Nothing stops you from filing, nothing, he said it
11 twice, stops you from filing your plenary action.

12 THE COURT: I agree. I one hundred percent agree
13 Judge McAllister clearly said you couldn't intervene in this
14 case, but you could start a separate standalone case, which
15 is why we're here today, which is fine. I'm not disputing
16 your right to have brought it.

17 But I can't get away from a lot of the language he
18 used when he denied the intervention. And, here, he was a
19 judge who was most familiar with everything that was going
20 on on the redistricting, already had an established
21 relationship with a Special Master, who he was comfortable
22 using for this process. And that Special Master was
23 obviously already doing a lot of the work. So he had a
24 tremendous head start on something that was already in a
25 short window.

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1 But, nonetheless, even with those circumstances,
2 let's remember, Judge McAllister, at the outset, sua sponte
3 had thought the Assembly lines should be part of the mix,
4 you know, in the first place. And it went through the
5 Appellate Division. And the Court of Appeals issued the
6 decision that they did.

7 There was nothing that was stopping
8 Judge McAllister at that stage from saying, okay, I already
9 had this finding, I'm going to stick with it, and now let's
10 add the Assembly into the pile.

11 So that opportunity was there a couple of weeks ago
12 for that to have occurred. And a good part of the reason
13 that he rejected the intervention, while at the same time
14 saying you could file a new case, but a great part of the
15 reason he rejected it was because going through that process
16 would necessitate probably a further delay on the
17 Congressional and the State Senate part.

18 MR. WALDEN: Well, Your Honor, you said quite a bit
19 there, Your Honor, so I'm not sure what you want me to focus
20 on, but even if, for no other reason, if you just let me
21 make the record on a couple of things.

22 THE COURT: That's fine. I will let you do that.

23 MR. WALDEN: I have a very brief concluding
24 statement.

25 THE COURT: That's fine.

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1 MR. WALDEN: Thank you. I appreciate that.

2 So, first of all, I said this, this argument of
3 burden on the election, it's not before the Court because
4 there is no timeliness requirement under the Constitution.
5 The Constitution doesn't say you have to do these things
6 unless it's really hard. It says you have to do them.

7 So, Your Honor, I think on that basis alone, if the
8 Court were to deny the TRO based on burden, especially when
9 there's no prejudice, they're going to get up here and say
10 burden, burden, burden. They're going to say prejudice, but
11 it's not. They created the burden. That's the unclean
12 hands doctrine. They can't complain about the burden that
13 they self created.

14 So legally, Your Honor, I don't think you can
15 consider this. Factually, Your Honor, I don't think that
16 you should. And, most importantly, it's illusory.

17 You could simply move back, even if it was just the
18 Assembly, it would be confusing to have three primaries, but
19 at least it would be constitutional, you could move back the
20 Assembly race alone, which has other, as you've said,
21 fairly -- has other collateral races that are tied to the
22 Assembly, that would give the Board of Elections plenty of
23 time, right. Ask them for specifics on why that's not
24 possible.

25 THE COURT: I intend to.

dk

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1 MR. WALDEN: Thank you.

2 THE COURT: That will be part of what we're doing
3 today.

4 MR. WALDEN: Your Honor, what they have said in all
5 these affidavits and what they said to Judge Steuben was all
6 these generalities, oh, there's so much burden, there's so
7 much burden, and it's extreme. They blame us for it. But
8 they never say, okay, if we really -- because think about
9 the timing, Your Honor, they have from May 20th to
10 August 23rd to do these, three months. If we get the maps
11 in two weeks, they will have three months to do the Assembly
12 race in September. If they can do one race, and this is
13 where the Court of Appeals' decision is so important,
14 Your Honor, the time period is virtually identical.

15 So this whole issue -- aside from the reasons I
16 have given you, this whole argument is made up. They're
17 trying to be as general as possible, hoping against hope
18 that some judge is, like, I don't need to dig into the
19 details.

20 And the details here are important if they're going
21 to to meet -- satisfy their burden for a legal standard,
22 laches, which doesn't apply here.

23 I'm going to wrap up, Your Honor. I'm going to get
24 to the TRO standards. This will be two minutes or less.

25 The issue before the Court is really only this

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1 issue, is there a likelihood of success on the merits, is
2 there irreparable harm, and what is the balance of equities.

3 On likelihood of success on the merits, we all know
4 what the Court, of course, is going to do. They have
5 already spoken. We are going to win on the merits. They
6 don't seriously contend otherwise.

7 On irreparable harm, the Court of Appeals has been
8 extremely clear that if you allow an election to go over --
9 go forward on unconstitutional maps, that is a
10 constitutional injury to voters. So that satisfies
11 irreparable harm.

12 And now we're just down to the balance of equities.
13 They say to us, you've delayed, right. We say to them, you
14 intentionally broke the law, you're violating your oaths by
15 even defending this litigation, and you certified, which is
16 now going to be before a judge in Albany, an
17 unconstitutional map, even though the Court of Appeals could
18 not award relief because of the procedural gamesmanship.
19 The Board of Elections can't just simply willy-nilly ignore
20 the Court of Appeals, right.

21 They should have said, sorry, game over, we're
22 going to do our jobs. They didn't.

23 So, Your Honor, I'm begging you, please, on behalf
24 of the voters of New York and every candidate that was
25 rigged off the bid by these shenanigans, for the Court to

dk

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1 say, not on my watch. Their tactics are more informed by
2 Darwin than Mill, right.

3 The voters here are what count. The excluded
4 candidates are what count.

5 I beg Your Honor to keep them at the forefront of
6 your mind when you are listening to the Respondents'
7 arguments.

8 Thank you. Thank you for all the time, Your Honor.

9 THE COURT: Thank you, counsel.

10 Counsel, I am just going to -- I want to take a
11 short break so that everyone can stretch their legs,
12 including the court reporter.

13 We are going to take a five minute or so recess.
14 Then we will resume with Respondents' argument.

15 (Whereupon, a recess was taken.)

16 COURT CLERK: Come to order.

17 THE COURT: You may all be seated.

18 We'll turn now to counsel for Respondents.

19 Whatever order you wish to proceed. I know the
20 Governor was first named. We can proceed from there.

21 MR. FARBER: Thank you, again, Your Honor. Seth
22 Farber, with the Office of the Attorney General, for
23 Governor Hochul.

24 Your Honor's questions indicate that you have a
25 thorough understanding of what is going on here.

dk

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1 Counsel for the Petitioners asked the question of
2 who caused the chaos. And not to answer a question with a
3 question, except I will, who brought this case on May 15th?
4 Who didn't bring this case on May 2nd or May 3rd --
5 February 2nd or February 3rd, when the Steuben County
6 litigation got started, or in the month of February, in the
7 month of March, or even in the month of April, after the
8 Fourth Department and the Court of Appeals had decided this
9 case?

10 Instead, they waited to intervene until the
11 beginning of May, when the Supreme Court Justice in Steuben
12 County, who has lived with the redistricting issues since
13 February, concluded that, notwithstanding his own view on
14 the Assembly maps, the attempts at intervention at that
15 point were too late.

16 So, instead, they come to this Court and put this
17 all on you, at this late hour, after military ballots have
18 gone out, numerous other preparations for the election,
19 including the printing of approximately 700,000 ballots that
20 would have to be destroyed, unknown numbers of military
21 ballots would have to be discarded, and military voters
22 disenfranchised. Why? Because Petitioners have waited
23 until now to bring this case.

24 Another matter not discussed in argument is that
25 the relief sought is a lot more than simply invalidating the

dk

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1 Assembly maps. And even invalidating petitions or redoing
2 petitions for other offices that are tied with Assembly
3 maps, relief is also sought to literally cancel and
4 reschedule the June primary altogether for all offices, not
5 just the Assembly, but including statewide offices,
6 including Governor, for which, well, one of the Petitioners
7 advises that they were an unsuccessful candidate for. It's
8 not addressed in argument, but, nonetheless, what is before
9 the Court.

10 All of these issues could have been addressed for
11 months, but are brought now, literally at the twelfth,
12 thirteenth or fourteenth hour, because the election is
13 underway now.

14 I have no doubt that my colleagues for the State
15 Board of Elections, for Speaker Beastie, for the Senate
16 Majority Leader Cousins, can go into more detail on these
17 points.

18 But under the circumstances, Your Honor, at this
19 late hour, even as Justice McAllister noted, chaos would be
20 caused as a result of interfering with the election process
21 at this hour.

22 If Your Honor has no further questions, I'll defer
23 to my colleagues.

24 THE COURT: All right. Thank you, counsel. I will
25 hear from your colleagues as well.

dk

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1 MR. FARBER: Thank you, Your Honor.

2 THE COURT: Counsel on behalf of the Assembly
3 Speaker.

4 MR. BUCKI: First off, would Your Honor prefer I
5 stand here or at the podium?

6 THE COURT: I think between all the Plexiglas and
7 stuff, it would be perfectly fine if you stand there, it is
8 a little closer, as we continue to navigate the joys of our
9 current COVID universe.

10 MR. BUCKI: Certainly, Your Honor.

11 Where I would like to begin is a point that is
12 similar to where I began my presentation at Steuben County
13 Supreme Court on the intervention motion.

14 I have to call out Mr. Walden again for the
15 numerous irresponsible accusations that he makes as an
16 officer of this court. I can get past all of his sarcasm
17 because I've dealt with many sarcastic lawyers in the past.
18 What I can't get past is when he accuses people who take a
19 constitutional oath of office in the New York State Assembly
20 of things like voter suppression, without any evidence, when
21 he says that there are going to be Federal investigations,
22 that the FBI and public integrity units are going to become
23 involved, and he doesn't offer any kind of evidence, when he
24 says that Legislators are violating their Congressional
25 oaths of office, and he doesn't offer any evidence.

dk

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1 Where we should be focused on this special
2 proceeding is on the law, rather than making wild
3 accusations and delving into the kind of conspiracy theories
4 that the Courts are supposed to stay away from.

5 And so with that in mind, I would like to begin by
6 saying that contrary to what Mr. Walden says, I would submit
7 to this Court that this case has nothing to do with the
8 Constitution for these Petitioners. This case has nothing
9 to do with democracy for these Petitioners.

10 Rather, this case needs to be viewed through the
11 prism of the fact that all three of these Petitioners have
12 grievances with either the New York State Board of Elections
13 or the New York State Assembly.

14 And that's the reason why this proceeding was not
15 brought until May 15th. That's why we didn't have
16 litigation in February or March or April, because now they
17 have beefs with either the Board of Elections or the
18 Assembly, and so this is their way to get back at them. And
19 they have the money to do it. They have the money to hire
20 Mr. Walden and Mr. Foldenauer. So that's what this case is
21 really all about.

22 And I would boil down the interests of the
23 Petitioners to three words, correction, attention, and
24 coercion.

25 Now, with respect to Mr. Nichols, this proceeding

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1 is all about correcting his mistakes that he made in his
2 race for Governor because he needed to get a certain number
3 of signatures to get onto the primary ballot. And he simply
4 didn't get enough valid signatures. So the State Board of
5 Elections ruled him off the ballot.

6 And then Mr. Nichols brought a lawsuit in Albany
7 County Supreme New York, which he discloses nowhere in the
8 petition, nowhere in the supporting papers, and he brings
9 this case in Albany, but his problem was, he botched the
10 service of the petition. And because he botched the
11 service, therefore, the case was dismissed on May 12th.

12 And so he had the opportunity to take an appeal
13 from that decision on May 12th in an effort to try to get
14 the Third Department to restore his candidacy, but for
15 whatever reason, he decided he wasn't going to take that
16 appeal. And therefore was going to try to bring this
17 proceeding as kind of a collateral attack on the fact that
18 the Board of Elections threw him off the ballot. And he
19 couldn't even get the service right for his lawsuit.

20 So that's the motivation of Mr. Nichols.

21 With respect to Mr. Wax, his motivation is
22 attention.

23 Why else would we have tweets from Mr. Wax going
24 back to February calling Republican Assembly members weak
25 and pathetic and saying all these guys, referring to members

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1 of the State Assembly, care about is keeping their pension.

2 You know, he's a conservative commentator. He's a
3 conservative activist. He can't get on Fox News, so he goes
4 on One America News, which is to the right of Fox News, to
5 offer his opinions. And in this day and age, the more
6 outlandish the opinion, the more attention that you get.

7 And so I would submit that for him, this lawsuit is
8 all about getting attention and sticking it to the
9 Republicans in the Assembly with whom he has grievances, as
10 he has set forth in Twitter.

11 In the case of Mr. Greenberg, this lawsuit is all
12 about coercion, because time and again, particularly in the
13 last few weeks, he has been attacking the Assembly on
14 Twitter, he has been tagging the Speaker on Twitter, because
15 he is very passionate about a piece of legislation called
16 the Adult Survivors Act with respect to adult victims of
17 sexual abuse, and he has policy differences personally as
18 opposed to what has been proposed in the state legislature.

19 And so time and again he is saying we need to have
20 a taxpayer supported fund for different kinds of adult
21 survivor claims.

22 And there is, I think, at least I perceive,
23 disagreement between what Mr. Greenberg thinks ought to be
24 done and what the Legislature is hoping to do during what
25 remains of this session.

dk

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1 And so rather than hire a lobbyist, which maybe
2 he's done, I'm not sure about that, but rather than go
3 through the legitimate channels of persuasion to try to
4 achieve the result legislatively that he's hoping to
5 achieve, he brings this lawsuit to coerce the Assembly and
6 to hold the political process hostage so he can get what he
7 wants on this bill that is very important to him.

8 So I would submit that all of this explains why
9 this proceeding wasn't brought in February or March or
10 April. These are newfound grievances that all three of
11 these Petitioners have.

12 And so the question this Court needs to ask itself
13 is, will they allow these grievances to grind the electoral
14 system in the State of New York to a halt.

15 And I would submit that the answer is no.

16 Mr. Walden called the arguments that are made by
17 the State Assembly in support of its motion to dismiss
18 cynical and craven.

19 My response is that what I think is truly cynical
20 is that Mr. Walden made the same arguments before
21 Justice McAllister in support of his intervention motion,
22 and Justice McAllister, whom this Court rightly notes, back
23 on March 31st did sua sponte invalidate the Assembly
24 district lines, there were appeals that followed, and on
25 those appeals the Fourth Department said, we're leaving the

dk

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1 Assembly lines alone. The Court of Appeals said, we're
2 leaving the Assembly lines alone.

3 And so Mr. Walden went to Steuben County back on
4 May 10th and tried to argue in support of intervention, and
5 intervention was denied because, as Justice McAllister noted
6 in his decision, to allow intervention on May 10th, and, by
7 the way, we're already at May 23rd, but back on May 10th,
8 Judge McAllister said allowing intervention would create
9 total confusion.

10 And I would submit, Your Honor, nothing has changed
11 since May 10th, except that now we're not at May 10th
12 anymore. We're at May 23rd. And so whatever confusion
13 there would have been by allowing intervention on May 10th
14 is only compounded with every passing day that goes by.

15 THE COURT: But I will, counsel, just briefly,
16 although I agree Judge McAllister did have those findings,
17 and there was a large part of it rationale for denying their
18 intervention at that time, he did, as Petitioners pointed
19 out, he did go on to say that the parties were free to file
20 a new suit, specifically on the Assembly issue, which is
21 what brings us here today. He did not just issue a blanket
22 ruling of saying too little, too late at that time.

23 So the fact that he still believed at that point,
24 he obviously didn't issue a ruling on the substance of it,
25 but that he essentially opened the door and invited

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1 Petitioners to consider further legal action, what is your
2 response to that?

3 MR. BUCKI: I wouldn't say that Judge McAllister
4 made any kind of invitation of anything.

5 What Judge McAllister said was, these proposed
6 intervenors, which at the time were Mr. Wax and
7 Mr. Greenberg, they can bring a separate lawsuit and they
8 didn't need Justice McAllister's permission to bring a
9 separate lawsuit.

10 And when I counsel clients about, you know, is it
11 possible that I'm going to get sued, what I like to say is,
12 anybody can sue anybody else over anything at any time.
13 There's no doctrine or decree that says you cannot sue
14 somebody.

15 But when you decide to bring a separate action and
16 commence a separate lawsuit, you need to be prepared to
17 address any of the defenses that might be raised to that
18 lawsuit; equitable defenses, defenses concerning necessary
19 parties, defenses concerning standing, defenses concerning
20 timeliness.

21 And the fact is, if the Assembly map was going to
22 be challenged, notwithstanding whatever the Court of Appeals
23 may have said in a footnote, the challenge needed to be made
24 in the right way in order for it to have any effect.

25 And a good example, which I also raised in the

dk

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1 argument before Judge McAllister, is what happens in cases
2 involving suits seeking to address illegal or
3 unconstitutional government action such as, say, a land use
4 dispute, an issue that arises under the State Environmental
5 Quality Review Act.

6 You have a very narrow statute of limitations in
7 which to make your challenge. Sometimes it's four months.
8 Sometimes it's maybe 60 days. Sometimes it can even be as
9 little as 30 days. Or, under the Election Law, as little as
10 14 days.

11 And we're going to get to that statute of
12 limitations in a minute.

13 So all the time it happens that matters that are
14 substantively illegal or substantively unconstitutional are
15 allowed to stand because they're not challenged timely,
16 because they're not challenged using the proper procedure.
17 And so when Mr. Walden says at the beginning of his more
18 than an hour long presentation how can the Assembly defend
19 these lines, I can tell Your Honor how we can defend it.

20 Number one, because the Court of Appeals had an
21 opportunity to invalidate the Assembly map and it declined
22 to do so.

23 And, furthermore, that there are a whole host of
24 issues relating to timeliness and necessary parties and
25 standing, et cetera, and we're going to go through every

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1 single one, that make this challenge not a challenge that
2 can be countenanced at this point in time.

3 And so we offer a variety of defenses. And I would
4 say that any one of them independently has sufficient merit
5 to justify dismissing this lawsuit.

6 And the first one is laches.

7 I can hardly believe my ears to hear Mr. Walden
8 claim that somehow there is no limit, either as a matter of
9 equity or as a matter of statute, with respect to timeliness
10 of bringing a claim such as the one that's brought in this
11 petition.

12 If that were true, then there would be no reason
13 for any kind of statute of limitations at all.

14 And under the law of equity, it is a well-known
15 principle that those who seek equity must do equity.

16 And the last people on earth in this case who did
17 any kind of equity at all were Mr. Nichols and Mr. Wax and
18 Mr. Greenberg because while all of the proceedings were
19 going on in Steuben County Supreme Court, with the
20 Petitioners and counsel for the Legislative leaders and
21 counsel for the Governor, having a trial, having expert
22 testimony concerning a variety of very complex technical
23 issues relating to the redistricting process, what were
24 Mr. Wax and Mr. Greenberg doing? They were tweeting, rather
25 prolifically. They were hiding behind their computers in

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1 their basement offering all kinds of commentaries on the
2 lawsuit.

3 THE COURT: I would just ask you, the bench trial
4 that was held before Judge McAllister, approximately how
5 long did that bench trial last?

6 MR. BUCKI: So the first day of argument on motions
7 in the trial took place on March 3rd.

8 And, in fact, we have copies of Mr. Greenberg's
9 tweets where he was actually live tweeting and copying
10 commentaries made by others who were tweeting about the
11 proceedings because they were live streamed, so anyone who
12 wanted to watch the proceedings. So Mr. Greenberg was well
13 aware of what was going on, not to mention the fact that he
14 was posting copies of the pleadings on Twitter.

15 THE COURT: No, no. That I'm aware of in terms of
16 the timeline. I saw that in the various papers filed.

17 MR. BUCKI: Certainly.

18 So March 3rd was the first day of argument on
19 motions. And then March 14th, I believe it was, was a
20 Monday. And so we had testimony on the 14th, the 15th, and
21 the 16th, with the possibility of the 17th, but we didn't
22 have to go over to the 17th.

23 And then there still needed to be closing
24 arguments. And the closing arguments took place in person
25 in Steuben County on March 31st. And there was a decision

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1 later that day. So effectively, when you add up the
2 different court appearances, it amounted to five days.

3 THE COURT: Right.

4 MR. BUCKI: And then the appellate process followed
5 from that.

6 So there was ample opportunity for Mr. Wax and
7 Mr. Greenberg to commence a proceeding or to intervene at
8 that earlier point in time when all of these issues could
9 have been hashed out concerning not only the Congressional
10 map and the Senate map, but also the Assembly map too.

11 And why that's important also is that back in
12 February and in March, there had been no designating
13 petitions filed anywhere in the State of New York. Those
14 filings didn't happen until April 4th through 7th.

15 So Mr. Walden says why is it that these arguments
16 concerning necessary parties were not raised in the original
17 Harkenrider proceeding in Steuben County that was begun in
18 February, because there had been no petitions filed, and so,
19 therefore, there were none of these candidate necessary
20 parties who could have been named because you don't know who
21 your candidates are going to be whose rights might be
22 inequitably affected until these individuals' petitions
23 would have been filed.

24 So for Mr. Walden to say that we're somehow
25 imposing that draconian burden upon the Petitioners to make

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1 them sue all kinds of candidates, that's a burden they
2 themselves created. Because if they had brought this
3 lawsuit in February, there would have been no need to name
4 any of these other candidates because no petitions would
5 have been filed yet at that time.

6 And so, really, it was the delay on the part of the
7 Petitioners that leads us to this point.

8 And, of course, laches, an equitable doctrine,
9 equals delay, plus prejudice. We certainly have the delay.

10 And in terms of the prejudice, here's the prejudice
11 that we have. First of all, prejudice to candidates. And
12 we're not just talking about candidates for State Assembly.
13 We're talking about candidates for district leader in
14 New York City, for State Democratic Committee, for county
15 party committee, because you have to run in the Assembly
16 district where you live. And then, finally, and perhaps
17 most critically with respect to time frame, candidates for
18 delegates and alternate delegates to the various judicial
19 nominating conventions.

20 And Mr. Walden claims that we're not looking to
21 invalidate any kind of candidacies. And so, therefore,
22 there's no need for any of these candidates to be worried,
23 for any of these thousands of different positions throughout
24 the State of New York.

25 Well, let's look at the relief that is sought by

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1 Mr. Walden in his petition. The words speak for themselves.

2 He says in the petition that the Petitioners are
3 looking to enjoin Respondents, quote, to open designating an
4 independent nominating petition periods for statewide
5 Congressional, State Assembly, State Senate and local
6 offices with deadlines sufficient to obtain new designating
7 petition signatures.

8 So, in fact, even if candidates aren't necessarily
9 going to be disqualified, Mr. Walden is asking for the
10 petitioning period to be reopened for candidates for all
11 kinds of offices to have to get new signatures.

12 And I would submit that that is a way in which
13 these candidates are going to be prejudiced and inequitably
14 affected because, as of right now, candidates for all of
15 these various offices that I mentioned, they know what
16 districts they're running in, they know they filed their
17 petitions from April 4th through 7th, they know, if they
18 haven't been thrown off the ballot, that they've satisfied
19 the signature requirements, they know if they have a
20 primary, they know who their primary opponent is going to
21 be, or if they don't have an opponent, they know that they
22 don't have a primary opponent.

23 So by granting the relief that Mr. Walden asks for
24 at this late date, all of these assumptions that are baked
25 into the decisions that have been made by the Boards of

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1 Elections are going to go up in smoke.

2 And so now candidates may go from having no race,
3 to perhaps having a race, from thinking they've gotten
4 enough signatures to now needing to get more.

5 These are all the reasons in which candidates, for
6 a variety of these positions, not just State Assembly, are
7 going to be inequitably affected because Assembly districts
8 are the building blocks pursuant to which other offices are
9 elected.

10 That's why the New York State Democratic Committee,
11 elected from Assembly districts. Judicial delegate and
12 alternate, elected from Assembly districts. Where you can
13 run for county committee, determined by your Assembly
14 district.

15 So this isn't just about getting rid of Assembly
16 districts. By getting rid of Assembly districts, and having
17 a brand-new map, you affect all of these races and all of
18 these thousands of candidates where a whole variety of
19 offices are going to be prejudiced.

20 And Mr. Walden simply discounts that. And we would
21 submit that that's wrong.

22 That's the first way candidates are prejudiced.
23 And that applies whether you're an incumbent or a
24 challenger.

25 THE COURT: Counsel, I will let you continue in a

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1 moment.

2 MR. BUCKI: Sure.

3 THE COURT: But just hypothetically, if what
4 Petitioner was seeking was granted and officially a new
5 primary date was being set for sometime in September
6 because, as I mentioned, I cannot fathom how we could get
7 through that, even that potential hypothetical, following
8 the same August dates that are in place for the Senate and
9 Congressional races, do you believe, and I will hear
10 obviously from the Board of Elections as well, but do you
11 believe in your opinion that it would be possible to get all
12 of that together for a September primary?

13 MR. BUCKI: Absolutely not. And here's an example
14 as to why.

15 Under UOCAVA, Uniformed and Overseas Citizens
16 Absentee Voting Act, the absentee ballots need to be sent to
17 our overseas citizens and our men and women serving our
18 country in uniform 45 days before the general election.

19 And the general election this year is scheduled for
20 November 8, 2022. There is no changing that date.

21 And 45 days before November 8th is September 23rd.
22 So the ballots need to be sent to all of these people
23 overseas September 23rd.

24 And yet Mr. Walden proposes a September 13th
25 primary date. And, as Your Honor knows, sometimes elections

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1 are close. You may think that you will get a result on
2 election night. But, as recent history has shown, sometimes
3 you can have elections that take weeks to be decided, like
4 the race for district attorney in Queens back in 2019.

5 And so a ten-day window from a September 13th
6 primary to a September 23rd date for sending out all of
7 these absentee ballots is simply unworkable because of the
8 prospects of having close races.

9 In addition, what cannot be forgotten is the need
10 to finalize the ballot for New York State Supreme Court. So
11 if you have primary races on September 13th to choose
12 delegates to judicial nominating conventions, those
13 primaries, inasmuch as they take place, the winners need to
14 be certified. And then you actually need to have the
15 judicial nominating conventions. And you don't know who the
16 candidates for State Supreme Court are going to be until the
17 nominating conventions are actually held.

18 So only once those conventions are held can ballots
19 be actually printed listing the names of the candidates for
20 State Supreme Court. There simply is not enough time. Not
21 to mention that it's already enshrined in statute that the
22 judicial nominating conventions are supposed to take place
23 during the early part of August.

24 So those are two examples that demonstrate why the
25 September 13th primary date that they propose is simply

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1 unworkable.

2 And what the Petitioners forget is that UOCAVA, the
3 Federal statute, is a relatively recent creation.

4 The reason why we were able to have primaries in
5 the State of New York in September for so long is that for
6 many years there was no UOCAVA statute. And, in fact,
7 absentee ballots were routinely sent to people no matter
8 where in the world they were located in the month of
9 October.

10 But the Federal Government stepped in and said, we
11 want to have a statute that standardizes nationwide when
12 people in the military are supposed to get their absentee
13 ballots. And so that's why we have that statute now.

14 And that statute places a firm limit on the ability
15 of the State Board of Elections to send absentee ballots --
16 I should say to finalize absentee ballots any later than the
17 date that is set by the UOCAVA statute.

18 And that is why the calendar that the Petitioners
19 propose is simply unworkable.

20 THE COURT: Counsel, to pick up on that, because as
21 you just mentioned, within New York State it was fairly
22 common that primaries used to take place in September for a
23 long period of time.

24 MR. BUCKI: Very true.

25 THE COURT: And I understand the rationale you just

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1 gave in terms of the Federal statute with the 45-day window,
2 but are there other additional reasons why you believe
3 potentially having a primary in September would create any
4 other difficulties?

5 MR. BUCKI: Well --

6 THE COURT: Beyond what -- I know you referenced
7 some.

8 MR. BUCKI: Simply the difficulty of actually
9 getting ballots printed in a timely fashion. As the Board
10 of Elections has stated in various affidavits, because of
11 supply chain issues, we've even had problems getting the
12 necessary supplies that are required simply to print out the
13 ballots that are needed for the entire State of New York,
14 not to mention the fact that the more compressed of a time
15 frame that you have, the more the cost increases.

16 And I expect the State Board of Elections will talk
17 in great detail about the problems they have been having
18 simply to satisfy the requirements already that have been
19 imposed by Justice McAllister. And September 13th is simply
20 unworkable.

21 Not to mention the fact that the Petitioners, even
22 though Justice McAllister has exercised jurisdiction over
23 the Congressional and Senate lines, the Petitioners, for
24 whatever reason, in their petition want to circumvent
25 Justice McAllister's authority in Steuben County

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1 Supreme Court and have this Court somehow reopen or change
2 the limitation period for candidates' signatures and the
3 signature requirements with respect to Congressional and
4 State Senate offices, when that's really the domain of
5 Justice McAllister.

6 And, in fact, the August 23rd primary date that he
7 set had to be approved by a Federal Judge, Judge Sharpe, in
8 the United States District Court for the Northern District
9 of New York.

10 So should this Court accept the invitation of the
11 Petitioners to have yet another change, it would be
12 necessary to go back to Judge Sharpe.

13 And Judge Sharpe has already ruled that the fourth
14 week of August is about as far as one can go in terms of
15 having a primary in order to satisfy Federal law as it
16 exists at the present time. That didn't used to be the
17 case, but it is the case now. And that's an important
18 consideration that this Court should keep in mind.

19 So because of the delay that was promulgated by
20 these Petitioners, sitting on the sidelines and tweeting,
21 while everybody else was litigating over the Congressional
22 and State Senate lines that causes prejudice to candidates,
23 be they incumbents or challengers, it causes prejudice to
24 our men and women in uniform, in the military, who are
25 required to get their absentee ballots, have them sent out

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1 by a particular date, and the prejudice in terms of the time
2 frame because it took a month, approximately, for
3 Justice McAllister to put together, with the aid of a
4 Special Master, 89 districts combined, for Congress and
5 State Senate.

6 And this Court would have to put together 150
7 districts for State Assembly, not to mention that all of
8 those State Assembly districts are going to impact races for
9 a variety of other offices that I already mentioned.

10 So even to think that a month would be sufficient
11 to put together a new map, we would submit that that's an
12 unrealistic expectation.

13 So that's the issue of laches.

14 And I would combine in with the issue of laches the
15 issue of the statute of limitations. Because of the
16 inequitable effect that will be had upon various candidates
17 if these lines go down, to invalidate candidacies for
18 particular offices, in a particular district, Election Law
19 16-102 is clear, there was a 14-day statute of limitations
20 from the last day for filing designating petitions.

21 And it's not enough for the Petitioners to claim
22 that they're not looking to invalidate candidacies because,
23 yeah, they are. They're looking to invalidate candidacies
24 that are dependent upon the districts that exist now and
25 they're looking to require candidates who have already filed

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1 their petitions to now go get new petitions or, at a
2 minimum, run in districts other than the districts where
3 they had planned and intended to run all along.

4 And so Election Law 16-102 is clear, they had
5 14 days to bring this proceeding from the last day for
6 filing petitions. And that was April 21st. And this
7 proceeding was brought on May 15th. It is simply untimely.

8 And Mr. Greenberg knows well about the statute of
9 limitations. He was very much an advocate for the Child
10 Victims Act. And all of those Child Victims Act lawsuits
11 only became possible by changing the statute of limitations.

12 And so too here, the Petitioners have to live with
13 the statute of limitations that exists under the
14 Election Law right now. If they want to change the law and
15 go to Albany and try to advocate for that, then that's
16 something they can certainly do. But the law right now
17 imposes a 14-day statute of limitations, separate and apart
18 from, and in addition to, the application of the equitable
19 doctrine of laches. And this is why this proceeding is
20 simply untimely.

21 THE COURT: Counsel, just on the statute of
22 limitations argument, I mean, I understand the argument that
23 you're making, but here, they're not challenging one
24 specific group that was designated by the petitions. This
25 is obviously on a much larger scale. So do you still

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1 believe that the 14-day statute of limitation would be in
2 place where we're not talking about the specific petitions
3 but the overall constitutional status of them?

4 MR. BUCKI: They are challenging specific
5 petitions. They are challenging the candidacies and the
6 designations of every single person statewide who was
7 designated for State Assembly, for district leader, for
8 delegate judicial convention, for all judicial convention,
9 for county party committee and for State Democratic
10 Committee, because all of those designations depend upon the
11 Assembly districts being as they were enacted back on
12 February 3rd in Chapter 14 of the laws of 2022. And so that
13 is why that statute of limitations applies.

14 And even if this Court should determine that that
15 statute of limitations doesn't apply, the equitable doctrine
16 of laches applies regardless. And so either way, this is an
17 untimely proceeding.

18 And then the next issue that I really think cannot
19 go unnoticed is the issue of the absence of the necessary
20 parties.

21 And Mr. Walden pokes fun at the argument, but I'll
22 tell you, the First Department last year did not poke fun at
23 the argument in Matter of Clinton versus Board of Elections
24 of the City of New York, which is binding precedent on this
25 Court.

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1 And that was a case concerning a certificate for
2 filling vacancies with respect to a judicial nominating
3 convention. And there was a challenge to the certificate,
4 but only certain individuals who were named on the
5 certificate were actually named as parties to the lawsuit.

6 And they said this case should be dismissed because
7 everyone who was named on the certificate needs to be
8 treated as a necessary party because if the certificate goes
9 down, not only do our filling the vacancies goes down, but
10 the vacancies filled by everybody else on the certificate
11 goes down. And the First Department agreed. And the
12 New York Court of Appeals denied leave to appeal.

13 And so here, Mr. Walden made a statement in his
14 presentation saying, well, you know, this is an argument
15 that depends upon what might happen in terms of whether a
16 person will have to run in a different district or whether a
17 person will be happy with their new district, unhappy with
18 their new district.

19 Well, that's the standard because CPLR 1001(a) says
20 that persons who might be inequitably affected by a judgment
21 in the action shall be made plaintiffs or defendants. The
22 standard isn't whether they will be inequitably affected.
23 The fact is they might be inequitably affected.

24 And all of these candidates, for all of these
25 different offices, that are based upon the Assembly district

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1 lines, these are all individuals who might be inequitably
2 affected by a judgment in that, as Mr. Walden requests in
3 his petition, they might need to get new signatures. They
4 might need to run in different districts. They might end up
5 facing a primary opponent who they presently do not have.
6 They might end up having a tougher race than they had
7 bargained for in a district that looks different from what
8 they're currently planning on.

9 All of those are ways in which the candidates who
10 are on the ballot right now might be inequitably affected by
11 a judgment in this case. All of them are necessary parties.
12 And yet none of them are here.

13 And with respect to that issue, what also cannot be
14 ignored is the fact that we have Boards of Elections
15 throughout the State of New York that also are necessary
16 parties. And the cases on this issue are Flynn v. Orsini
17 from the Fourth Department and Gagliardo, G-A-G-L-I-A-R-D-O,
18 versus Colascione, C-O-L-A-S-C-I-O-N-E, because in the
19 petition, Mr. Walden and the Petitioners ask this Court to
20 suspend or enjoin the operation of any other state laws or
21 vacating any certifications or other official acts of the
22 New York State Board of Elections or other governmental
23 body.

24 And what's important to keep in mind is that it's
25 not only the New York State Board of Elections that

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1 certifies candidacies and certifies the primary ballot.
2 When a particular office to be elected crosses county lines,
3 the petitions for that office are indeed filed with the
4 New York State Board of Elections. But in the City of
5 New York, if the office to be elected does not cross between
6 lines within the city versus outside the city, those
7 petitions are filed with the New York City Board of
8 Elections. And in Long Island, upstate, if the race to be
9 elected is only to be elected from within a particular
10 county, likewise, the petitions are filed at that particular
11 county's Board of Elections.

12 So Mr. Walden, in his petition, is asking for all
13 kinds of certifications of the ballot and certifications of
14 candidacies to be suspended and enjoined and vacated. And
15 yet the Boards that issued these certifications are not here
16 to be represented. We don't have the New York City Board of
17 Elections here. We don't have the 57 other county Boards of
18 Elections throughout the State of New York, outside New York
19 City, represented here. And we would submit that they too
20 are necessary parties, even if the individual candidates are
21 not.

22 And so, either way, there are necessary parties
23 that needed to be named, that might be inequitably affected,
24 and yet are not represented here.

25 And for Mr. Walden to go talking about how much

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1 he's interested in people's rights, what about the rights of
2 these candidates, what about the rights of the Boards of
3 Elections?

4 Apparently the Petitioners don't care about their
5 rights, because if they really cared about their rights,
6 then those individuals, those Boards, would have been named
7 as Respondents to this proceeding.

8 And this is why the proceeding fails as well.

9 I'll touch briefly on standing.

10 We would submit Election Law 16-102 standing
11 requirements apply. You need to be a party chair or
12 objector or an aggrieved candidate.

13 The Petitioners are none of these. Mr. Nichols
14 cannot possibly claim that he's aggrieved by how the
15 Assembly map looks. He's only aggrieved inasmuch as he
16 didn't get enough signatures for Governor in the first
17 place. And then he tried to bring a lawsuit. And he
18 couldn't follow the instructions right for getting the
19 lawsuit served. And instead of bringing an appeal to the
20 Appellate Division Third Department, he decided, well, I'm
21 going to do a Hail Mary pass three days later and try to
22 bring this case and latch on with Mr. Wax and Mr. Greenberg.

23 And we would submit that that's -- that that does
24 not satisfy the test of aggrievement.

25 And then further, with respect to Mr. Wax and

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1 Mr. Greenberg, they too had an opportunity to appeal from
2 the denial of intervention to the Appellate Division
3 Fourth Department.

4 Funny thing, they decided not to do that because
5 maybe they could tell they weren't likely to succeed. And
6 so now they want to come to this Court to try to get a
7 second bite at the apple to see if they can try again with
8 another judge when Justice McAllister, who was so keenly
9 familiar with the issues, simply would not give them
10 countenance for the challenge that they're trying to pursue.

11 THE COURT: But, counsel, do you believe that
12 Mr. Wax and Mr. Greenberg also lack standing or you are just
13 making that argument with Mr. Nichols?

14 MR. BUCKI: Yes, with respect to all the
15 Petitioners, yes, they absolutely lack standing.

16 THE COURT: And you are making that statement
17 despite what was within the Court of Appeals decision in
18 terms of standing on these types of matters?

19 MR. BUCKI: Yes. The Court of Appeals talked about
20 the constitutional language saying that any citizen could
21 bring a challenge to Assembly maps.

22 We would submit that this case is about a lot more
23 than challenging Assembly maps. It's about challenging
24 candidate certifications. It's about requiring candidates
25 to go get new signatures, requiring candidates to run in

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1 districts other than the districts for which their
2 candidacies have been certified. And so that crosses from
3 the realm of simply challenging maps to the realm of trying
4 to have an inequitable effect upon candidacies that already
5 were finalized back on April 21st when they were not
6 challenged. And that is why the Petitioners don't have
7 standing.

8 And where I would like to close is, let's say, for
9 the sake of argument, that the Court agrees with Mr. Walden
10 that notwithstanding all of these defenses that the petition
11 can be granted, I would submit to this Court that the
12 solution is not the convoluted solution that Mr. Walden
13 proposes to try to create havoc in this year's elections.
14 Rather, I apply the rule of Occam's razor whereby the
15 simplest solution is usually the correct one.

16 And so too here, all that's been alleged in papers,
17 putting aside bluster, putting aside conspiracy theories,
18 putting aside wild accusations from Mr. Walden, all that's
19 been actually alleged in litigation papers in this lawsuit
20 is procedural unconstitutionality of the Assembly map, that
21 the Assembly map was enacted, notwithstanding the fact that
22 the Independent Redistricting Commission had not had an
23 opportunity to, at least in the view of the
24 Court of Appeals, had not had sufficient opportunity to
25 issue a second set of maps for the Legislature's

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1 consideration.

2 Nowhere is it alleged that there is any substantive
3 unconstitutionality in the map for the Assembly districts.

4 Nowhere in the petition do they say anything about
5 the fact that the map is somehow gerrymandered.

6 Nowhere do they say, aside from bluster today,
7 nowhere do they say, backed up by any evidence, that somehow
8 the match was unfair.

9 Nowhere do they say that the map for Assembly is
10 not compact.

11 Nowhere do they say that it ignores communities of
12 interest.

13 Nowhere do they say that doesn't -- that it fails
14 to satisfy any of the other substantive Congressional
15 criteria that are said in Article III of the State
16 Constitution.

17 All that's alleged is this purported procedural
18 infirmity. And so the solution to the procedural infirmity,
19 should the Court find one, and should the Court determine
20 that this is somehow a timely proceeding, and somehow that
21 there isn't a necessary parties problem, and that somehow
22 there isn't a laches problem, the solution is simply to take
23 the map that was enacted by the representatives of the
24 people of the State of New York, not imposed by a judge
25 elected by a small portion of the state population, but

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1 rather by the representatives who are elected by all
2 20 million of us, take that map and impose it, and say, this
3 will be the map for the next ten years, and adopt it and
4 ratify it.

5 I think an important contrast needs to be drawn
6 between this proceeding and the one that was brought by the
7 Petitioners in Steuben County.

8 The Steuben County Petitioners, in challenging the
9 Congressional map and the State Senate map as a substantive
10 matter, they brought evidence, they put forth expert
11 affidavits. We had a trial based upon very complex issues
12 of statistics, Monte Carlo simulation, issues that would
13 take a long time to explain, and that I think would go
14 beyond the proper boundaries of my argument today, and
15 likewise, the Respondents offered a variety of experts too.
16 So there needed to be a trial to hash out all of the
17 different expert opinions that were based upon simulations
18 and evaluations of statistical data.

19 Here, by contrast, the Petitioners offer nothing of
20 the sort. To use a baseball analogy, they want to take the
21 fact that the Petitioners hit a home run on the issue of
22 procedural unconstitutionality before the Court of Appeals,
23 and they are the ones who want to run the bases, even though
24 they had nothing to do with that outcome. We would submit
25 that that's not proper.

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1 THE COURT: Counsel, my only question on that is,
2 when everything -- I understand what you're saying,
3 essentially to, for lack of a better term, rubber stamp the
4 existing Assembly and wave my magic wand and say that they
5 are now constitutional, but the State Senate maps were also
6 solely found to be procedurally unconstitutional.

7 There was no claim in terms of gerrymandering or
8 any of the other issues with that, yet it still resulted in
9 the process that was just completed upstate where those set
10 of lines were, in fact, redrawn.

11 MR. BUCKI: Well, actually, the Petitioners did
12 allege in great detail and offer simulation evidence stating
13 that the Senate now was substantively unconstitutional and
14 did not -- setting aside the procedural argument, did not as
15 a matter of substance satisfy the criteria for
16 redistricting.

17 THE COURT: I understand your argument was made,
18 but the Court of Appeals in their decision related to the
19 State Senate map found that it was just -- their finding was
20 it was only procedurally unconstitutional. They weren't
21 getting into -- did not agree that there was any sort of
22 gerrymandering or other items that had occurred.

23 But that said, I do understand the argument that
24 you are putting forth.

25 MR. BUCKI: Your Honor is absolutely right that the

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1 Special Master in Steuben County, Dr. Cervas, C-E-R-V-A-S,
2 he would have been well within his rights simply to say,
3 we're going to adopt the Senate map that was enacted. In
4 fact, that was what I argued before the Special Master back
5 on May 6th.

6 In large part, Dr. Cervas did leave the Senate map
7 unchanged. He did make a few revisions, particularly in
8 Erie County, and also in New York City, and on Long Island,
9 because he decided that those were decisions he wanted to
10 make.

11 THE COURT: Which I understand. And just
12 hypothetically, if I followed your, and I know it's not your
13 main argument, but if it came down to it, and I followed
14 what you are suggesting as an alternate resolution and
15 simply said that the existing Assembly maps are -- that
16 there's nothing wrong with them and that they should remain
17 in place, wouldn't we still have to go through a lot of the
18 same process?

19 MR. BUCKI: Absolutely not, because there's no need
20 for a Special Master unless there is a need for changes to
21 the map.

22 And what differentiates this case from the case
23 that concerned the Senate is, with respect to the Senate
24 maps, there was strong clash among the parties as to whether
25 those maps were a substantive gerrymander. And we had a

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1 significant amount of testimony and evidence concerning that
2 issue.

3 Here, by contrasting the Assembly map, we have
4 nothing in the way of expert affidavits. We have nothing in
5 the way of simulations. We have nothing that could support
6 even an allegation that there is any kind of substantive
7 unconstitutionality, aside from the new matter that
8 Mr. Walden raises today based upon anecdotes about people
9 who purportedly wanted to run for Assembly.

10 And my response to that is, the State Constitution
11 is clear, that in a redistricting year, you can move into
12 the district where you want to run. No one is prohibited
13 from doing that.

14 THE COURT: No, I understand, as long as you are a
15 resident.

16 MR. BUCKI: As long as you've been a resident of
17 the county for a certain period of time, you are welcome to
18 move into any other Assembly district, Senate district in
19 that county that you choose.

20 And so to say that this is some -- that the way
21 certain lines were drawn based upon anecdotes and
22 accusations therefore is somehow a gerrymander is really
23 irresponsible because the solution is if you want to run in
24 a different district, move to that different district.
25 Nothing is stopping you as a candidate from moving to that

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1 district.

2 THE COURT: All right.

3 MR. BUCKI: We would submit, as I said, that this
4 proceeding should be dismissed or, in the alternative,
5 regardless of dismissal, we would submit that the map that
6 was enacted for State Assembly by the New York State
7 Legislature in February be ratified so that the elections
8 for State Assembly and all of these other races that depends
9 on the Assembly map can continue in an orderly fashion as
10 they have been to this point.

11 THE COURT: Thank you.

12 Just before I turn back to hear from the Board of
13 Elections, I just want to follow up on that last point with
14 Mr. Walden.

15 To be clear, I think you had said it as part of
16 your argument, is your only claim to strike the Assembly
17 maps and to do the other items based upon the perceived
18 procedural unconstitutionality or are you seeking a claim
19 that there are issues in terms of potential gerrymandering
20 and other things that have gone on which would, in all
21 likelihood, require the Court to hear, essentially go
22 through a similar bench trial to what may have occurred
23 before Judge McAllister?

24 MR. WALDEN: Your Honor, to be crystal clear,
25 again, I'm sorry if I wasn't crystal clear before, the issue

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1 here is what everybody here is referring to as procedural
2 unconstitutionality. Also I was responding to the fact that
3 they keep saying it's fair. But if you want me to wait
4 until after the BOE.

5 THE COURT: I wanted that quick point. I'll come
6 back.

7 With that said, counsel, I am now going to turn to
8 the representative from the State Board of Elections.
9 Whoever is going to speak on behalf of the Board, I will
10 give you an opportunity to be heard as well.

11 MR. QUAIL: Thank you, Your Honor.

12 Brian Quail for the New York State Board of
13 Elections.

14 I appreciate that a lot has been said before the
15 Court today. Nonetheless, I would like to take a very brief
16 segue back to 1976.

17 In 1976, in a case that bears little relation to
18 the circumstances in this one, because, frankly, no case
19 does, the Court, in Pataki v. Hayduk, 87 Misc.2d 1095,
20 articulated rather brilliantly the considerations, though,
21 that need to be considered by the Court in an Election Law
22 case like this.

23 And what the Court there said is that once the
24 Board of Elections takes the first step and gears are set in
25 motion, and the next step then must be taken by the person

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1 aggrieved, whether candidate or nominee, the Supreme Court
2 then may act and adequate machinery is set up for the
3 immediate review by the highest court, if necessary.

4 And then the Court continued, time is the
5 watchword. The candidate must have time to conduct a
6 campaign. The electorate must have time to identify
7 candidates to make up its mind. The municipal body must
8 have time to set up the ballot and prepare the voting
9 machine. There is no room for procrastination or
10 retraction. And the Court concluded, only confusion and
11 chaos can result from delay.

12 In this case, the possibility that Petitioners here
13 could have brought their grievance into the courthouse, as
14 has been well established, is the truth of the matter as of
15 February of this year. Here we are in May.

16 But instead of looking back, I think it is more
17 instructive to look forward.

18 We are 36 days away from a primary election on
19 June 28th that was scheduled as a matter of law. And we are
20 26 days away from the beginning of early voting.

21 And while there were some averments in this
22 courtroom that the Board of Elections has only offered up
23 vague articulations of what the problems are, I would point
24 to the 15-page affidavit of Mr. Valentine that was submitted
25 in this matter, which was quite specific. But I am more

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1 than happy to get even more specific than that.

2 The issue with the election time frame boils down
3 to reverse planning. So in this instance we know we're
4 having a general election on November 8th. And that date --
5 so we have to first begin to plan back from there.

6 The way New York's election calendar works, the
7 goal is to have the ballot certified 54 days out from the
8 election. That 54 days out from the general election puts
9 us on or about September 13th.

10 From September 13th then, the Board needs to,
11 collectively all the boards in New York, need to make sure
12 that military ballots are able to flow by 9-24, which is not
13 so many days later, 9-23/9-24. The state law deadline is
14 actually 46 days before the election and the Federal
15 deadline is 45.

16 So when looking at the scenario that was presented
17 on April 27th, when the Court of Appeals in Harkenrider
18 determined that there was going to have to be a remedial
19 primary, and remanded this matter to Steuben County Supreme
20 Court to determine the calendar for that primary, the
21 question was, looking forward from April 27th, and knowing
22 where we need to be by 9-13, which is a certified ballot for
23 the general election, how do we squeeze in yet another
24 primary.

25 So we have one on June 28th. And there's no basis

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1 to move anything other than Congress or State Senate because
2 they were not impacted by the judge's order. If those
3 primaries were to move, that determination would need to be
4 made, and I believe Judge McAllister noted this on more than
5 one occasion, that determination would need to be made by
6 the Legislature, which is due deference, because it is not
7 necessary to move any other primaries other than the State
8 Senate and Congressional one to effectuate the
9 Court of Appeals ruling and the prior ruling of
10 Judge McAllister that started all of this back at the end of
11 March.

12 So the Board looked at where we were at on
13 April 27th, and looked at where we needed to be, and
14 determined that the latest date that a primary would be
15 feasible would be August 23rd.

16 Moving forward from August 23rd, the ballot for the
17 general election would need to be certified by 9-13,
18 facilitating the flow of military ballots just eight
19 some-odd days after that.

20 And the Board then endeavored to create a calendar
21 moving it back from that date, the August 23rd date, that
22 would permit that primary to occur.

23 The certification date for the August primary,
24 54 days before that date, would be June 29th, which would
25 allow time between June 29th and July 8th to transmit

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1 military ballots timely for that primary.

2 And then what has to happen in between, what has to
3 happen between where we were on April 27th and getting to
4 the point where we have a ballot on 6-29, military ballots
5 flowing on 7-8, we have to fit in all the ballot access. We
6 have to fit in a challenge period. We have to fit in all of
7 the steps that would normally happen in a much longer period
8 of time in that window, which was already comprised.

9 As a result, the Board recommended a calendar that
10 shrank the designating petitioning period from 37 days to
11 21. And a number of other interstitial steps with respect
12 to other filings that are related to post election ballot
13 sorting and challenges that would shrink the amount of time
14 that it would take to complete them. And in so doing, and
15 as you will note, we began the designating petitions process
16 at the absolute first available date, literally the day
17 after the maps were promulgated. And that date was
18 originally scheduled for the 24th. But in order to grab
19 additional time to make the process work reasonably, the
20 Board asked the Court if it could do something to move off
21 of its original calendar promulgation date of May 24th, and
22 the Court graciously did, promulgating the calendar --
23 excuse me, promulgating the districts on the 20th, or in the
24 wee morning hours of the 21st, which the case may be.

25 So that's how we managed to fit in this new

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1 primary.

2 Now, also of consideration in all of this is that
3 the June primary has to coexist with the August primary.
4 The same machines are going to be needed at both events.
5 And one of the considerations then, obviously, also had to
6 be can there be a turnaround from primary number one and
7 primary number two, from July 28th to August 23rd. And,
8 very tightly, the answer to that is yes, but it is very
9 tight.

10 Remember, an election event --

11 THE COURT: I'm sorry, counsel, you froze up there
12 for a second. Repeat the last line.

13 MR. QUAIL: An election event is not an
14 insignificant undertaking. There are 15,000-plus election
15 districts, 5,000 poll sites, more than 300 early voting
16 sites, and over 50,000 people who are deployed, in order to
17 make all of those mechanics function.

18 So in looking at the scenario that was presented,
19 we did manage to squeeze in the August primary in a way that
20 would comport with getting military and overseas and all
21 other ballots out timely for November and be far enough from
22 the June primary to make the June primary also work.

23 So now we hear that the Petitioners are interested
24 in having a primary in September. Their papers would have
25 suggested that all primaries were going to move. But during

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1 oral argument now, Petitioners have posited perhaps just
2 some of the primaries could move to 9-13. The remainder, or
3 just the Congressional primary, perhaps, would continue to
4 be held on August 23rd.

5 The distance between August 23rd and 9-13 in a two
6 primary scenario is absolutely, positively undoable. There
7 is not enough election machinery to turn the machines around
8 between those two events.

9 There would be tremendous overlap of various
10 processes, like absentee ballots out for both elections at
11 the same time, and any number of other logistical hurdles
12 and problems that there is absolutely no surmountable
13 scenario to get around. It's just, it's a nonstarter
14 positively.

15 Then we turn to, sort of, the argument that we
16 should have done something more to get ready.

17 The Board of Elections doesn't draw the lines. The
18 Board of Elections administers elections on dates that are
19 provided by law. And our duty is to have fidelity to the
20 law and to implement elections as they are provided for by
21 court order, obviously, or by statute.

22 That is what the Board did in this case.

23 The idea that we could have begun planning for a
24 remedial election on an as yet undetermined date with maps
25 that would not be determined until some unknown point in the

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1 future, that there was some burden or duty on the part of
2 the Board to do that is just remarkable that it was even
3 asserted.

4 What the Board of Elections has done in a
5 yeoman-like manner, particularly county Boards of Elections,
6 is continuing along the process and planning for two
7 election events relatively close in time, one of which was
8 not planned for, with substantial supply chain problems
9 presented, the need to schedule poll sites for a second
10 event that normally would have been occurring earlier, much
11 earlier in the year. And they have set about this work as
12 the diligent public officials that they are.

13 And I come back to where I began. There is no room
14 for procrastination or retraction. Only confusion and chaos
15 can result from delay.

16 Words of wisdom from 1976, absolutely true in 2022.

17 I respectfully ask Your Honor to deny the
18 application that's been made by the Petitioners because
19 democracy requires orderliness to unfold so that people's
20 voices can be heard. That's what a denial in this case
21 means.

22 It is not somehow or another bending to the
23 political class that's trying to manipulate anything. It's
24 about making sure that the people's voices in this day, the
25 millions of voters who participate in these election

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1 contests, can be heard.

2 Thank you, Your Honor.

3 THE COURT: Mr. Quail, let me just ask you, sir, to
4 be clear, I think you mentioned it, the physical turnaround
5 time between the machines that would be used on the
6 August 23rd primary for Congressional and Senate races, is
7 it your testimony here today that it would be impossible to
8 have those machines ready to go again for another primary
9 21 days later?

10 MR. QUAIL: It is literally unthinkable that it
11 would be possible to have the election on that date, get the
12 election results certified and reprogram and have reprinted
13 ballots in time to go for an election on 9-13.

14 THE COURT: Okay.

15 Realistically, how much time would you need to
16 complete that undertaking?

17 MR. QUAIL: Generally speaking, the time from the
18 certification to when the election itself actually occurs,
19 we are typically looking at 54 days is what we would
20 normally look at.

21 By the way, I would point out that for a 9-13
22 election, we would be looking at early voting that would be
23 starting ten days before that date, right. So we would be
24 looking at 9 -- you know, the 2nd of September early voting
25 would be starting for -- on at least some set of machines

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1 during an election that was conducted, that would need to be
2 completed and ready and made available for an election held
3 on 8-23. The mechanisms by which that would happen are
4 just, I can't fathom that.

5 THE COURT: Okay.

6 MR. QUAIL: And, Your Honor, I'm not able to
7 testify here because I'm only an attorney, but I --

8 THE COURT: I apologize. To be clear, I know I
9 said your testimony. I mischaracterized that. I meant to
10 say your position and your part of the arguments. I know
11 obviously the affidavits that were filed as part of these
12 proceedings.

13 MR. QUAIL: What dictates this, Your Honor, is the
14 size of the election event. So if you have a situation
15 where some very small subset of a county is having an
16 election event within a window of, say, 20 days and there's
17 sufficient voting machines available in their county, then
18 there are scenarios where it can occur.

19 But when you're talking about a large election
20 event, one of which at least is going to be a statewide
21 election event, which means all election districts, poll
22 sites are going to be engaged in that election event, a mere
23 20 some-odd days between the two things, and the need to
24 prepare for that is just unthinkable.

25 THE COURT: Thank you.

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1 I am just going to turn back to Petitioners'
2 counsel. I will give you an opportunity.

3 MR. WALDEN: Your Honor, you heard the three
4 attorneys. They had a break. I would like to consult with
5 my client, who is in the courtroom.

6 MR. QUAIL: Your Honor, we can't hear.

7 THE COURT: I'm sorry. Counsel was just asking for
8 a brief recess before I gave him an opportunity for a
9 rebuttal.

10 Counsel, I have no problem doing that. I'm just
11 cautioning, because I'm looking at the clock, we sort of
12 have to break for lunch by 1:00. So depending on how long
13 you need you think with your rebuttal, I would like to get
14 this done before the lunch break rather than having to come
15 back in the afternoon.

16 So with that said, I am okay taking a quick
17 five-minute recess, but it will be a real five-minute
18 recess, not a traditional court five-minute recess.
19 All right.

20 With that, I will see everyone back in five
21 minutes.

22 (Whereupon, a recess was taken.)

23 THE COURT: Everyone may be seated.

24 Counsel for Petitioners, I want to give you an
25 opportunity for some rebuttal. You may proceed.

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1 MR. WALDEN: Thank you, Your Honor.

2 That's going to be, given how much was said here, a
3 little more than ten minutes. I'll do my best.

4 You asked Mr. Bucki -- and, by the way, I have
5 great respect for him. I'm not going to engage in insults
6 to counsel, which I don't think have a place in the
7 courtroom, but I respect him.

8 You asked him a pointblank question. Mr. Bucki, is
9 it impossible to do a September 13th primary. And his
10 answer was, well, Judge, there's this statute, and I can't
11 even pronounce the acronym, but I think Your Honor
12 understands this, it's the same statute that the Board of
13 Elections was talking about when they're talking about this
14 reverse clock, everybody keeps talking about military and
15 overseas ballots. Does that apply to State races? No, it
16 doesn't. It's a Federal statute that applies to Federal
17 races. It is irrelevant to their reverse clock for the
18 purposes of this petition.

19 THE COURT: Well, counsel, if there are New York
20 State residents who are outside of the state, they still
21 have the opportunity to vote.

22 MR. WALDEN: Yes, Your Honor, but that statute
23 applies only to Congressional races. It's a Federal
24 statute.

25 There is a corresponding State Court statute, but

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1 the whole point of the Court of Appeals is that in light of
2 the Congressional infirmity, including the procedural one
3 with respect to the Senate, you have the power to change all
4 State Court deadlines.

5 That's what Judge McAllister did. He changed the
6 number of signatures on the petition. He changed the time
7 frame for petitions to be submitted. He changed when things
8 were supposed to get certified and when people got notice.

9 It's imperfect, Your Honor, but they can't use the
10 reverse clock with respect to the military and overseas
11 ballots on the Federal election side. You can't change
12 that.

13 They're right, that's what Judge Sharpe is for. We
14 would have to go to Judge Sharpe if we were changing the
15 Congressional race, which is why we did not ask to change
16 the Congressional race.

17 THE COURT: No, I understand. And I certainly
18 understand what you're saying. But, counsel, in terms of
19 the issue of the practicalities of election machines, going
20 out to, as they said, 5,000 polling sites around the state
21 for an August 23rd primary date, just the physical logistics
22 of getting those machines back in, doing what they need to
23 to certify the results, and then to get the machines back
24 out for a September primary 21 days later, and, as they
25 pointed out, it's not just 21 days later because we now have

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1 early voting, so it would be probably about ten to
2 twelve days later, that they are characterizing as
3 essentially being an impossible task.

4 MR. WALDEN: I heard them, Your Honor.

5 THE COURT: Do you agree with that?

6 MR. WALDEN: No. Your Honor, that's why I think
7 it's great that Mr. Quail made that caveat at the end. You
8 remember, you asked him the question pointblank, Mr. Quail,
9 are you telling me, put aside the testimony, but are you
10 telling me you can't turn them around. And he totally
11 hedged.

12 The reason he hedged is his expert affidavit
13 doesn't said anything about time. And it's a red herring
14 anyway, Your Honor, because we have two forms of relief when
15 it comes to the date.

16 If they're saying they can't turn around a second
17 primary, fine, let's have one primary on August 23rd. Then
18 you only use the election machines once. We can clarify
19 everything.

20 We were trying to give them an option to have more
21 time, at least with respect to the Assembly, so that --

22 THE COURT: But then, counsel, we're back to the
23 initial problem, to try to get everything done that would
24 need to be done, to invalidate the current Assembly maps,
25 consult with a Special Master, go through the process of

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1 coming through with new maps, and getting all of that done
2 timely enough that they would be in place for the same
3 August 23rd primary date currently in place for the Senate
4 and Congressional maps. I mean, that was a good part of the
5 reason that your application to intervene in the action
6 before Judge McAllister was denied.

7 MR. WALDEN: Judge, again, because of the potential
8 time --

9 THE COURT: I understand.

10 MR. WALDEN: I disagree there, Your Honor. But
11 here's the issue that I didn't get to earlier, which is, we
12 asked for the Special Master there to be appointed here
13 because even though the BOE decided, maybe because of their
14 political master does not have a contingency plan, and that
15 was pretty shocking, they said the BOE didn't have any
16 responsibility to that, I'm sure the Special Master did
17 because he was living in a world where he thought the
18 Assembly maps were going to be gone for about a month and
19 half.

20 And Mr. Bucki made an incredibly important
21 concession, Your Honor. And I hope that you take this into
22 account. What he said was that the Senate maps were changed
23 very little. They mostly stayed the same. They mostly
24 stayed the same.

25 That detail is important, Your Honor, because what

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1 the Special Master did was to fix the obvious problems.

2 And you know what he invited you to do? He invited
3 you to own those problems, even though you have no idea why
4 they excluded Candidate Ma, why they excluded
5 Candidate Fein, why they --

6 THE COURT: Counsel, I agree, if there is a
7 Special Master, if it came to it, and I was in a position to
8 appoint a Special Master to deal with the Assembly maps, as
9 a starting point, don't make the assumption I'm using --
10 would use the same Special Master who was already utilized
11 for other matters. There are --

12 MR. WALDEN: He's done.

13 THE COURT: He's done his job and had his
14 qualifications for it, but, as we all know, there are other
15 individuals who could be serving in that role.

16 MR. WALDEN: Judge, their whole point is that we
17 acted so irresponsibly in not filing a plenary action there
18 because there's so much expertise there. But I think it
19 would be a missed opportunity, Your Honor, to not use the
20 same guy. When the BOE was sitting on its hands, he was
21 probably looking at the Assembly maps, and has a lot of
22 experience there, Your Honor.

23 My only point to you, Mr. Bucki invited you to just
24 recertify the maps. And I don't think it's wise for the
25 Court.

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1 THE COURT: I understand.

2 MR. WALDEN: On maps that clearly have significant
3 problems, which goes to the substantive fairness issue.

4 THE COURT: Counsel, I'll say at the outset, I
5 agree with you, I think that's a dangerous way to go. I
6 think, you know, literally having one person, even if it's
7 myself, or especially if it's myself, depending who you ask,
8 but having me make the determination of what the maps are
9 for all of the Assembly districts without having an expert
10 to rely on, who goes through a much more detailed process
11 and goes through things, I would be very hesitant to do
12 something like that. I would want to have an opportunity to
13 hear full arguments on the rationale for all of this. And,
14 frankly, that's part of my concern.

15 And I know Judge McAllister I'm sure had that as, I
16 don't want to get into his head, and I'm not going to
17 predetermine for him, but he had a short window of time, but
18 there was a window nonetheless, a window of time where he
19 was able to go through this whole process and get a Master
20 in and go through some really significant things that needed
21 to be done, which obviously has an impact on everyone in the
22 state for the next ten years.

23 MR. WALDEN: The argument Mr. Bucki suggested is
24 that the voters are going to be living with an
25 unconstitutional map for ten years, Your Honor. So I can

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1 say a couple of things. Again, I ask that you give me a
2 little bit more time.

3 THE COURT: Briefly. I am here all day. I would
4 rather not have to have everyone come back after two.
5 Go ahead.

6 MR. WALDEN: I'm not asking for an hour. I'm
7 asking for a couple of minutes.

8 THE COURT: I will give you a few minutes.
9 Go ahead.

10 MR. WALDEN: Your Honor, I know this is a difficult
11 burden for you, but you've got broad shoulders.

12 Judge McAllister's decision, whatever you think of
13 it, is not relevant here, Your Honor. This can be done. It
14 can be done.

15 And what -- the two things that you have to
16 understand when you're going to go on burden or delay, which
17 are all part of the laches structure, which is, they don't
18 deny that the Constitution and the Court of Appeals said
19 what they said. And it's mandatory and it's
20 nondiscretionary.

21 But think about it, Your Honor, take their argument
22 to its logical extreme, what if we had filed in February,
23 what really would be different now?

24 Judge McAllister still would have thrown out the
25 Assembly maps. He would have just done it on a motion as

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1 opposed to sua sponte. The Fourth Department still would
2 have reversed. And the Court of Appeals -- this is the only
3 difference. The Court of Appeals would have had a
4 Petitioner there. And so on April 27th, which is really not
5 that long ago, the maps would have been invalid.

6 THE COURT: Well, I will say this, on April 27th,
7 the Court of Appeals may have issued a different decision
8 related to the Assembly maps, but if they did, that would
9 have then been part of what was being done by
10 Judge McAllister.

11 MR. WALDEN: I'm not sure, I apologize, maybe I'm
12 tired, but I don't understand what you're saying.

13 THE COURT: If the Assembly maps, if the Court of
14 Appeals hypothetically had said that the Assembly maps were
15 unconstitutional for procedural reasons and need to be
16 redrawn as well, that would have been part, on April 27th,
17 that would have gone back before Judge McAllister at the
18 same time.

19 MR. WALDEN: I totally agree, Your Honor. I'm
20 being candid about this. It's not February that matters.
21 What matters is what happened right after the
22 Court of Appeals. And right after the Court of Appeals, we
23 moved to intervene within days, within days. And we were
24 denied. They opposed. We were denied. Right.

25 Honestly, Judge, that is not a great look for

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1 anyone when we act that quickly and we're denied on these
2 grounds.

3 And, again, Your Honor, this is really important.
4 Mr. Bucki's whole claim here is that you have the discretion
5 to knock us out on timeliness grounds, which don't apply
6 under the statute. But remember his words, he said, those
7 who seek equity must do equity. Very broad pronouncement.

8 What he doesn't understand, but I know that he's a
9 smart guy, so I'm sure that was tactical on his part, we're
10 not seeking equity here. We're not. We're trying to
11 enforce the Constitution, regardless of what he thinks my
12 clients' motives are. And when he questions those motives,
13 he's punching above his weight class.

14 They're trying to get equity. They're trying to
15 use all of these doctrines which you know don't apply.
16 They're seeking laches. They have to do equity in order to
17 get equity. They have the burden, not us. They violated
18 the Constitution. They are violating their constitutional
19 oaths.

20 My clients are simply trying to defend the
21 Constitution, not just for this election, but for the next
22 ten years.

23 Thank you, Your Honor.

24 THE COURT: Thank you, counsel.

25 My appreciation to counsel on all sides. I know

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1 everything was done under a relatively tight time frame to
2 be in here today, even under normal circumstances. I
3 recognize everyone's dealing with one version or another of
4 COVID circumstances as well.

5 I will endeavor to issue a decision on this matter
6 fairly quickly. It will certainly be out this week. I'm
7 certainly going to endeavor to get it done hopefully over
8 the next day or two so that everyone has that out there and
9 can proceed accordingly from there.

10 With that said, I am going to conclude this matter.

11 I will ask if both sides can order a transcript of
12 today's proceedings.

13 And with that, I wish everyone the best of luck.

14 MR. WALDEN: Thank you, Judge.

15 MR. BUCKI: Thank you, Your Honor.

16 MR. FARBER: Thank you, Your Honor.

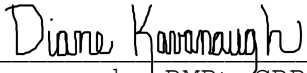
17 MR. QUAIL: Thank you, Your Honor.

18

19 * * * *

20 Certified to be a true and accurate transcript of
21 the stenographic minutes taken within.

22

23 
Diane Kavanaugh, RMR, CRR, CRC
24 Senior Court Reporter
25

dk

Decision and Order of the Honorable Laurence Love, dated May
25, 2022, with Notice of Entry, dated May 25, 2022

[pp. 1016 - 1029]

FILED: NEW YORK COUNTY CLERK 05/25/2022 03:29 PM

NYSCEF DOC. NO. 92

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/25/2022

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

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: *Jim Walden*
Jim Walden
Peter A. Devlin
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*Attorneys for Petitioners Paul Nichols and Gary
Greenberg*

FILED: NEW YORK COUNTY CLERK 05/25/2022 03:29 PM

NYSCEF DOC. NO. 92

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/25/2022

LAW OFFICE OF AARON S. FOLDENAUER

By: /s/ Aaron S. Foldenauer

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Attorney for Petitioner Gavin Wax

TO: All Counsel on record via NYSCEF

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

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

**DECISION + ORDER ON
MOTION**

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

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:

☒

CASE DISPOSED

☐

GRANTED

☒

DENIED

☐

NON-FINAL DISPOSITION

GRANTED IN PART

☐

OTHER

LAURENCE LOVE, J.S.C.

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

NYSCEF DOC. NO. 91

INDEX NO. 154213/2022

RECEIVED NYSCEF: 05/25/2022

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE

FILED: NEW YORK COUNTY CLERK 06/30/2022 08:13 AM

NYSCEF DOC. NO. 98

INDEX NO. 154213/2022

RECEIVED NYSCEF: 06/29/2022

**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, INDEX NO. 154213/2022
 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

In an Order entered June 10, 2022 under Case No. 2022-02301, the Appellate Division, First Department, modified this Court's Order entered May 27, 2022 and remanded this matter back to this Court "for consideration of the proper means for redrawing the state assembly map, in accordance with NY Const, art III, § 5-b."

Pursuant to Article III, § 5-b(a), "On or before February first of each year ending with a zero and at any other time a court orders that congressional or state legislative districts be amended, an independent redistricting commission shall be established to determine the district lines for congressional and state legislative offices..." Said section continues with the procedural requirements for selection of the members of the Independent Redistricting Commission.

As such it is hereby:

ORDERED that this matter is restored to this Court's active calendar; and it is further

ORDERED that all parties shall submit briefs and supporting materials on or before August 8, 2022 expressing their views as to the proper means by which to redraw the state assembly map as ordered by the Appellate Division; and it is further

ORDERED that all parties shall appear for oral argument to be held at the Courthouse located at 60 Centre Street, New York NY 10007, Courtroom 355, at 10:00 a.m in the forenoon on the 19th day of August 2022.

DATE: 6/29/2022


 LAURENCE LOVE, JSC

Check One:

☐

Case Disposed

☒

Non-Final Disposition

Check if Appropriate:

☐

Other (Specify

)

OTHER ORDER – NON-MOTION

Appellate Division, First Department Decision and Order, dated
June 10, 2022
[pp. 1031 - 1033]

FILED: NEW YORK COUNTY CLERK 06/30/2022 10:30 AM

NYSCEF DOC. NO. 99

INDEX NO. 154213/2022

RECEIVED NYSCEF: 06/30/2022

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Kapnick, J.P., Friedman, Moulton, Shulman, Pitt, JJ.

16230 In the Matter of PAUL NICHOLS et al.,
Petitioners-Appellants,

Index No. 154213/22
Case No. 2022-02301

-against-

GOVERNOR KATHY HOCHUL et al.,
Respondents-Respondents.

Walden Macht & Haran LLP, New York (Jim Walden of counsel), for appellants.

Letitia James, Attorney General, New York (Andrea W. Trento of counsel), for Governor Kathy Hochul, respondent.

Phillips Lytle LLP, Buffalo (Craig R. Bucki of counsel), for Speaker of the Assembly Carl Heastie and Senate Minority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins, respondents.

Brian Quail, Albany, for New York State Board of Elections, respondent.

Order, Supreme Court, New York County (Laurence Love, J.), entered May 27, 2022, which denied the petition seeking, inter alia, to declare void the state assembly redistricting legislation and map adopted in February 2022, to appoint a special master to draw a legally compliant map for use in the 2022 primary elections and to enjoin the respondents from adjourning the primary election dates, unanimously modified, on the law and the facts, to grant the petition to declare that the February 2022 map is invalid, based on its procedural infirmity as previously determined by the Court of Appeals in *Matter of Harkenrider v Hochul* (__ NY3d __, 2022 NY Slip Op 02833 [Apr. 27, 2022]), that nevertheless it will remain in effect for the 2022 assembly primary election

to be held on June 28, 2022 and the general election to be held on November 8, 2022, and that, upon the formal adoption and implementation of a new legally compliant state assembly map, for use no sooner than the 2024 regular election, the February 2022 map will be void and of no effect, and otherwise affirmed, without costs, and the matter is remanded to Supreme Court, New York County, for further proceedings in connection with the redrawing of the map, as consistent herewith.

Supreme Court properly denied the petition to the extent it seeks to obtain a new state assembly map for use in the 2022 assembly elections. To this extent, the petition, which includes a request for an order delaying the 2022 assembly primary election to August or September 2022, is barred by the doctrine of laches, given petitioners' unreasonable and prejudicial delay in bringing this proceeding. The request for a delay of the 2022 assembly primary elections is denied in any event, because the redrawing and implementing of a new assembly map before a 2022 primary election delayed even until September is, at this late date, no longer feasible.

The petition is timely to the extent it seeks a declaration that the February 2022 assembly map is invalid due to procedural infirmities in the manner in which it was adopted (*see Matter of Harkenrider v Hochul*, __ NY3d __, 2022 NY Slip Op 02833), and, consistent with that decision, we so declare. Upon the formal adoption and implementation of a new state assembly map that conforms with the procedural and substantive constitutional and statutory requirements, the February 2022 assembly map will become void and of no effect. However, for the reasons stated above, said map is to be used in the regularly scheduled 2022 assembly elections (*see e.g. Badillo v Katz*, 32 NY2d 825 [1973]; *Honig v Board of Supervisors of Rensselaer County*, 31 AD2d 989 [3d Dept 1969], *aff'd* 24 NY2d 861 [1969]).

FILED: NEW YORK COUNTY CLERK 06/30/2022 10:30 AM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 99

RECEIVED NYSCEF: 06/30/2022

The matter is remanded to Supreme Court, New York County for consideration of the proper means for redrawing the state assembly map, in accordance with NY Const, art III, § 5-b.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: June 10, 2022



Susanna Molina Rojas
Clerk of the Court

**Order to Show Cause to Add the Independent Redistricting Commission
to this Proceeding, dated August 25, 2022
[pp. 1034 - 1039]**

FILED: NEW YORK COUNTY CLERK 08/25/2022 04:40 PM

NYSCEF DOC. NO. 115

FILED: NEW YORK COUNTY CLERK 08/08/2022 04:50 PM

NYSCEF DOC. NO. 105

INDEX NO. 154213/2022

RECEIVED NYSCEF: 08/25/2022
INDEX NO. 154213/2022

RECEIVED NYSCEF: 08/08/2022

At IAS Part 63, Room 355 of the
Supreme Court of the State of New
York, New York County, at the
New York County Courthouse at
60 Centre Street, New York, NY
10007 on the 25 day of
August, 2022

PRESENT: Hon. Laurence R. Love, J.S.C.

-----X
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.
-----X

Index No. 154213/2022E

~~Proposed~~

ORDER TO SHOW CAUSE

Upon reading and filing: (i) the Order of the Appellate Division, First Department,
entered on June 10, 2022 [NYSCEF Doc. No. 99]; (ii) the Memorandum of Law of Respondent
Speaker of the Assembly Carl Heastie e-filed on August 8, 2022; (iii) the Affirmation of Elaine
M. Reich with the exhibits thereto e-filed on August 8, 2022; and (iv) all of the papers and
proceedings heretofore had herein;

AND good cause having been shown therefor, it is hereby

ORDERED, that the New York State Independent Redistricting Commission,
comprised of the following members, David Imamura, Chair, Eugene Benger, Ross Brady,

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NYSCEF DOC. NO. 115

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NYSCEF DOC. NO. 105

RECEIVED NYSCEF: 08/08/2022

John Conway III, Dr. Ivelisse Cuevas-Molina, Elaine Frazier, Lisa Harris, Charles Nesbitt and Willis H. Stephens, Jr., or their attorneys show cause before the Court at IAS Part 63, Room 355, of the Courthouse at 60 Centre Street, New York, NY 10007, on September 16, 2022 at 10:30 A.M./P.M., or as soon thereafter as counsel may be heard, why an Order should not be made and entered:

1. Adding the New York State Independent Redistricting Commission as Respondent to this proceeding;

2. Requiring the Independent Redistricting Commission to initiate the constitutional process for amending the Assembly district map, and to formulate a proposed Assembly map no later than a date to be determined by the Court;

3. Further requiring the Independent Redistricting Commission and Respondents thereafter to follow the procedural steps set forth in Article III, §§ 4 and 5-b of the New York State Constitution with respect to the adoption of a remedial Assembly district map; and

4. Granting such other and further relief as the Court deems just and appropriate; and it is further

ORDERED, that service of a copy of this Order and the papers upon which it is granted, on or before 4:00 A.M./P.M. on August 30, 2022 by: (a) Federal Express or other overnight delivery service on David Imamura, Chair, Eugene Benger, Ross Brady, John Conway III, Dr. Ivelisse Cuevas-Molina, Elaine Frazier, Lisa Harris, Charles Nesbitt and Willis H. Stephens, Jr. waiving the requirement of a signature, addressed to said commissioners at either 250 Broadway, 22nd Floor, New York, N.Y. 10007 or 302A Washington Avenue Ext., Albany, N.Y. 12203, being the offices of the New York State Independent Redistricting Commission; and (b) via email to each commissioner: David Imamura imamurad@nyirc.gov,

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NYSCEF DOC. NO. 115

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NYSCEF DOC. NO. 105

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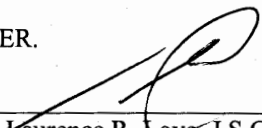
Eugene Benger bengere@nyirc.gov, Ross Brady bradyr@nyirc.gov, John Conway conwayj@nyirc.gov, Ivelisse Cuevas Molina cuevasmolina@nyirc.gov, Elaine Frazier frazier@nyirc.gov, Lisa Harris harrislr@nyirc.gov, Charles Nesbitt nesbittc@nyirc.gov, Willis Stephens, Jr. stephensw@nyirc.gov shall be good and sufficient service; and it is further

ORDERED, that answering papers, if any, shall be served by e-filing on or before

September 15th, 2022.

(u)

ENTER.


Hon. Laurence R. Love, J.S.C.

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,

**AFFIDAVIT
OF SERVICE**

Index No.
154213/2022

Respondents.

STATE OF NEW YORK)
) SS:
COUNTY OF ERIE)

Karen Stachowski, being duly sworn, deposes and says that deponent is an employee of Phillips Lytle LLP, Attorneys for Respondent Speaker of the Assembly Carl Heastie; that deponent is not a party to this action and is over eighteen years of age; and that deponent resides in Orchard Park, New York.

On August 26, 2022, I served true and accurate copies of the **Order to Show Cause entered by the New York County Supreme Court (Hon. Laurence L. Love, J.S.C.) on August 25, 2022 (NYSCEF Dkt. No. 115); the Order entered by the New York County Supreme Court (Hon. Laurence L. Love, J.S.C.) on June 30, 2022 (Dkt. No. 98); the Order entered by the Appellate Division, First Department, on June 10, 2022 (Dkt. No. 99); New York State Assembly Speaker Carl Heastie's Memorandum of Law dated August 8, 2022, on the Proper Means by Which to Redraw the State Assembly Map as Ordered by the Appellate Division (Dkt. No. 100); the Affirmation of Elaine M. Reich, Esq., dated August 8, 2022, with accompanying Exhibits 1 through 4 (Dkt. Nos. 101-105); the Letter dated August 8, 2022, from Seth J. Farber, Esq., to Hon. Laurence L. Love, J.S.C. (Dkt. No. 106); Petitioners' Memorandum of Law dated August 8, 2022, Concerning the Appropriate Process to Redraw the Assembly Map (Dkt. No. 107); the Affidavit of Jeanne N. Clelland, Ph.D., sworn to on July 28, 2022, with exhibit (Dkt. No. 108); the Affirmation of Peter A. Devlin, Esq., dated August 8, 2022, with**

accompanying Exhibits 1 through 3 (Dkt. Nos. 109-112); the Letter e-filed on August 25, 2022, by Jim Walden, Esq., to Hon. Laurence L. Love, J.S.C. (Dkt. No. 113); and the Proposed (but not signed or entered) order to show cause e-filed by Jim Walden, Esq., on August 25, 2022 (Dkt. No. 114) in the above-captioned proceeding, upon the following via email at their respective e-mail addresses indicated:

David Imamura, Chair
imamurad@nyirc.gov

Commissioner Eugene Benger
bengere@nyirc.gov

Commissioner Ross Brady
bradyr@nyirc.gov

Commissioner John Conway III
conwayj@nyirc.gov

Dr. Ivelisse Cuevas-Molina, Commissioner
cuevasmolina@nyirc.gov

Commissioner Elaine Frazier
frazier@nyirc.gov

Commissioner Lisa Harris
harrislr@nyirc.gov

Commissioner Charles Nesbitt
nesbittc@nyirc.gov

Commissioner Willis H. Stephens, Jr.
stephensw@nyirc.gov

On August 26, 2022, I also served true and accurate copies of said papers upon the following by mailing said documents to the business addresses indicated below, by causing true copies of the documents to be deposited and enclosed in a postpaid properly addressed wrapper into the custody of Federal Express, for Federal Express Overnight/Saturday Delivery, prior to the latest time designated by Federal Express, to:

David Imamura, Chair
New York State Independent
Redistricting Commission
250 Broadway, 22nd Floor
New York, New York 10007

Commissioner Ross Brady
New York State Independent
Redistricting Commission
302A Washington Avenue Extension
Albany, New York 12203

Commissioner Eugene Benger
New York State Independent
Redistricting Commission
250 Broadway, 22nd Floor
New York, New York 10007

Commissioner John Conway III
New York State Independent
Redistricting Commission
302A Washington Avenue Extension
Albany, New York 12203

Dr. Ivelisse Cuevas-Molina,
Commissioner
New York State Independent
Redistricting Commission
250 Broadway, 22nd Floor
New York, New York 10007

Commissioner Elaine Frazier
New York State Independent
Redistricting Commission
302A Washington Avenue Extension
Albany, New York 12203

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NYSCEF DOC. NO. 116

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Commissioner Lisa Harris
New York State Independent
Redistricting Commission
302A Washington Avenue Extension
Albany, New York 12203

Commissioner Willis H. Stephens, Jr.
New York State Independent
Redistricting Commission
302A Washington Avenue Extension
Albany, New York 12203

Commissioner Charles Nesbitt
New York State Independent
Redistricting Commission
302A Washington Avenue Extension
Albany, New York 12203


KAREN M. STACHOWSKI

Sworn and subscribed to before
me on the 26th day of August, 2022.


Notary Public

MICHELLE L. CHRISTOFARO
No. 01CH5049247
Notary Public, State of New York
Qualified in Erie County
My Commission Expires 09/11/2025

**Memorandum of Law of Respondent Speaker of the Assembly Carl
Heastie on the Proper Means by Which to Redraw the State Assembly
Map as Ordered by the Appellate Division, dated August 8, 2022
[pp. 1040 - 1052]**

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NYSCEF DOC. NO. 100

RECEIVED NYSCEF: 08/08/2022

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

----- X
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.
----- X

: Index No. 154213/2022E

: (IAS Part 63)

: (Hon. Laurence Love, J.S.C.)

**MEMORANDUM OF LAW OF RESPONDENT
SPEAKER OF THE ASSEMBLY CARL HEASTIE
ON THE PROPER MEANS BY WHICH TO REDRAW THE STATE
ASSEMBLY MAP AS ORDERED BY THE APPELLATE DIVISION**

PRELIMINARY STATEMENT

Respondent Speaker of the Assembly Carl Heastie (the "Assembly Speaker") respectfully submits this memorandum of law pursuant to the Order of the Court entered June 30, 2022 [NYSCEF Doc. No. 98], which directed the parties to this proceeding to submit briefs and other supporting materials "expressing their views as to the proper means by which to redraw the state assembly map as ordered by the Appellate Division."

The Order of the Appellate Division, First Department, expressly directed that the state Assembly map should be redrawn “in accordance with NY Const., art. III, § 5-b.” Appellate Division Order, at 3 [NYSCEF Doc. No. 99].¹

Article III, § 5-b provides that a redistricting plan setting “district lines for congressional and state legislative offices,” including the state Assembly, shall be prepared and submitted to the Legislature by an independent redistricting commission (the “IRC”). Section 5-b also adopts and incorporates the procedures set out in § 4 for the adoption of new district lines. Section 5-b(g) provides that “[t]he legislature shall consider and vote upon such implementing legislation *in accordance with the voting rules set forth in subdivision (b) of section four of this article.*” N.Y. Const. art. III, § 5-b(g) (emphasis added).

As explained in detail below, in order to effectuate “the proper means for redrawing the state assembly in accordance with NY Const., art. III, § 5-b,” as ordered by the Appellate Division, this Court should: (a) order that the IRC initiate the constitutional process for amending the state Assembly map based on the 2020 census data; and (b) further order that the procedures set forth in Article III, §§ 4 and 5-b be followed with respect to the adoption of such amended state Assembly map. This Court does not have to establish an IRC as it is still constituted and in effect, currently with nine of the required ten members.

PROCEDURAL HISTORY

The present proceeding was commenced by the e-filing of a Petition and proposed Order to Show Cause on May 15, 2022 [NYSCEF Doc. Nos. 1-2]. The Petition sought six items of relief:

¹ The Appellate Division Order is identified in the NYSCEF list for this proceeding as “Remittitur” and is identified in the NYSCEF list for the appeal (Case No. 2022-0230) as “Decision and Order” [App. Div. 1st Dep’t NYSCEF Doc. No. 15] filed June 10, 2022.

1. a declaration that “2022 State Assembly map . . . is void based upon the constitutional flaws in its adoption previously found by the Court of Appeals;”
2. appointment of “a special master to adopt a legally compliant State Assembly map;”
3. adjournment of “the primary election date for state and local elections to August 23, 2022, or, alternatively, September 13, 2022;”
4. an order opening the designating and independent nominating petition periods “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. an order “suspending or enjoining the operation of any other state laws, or vacating any certifications or other official 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
6. an award of “Petitioners [sic] reasonable attorneys’ fees and costs.”

Petition at 29-30 [NYSCEF Doc. No. 1].

The Petition alleged that the 2022 state Assembly map was procedurally invalid for the reasons found by the Court of Appeals in *Harkenrider v. Hochul*, ___ N.Y.3d ___, 2022 WL 1236822 (Apr. 27, 2022), with respect to the congressional and state Senate maps. Neither the Petition nor any affidavit e-filed therewith alleged that the state Assembly map was in any way substantively unconstitutional, including, for example, that it constituted partisan gerrymandering.

The Court signed an Order to Show Cause on May 19, 2022, with a return date of May 23, 2022 [NYSCEF Doc. No. 25].

The Speaker moved to dismiss the Petition—a motion that was also returnable on May 23, 2022 [NYSCEF Doc. Nos. 30-81]. Respondents Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins, Governor Kathy Hochul, and the New York State Board of Elections joined the Speaker’s motion [NYSCEF Doc. Nos. 83-85, 88].²

The Court heard oral argument from all parties on May 23, 2022 [NYSCEF Doc. No. 95].

By letter to the Court e-filed on May 24, 2022, Petitioners supplemented the opposition to the Speaker’s motion to dismiss that they had made during oral argument [NYSCEF Doc. No. 89]. The Speaker responded to Petitioners’ May 24, 2022 letter by letter e-filed on May 25, 2022 [NYSCEF Doc. No. 90].

By Decision and Order entered on May 27, 2022 (the “Order”), the Court dismissed the Petition in its entirety, declining to award any of the items of relief sought therein [NYSCEF Doc. 91]. The Order specifically noted that the state Assembly maps had not been found by the Court of Appeals in *Harkenrider* to be “substantively unconstitutional as drawn with impermissible partisan purpose.” Order at 6 [NYSCEF Doc. No. 91].

Petitioners sought to appeal the Order directly to the Court of Appeals. By Order entered on May 27, 2022, the Court of Appeals denied Petitioners’ request for a direct appeal. A copy of the Court of Appeals order is e-filed herewith as Exhibit I to the accompanying Affirmation of Elaine M. Reich (“Reich Aff.”).

² Respondent Governor Hochul also filed: (i) an Answer denying the material allegations of the Petition and asserting affirmative defenses thereto; and (ii) a Memorandum of Law in opposition to the Petition [NYSCEF Doc. Nos. 86-87].

Petitioners filed a Notice of Appeal to the Appellate Division, First Department, on May 27, 2022. Copies of Petitioners' Notice of Appeal (without the annexed Order) and Appellate Division Information Statement are e-filed herewith collectively as Exhibit 2 to the Reich Aff.

By Order entered on June 10, 2022 (the "Appellate Division Order"), the Appellate Division modified this Court's Order only to the extent of declaring the 2022 Assembly map to be procedurally invalid and otherwise affirmed this Court's dismissal of the other items of relief sought in the Petition, including the request that any new map be adopted "for use in the 2022 assembly elections."

Specifically, the Appellate Division Order provided that: (a) the existing state Assembly map "is to be used in the regularly scheduled 2022 assembly elections;" and (b) any new state Assembly map shall be "for use no sooner than the 2024 regular election." Appellate Division Order at 1-2 [NYSCEF Doc. No. 99].

The Appellate Division Order further provided that "[t]he matter is remanded to Supreme Court, New York County for consideration of the proper means for redrawing the state assembly map, in accordance with NY Const., art. III, § 5-b." *Id.* at 3 [NYSCEF Doc. No. 99].

By Order entered on June 14, 2022, the Court of Appeals dismissed Petitioners' appeal and motion for leave to appeal to the Court of Appeals "upon the ground that the order sought to be appealed [*viz.*, the Appellate Division Order] does not finally determine the proceeding within the meaning of the Constitution." A copy of the Court of Appeals' Order is e-filed herewith as Exhibit 3 to the Reich Aff.

By Order entered June 30, 2022, the Court directed all parties to “submit briefs and supporting materials on or before August 8, 2022 expressing their views as to the proper means by which to redraw the state assembly map as ordered by the Appellate Division” [NYSCEF Doc. No. 98].

ARGUMENT

THE ASSEMBLY MAP SHOULD BE REDRAWN IN ACCORDANCE WITH THE PROCEDURE SET OUT IN ARTICLE III, §§ 4 AND 5-B OF THE NEW YORK CONSTITUTION

Courts have long recognized that redistricting plans developed in accordance with the state’s redistricting process are favored over court-imposed plans. *E.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) (“[T]o prefer a court-drawn plan to a legislature’s replacement would be contrary to the ordinary and proper operation of the political process.”); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (“[I]t is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan.”); *In re Orans*, 15 N.Y.2d 339, 352, 258 N.Y.S.2d 825, 833 (1965) (“[T]he Legislature is under an obligation to reapportion and . . . courts move in only as a last resort.”). *See also Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) (We have repeatedly recognized that state reapportionment is the task of local legislatures or of those organs of state government selected to perform it.”); *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79, 587 N.Y.S.2d 560, 564 (1992) (“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.”).

The preference for legislative corrective action is explicitly enshrined in the New York Constitution. Article III, § 5 states:

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.*"

N.Y. Const. art. III, § 5 (emphasis added).

In its remand to this Court, the Appellate Division recognized the right of the Legislature to correct the procedural invalidity in enacting the state Assembly map. Instead of using the generic formula "the matter is remanded for further proceedings in accordance with this opinion," the Appellate Division explicitly directed this Court to determine the proper means for redrawing the Assembly map "in accordance with N.Y. Const. art. III, § 5-b." Appellate Division Order at 3 [NYSCEF Doc. No. 99].

The Appellate Division has thus made clear that this Court is not free to choose any available method to correct the procedural infirmity in the enacted state Assembly map, such as, for example, imposing its own corrective map with the assistance of a special master. Rather, the Appellate Division explicitly directed that Article III, § 5-b must govern the procedure for correcting the prior procedural infirmity in enacting the Assembly maps.

Section 5-b(a) of Article III of the New York State Constitution states in pertinent part:

On or before February first of each year ending with a zero and at any other time a court orders that congressional or state legislative districts be amended, an independent redistricting commission shall be established to determine the district lines for congressional and state legislative offices.

N.Y. Const., art. III, § 5-b(a) (emphasis added).

Since a court—the Appellate Division—has ordered that the state Assembly districts be amended, the plain language of Article III, § 5-b(a) of the Constitution mandates that the IRC initiate the constitutional process for making the Court-ordered revisions to the Assembly district

map and that the procedural steps set forth in § 5-b and § 4 be followed thereafter. Indeed, § 5-b expressly references the voting protocols of § 4 of Article III, stating:

The legislature shall consider and vote upon such implementing legislation *in accordance with the voting rules set forth in subdivision (b) of section four of this article.*

N.Y. Const. art. III, § 5-b(g) (emphasis added).

Article III, §§ 5-b and 4 set out the procedure for: (a) formulation by the IRC of proposed redistricting maps; (b) submission by the IRC of a proposed redistricting plan and implementing legislation therefor to the Legislature; and (c) adoption of the redistricting plan by legislative vote.

Accordingly, Article III, §§ 5-b and 4 govern the “proper means for redrawing the state Assembly map.”

Significantly, in *Harkenrider v. Hochul*, both the Trial Court and the Appellate Division, Fourth Department, recognized that the Legislature is required to be given an opportunity to rectify the constitutional infirmities found by those Courts with respect to the congressional and state Senate redistricting maps.

The Trial Court’s Order stated:

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.

Harkenrider v. Hochul, 2022 WL 1819491 at *14 (Sup. Ct. Steuben County Mar. 31, 2022) (emphases added).

Similarly, the Appellate Division, Fourth Department, ordered as follows:

[W]e conclude that *the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities*. Consistent with this Court's prior order entered upon respondents' motion to stay Supreme Court's order pending this appeal, *the legislature has until April 30, 2022 to enact a constitutional replacement for the congressional map*.

Harkenrider v. Hochul, 204 A.D.3d 1366, 1375, 167 N.Y.S.3d 659, 667 (4th Dep't 2022) (emphases added).

Indeed, the only reason that the Court of Appeals did not give the Legislature a first opportunity to correct the constitutional infirmities in the congressional and state Senate maps was because, by the time of that Court's decision, there was no longer sufficient time to do so in light of the impending election. As the Court of Appeals explained, "[t]he procedural unconstitutionality of the congressional and senate maps is, *at this juncture*, incapable of a legislative cure." *Harkenrider v. Hochul*, __ N.Y.3d __, 2022 WL 1236822 at *12 (Apr. 27, 2022) (emphasis added).

Here, however, there is no such time pressure as compelled the Court of Appeals to bypass the Legislature with respect to the congressional and state Senate maps. The Appellate Division expressly held that: (a) the existing state Assembly map "will remain in effect for the 2022 assembly primary election to be held on June 28, 2022 and the general election to be held on November 8, 2022;" and (b) any new Assembly map is "for use no sooner than the 2024 regular election." Appellate Division Order at 1-2 [NYSCEF Doc. No. 99].³

³ The Appellate Division Order, which is unequivocal in this regard, is conclusive and binding, and it forecloses any argument by Petitioners that a new Assembly map be prepared in time for a special election in 2023.

While the Court of Appeals indicated that the procedure set out in §§ 5-b and 4 is not available when an election is close at hand and amended district lines must be developed with dispatch—as it found with the congressional and state Senate maps in the aftermath of its decision in *Harkenrider*—that is not the case here.

As previously noted, by Order of the Appellate Division, the new Assembly map shall be “for use no sooner than the 2024 regular election.” Appellate Division Order at 2 [NYSCEF Doc. No. 99]. Two years is more than ample time for the procedural steps set forth in Article III, §§ 5-b and 4 of the Constitution to play out so as to enable the Assembly map to be redrawn in time for the 2024 election. The IRC will, after all, not be working from a blank slate. It has available to it all of the “draft redistricting plans, relevant data, and related information” [*see* Art. III, § 4(c)] that were used in preparing the previously submitted first plan.

In light of the foregoing, it is respectfully submitted that the proper means for devising the new Assembly map ordered by the Appellate Division is to adhere to the constitutional procedure set forth in Article III, §§ 5-b and 4 of the Constitution.

Accordingly, to remedy the procedural invalidity of the 2022 enacted Assembly districts, the Court should order that the IRC initiate the constitutional process for amending the Assembly district map based on the 2020 census data, and that, thereafter, the procedure set forth in Article III, §§ 5-b and 4 be followed with respect to the adoption of such amended Assembly district map. To that end, and because the IRC and its members are not parties to this proceeding, it is respectfully submitted that the Court sign an Order to Show Cause directing the members of the IRC to show cause why the IRC should not be added to this proceeding as a necessary party

pursuant to CPLR 1001.⁴ A proposed Order to Show Cause is e-filed herewith as Exhibit 4 to the Reich Aff.

It is respectfully submitted that the Court's order should impose the following suggested timetable for developing an Assembly redistricting plan in accordance with the timeframe established in the Constitution:

1. No later than September 15, 2022, or as soon as practicable thereafter, the IRC shall make widely available to the public, in print form and using the best available technology, its draft redistricting plans, relevant data, and related information.

2. Commencing 30 days after its draft redistricting plan is released, the IRC shall hold public hearings on proposals for the redistricting of state Assembly districts in each of the following: (i) cities of Albany, Buffalo, Syracuse, Rochester, and White Plains; and (ii) counties of Bronx, Kings, New York, Queens, Richmond, Nassau, and Suffolk. Notice of all such hearings shall be widely published using the best available means and media a reasonable time before every hearing.

3. On January 1, 2023, or as soon as practicable thereafter, but no later than January 15, 2023, the IRC shall submit to the Legislature that Assembly redistricting plan and implementing legislation therefor that garnered the highest number of votes in support of its approval by the IRC with a record of the votes taken. In the event that more than one plan received the same number of votes for approval, and such number was higher than that for any other plan, then the IRC shall submit all plans that obtained such number of votes.

⁴ Alternatively, the IRC could be added to this proceeding as a permissive party pursuant to CPLR 1002.

4. If the Legislature fails to approve the first plan and implementing legislation therefor submitted to it by the IRC, or if the governor shall veto such legislation and the Legislature shall fail to override such veto, each house or the governor if the governor vetoes it, shall promptly notify the IRC that such legislation has been disapproved.

5. Within fifteen (15) days of such of such notification and in no case later than February 28, 2023, the IRC shall prepare and submit to the Legislature a second redistricting plan and the necessary implementing legislation for such plan.

6. If the Legislature fails to approve any second redistricting plan and implementing legislation therefor submitted to it by the IRC, or if the governor shall veto such legislation and the Legislature shall fail to override such veto, each house shall introduce such implementing legislation with any amendments each house of the Legislature deems necessary. All such amendments shall comply with the provisions of Article III of the New York State Constitution. If approved by both houses, such legislation shall be presented to the governor for action.

Finally, it is also respectfully submitted that the Order should provide that the Court retains jurisdiction over this matter so that it may take such further action as the circumstances may require.

CONCLUSION

For the foregoing reasons, we respectfully submit that as the proper means to remediate the constitutional infirmity of the enacted Assembly redistricting plan, the Court should order that: (a) the IRC initiate the constitutional process for amending the Assembly district map based on the 2020 census data by formulating a proposed Assembly map; (b) thereafter, the procedural

steps set forth in Article III, §§ 5-b and 4 be followed with respect to the adoption of a remedial Assembly district map; and (c) the Court retain jurisdiction over this matter to take such further action as circumstances may require.

Dated: New York, New York
August 8, 2022

GRAUBARD MILLER

By: 

C. Daniel Chill
Elaine M. Reich

405 Lexington Avenue
New York, NY 10174
(212) 818-8800
dchill@graubard.com
ereich@graubard.com

Dated: Buffalo, New York
August 8, 2022

PHILLIPS LYTLE LLP

By: 

Craig R. Bucki
Steven B. Salcedo
Rebecca A. Valentine

One Canalside
125 Main Street
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rvalentine@phillipslytle.com

Attorneys for Respondent Speaker
of the Assembly Carl Heastie

RECEIVED NYSCEF: 08/08/2022

FILED: NEW YORK COUNTY CLERK 08/08/2022 04:50 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 101

RECEIVED NYSCEF: 08/08/2022

Ex. 4 Proposed Order to Show Cause to add the Independent
Redistricting Commission as Respondent to this proceeding

3. The significance of the foregoing documents is discussed in the accompanying

Memorandum of Law.

Dated: New York, New York
August 8, 2022


ELAINE M. REICH

Exhibit 1 to Reich Affirmation-
Order of the New York Court of Appeals, entered on May 27, 2022

FILED: NEW YORK COUNTY CLERK 08/08/2022 04:50 PM

NYSCEF DOC. NO. 102

INDEX NO. 154213/2022

RECEIVED NYSCEF: 08/08/2022

State of New York
Court of Appeals

*Decided and Entered on the
twenty-seventh day of May, 2022*

Present. Hon. Janet DiFiore, *Chief Judge presiding.*

SSD 16

Paul Nichols, et al.,

Appellants,

v.

Kathy Hochul, &c., et al.,

Respondents.

Appellants having appealed to the Court of Appeals in the above cause:

Upon the papers filed and due deliberation, it is

ORDERED, that the appeal is transferred without costs, by the Court *sua sponte*, to the Appellate Division, First Department, upon the ground that a direct appeal does not lie when questions other than the constitutional validity of a statutory provision are involved (*see* NY Const. art VI, §§ 3 [b] [2], 5 [b]; CPLR 5601 [b] [2]).



Lisa LeCours
Clerk of the Court

**Exhibit 2 to Reich Affirmation-
Petitioners' Notice of Appeal and Appellate Division Information
Statement
[pp. 1056 - 1063]**

FILED: NEW YORK COUNTY CLERK 08/08/2022 04:50 PM

NYSCEF DOC. NO. 103

INDEX NO. 154213/2022

RECEIVED NYSCEF: 08/08/2022

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

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG

Petitioners,

Index No. 154213/2022

v.

NOTICE OF APPEAL

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.

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).

FILED: NEW YORK COUNTY CLERK 08/08/2022 04:50 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 103

RECEIVED NYSCEF: 08/08/2022

Dated: New York, NY
May 25, 2022

Respectfully submitted,

WALDEN MACHT & HARAN LLP

By: *Jim Walden*
 Jim Walden
 Peter A. Devlin
 250 Vesey Street, 27th Floor
 New York, NY 10281
 Tel: (212) 335-2030
 jwalden@wmhlaw.com
 pdevlin@wmhlaw.com

Attorneys for Petitioners Paul Nichols and Gary Greenberg

LAW OFFICE OF AARON S. FOLDENAUER

By: /s/ Aaron S. Foldenauer
 Aaron S. Foldenauer
 30 Wall Street, 8th Floor
 New York, NY 10005
 Tel: (212) 961-6505
 aaron@nyelectionlaw.com
Attorney for Petitioner Gavin Wax

TO: All Counsel on record **via NYSCEF**

LETITIA JAMES, NEW YORK ATTORNEY GENERAL
 Attorneys for Respondent Governor Kathy Hochul
 Seth Farber
 Special Litigation Counsel
 28 Liberty Street
 New York, NY 10005
 (212) 416 – 8029
 seth.farber@ag.ny.gov

CUTI HECKER WANG LLP
 Attorneys for Respondent Senate Majority Leader Andrea Stewart-Cousins
 Eric J. Hecker
 Alexander Goldenberg
 Alice G. Reiter
 305 Broadway, Suite 607

FILED: NEW YORK COUNTY CLERK. 08/08/2022 04:50 PM

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NYSCEF DOC. NO. 103

RECEIVED NYSCEF: 08/08/2022

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 areiter@chwllp.com

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 Elaine M. Reich
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PHILLIPS LYTLE LLP

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 Steven B. Salcedo
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NEW YORK STATE BOARD OF ELECTIONS

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 brian.quail@elections.ny.gov
 aaron.suggs@elections.ny.gov

Supreme Court of the State of New York

Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.		For Court of Original Instance
Paul Nichols, Gavin Wax, and Gary Greenberg <div style="text-align: center;">- against -</div> 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		<div style="border: 1px solid black; height: 40px; margin-bottom: 5px;"></div> Date Notice of Appeal Filed
Case Type		Filing Type
<input type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	<input type="checkbox"/> CPLR article 78 Proceeding <input checked="" type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278 <input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review
Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.		
<input type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input type="checkbox"/> Commercial
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input checked="" type="checkbox"/> Election Law
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous
<input type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Statutory	<input type="checkbox"/> Taxation
		<input type="checkbox"/> Contracts
		<input type="checkbox"/> Estate Matters
		<input type="checkbox"/> Prisoner Discipline & Parole
		<input type="checkbox"/> Torts

FILED: NEW YORK COUNTY CLERK 08/08/2022 04:50 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 103

RECEIVED NYSCEF: 08/08/2022

Appeal			
Paper Appealed From (Check one only):		If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.	
<input type="checkbox"/> Amended Decree	<input type="checkbox"/> Determination	<input checked="" type="checkbox"/> Order	<input type="checkbox"/> Resettled Order
<input type="checkbox"/> Amended Judgement	<input type="checkbox"/> Finding	<input type="checkbox"/> Order & Judgment	<input type="checkbox"/> Ruling
<input type="checkbox"/> Amended Order	<input type="checkbox"/> Interlocutory Decree	<input type="checkbox"/> Partial Decree	<input type="checkbox"/> Other (specify):
<input type="checkbox"/> Decision	<input type="checkbox"/> Interlocutory Judgment	<input type="checkbox"/> Resettled Decree	
<input type="checkbox"/> Decree	<input type="checkbox"/> Judgment	<input type="checkbox"/> Resettled Judgment	
Court: Supreme Court		County: New York	
Dated: 05/25/2022		Entered: 5/25/2022	
Judge (name in full): Laurence Love, J.S.C.		Index No.: 154213/2022	
Stage: <input type="checkbox"/> Interlocutory <input type="checkbox"/> Final <input type="checkbox"/> Post-Final		Trial: <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury	
Prior Unperfected Appeal and Related Case Information			
Are any appeals arising in the same action or proceeding currently pending in the court? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.			
Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:			
Original Proceeding			
Commenced by: <input type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus			Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:			
Proceeding Transferred Pursuant to CPLR 7804(g)			
Court: Choose Court		County: Choose County	
Judge (name in full):		Order of Transfer Date:	
CPLR 5704 Review of Ex Parte Order:			
Court: Choose Court		County: Choose County	
Judge (name in full):		Dated:	
Description of Appeal, Proceeding or Application and Statement of Issues			
Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.			
Petitioners' appeal from the Decision and Order of the Supreme Court, New York County (Love, J.) denying Petitioners' Order to Show Cause for Preliminary Relief and denying the Petition in full. Petitioners sought preliminary relief to restrain Respondents from using the current Assembly district map in the 2022 election cycle, and Petitioners requested immediate appointment of a special master to evaluate and draft a new Assembly map. The Petition further seeks to invalidate the current Assembly map, enjoin all state and local primaries to August 23, 2022, or September 13, 2022, and reopen ballot-access designating and nominating petition periods.			

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

(1) The Court of Appeals held in *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022), that the method used by the Legislature to enact Congressional, Senate, and Assembly district maps violated Article III of the New York Constitution. The Court, however, declined to invalidate the Assembly map "despite its procedural infirmity" because the petitioners in *Harkenrider* did not seek such relief. *Id.* at *11 n.15. Is the Assembly map, enacted in 2021–2022 N.Y. Reg. Sess. Leg. Bills A.9040-A and A.9168, invalid under Article III? The Supreme Court erred by holding that the *Harkenrider* decision did not rule on the constitutionality of the Assembly map. This is a pure question of law. Petitioners request the First Department invalidate the Assembly map.

(2) Section 5 of Article III of the New York Constitution provides that any law establishing districts found to violate Article III "shall be invalid in whole or in part." Section 5 further provides that an apportionment "shall be subject to review" by the supreme court. Can a supreme court avoid ruling on the validity of such a law by imposing a requirement that a challenge be "timely" or applying the equitable doctrine of laches, when the Constitution mandates review and invalidation? The Supreme Court erred by holding that the Petition is untimely and barred by laches. Petitioners request that the First Department hold that the Petition is timely and not barred by laches.

(3) Within four and six days of the Court of Appeals' April 27, 2022, decision in *Harkenrider*, Petitioners' Greenberg and Wax, moved to intervene in the Supreme Court, Steuben County, seeking the relief sought in the instant Petition. Within four days of the denial of intervention, Petitioners commenced the instant special proceeding in the Supreme Court, New York County. Had Petitioners commenced their action when the Assembly map was enacted on February 3, 2022, no relief would have been granted any earlier than April 27, 2022. Is the Petition untimely or otherwise barred by the equitable doctrine of laches? The Supreme Court erred by holding that the Petition is untimely and barred by laches. Petitioners request that the First Department hold that the Petition is timely and not barred by laches.

Petitioners further request that the First Department order all appropriate relief to the Legislature's unconstitutional action, including granting the relief requested in the Petition.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Paul Nichols	Petitioner	Appellant
2	Gavin Wax	Petitioner	Appellant
3	Gary Greenberg	Petitioner	Appellant
4	Governor Kathy Hochul	Respondent	Respondent
5	Senate Majority Leader Andrea Stewart-Cousins	Respondent	Respondent
6	Speaker of the Assembly Carl Heastie	Respondent	Respondent
7	New York State Board of Elections	Respondent	Respondent
8	New York State Legislative Task Force on Demographic Research and Reapportionment	Respondent	Respondent
9			
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20			

FILED: NEW YORK COUNTY CLERK 08/08/2022 04:50 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 103

RECEIVED NYSCEF: 08/08/2022

Attorney Information			
Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.			
Attorney/Firm Name: Jim Walden and Peter Devlin/Walden Macht & Haran LLP			
Address: 250 Vesey Street, 27th Floor			
City: New York	State: NY	Zip: 10281	Telephone No: 212-335-2030
E-mail Address: jwalden@wmhlaw.com and pdevlin@wmhlaw.com			
Attorney Type: <input checked="" type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1 and 3			
Attorney/Firm Name: Aaron S. Foldenauer/Law off of Aaron S. Foldenauer			
Address: 30 Wall Street, 8th Floor			
City: New York	State: NY	Zip: 10005	Telephone No: 212-961-6505
E-mail Address:			
Attorney Type: <input checked="" type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 2			
Attorney/Firm Name: Seth Farber/Letitia James, New York Attorney General			
Address: 28 Liberty Street			
City: New York	State: NY	Zip: 10005	Telephone No: 212-416-8029
E-mail Address: seth.farber@ag.ny.gov			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input checked="" type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 4			
Attorney/Firm Name: Eric J. Hecker, Alexander Goldenberg, and Alice G. Reiter/Cuti Hecker Wang LLP			
Address: 305 Broadway, Suite 607			
City: New York	State: NY	Zip: 10007	Telephone No: 212-620-2600
E-mail Address: ehecker@chwilp.com, agoldenberg@chwilp.com, and areiter@chwilp.com			
Attorney Type: <input checked="" type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 5			
Attorney/Firm Name: C. Daniel Chill, Joseph H. Lessem, and Elaine M. Reich/Graubard Miller			
Address: 405 Lexington Avenue, 11th Floor			
City: New York	State: NY	Zip: 10174	Telephone No: 212-818-8800
E-mail Address: dchill@graubard.com, jlessem@graubard.com, and ereich@graubard.com			
Attorney Type: <input checked="" type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 6			
Attorney/Firm Name: Craig R. Bucki, Steven B. Salcedo, Rebecca A. Valentine/Phillips Lytle LLP			
Address: One Canalside 125 Main Street			
City: Buffalo	State: NY	Zip: 14203	Telephone No: 716-847-8400
E-mail Address: cbucki@phillipslytle.com, ssalcedo@phillipslytle.com, and rvalentine@phillipslytle.com			
Attorney Type: <input checked="" type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 6			

FILED: NEW YORK COUNTY CLERK 08/08/2022 04:50 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 103

RECEIVED NYSCEF: 08/08/2022

Attorney Information			
Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.			
Attorney/Firm Name: Kevin G. Murphy Brian Lee Quail and Aaron K. Suggs/New York State Board of Elections			
Address: 40 N. Pearl Street, Suite 5			
City: Albany	State: NY	Zip: 12207	Telephone No: 518-474-2063
E-mail Address: kevin.murphy@elections.ny.gov, brian.quail@elections.ny.gov, and aaron.suggs@elections.ny.gov			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input checked="" type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 7			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 7			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 7			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 7			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 7			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 7			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 7			

Exhibit 3 to Reich Affirmation-
Order of the New York Court of Appeals, entered on June 14, 2022

FILED: NEW YORK COUNTY CLERK 08/08/2022 04:50 PM

NYSCEF DOC. NO. 104

INDEX NO. 154213/2022

RECEIVED NYSCEF: 08/08/2022

State of New York
Court of Appeals

*Decided and Entered on the
fourteenth day of June, 2022*

Present, Hon. Janet DiFiore, *Chief Judge, presiding.*

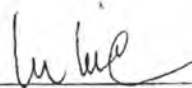
Mo. No. 2022-462
Paul Nichols, et al.,
Appellants,
v.
Kathy Hochul, &c., et al.,
Respondents.

Appellants having appealed and moved for leave to appeal to the Court of Appeals
in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, on the Court's own motion, that the appeal is dismissed, without
costs, upon the ground that the order appealed from does not finally determine the
proceeding within the meaning of the Constitution; and it is further

ORDERED, that the motion for leave to appeal is dismissed upon the ground that
the order sought to be appealed from does not finally determine the proceeding within the
meaning of the Constitution.



Lisa LeCours
Clerk of the Court

**Exhibit 4 to Reich Affirmation-
Proposed Order to Show Cause to add the Independent Redistricting
Commission as Respondent to this proceeding
[pp. 1065 - 1068]**

FILED: NEW YORK COUNTY CLERK 08/08/2022 04:50 PM

NYSCEF DOC. NO. 105

INDEX NO. 154213/2022

RECEIVED NYSCEF: 08/08/2022

At IAS Part 63, Room 355 of the
Supreme Court of the State of New
York, New York County, at the
New York County Courthouse at
60 Centre Street, New York, NY
10007 on the ____ day of
_____, 2022

PRESENT: Hon. Laurence R. Love, J.S.C.

-----	X	
PAUL NICHOLS, GAVIN WAX,	:	Index No. 154213/2022E
AND GARY GREENBERG,	:	
	:	
Petitioners,	:	[Proposed]
	:	<u>ORDER TO SHOW CAUSE</u>
-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.	:	
-----	X	

Upon reading and filing: (i) the Order of the Appellate Division, First Department, entered on June 10, 2022 [NYSCEF Doc. No. 99]; (ii) the Memorandum of Law of Respondent Speaker of the Assembly Carl Heastie e-filed on August 8, 2022; (iii) the Affirmation of Elaine M. Reich with the exhibits thereto e-filed on August 8, 2022; and (iv) all of the papers and proceedings heretofore had herein;

AND good cause having been shown therefor, it is hereby

ORDERED, that the New York State Independent Redistricting Commission, comprised of the following members, David Imamura, Chair, Eugene Benger, Ross Brady,

John Conway III, Dr. Ivelisse Cuevas-Molina, Elaine Frazier, Lisa Harris, Charles Nesbitt and Willis H. Stephens, Jr., or their attorneys show cause before the Court at IAS Part 63, Room 355, of the Courthouse at 60 Centre Street, New York, NY 10007, on _____, 2022 at _____ A.M./P.M., or as soon thereafter as counsel may be heard, why an Order should not be made and entered:

1. Adding the New York State Independent Redistricting Commission as Respondent to this proceeding;
2. Requiring the Independent Redistricting Commission to initiate the constitutional process for amending the Assembly district map, and to formulate a proposed Assembly map no later than a date to be determined by the Court;
3. Further requiring the Independent Redistricting Commission and Respondents thereafter to follow the procedural steps set forth in Article III, §§ 4 and 5-b of the New York State Constitution with respect to the adoption of a remedial Assembly district map; and
4. Granting such other and further relief as the Court deems just and appropriate; and it is further

ORDERED, that service of a copy of this Order and the papers upon which it is granted, on or before ____ A.M./P.M. on _____, 2022 by: (a) Federal Express or other overnight delivery service on David Imamura, Chair, Eugene Benger, Ross Brady, John Conway III, Dr. Ivelisse Cuevas-Molina, Elaine Frazier, Lisa Harris, Charles Nesbitt and Willis H. Stephens, Jr. waiving the requirement of a signature, addressed to said commissioners at either 250 Broadway, 22nd Floor, New York, N.Y. 10007 or 302A Washington Avenue Ext., Albany, N.Y. 12203, being the offices of the New York State Independent Redistricting Commission; and (b) via email to each commissioner: David Imamura imamurad@nyirc.gov,

Eugene Bengere bengere@nyirc.gov, Ross Brady bradyr@nyirc.gov, John Conway conwayj@nyirc.gov, Ivelisse Cuevas Molina cuevasmolina@nyirc.gov, Elaine Frazier fraziere@nyirc.gov, Lisa Harris harrislr@nyirc.gov, Charles Nesbitt nesbittc@nyirc.gov, Willis Stephens, Jr. stephensw@nyirc.gov shall be good and sufficient service; and it is further

ORDERED, that answering papers, if any, shall be served by e-filing on or before

_____, 2022.

ENTER.

Hon. Laurence R. Love, J.S.C.

Certified pursuant to 22 N.Y.C.R.R. § 130.1

GRAUBARD MILLER

By: 

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Elaine M. Reich

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PHILLIPS LYTLE LLP

By: 

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Rebecca A. Valentine

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ssalcedo@phillipslytle.com
rvalentine@phillipslytle.com

Attorneys for Respondent Speaker
of the Assembly Carl Heastie

**Letter from Seth J. Farber to the Honorable Laurence L. Love, dated
August 8, 2022**



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF STATE COUNSEL
LITIGATION BUREAU

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By NYSCEF

August 8, 2022

Honorable Laurence L. Love, J.S.C.
Supreme Court of the State of New York, New York County
80 Centre Street
New York, NY 10013

Re: *Nichols, et al. v. Hochul, et al.*, Index No. 154213/2022 (Sup. Ct. N.Y. Cty.)

Dear Justice Love:

This letter is submitted on behalf of Governor Kathy Hochul ("Governor Hochul"), named as a respondent in the above-captioned matter, in response to Your Honor's Order dated June 29, 2022 (NYSCEF No. 98) directing the parties to submit briefs and supporting materials "expressing their views as to the proper means by which to redraw the state assembly map as ordered by the Appellate Division."

Governor Hochul respectfully concurs with the position taken by Assembly Speaker Carl Heastie, also named as a respondent, in his submission (NYSCEF No. 100). Pursuant to Article III of the State Constitution, matters of redistricting are within the province of the Independent Redistricting Commission, subject to the approval of each house of the Legislature and then ultimately the approval or veto of the Governor. N.Y. CONST. art. III, § 5-b (2014). Since the issue before the Court concerns the 2024 elections, there is ample time to permit operation of the process envisioned by the State Constitution.

Accordingly, Governor Hochul respectfully submits that the Court should remand this matter to the Independent Redistricting Commission for further proceedings. The remedies suggested by the Petitioners, such as appointment of a special master, are premature at best and inappropriate under the circumstances.

Thank you for Your Honor's consideration of this matter.

Respectfully submitted,

Seth J. Farber /s/
Seth J. Farber
Special Litigation Counsel

cc: All Counsel of Record (via NYSCEF)

**Petitioners' Memorandum of Law Concerning the Appropriate Process
to Redraw the Assembly Map, dated August 8, 2022
[pp. 1070 - 1089]**

FILED: NEW YORK COUNTY CLERK 08/08/2022 09:47 PM

NYSCEF DOC. NO. 107

INDEX NO. 154213/2022

RECEIVED NYSCEF: 08/08/2022

SUPREME COURT OF THE STATE OF NEW YORK
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.

**PETITIONERS' MEMORANDUM OF LAW CONCERNING THE APPROPRIATE
PROCESS TO REDRAW THE ASSEMBLY MAP**

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Petitioners Paul Nichols, Gary Greenberg, and Gavin Wax, by their undersigned counsel, submit this Memorandum of Law concerning the appropriate method to redraw the Assembly district lines, following the June 10, 2022, decision of the First Department, which remanded this action “for further proceedings in connection with the redrawing of the [Assembly] map.”

PRELIMINARY STATEMENT

In February 2022, the Legislature passed a redistricting plan for the Assembly. The Legislature drew the new Assembly map in the secrecy of its chambers—without public input, without transparency, and without independent checks—ignoring the constitutional mandate adopted by New Yorkers less than a decade before. On June 10, 2022, the First Department held that the 2022 Assembly map was unconstitutional and void, since the Legislature failed to follow the exclusive redistricting process set forth in Article III of the New York Constitution.

One question remains. Does the Constitution require a judicial remedy when a redistricting plan has been invalidated for violating the Article III redistricting process?

The text and structure of the Constitution is plain. And the Court of Appeals’ decision in *Harkenrider* is unequivocal. A judicial remedy is now the only option. Neither the Legislature nor the Independent Redistricting Commission (IRC) get a second chance at fixing a procedural violation *when constitutionally fixed deadlines have passed*. There are no do-overs. No mulligans. Article III provides that only a court can now impose a remedy:

The 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 *except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.*

Art. III, § 4(e) (emphasis added).

This is especially so here because, as verified by the study of a nationally recognized expert in redistricting, the 2022 Assembly map violated the Constitution in a second way by intentionally

drawing the now-voided map to eliminate competition and favor incumbents, which the Constitution forbids. Art. III, § 4(b)(5) (forbidding map drawing to stifle competition).

BACKGROUND

In 2014, New Yorkers added gerrymandering protections to the Constitution. They passed amendments to Article III Sections 4 and 5 and adopted Section 5-b. Together, these amendments created an Independent Redistricting Commission (IRC), a detailed procedure for crafting and enacting redistricting plans, and prohibitions against partisan and incumbent considerations in drawing the new plans. The amendments were passed “in response to criticism of the scourge of hyper-partisanship.” *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *7 (N.Y. Apr. 27, 2022). Together, the 2014 amendments created an “exclusive” process of redistricting that was designed to promote citizen participation, fair representation, and confidence in elections, thereby ushering in “a new era of bipartisanship and transparency.” *Id.* at *2, *8.

This year marked the first redistricting cycle with the new constitutional paradigm. The Legislature ignored it. On April 27, 2022, the Court of Appeals held that the IRC and the Legislature violated this constitutionally mandated process. *Id.* at *9. The Court struck down the Congressional and Senate maps for that reason. *Id.* at *11. The Assembly map remained, however, because the petitioners in *Harkenrider* had not challenged it; and so, the Court could not also strike down the Assembly map “despite its procedural infirmity.” *Id.* at *11 n.15.

Petitioners in this matter thus filed an action on May 15, 2022, seeking to invalidate the 2022 Assembly map. This Court rejected and dismissed the Petition. On June 10, 2022, the First Department reversed, granted the Petition, and invalidated the 2022 Assembly map “based on its procedural infirmity as previously determined by the Court of Appeals” in *Harkenrider*. NYSCEF No. [99](#), at 1. Although Petitioners requested that a new map be adopted in time for the 2022 primary and general elections, the First Department held that insufficient time existed to draw a

new Assembly map, allowing the election to proceed with a constitutionally infirm map. *Id.* The court remanded the matter “for consideration of the proper means for redrawing the state assembly map, in accordance with NY Const, art III, § 5-b.”¹ *Id.* at 3.

Three weeks later, the June 28 primary election went ahead with the unconstitutional Assembly map in place. Turnout was anemic; voters’ disgust with the legislative game-playing inherent in the redistricting process was likely a contributing factor. According to preliminary data, only 13% of registered Democrats in New York voted in the June 28 gubernatorial primary, compared to 25% in 2018; and only 16% of registered Republicans voted in the June 28 primary (there was no Republican gubernatorial primary in 2018).² In New York City, approximately 12.3% of registered Democrats and Republicans cast votes in the primary, whereas in 2018, 27% of all registered Democrats voted.³ This result was foreseeable.

On June 29, 2022, this Court directed the parties to submit briefs to address “the proper means by which to redraw the state assembly map as ordered by the Appellate Division.” NYSCEF No. [98](#). This brief provides the answer, and there is only one: a judicial remedy.

¹ Although Petitioners also requested a special election with a new map, the First Department foreclosed that specific relief when it ordered: “upon the formal adoption and implementation of a new legally compliant state assembly map, for use no sooner than the 2024 regular election, the February 2022 map will be void and of no effect” NYSCEF No. [99](#), at 2.

² Ethan Geringer-Sameth, *Voter Turnout in New York Gubernatorial Primary Drops Sharply from 2018 Surge*, Gotham Gazette (June 30, 2022), <https://www.gothamgazette.com/state/11431-voter-turnout-2022-primaries-new-york>.

³ David Cruz & Cyra Paladini, *NYC turnout in June’s primary was weak — August will likely be weaker*, Gothamist (July 13, 2022), <https://gothamist.com/news/nyc-turnout-in-junes-primary-was-weak-august-will-likely-be-weaker>.

ARGUMENT**I. As *Harkenrider* holds, the Constitution requires a judicial remedy when there has been a constitutional violation that the Legislature is incapable of curing.**

This Court need only look to the plain text of Article III to decide the remedial question presented. Article III sets forth the “exclusive” process for redistricting with one caveat: “court intervention following a violation of the law.” *Harkenrider*, 2022 WL 1236822, at *8. When that process has been violated, Section 4(e) empowers the court—and only the court—to “*order the adoption of, or changes to, a redistricting plan* as a remedy for a violation of law.” Art. III, § 4(e) (emphasis added). The language is “plain and precise” that a judicial remedy is the only option; it must therefore “be given its full effect.” *Harkenrider*, 2022 WL 1236822, at *5 (quoting *People v. Rathbone*, 145 N.Y. 434, 438 (1895)). The 2014 amendments’ framers “understood the force of the language used and, as well, the people who adopted it.” *Id.*

For that reason, the Court of Appeals found that “due to the procedural constitutional violations and the expiration of the outer February 28th constitutional deadline for IRC action, *the legislature is incapable of unilaterally correcting the infirmity.*” *Id.* *10 n.19 (emphasis added). The Court rejected Respondents’ argument that the Legislature be given an opportunity to redraw the maps: “[t]he procedural unconstitutionality of the congressional and senate maps is, at this juncture, *incapable of a legislative cure.* The deadline in the Constitution for the IRC to submit a second set of maps has long since passed.” *Id.* at *10 (emphasis added). And the Court rejected Judge Troutman’s dissenting view that the Court “should now order the legislature to enact redistricting legislation despite their inability to cure the procedural violation.” *Id.* at *10 n.20.

What role, then, does the Legislature have within Article III’s remedial scheme? The answer to that is also plain. The Legislature may fix defects in a map—but only if it *can* fix them within the required constitutional process, including its time limits. Section 5 provides that the

Legislature “shall have a full and reasonable opportunity to correct the [map’s] legal infirmities.” Art. III, § 5. This provision is a safety valve; it provides that where legal infirmities exist that the Legislature *is capable* of correcting—such as partisan or other substantive bias—it must have an opportunity to correct them. But when the redistricting process itself has been violated and constitutionally set deadlines have passed—there is no role for the Legislature to try to salvage a defective map, since it is no longer salvageable. A judicial remedy is the mandate of Article III and the clear holding of *Harkenrider*, which this Court is duty-bound to follow.

The Assembly map, which has been invalidated because of the same procedural infirmities as the Congressional and Senate maps,⁴ is now in the same remedial posture. This Court must adopt a redistricting plan for the Assembly, since the old one is now legally void and of no effect. Art. III, § 4(e). Respondents might argue, as they did in *Harkenrider*, that Article III leaves room for “legislative discretion regarding the particulars of implementation.” *Harkenrider*, 2022 WL 1236822, at *7 (referencing Respondents’ arguments). But the Court of Appeals rejected that argument: “this is not a scenario where the Constitution fails to provide ‘specific guidance’ or is ‘silent on the issue.’” *Id.* (quoting *Cohen v. Cuomo*, 19 N.Y.3d 196, 200 (2012)).

In *Harkenrider*, the League of Women Voters as *amicus curiae* succinctly articulated the remedial scheme that the 2014 reforms created. The League explained:

[I]f there has been a “violation of law,” including the procedural dictates of the Constitution, Section 4(e) charges the courts to order one of two specified remedies—the adoption of a new redistricting plan or a change to a pre-existing plan. Although Section 5 allows for the Legislature to “have a full and reasonable opportunity to correct” the “legal infirmities” of a “law establishing congressional or state legislative districts,” that remedial path, necessarily, can be

⁴ The Congressional map was found to be both procedurally and substantively unconstitutional; the Senate map was found to be procedurally unconstitutional. *Harkenrider*, 2022 WL 1236822, at *11. In *Harkenrider*, both the Congressional and Senate maps were redrawn with the assistance of a special master, pursuant to a court-supervised process.

available only when it is possible for the Legislature to correct the “legal infirmities.” Here, the Legislature is incapable of curing the procedural violation. Thus, Section 4(e)’s express charge to the Judiciary must be respected; the Court should order one of the two specified remedies contemplated by that subsection.

Devlin Aff., Ex. 1, at 2; *see also* Devlin Aff., Ex. 2, at 11–18 (the League of Women Voters arguing same as *amicus* to the Fourth Department). The Legislature is unable to fix the invalidated Assembly map. This Court must therefore adopt a new map. Allowing the Legislature to step in would be the same as granting no remedy at all and is precisely what the Court of Appeals warned should not happen. The exclusive redistricting process is not just a procedural formality.

Adherence to the process and deadlines in Article III as they are plainly written serves substantive interests. The process “incentiviz[es] the legislature to encourage and support fair bipartisan participation and compromise throughout the redistricting process.” *Harkenrider*, 2022 WL 1236822, at *8; *see also* Devlin Aff., Ex. 2, at 16 (“By insisting that the remedial provisions of the Amendment must be enforced as written, this Court would give the members of the IRC a powerful incentive to perform their constitutional duties, and give the legislative leaders who appoint them a powerful incentive to spur them to do so. Surely the uncertain contours of a judicial reapportionment plan would encourage political compromises, compromises that, perforce, would reduce the possibility of abusive gerrymandering.”).

Nor is reconvening or restarting the IRC process an option. The Article III process is the exclusive process—deadlines and all—as *Harkenrider* holds. The constitutional timetable, among other requirements, for the IRC to carry out any redistricting process has lapsed. The IRC has until “January fifteenth in the year ending in two beginning in two thousand twenty-two” to submit a plan and implementing legislation to the Legislature. Art. III, § 4(b). That date passed long ago.

Respondents might argue that Section 5-b(a) requires another IRC process to redraw the Assembly map. Section 5-b(a) states: “On or before February first of each year ending with a zero

and at any other time a court orders that congressional or state legislative districts be amended, an independent redistricting commission shall be established to determine the district lines for congressional and state legislative offices.” Art. III., § 5-b(a).

This argument lacks merit for three reasons.⁵

First, this Court could not direct the IRC to “amend” the original assembly map, because it no longer exists. The First Department voided it. The First Department ordered that the map be “redrawn[n],” not amended.

Second, the other conditions in Article III for IRC action could not be met and are impossible to meet. It is not possible for the IRC to comply at this point with the deadlines established in Sections 4(b) (“no later than January fifteenth in the year ending in two beginning in two thousand twenty-two”), 4(c) (“no later than September fifteenth of the year ending in one or as soon as practicable thereafter”), and 5-b(g) (“on or before January first in the year ending in two or as soon as practicable thereafter”). It also is not possible for the IRC to comply with various other constitutional requirements; for example, Section 4(b) requires that plans for *both* “the assembly and the senate *shall be contained* in and voted upon by the legislature *in a single bill*.” Art. III, § 4(b) (emphasis added).

Third, allowing the IRC to fix a violation of law contradicts the plain remedial scheme of Article III and renders that scheme meaningless. Section 4(e) specifically addresses what happens when there is a “violation of law”; Section 5-b sets forth the composition of the IRC. Under

⁵ In the Supreme Court, County of Albany, several New York voters have filed a petition against the members of the IRC seeking a mandamus order that would force the IRC to reconvene and submit a second set of Congressional plans to the legislature. *See* Amended Verified Petition for Writ of Mandamus, *Hoffman v. N.Y. State Indep. Redistricting Comm’n*, No. 904972-22 (Sup. Ct. Albany Cnty. Aug. 4, 2022) (NYSCEF No. [47](#)). The respondents’ answer is presently due August 23, 2022. *See* Order to Show Cause, *Hoffman*, (Aug. 5, 2022) (NYSCEF No. [58](#)).

longstanding canons of construction, a specific provision trumps a general one, and a provision should not be made superfluous.⁶ *Isaacs v. Westchester Wood Works, Inc.*, 278 A.D.2d 184, 185 (1st Dep’t 2000). Moreover, to argue that the IRC should again convene under Section 5-b would conflict with *Harkenrider*’s reading of the Constitution, which recognizes that a judicial remedy is now necessary (and which the Court of Appeals imposed with respect to both the Congressional and Senate maps). Giving the IRC “another chance” at drawing the Assembly lines would incentivize dilatory and unlawful conduct if they know that courts will afford them opportunities to bypass the exclusive process for redistricting and corresponding remedies.

II. This Court should appoint a special master to draw the Assembly map.

Petitioners respectfully request that the Court appoint a special master with redistricting expertise to draw a new Assembly map. The Supreme Court in Steuben County appointed Dr. Jonathan Cervas as Special Master to redraw the Congressional and Senate maps. Dr. Cervas is highly qualified and was assisted in that matter by a team of experts. Given his expertise and familiarity with the process of redrawing the other maps, it is likely that he could readily be retained as a Special Master in this action and get to work immediately; accordingly, Dr. Cervas is Petitioners’ first choice. If, however, the Court wishes to evaluate other redistricting experts to potentially serve as special master, Petitioners stand ready to assist the Court with that process.

⁶ Although the First Department referenced only Section 5-b in its instructions on remand, that does not require this Court blind itself to the rest of Article III. It is axiomatic that the Court has a duty to interpret the Constitution as a whole. *See People ex rel. McClelland v. Roberts*, 148 N.Y. 360, 367 (1896) (“The constitution, as it now exists, must be read and considered in all its different parts, and each provision must be given its appropriate place in the system, and some office to perform, and at the same time all must be so construed as to operate harmoniously.”).

Even if the Court had some discretion to allow the IRC to reconvene, and it does not, the Court should not exercise any such discretion. The State of New York was not supposed to be cited this year alongside the long list of regressive states that have rigged elections through gerrymandering. But this whole redistricting debacle has brought appropriate scorn and derision to the State. Although Petitioners brought no gerrymandering claim in the very short time they had to file the original Petition, Petitioners have now commissioned an expert study. The study demonstrates conclusively that the corrupt purpose of the unconstitutionally drawn Assembly map was a gerrymander, and thus violated the Constitution for that reason as well.

A. The Court must not countenance the IRC's and Legislature's attempt to shortcut the exclusive Article III redistricting process.

The redrawing of the Congressional and Senate maps in *Harkenrider* has been successfully completed. Dr. Cervas now has expertise in both the map-drawing process and the requirements and computations required to accomplish drawing new maps here in New York. Dr. Cervas also successfully participated in public hearings and reviewed and considered written submissions from interested parties. At the conclusion of the process, the court commended Dr. Cervas's work:

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.

Order at 4, *Harkenrider v. Hochul*, Index. No. E2022-0116CV (Sup. Ct. Steuben Cnty. May 20, 2022) (NYSCEF No. [670](#)); *see also* Devlin Aff., Ex. 3 (Dr. Cervas's curriculum vitae). Dr. Cervas received thousands of comments and submissions from New Yorkers. He heard remarks at a hearing in Steuben County. He released proposed maps on May 16 and 17 and, after additional comments, released final maps on or about May 20. The process was thorough and efficient.

Petitioners are prepared to assist the Court with contacting Dr. Cervas to ascertain whether he can be retained in connection with this action, or in connection with a search process concerning the potential retention of another qualified individual.

At oral argument before this Court, and in briefing to the First Department, Respondents suggested that the Court rubberstamp the now-void Assembly map. According to Respondents Heastie and Stewart-Cousins, the Assembly map “is fair and should not be re-drawn”; and the Court should “simply re-adopt[] the enacted bipartisan Assembly map.” Resp’ts Heastie & Stewart-Cousins Br. at 36–38, App. No. 2022-2301 (1st Dep’t) (NYSCEF No. [11](#)). At oral argument before this Court on Petitioners’ order to show cause, Respondent Heastie invited this Court to “ratify” the Assembly map for the next decade. Tr. 78–79 (NYSCEF No. [95](#)). But this Court correctly recognized that solution as untenable. *Id.* at 99.

An unvetted and perfunctory process to redraw the Assembly map would do nothing to dispel the shadow over Assembly elections. The constitutional harm, if unremedied, will cast a pall of suspicion over elected officials for years to come. The now-voided Assembly map lacks the legitimacy that a rigorous enactment process would have imparted. Not only is the now-voided Assembly map procedurally unconstitutional, but also, as discussed below, it was designed to protect incumbents—hence its purported “bipartisan” support Respondent Heastie has touted throughout these proceedings. This Court must dispel voters’ doubts seeded by the IRC’s and Legislature’s constitutional violations and incentivize our elected officials and their appointees to follow the Constitution in the first instance.

B. The statistical analysis of a nationally recognized expert demonstrates that the 2022 Assembly map was purposefully drawn to favor incumbents.

The Assembly map that the First Department recently invalidated is also unconstitutionally biased towards incumbents. Article III expressly forbids the exact incumbent protection that the

Legislature sought when it passed the map: “Districts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.” Art. III, § 4(b)(5). This basic truth supplies compelling justification for the Court to use an independent expert to redraw the Assembly map, which is the best process to protect voters and the best mechanism to deter the Legislature from ever-again executing a corrupt scheme to protect incumbents, as it did here.

To assess the 2022 Assembly map’s incumbent-bias, Petitioners engaged Dr. Jeanne Clelland to analyze it using an ensemble analysis.⁷ Dr. Clelland is a Professor of Mathematics at University of Colorado Boulder, where she has been a faculty member since 1998. Clelland Aff. ¶ 2. She was a National Science Foundation Postdoctoral Research Fellow at the Institute for Advanced Study from 1996 to 1998. *Id.* Her research has been supported by grants from the National Science Foundation and the Simons Foundation. *Id.* She is the author of a graduate-level textbook and 29 peer-reviewed journal articles. *Id.* ¶ 3. Her research focuses on the mathematical analysis of redistricting; in particular, ensemble analysis, which is the algorithmic sampling of district plans to identify plans with extreme properties, such as partisan or incumbent bias. *Id.* ¶ 4.

In her expert study, Dr. Clelland performed “two independent and complementary” ensemble analyses of the 2022 Assembly map. *Id.* ¶ 10. Both analyses independently led Dr. Clelland to conclude that it “is almost certain that the 2022 Assembly plan was deliberately designed in part to maximize the number of districts containing a single incumbent Assembly

⁷ Ensemble analyses were used by the *Harkenrider* petitioners’ expert, Sean P. Trende, to prove that the 2022 Congressional map was a partisan gerrymander. Mr. Trende’s ensemble analysis was credited by the trial court, the Fourth Department, and the Court of Appeals, and relied upon by all to hold and affirm that the Congressional map was substantively unconstitutional. *See Harkenrider v. Hochul*, 204 A.D.3d 1366, 1371 (4th Dep’t 2022) (“[T]he testimony of Trende was probative and confirmed the inference from the above two points that the legislature engaged in unconstitutional partisan gerrymandering when enacting the 2022 congressional map.”).

member.” *Id.* ¶¶ 11, 61. Dr. Clelland’s analyses demonstrate that the 2022 Assembly map was intentionally drawn by the Legislature to protect incumbents by ensuring that each incumbent had their own district and would not be forced to run against another incumbent, ensuring the political status quo and violating Section 4(b) of the Constitution. Little wonder that legislators agreed on the now-voided Assembly map when they focused on protecting their own seats instead of drawing a fair and constitutionally compliant map.

In her first analysis, Dr. Clelland constructed three ensembles of 50,000 district plans. She then computed the number of districts where 0, 1, 2, or 3 incumbents resided in each plan. *Id.* ¶ 17. Finally, she compared the statistical range of outcomes for these measures to the values of the 2022 Assembly map and found that the 2022 Assembly was an extreme outlier, meaning that it is highly unlikely an Assembly map would have the number of one-incumbent districts it did. *Id.*

For this first analysis, Dr. Clelland used resident addresses provided by counsel from publicly available data. Counsel provided Dr. Clelland with 141 of 150 Assembly incumbent addresses that were available from public sources. Dr. Clelland conducted her analysis with the 141 addresses and 9 “proxy” addresses based on incumbent office addresses. *Id.* ¶¶ 15 n.5, 56. From this data, Dr. Clelland assumed that the 2022 Assembly map contains 2 districts with 0 incumbents, 2 districts with 2 incumbents, and 146 districts with 1 incumbent. *Id.* ¶ 38. Potential inaccuracies of the address data likely did not affect the conclusions of her district ensemble analysis. *Id.* ¶¶ 44–48.

From this first analysis, Dr. Clelland concluded that “it seems very likely that the plan was deliberately designed to maximize the number of districts containing exactly 1 incumbent.” *Id.* ¶ 48. Further, under her second ensemble analysis, discussed below, Dr. Clelland independently reached the same conclusion, and she demonstrates that her second analysis would remain valid

even in the worst-case scenario in which all 9 proxy incumbent addresses are located in the wrong 2022 Assembly district. *Id.* ¶¶ 56–60.

In her second analysis, Dr. Clelland considered only the Assembly map that was in fact drawn, so that her analysis could account for the difficulty of incorporating all redistricting criteria into the same district ensemble. *Id.* ¶ 18. Rather than generating an ensemble of district plans, Dr. Clelland generated 100,000 sets of “theoretical” incumbent addresses within each district from the 2012 Assembly map and compared each of these sets against the 2022 Assembly map. *Id.* ¶ 19. By then determining whether the actual set of incumbent addresses was an extreme outlier relative to the results of the ensemble, Dr. Clelland could conclude whether the 2022 Assembly map was drawn to accommodate incumbent residences, “regardless of what additional considerations may have informed the drawing of the plan,” such as core preservation. *Id.* ¶ 20.

From this second analyses, Dr. Clelland concluded:

The actual addresses were a very extreme outlier—more extreme, in fact, than any of the sets of addresses in the ensemble. **The probability of this outcome occurring by chance if the 2022 Assembly plan had not been deliberately designed to accommodate incumbent addresses is less than 0.01%.** Even allowing for possible inaccuracies in the 9 incumbent addresses for which proxy addresses were used, this probability estimate remains accurate even if the actual number of districts with 1 incumbent is as low as 142. Even in the worst-case scenario in which all 9 proxy addresses are located in the wrong 2022 Assembly district, the probability of this outcome occurring by chance remains less than 1 in 500.

Id. ¶ 60. This range of probabilities is summarized below.

Table 15: Probability of numbers of districts with 1 incumbent occurring by chance

	Standard deviations above the mean	Probability
137 districts	2.89	0.19%
138 districts	3.07	0.11%
139 districts	3.25	0.06%
140 districts	3.42	0.03%
141 districts	3.60	0.02%
142 districts	3.78	0.01%
143 districts	3.95	< 0.01%
144 districts	4.13	< 0.01%
145 districts	4.31	< 0.01%
146 districts	4.48	< 0.01%

Id. ¶ 57 tbl. 15.

Dr. Clelland’s analysis is further supported by individual examples. Huge Ma was an Assembly candidate in Queens who won significant grassroots support after he built a website that helped residents find vaccinations for COVID-19. (This earned him the avuncular nickname “VaxDaddy.”) But Mr. Ma had to exit the race because under the 2022 Assembly map his residence was outside the district in which he was running. Mr. Ma was challenging incumbent Catherine Nolan in the 37th District, who, according to the N.Y. Times, is “a high-ranking Democrat who has served for nearly four decades.”⁸ What happened? “The new lines for her district carved out parts of the Long Island City waterfront where some of her most likely challengers, including Mr. Ma, reside.”⁹ In addition, Sam Fein was a primary challenger in the

⁸ Luis Ferré-Sadurni & Grace Ashford, *How Democrats’ New Maps Could Shape N.Y. Politics for Years to Come*, N.Y. Times (Feb. 14, 2022), <https://www.nytimes.com/2022/02/14/nyregion/redistricting-gerrymandering-albany-ny.html>. After the map was redrawn, Assembly Member Nolan dropped out of the race for medical reasons.

⁹ *Id.*

108th District against Democratic incumbent John McDonald. Mr. Fein dropped out of the race when his residence was drawn outside of the district. Mr. Fein announced on Twitter: “I am disappointed that I can no longer run in the redrawn 108th Assembly District. When the new Assembly district lines were released, I found out that I am no longer in the 108th District.”¹⁰

Had the IRC and the Legislature followed the constitutionally required process, the Legislature would have been unable to engineer an Assembly map that was unconstitutionally designed to protect incumbents. New Yorkers should have faith that the map is fair, and the Constitution provides that only a court-adopted map is now allowed.

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¹⁰ @samfein518, Twitter (Feb. 8, 2022, 2:18 PM), <https://twitter.com/samfein518/status/1491129314368442369?s=20&t=ccOkKfX74DFWaSgFfC0jfg>.

CONCLUSION

For the reasons given, the Court should adopt a new Assembly map by appointing a special master to conduct a public and Court-supervised redistricting proceeding.

Dated: New York, NY
August 8, 2022

Respectfully submitted,

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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 4,717 words as calculated by the application's word counting function.

Dated: New York, New York
August 8, 2022

/s/

Peter Devlin

Peter Devlin

**Affidavit of Jeanne N. Clelland, Ph.D. Concerning the Appropriate
Process to Redraw the Assembly Map, sworn to August 2, 2022
[pp. 1090 - 1144]**

FILED: NEW YORK COUNTY CLERK 08/08/2022 09:47 PM

NYSCEF DOC. NO. 108

INDEX NO. 154213/2022

RECEIVED NYSCEF: 08/08/2022

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

**AFFIDAVIT OF DR. JEANNE
CLELLAND**

Jeanne N. Clelland, Ph.D., affirms under penalty of perjury:

BACKGROUND AND QUALIFICATIONS

1. I received my B.S. (summa cum laude, 1991), M.A. (1993), and Ph.D. (1996) degrees in Mathematics from Duke University.

2. I currently am a Full Professor in the Department of Mathematics at the University of Colorado Boulder, where I have been on the faculty since 1998. Prior to that I was a National Science Foundation Postdoctoral Research Fellow at the Institute for Advanced Study from 1996 - 1998. My research has been supported by grants from the National Science Foundation and the Simons Foundation at various times throughout my career.

3. I am the author of a graduate-level textbook and 29 peer-reviewed journal articles, with 3 more articles currently submitted and under review.

4. Much of my research over the course of my career concerns differential geometry and applications of geometry to the study of partial differential equations. My more recent research focuses on mathematical analysis of redistricting, particularly on the use of ensemble analysis. My work includes both theoretical aspects related to the development of algorithms for sampling district plans to create ensembles and applications to identifying district plans with extreme properties. Items (1) and (2) under “Peer-reviewed articles” on my CV are related to this work.

5. My CV is attached to this report, and it contains a list of all my publications from the past 10 years.

6. I served as expert witness for Governor Tony Evers in the case of *Johnson vs. Wisconsin Elections Commissions*; I submitted three expert reports for this case but was not called to give testimony.

SCOPE OF WORK AND COMPENSATION

7. I have been retained by Walden Macht & Haran LLP to analyze the likelihood that the New York State Assembly district plan enacted by the New York State Legislature in January 2022 was drawn to accommodate incumbent residences.

8. Throughout this report, I will refer to this plan as the “2022 Assembly plan,” and to the prior decade’s district plan as the “2012 Assembly plan.”

9. I am being compensated at a rate of \$300.00 per hour. My compensation is not contingent in any way upon the substance or conclusions of my expert analysis and/or opinions.

SUMMARY OF OPINIONS

10. I performed two independent and complementary analyses:

- I constructed three large ensembles of valid district plans for New York State Assembly districts based on different districting criteria, and for each plan in the ensembles, I used the addresses of the current incumbent Assembly members to compute the numbers of districts that would contain 0, 1, 2, or 3 incumbents in that plan. I then compared the statistical range of outcomes for these measures to the values for the 2022 Assembly plan.
- I constructed a large ensemble of “theoretical” incumbent addresses by randomly selecting one Census block from each 2012 district to represent the “incumbent” address for that district. For each set of addresses in this ensemble, I computed the numbers of districts that would contain 0, 1, 2, or 3 “incumbents” in the 2022 Assembly plan. I then compared the statistical range of outcomes for these measures to the values for actual incumbent addresses.

11. For both of these analyses, the actual data (i.e., the 2022 Assembly plan for the first analysis and the actual incumbent addresses for the second analysis) is a very extreme outlier compared to the ensembles. Based on the results of these analyses, I consider it almost certain that the 2022 Assembly plan was deliberately designed in part to maximize the number of districts containing a single incumbent Assembly member.

BACKGROUND ON ENSEMBLE ANALYSIS

12. In the years since the last decennial redistricting cycle, there has been much interest in---and litigation around---quantifying and identifying bias of various sorts in district plans. One strategy for quantifying bias that has rapidly been gaining traction is the idea of

“ensemble analysis,” in which a particular district plan is compared to a large collection of randomly generated, legally valid plans, referred to as an “ensemble” of plans.

13. The fundamental goal of ensemble analysis is to model the political geography of a state in order to better understand what might be expected for a “typical” district plan for the state. Plans may be evaluated with regard to a variety of measures: partisan balance of election results, geographic compactness of districts, competitiveness of district elections, preservation of communities of interest, racial/ethnic population within districts, etc. The main idea is to create a large collection of randomly generated, legally valid plans, referred to as an “ensemble” of plans. Measures of interest are then computed for each plan in the ensemble using real population and voting data. The result is a statistical range of possible outcomes for each measure, to which any proposed plan may be compared. If a proposed plan appears to be an extreme outlier compared to the ensemble, this may suggest that factors not included in the ensemble design may have played an important role in the plan's construction. Such factors may be desirable (e.g., preservation of communities of interest) or not (e.g., partisan gerrymandering).

14. Ensemble analysis does have limitations, and here are some important points to keep in mind:

- **None of the plans in a computer-generated ensemble are intended for adoption.**

Redistricting is fundamentally a human endeavor, and there are many important considerations that are difficult or impossible to fully incorporate into a computer-generated ensemble. The ensembles that I will discuss here are intended **only** to provide context to which the 2022 Assembly plan may be compared with regard to specific quantitative measures.

- The goal of ensemble analysis is **not** to identify a single “best” value for any measure (e.g., the number of districts containing a single incumbent, as in the present analysis), but rather to identify a **range** of values that would be reasonably likely for plans drawn without taking any pertinent information (e.g., addresses of incumbent members) into account. This analysis only raises concerns when a proposed plan is an **extreme outlier** relative to the range of values seen in an ensemble.
- Because it is generally not possible to incorporate into an ensemble all considerations that may be taken into account when drawing maps, plans that appear to be extreme outliers compared to an ensemble may in fact have perfectly reasonable explanations for their deviation from the ensemble. In such cases, more information about the design criteria for a plan may be required in order to evaluate the plan on its merits.

DATA SOURCES

15. My analysis is based on data from the following sources:

- ESRI shapefiles for New York State’s 2020 Census blocks and Voter Tabulation Districts (VTDs) were downloaded from the Redistricting Data Hub at <https://redistrictingdatahub.org/>.
- Adjusted population data was downloaded from the New York Legislative Task Force on Demographic Research and Reappointment at <https://latfor.state.ny.us/>.
- Addresses of incumbent New York State Assembly members were provided by counsel.¹
- GEOID20 identifiers for Census blocks containing incumbent addresses were obtained via the Census geocoding tool at <https://geocoding.geo.census.gov>.

¹ Counsel was able to confirm 141 home addresses of incumbent members; for the remaining 9 incumbent members, office addresses were used as a proxy.

METHODOLOGY: OVERVIEW

16. I used two distinct approaches to analyze the likelihood that the 2022 Assembly plan was drawn to accommodate incumbent residences:

17. (1) (Qualitative²) I generated three different ensembles of 50,000 district plans each for the New York State Assembly, using a variety of criteria which I will describe more fully below. For each plan in these ensembles, I computed the numbers of districts containing 0, 1, 2, or 3 of the incumbent addresses provided by counsel. Comparing statistics from these ensembles is intended primarily to show how the incorporation of various district plan design criteria might affect the expected outcomes, and how the 2022 Assembly plan compares to the ensembles regarding these criteria as well as the incumbent district counts.

18. (2) (Quantitative³) As mentioned above, it is impossible in practice to build an ensemble that incorporates all the factors that map drawers might reasonably take into consideration when drawing a plan. Furthermore, New York's constitutional criteria for district plans are somewhat vague, particularly the requirement that

"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,"

which provides no guidance as to the relative importance of these criteria or how stringently they must be applied in practice.

² While this analysis will produce quantitative results, I am describing it as "qualitative" due to the limitations of ensemble analysis described above, some of which will be apparent in the variety of results obtained from different ensembles of district plans constructed with different criteria.

³ I am describing this analysis as "quantitative" because it addresses the primary question more directly and with more statistical rigor than the analysis based on ensembles of district plans.

19. In order to address this issue, I took an alternate approach that only considers the plan that was actually drawn. Instead of an ensemble of district plans, I generated an ensemble of 100,000 sets of “theoretical” incumbent addresses. Each set of addresses was created by randomly selecting one Census block from each district in the 2012 Assembly plan. In order for this process to approximate the random selection of one adult from each 2012 district to represent the “incumbent” from that district, the probability of randomly selecting a particular block was weighted proportionally to the (adjusted) Voting Age Population of that block.⁴

20. Next, for each set of theoretical incumbent addresses constructed in this way, I computed the numbers of districts in the 2022 Assembly plan containing 0, 1, 2, or 3 of the addresses in that set, and I compared these statistics for the ensemble to those for the actual incumbent addresses. If the actual incumbent addresses produce a result that is an extreme outlier relative to the ensemble, this would strongly suggest that the 2012 Assembly plan was drawn in part to accommodate incumbent residences, regardless of what additional considerations may have informed the drawing of the plan.

21. A typical conclusion from this analysis might be something like, “The actual incumbent addresses produce more districts containing a single incumbent than X% of the sets of incumbent addresses in the ensemble.” This percentage is approximately equal to the likelihood of this outcome occurring by chance if the plan was **not** drawn to accommodate incumbent residences. If this percentage is very small (say, less than 1%), it strongly suggests that the plan **was** drawn to accommodate incumbent residences.⁵

⁴ To visualize what this weighting means, imagine putting one ball into a jar for each adult in the district, with each ball labeled with the Census block where that adult lives, and then randomly selecting one ball from the jar to choose a Census block.

⁵ One must be careful with statements about conditional probability: The probability of an outcome occurring in the absence of deliberate intent is generally **not** the same as the probability that there was no deliberate intent given that

METHODOLOGY: DETAILS OF DISTRICT PLAN ENSEMBLE GENERATION

22. As described above, the main idea of ensemble analysis for redistricting is to create a large collection of randomly generated district plans, referred to as an “ensemble” of plans. Measures of interest are then computed for each plan in the ensemble, thereby creating a statistical range of possible outcomes for each measure, to which any proposed plan may be compared. If a proposed plan appears to be an extreme outlier compared to the ensemble, this may suggest that factors not included in the ensemble design may have played an important role in the plan's construction.

23. In order to keep computations manageable, all district plans in my ensembles were constructed from whole Voter Tabulation Districts (VTDs). For reference, data from the 2020 Census divides the state of New York into 288,819 Census blocks and 14,191 VTDs. Of the 14,191 VTDs, only 75 were not contained entirely within a single district in the 2012 Assembly plan, although 746 are split between multiple districts in the 2022 Assembly plan.

24. In order to generate my ensembles, I used the Recombination (“ReCom”) method developed by the MGGG Redistricting Lab in 2018.⁶ For this method, the VTD map is modeled by a mathematical object called a **dual graph**, where each VTD is represented by a point called a **vertex**, and two vertices are connected by an **edge** if the VTDs that they represent share a

the outcome occurred. Because of this asymmetry, it is generally not possible to accurately compute a quantitative probability that there was, in fact, deliberate intent. This is a well-known issue in statistical analysis, and the standard approach is exactly that taken here, namely, to estimate the probability of the outcome under the assumption of the “null hypothesis.” A result is often considered “statistically significant” if this probability is less than 5%, meaning that it would occur by chance only 1 time out of 20 if the null hypothesis were true. The smaller this probability is, the more significant the result is considered to be.

⁶ Details and Python source code are available at <https://github.com/mggg/GerryChain>.

geographic boundary of positive length. A map of New York's 2020 VTDs and its dual graph are shown in Figure 1.



Figure 1: New York 2020 VTD map and dual graph

25. A district plan is then represented by a partition of the dual graph into connected subgraphs, one for each district. A partition is **valid** if it represents a legally valid district plan; at a minimum, the districts in the plan should be contiguous and have (approximately) equal population.

26. An ensemble starts with one valid district plan, called the “seed plan.” The ensemble is then constructed by a mathematical process called a **Markov chain**, in which each new plan is created by applying a random process to modify the previous plan in some way. For the ReCom method used to build our ensembles, this random process works as follows: At each step, the algorithm randomly selects a pair of adjacent districts and merges the two subgraphs corresponding to these districts into a single graph. Next, it generates a **spanning tree** for the

merged graph---i.e., a subgraph consisting of all the graph's vertices and a subset of its edges, with the property that this subgraph is contiguous and has no closed loops---chosen randomly from the set of all spanning trees of the merged graph. Finally, it looks for an edge to cut in order to create two new districts that each satisfy the population constraint. (District contiguity is automatic with this method.) This process is illustrated in Figure 2.⁷

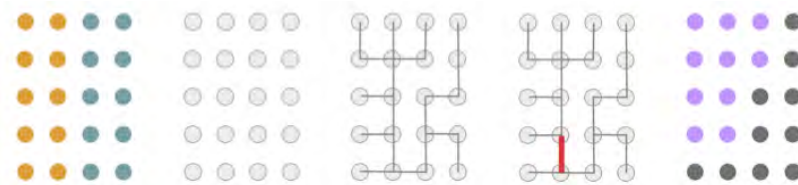


Figure 2: One step in a ReCom chain

27. Part of the appeal of the Markov chain approach is a well-developed theory and a long history of applications of Markov chain sampling methods.⁸ In particular, a sufficiently long Markov chain is theoretically guaranteed to produce an ensemble that accurately represents a specific probability distribution on the entire space of valid district plans. In general, this probability distribution is difficult to determine explicitly, but for the ReCom method there is good heuristic and experimental evidence indicating that the probability of any particular plan appearing in the ensemble is closely related to a natural discrete measure for district

⁷ Image taken from Daryl DeFord, Moon Duchin, and Justin Solomon, *Recombination: A family of Markov chains for redistricting*, arXiv e-prints (2019), arXiv:1911.05725; used with permission.

⁸ See, e.g., Persi Diaconis, *The Markov chain Monte Carlo revolution*, Bull. Amer. Math. Soc. (N.S.) **46** (2009), no. 2, 179–205.

compactness. In practice, this means that this method is strongly biased towards plans with relatively compact districts and has no other detectable bias towards any particular type of plan.

28. The question of how long is “sufficiently long” for a Markov chain to produce a representative sample of plans is usually answered heuristically, by running chains until statistics of interest appear to stabilize in a way that is not dependent upon the choice of seed plan. This stabilization is referred to as “convergence” of the statistics being measured.

29. A variation of this method may be employed to incorporate information about geographic units (e.g., counties and/or municipalities) and attempt to minimize the number of such units that are split across multiple districts in each plan. In this version, the random choice of edges to form the spanning tree is more heavily weighted towards intra-unit edges, so that the resulting spanning tree contains relatively few edges connecting VTDs in different units. When the tree is cut, it is less likely to produce districts that split units. This version is referred to as “region-aware ReCom.”

30. For my analysis, all districts in each ensemble were constrained to have (adjusted) total population between 95% and 105% of the ideal district population of 134,626.⁹ I constructed three separate ensembles of district plans, each using the same seed plan and one of three region-aware constraints.

31. To construct the seed plan, I started with the 2012 Assembly plan. District populations for this plan are outside the acceptable range, so I first ran a short ReCom chain with a constraint to reduce the population deviation at each step, until a plan was produced with all district populations in the acceptable range. This plan was then used as the seed plan.

⁹ For the 2022 Assembly plan, district populations range from a low of 127,923 (95.02% of the ideal population) to a high of 141,348 (104.99% of the ideal population).

32. The three different region-aware constraints are as follows:

- No region-aware constraints;
- County and municipality-aware constraints, with higher priority placed on minimizing municipal splits and secondary priority on minimizing county splits;
- 2012 Assembly district-aware constraints, as a means of minimizing “core population movement,” i.e., the number of persons moved from one 2012 district into a different 2022 district.

33. I did not attempt to impose all constraints simultaneously, because the more constraints that are built into an ensemble, the more difficult it is for the Markov chain to make significant changes to districts at each step and thereby to produce a wide variety of district plans. Each Markov chain was run for 500,000 steps, and since each step makes changes to only 2 of the 150 districts, I collected data for the current plan at every 10th step of the Markov chain, for a total of 50,000 plans in each ensemble. For each of these plans, I collected the following data:

- the numbers of “counties split” and “munis split,” which count the numbers of counties and municipalities split across multiple districts, respectively;¹⁰
- the numbers of “total county splits” and “total muni splits,” which count the numbers of times counties and municipalities are split, respectively. (So, e.g., if a county is divided between three districts, this counts as one split towards the “counties split” measure and two splits towards the “total county splits” measure);
- the total core population movement as a percentage of the (adjusted) total population;

¹⁰ For purposes of these computations, the municipality to which each Census block belongs was determined from the value in the COUSUB field for that block in the 2020 Census block shapefile.

- the numbers of districts containing 0, 1, 2, or 3 incumbent addresses.

METHODOLOGY: DETAILS OF INCUMBENT ENSEMBLE GENERATION

34. I generated an ensemble of 100,000 sets of locations for “theoretical” incumbent addresses, as follows. In order to model the idea of selecting one adult uniformly at random from each 2012 Assembly district to represent the “incumbent” from that district, I selected a Census block from each 2012 district at random, with the probability of randomly selecting a particular block weighted proportionally to the (adjusted) Voting Age Population of that block. This process was repeated for each 2012 Assembly district to create a set of “incumbent” addresses, and then the entire process was repeated 100,000 times to create an ensemble of theoretical incumbent addresses.

35. For each set of theoretical incumbent addresses, I collected the following data:

- A list of the Census blocks for the “incumbents;” this data was used to compute how often each Census block was selected over the course of the entire ensemble and to verify that each block occurred with frequency approximately proportional to its (adjusted) Voting Age Population.
- the numbers of districts in the 2022 Assembly plan containing 0, 1, 2, or 3 of the addresses in that set.

ANALYSIS: QUANTITATIVE FINDINGS

The 2012 and 2022 Assembly Plans - Baseline:

36. Table 1 shows some baseline statistics for both the 2012 and 2022 Assembly plans regarding county and municipal splits, as well as core population movement for the 2022 Assembly plan relative to the 2012 Assembly plan.¹¹

Table 1: Baseline Statistics for Assembly Plans

	2012 Assembly Plan	2022 Assembly Plan
Counties split	39	44
Munis split	38	45
Total county splits	166	179
Total muni splits	129	137
Core population movement	N/A	12.87%

37. According to the incumbent addresses provided by counsel, there were 5 incumbents (out of 150 total) whose district numbers changed from the 2012 Assembly plan to the 2022 Assembly plan; the old and new district numbers for these incumbents are shown in Table 2.

¹¹ With the official district numberings in the Assembly plans, the core population movement---i.e., the percentage of the population whose district number changed from the 2012 Assembly plan to the 2022 Assembly plan---is actually 13.76%. However, if numberings of Districts 121 and 122 are exchanged in the 2022 Assembly plan, this figure drops to 12.87%, and this slightly altered district numbering minimizes the core population movement over all possible district numberings,. This minimum value is the statistic that I computed for plans in the district ensembles, so it is the appropriate value for comparing the 2022 Assembly plan to the ensembles.

Table 2: Incumbent Districts That Changed in 2022 Assembly Plan

2012 Assembly District	2022 Assembly District
65	61
110	111
101	122
121	101
122	121

38. Observe that the incumbents in 2012 Districts 121, 122, and 101 simply rotated their district numbers in the 2022 Assembly plan, while each remaining as the sole incumbent in their district in the new plan.¹² Thus the 2022 Assembly plan contains:

- 2 districts with 0 incumbents (Districts 65 and 110);
- 2 districts with 2 incumbents (Districts 61 and 111);
- 146 districts with 1 incumbent.¹³

Results from district plan ensembles:

39. As described above, I constructed three ensembles of 50,000 district plans each, with three different levels of region-aware constraints:

- No region-aware constraints (“Unconstrained”);
- County and municipality-aware constraints (“County/muni-constrained”);
- 2012 Assembly district-aware constraints, as a means of minimizing core population movement (“Core pop movement-constrained”).

¹² Additionally, if the optimal district numbering described in the previous footnote had been used, the incumbent in 2012 District 122 would have remained in the same district in the 2022 Assembly plan.

¹³ Due to the uncertainty mentioned in Footnote 1 on p. 5 regarding 9 of the 150 incumbent addresses, it is possible that these numbers are slightly inaccurate. I will address the implications of this uncertainty in my analysis of the results below.

40. In order to illustrate how these various constraints played out in the ensemble generation algorithm, the following tables and histograms illustrate the observed ranges for county and municipal splits and core population movement for these ensembles. Values for the 2012 and 2022 Assembly plans are included where appropriate for comparison.

Table 3: Ensemble ranges for counties split

Counties split	Mean	Middle 50%	Middle 99%
Unconstrained ensemble	58.6	58 - 60	55 - 61
County/muni-constrained ensemble	34.9	33 - 36	31 - 44
Core pop movement-constrained ensemble	42.3	42 - 42	41 - 51

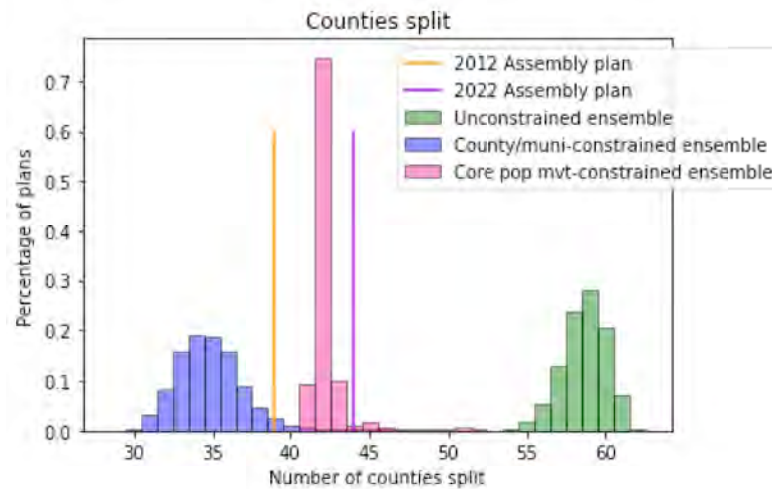


Figure 3: Ensemble histograms for counties split

Table 4: Ensemble ranges for municipalities split

Municipalities split	Mean	Middle 50%	Middle 99%
Unconstrained ensemble	225.9	219 - 232	201 - 252
County/muni-constrained ensemble	36.0	34 - 38	29 - 47
Core pop movement-constrained ensemble	44.8	41 - 46	37 - 105

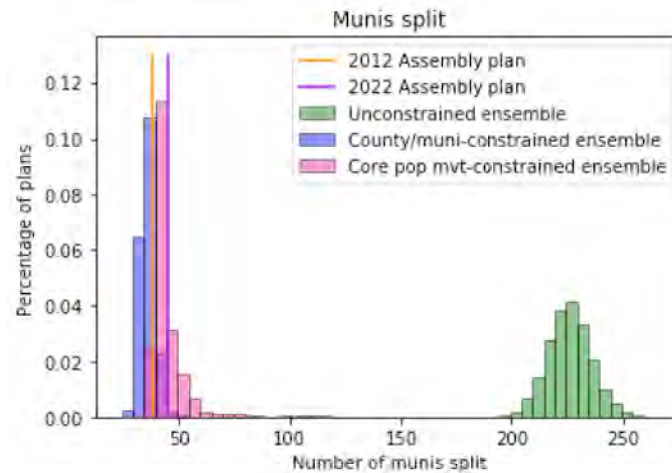


Figure 4: Ensemble histograms for municipalities split

Table 5: Ensemble ranges for total county splits

Total county splits	Mean	Middle 50%	Middle 99%
Unconstrained ensemble	252.9	249 - 256	239 - 267
County/muni-constrained ensemble	140.8	138 - 143	134 - 163
Core pop movement-constrained ensemble	176.9	175 - 178	173 - 192

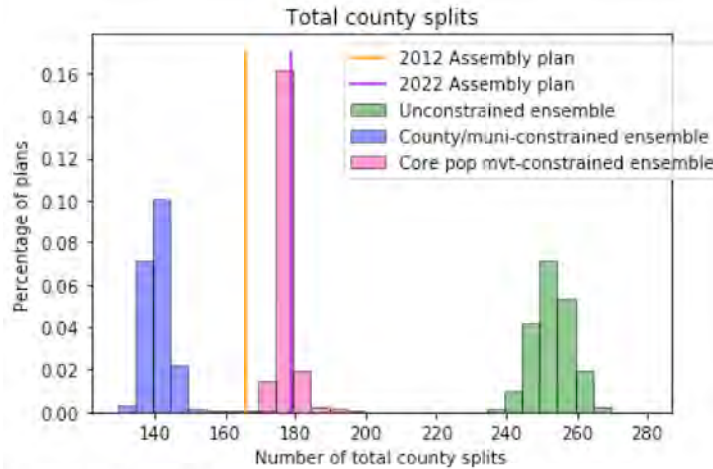


Figure 5: Ensemble histograms for total county splits

Table 6: Ensemble ranges for total municipality splits

Total municipality splits	Mean	Middle 50%	Middle 99%
Unconstrained ensemble	386.0	378 - 394	357 - 418
County/muni-constrained ensemble	105.5	103 - 108	97 - 121
Core pop movement-constrained ensemble	126.5	121 - 128	116 - 198

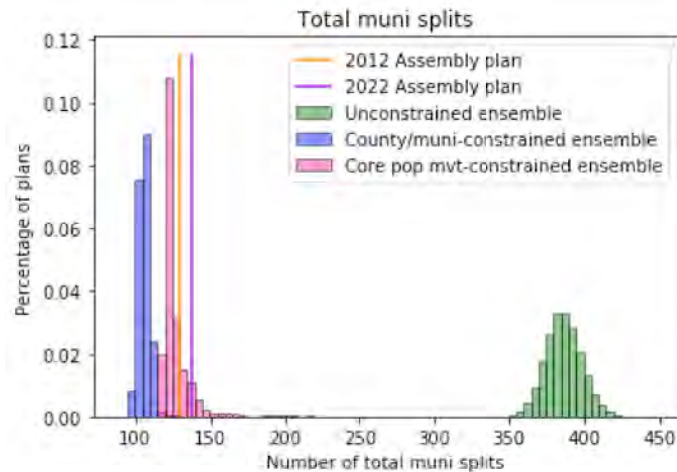


Figure 6: Ensemble histograms for total municipal splits

Table 7: Ensemble ranges for core population movement

Core population movement	Mean	Middle 50%	Middle 99%
Unconstrained ensemble	49.26%	48.53% - 50.03%	46.51% - 52.40%
County/muni-constrained ensemble	45.18%	44.41% - 45.96%	42.46% - 47.88%
Core pop movement-constrained ensemble	4.98%	3.03% - 4.47%	2.41% - 25.67% ¹⁴

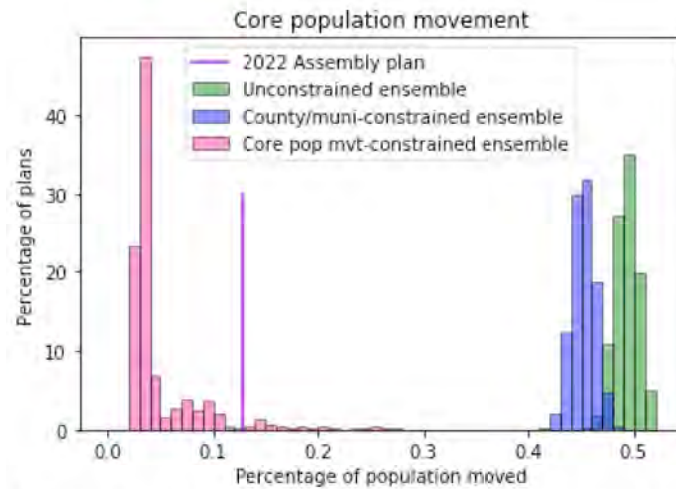


Figure 7: Ensemble histograms for core population movement

41. Some observations regarding these statistics:

- Relative to the unconstrained ensemble, both the county/muni-constrained ensemble and the core pop movement-constrained ensemble were much more effective at constraining county and municipal splits. As might be expected, the county/muni-constrained ensemble was the most effective in this regard, although the core pop movement-

¹⁴ This statistic converged more slowly for the core population movement-constrained ensemble than for the other two ensembles, and the unusual appearance of the mean outside the middle 50% and the high upper range for the middle 99% are artifacts of this relatively slow convergence.

constrained ensemble still achieved values fairly similar to those in the 2012 and 2022

Assembly plans.

- By contrast, the county/muni-constrained ensemble was only slightly more effective than the unconstrained ensemble at constraining core population movement, and core population movement for both of these ensembles was dramatically higher than the value for the 2022 Assembly plan. The core pop movement-constrained ensemble, on the other hand, was extremely effective at reducing core population movement, with a middle 50% range of 3.03% - 4.47% core population movement, compared to the actual value of 12.87% for the 2022 Assembly plan.

42. None of this is particularly surprising: There are an enormous variety of ways to draw plans that keep county and municipal splits to a minimum, most of which may bear little resemblance to the 2012 Assembly plan. However, attempting to minimize core population movement necessitates making minimal changes to the previous districts---and since those districts already contained relatively few county and municipal splits, it is to be expected that the new districts would fare reasonably well by this measure.

43. Now we come to the key statistics: the numbers of districts containing 0, 1, 2, or 3 incumbent addresses. These are shown in the tables and histograms below.

Table 8: Ensemble ranges for number of districts with 0 incumbents

Districts with 0 incumbents	Mean	Middle 50%	Middle 99%
Unconstrained ensemble	40.1	38 - 42	32 - 49
County/muni-constrained ensemble	36.0	34 - 38	28 - 44
Core pop movement-constrained ensemble	6.6	4 - 7	2 - 28

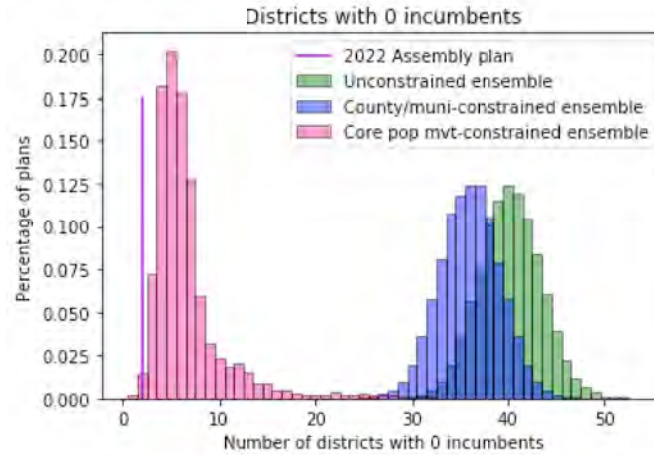


Figure 8: Ensemble histograms for number of districts with 0 incumbents

Table 9: Ensemble ranges for number of districts with 1 incumbent

Districts with 1 incumbent	Mean	Middle 50%	Middle 99%
Unconstrained ensemble	74.1	70 - 78	59 - 89
County/muni-constrained ensemble	80.7	77 - 84	67 - 96
Core pop movement-constrained ensemble	136.8	136 - 142	296 - 146

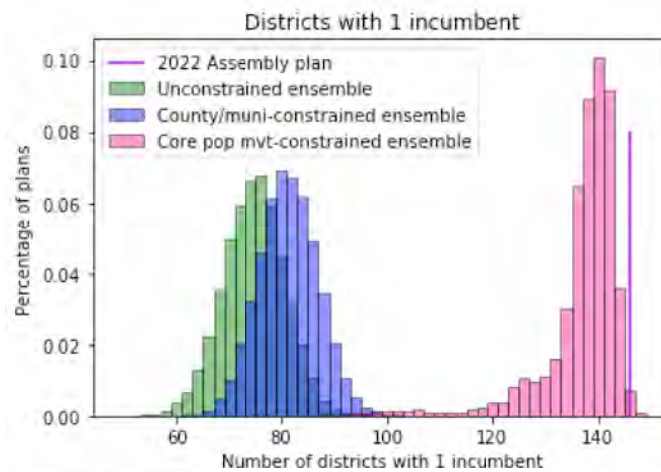


Figure 9: Ensemble histograms for number of districts with 1 incumbent

Table 10: Ensemble ranges for number of districts with 2 incumbents

Districts with 2 incumbents	Mean	Middle 50%	Middle 99%
Unconstrained ensemble	31.4	29 - 34	22 - 41
County/muni-constrained ensemble	30.8	29 - 33	23 - 39
Core pop movement-constrained ensemble	6.5	4 - 7	2 - 26

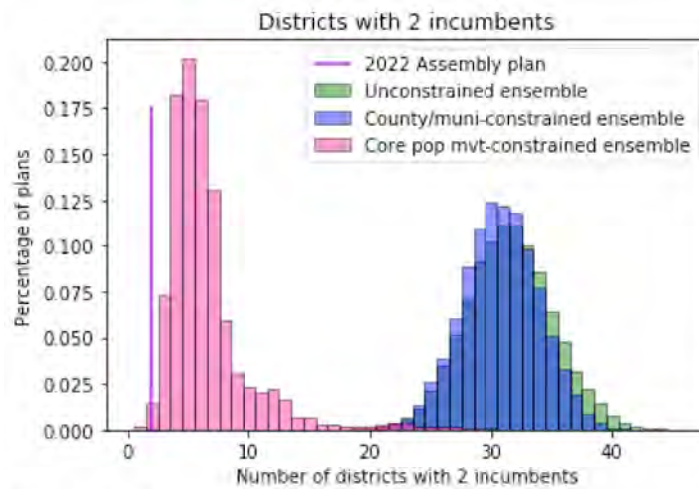


Figure 10: Ensemble histograms for number of districts with 2 incumbents

Table 11: Ensemble ranges for number of districts with 3 incumbents

Districts with 3 incumbents	Mean	Middle 50%	Middle 99%
Unconstrained ensemble	4.1	3 - 5	0 - 9
County/muni-constrained ensemble	2.5	1 - 3	0 - 7
Core pop movement-constrained ensemble	0.0	0 - 0	0 - 2

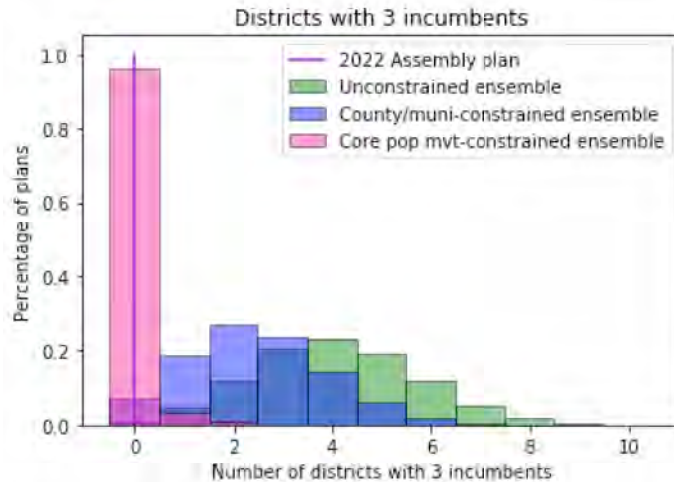


Figure 11: Ensemble histograms for number of districts with 3 incumbents

44. With 2 districts with 0 incumbents, 146 districts with 1 incumbent, 2 districts with 2 incumbents, and 0 districts with 3 incumbents, the 2022 Assembly plan is a **very** extreme outlier with respect to the unconstrained and county/muni-constrained ensembles, and a somewhat less extreme outlier with respect to the core pop movement-constrained ensemble. The most extreme values (i.e., the smallest numbers of districts with 0, 2, and 3 incumbents and largest number of districts with 1 incumbent) observed for **any** of the 50,000 plans in each of these ensembles are shown in Table 12.

Table 12: Most extreme values observed for numbers of districts with 0, 1, 2, or 3 incumbents

	0	1	2	3
Unconstrained ensemble	27	96	18	0
County/muni-constrained ensemble	24	103	18	0
Core pop movement-constrained ensemble	1	148	1	0

45. None of the plans in the unconstrained or county/muni-constrained ensembles have **any** values remotely as extreme as those for the 2022 Assembly plan. For the core pop movement-constrained ensemble, only 1.6% of the plans in the ensemble have 2 or fewer districts with 0 incumbents, 146 or more districts with 1 incumbent, and 2 or fewer districts with 2 incumbents. So even for this ensemble, the 2022 Assembly plan is a fairly extreme outlier.

46. Additionally, it is intuitively clear that the number of incumbents whose district number changes between the 2012 Assembly plan and any potential new plan should be strongly correlated with the proportion of the total population whose district number changes – i.e., with the core population movement of the new plan. When we look at the combination of these two measures, we see that among the plans in the core pop movement-constrained ensemble whose incumbent statistics are at least as extreme as those of the 2022 Assembly plan, the maximum core population movement observed is only 6.23%, whereas the core population movement in the 2022 Assembly plan is 12.87%. Conversely, among the plans in this ensemble with core population movement of 12.87% or greater, the maximum number of districts with 1 incumbent is 130, whereas the 2022 Assembly plan has 146 such districts.

47. These relationships are illustrated graphically in Figure 12, which shows a scatterplot of the relationship between core population movement and the number of districts containing 1 incumbent for all 3 ensembles, with the 2022 Assembly plan shown for comparison. Here we can see that even in the core pop movement-constrained ensemble, the 2022 Assembly plan is a very extreme outlier with respect to the **combination** of core population movement and numbers of districts with 1 incumbent.

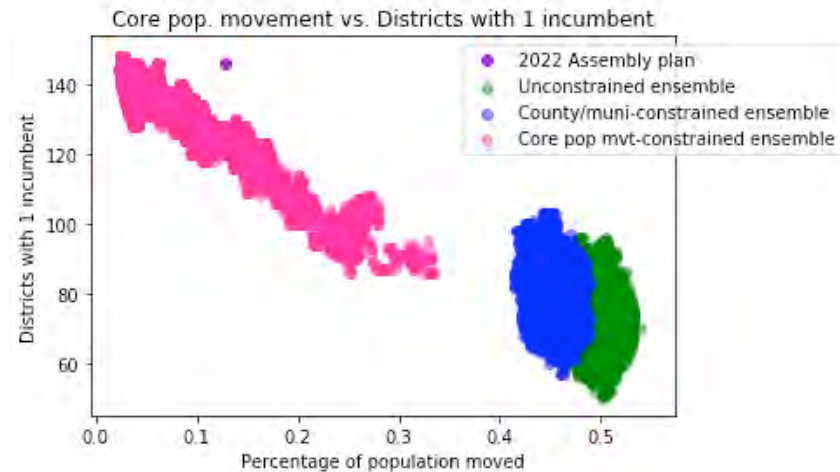


Figure 12: Ensemble scatterplot for core population movement vs. number of districts with 1 incumbent

48. **Conclusion:** By virtue of having the combination of 12.87% core population movement and 146 districts containing exactly 1 incumbent, the 2022 Assembly plan appears to be an extreme outlier compared to all district plans in all three ensembles under consideration. This analysis strongly suggests that some consideration impacting the number of single-incumbent districts other than those used to generate these ensembles played a role in the design of the 2022 Assembly plan. While it is impossible to identify such considerations with absolute certainty, it seems very likely that the plan was deliberately designed to maximize the number of districts containing exactly 1 incumbent.

Results from incumbent ensemble:

49. As described above, I constructed an ensemble of 100,000 sets of locations for “theoretical” incumbent addresses; each set of addresses was constructed by randomly selecting

one Census block from each 2012 district at random, with the probability of randomly selecting a particular block weighted proportionally to the (adjusted) Voting Age Population of that block.

50. Unlike the Markov chain that was used to generate the district-based ensembles for the previous analysis, this process produces an ensemble that is **independently and identically distributed (i.i.d.)**. This means that each set of addresses in the ensemble was selected by the same random process (“identically distributed”), and that the selected sets are not connected to each other in any way (“independent”). This differs from the Markov chain process, where each new district plan is created by making a random modification to the previous plan. For random samples with the i.i.d. property, there are well-developed, standard statistical techniques for estimating the reliability of the results; more details will be given below.

51. Since each element of the ensemble is a collection of 150 Census blocks, the process of creating the ensemble involved choosing a random Census block 15,000,000 times; thus we might expect each of the 288,819 Census blocks to have been chosen repeatedly. Figure 13 shows a scatterplot with one point for each Census block; the horizontal axis represents the (adjusted) Voting Age Population of each block, while the vertical axis represents the number of times that block was randomly sampled during the construction of the ensemble.¹⁵

¹⁵ The dataset for the (adjusted) Voting Age Population contains 41 Census blocks whose Voting Age Population is recorded as negative. The scatterplot confirms that these blocks were never selected for inclusion in the ensemble of addresses.

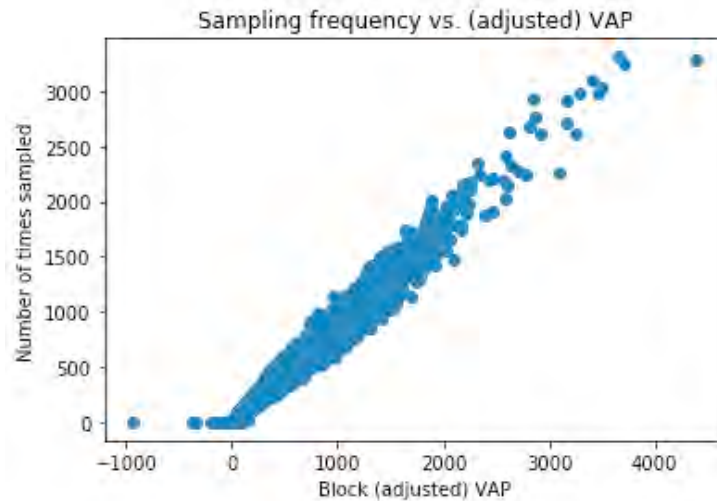


Figure 13: Incumbent ensemble scatterplot for Census block sampling frequency vs. (adjusted) VAP

52. The table and histograms below demonstrate the frequency statistics for the numbers of districts in the 2022 Assembly plan containing 0, 1, 2, or 3 of the addresses in each set of “theoretical” incumbent addresses in the ensemble. The values for the actual incumbent addresses are included in the histograms for comparison.

Table 13: Incumbent ensemble statistics

	Mean	Standard Deviation	Middle 50%	Middle 99%
Districts with 0 incumbents	14.99	2.83	13 - 17	8 - 20
Districts with 1 incumbent	120.62	5.66	117 - 124	106 - 130
Districts with 2 incumbents	13.79	2.83	12 - 16	7 - 19
Districts with 3 incumbents	0.58	0.0	0 - 1	0 - 2

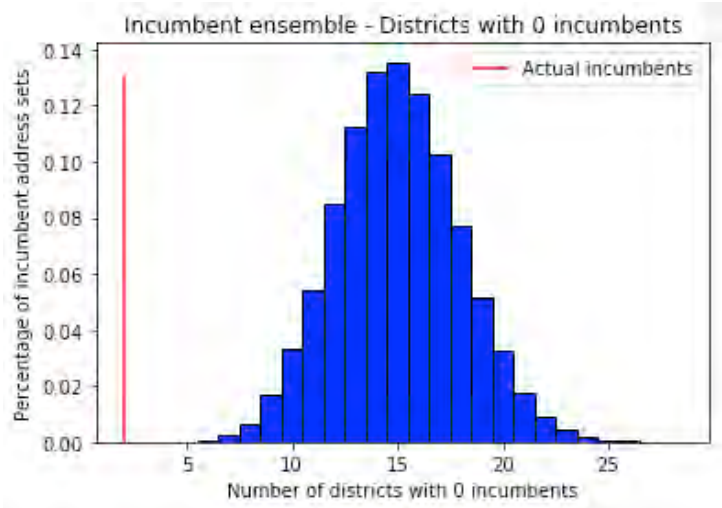


Figure 14: Incumbent ensemble histogram for number of districts with 0 incumbents

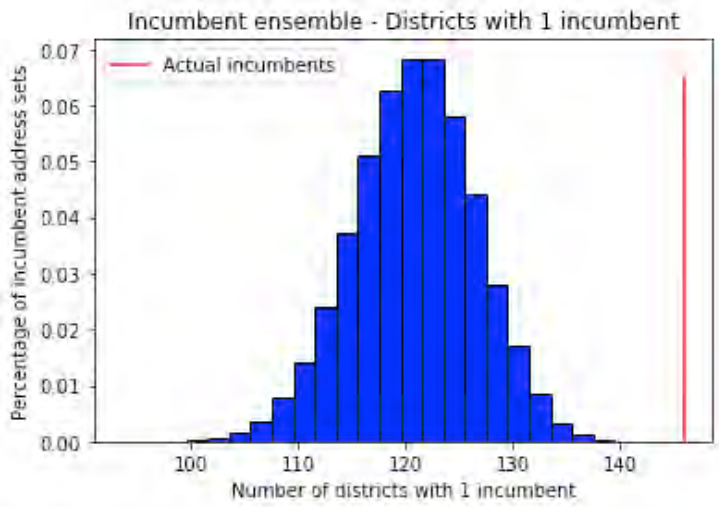


Figure 15: Incumbent ensemble histogram for number of districts with 1 incumbent

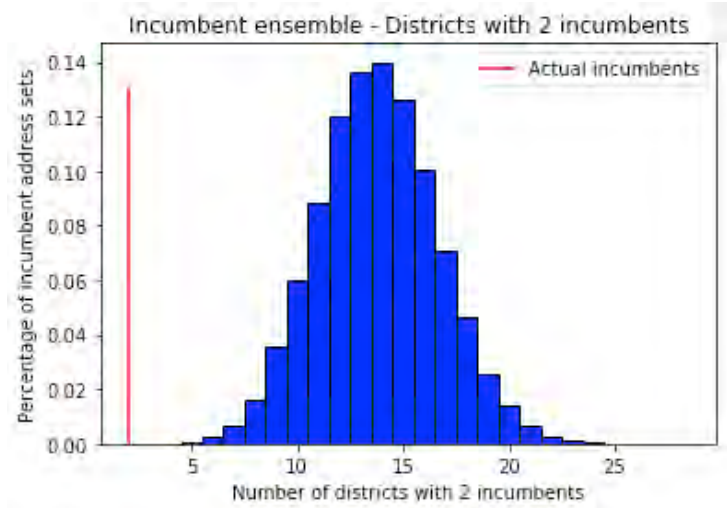


Figure 16: Incumbent ensemble histogram for number of districts with 2 incumbents

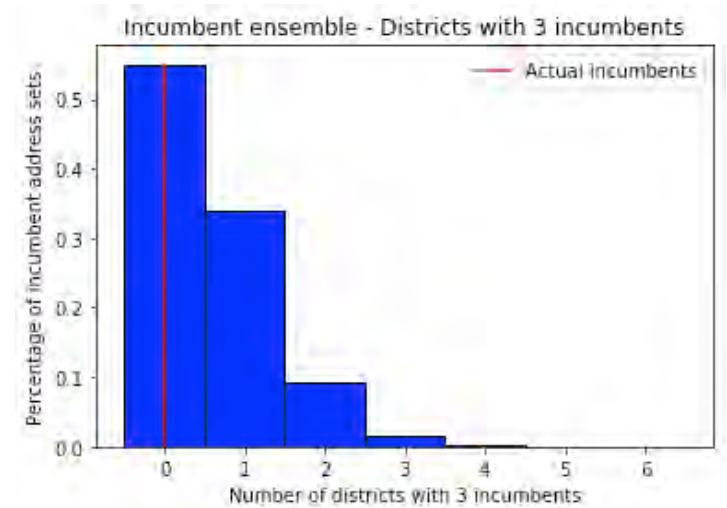


Figure 17: Incumbent ensemble histogram for number of districts with 3 incumbents

53. The shapes of the histograms in Figures 14, 15, and 16 indicate that this data is approximately **normally distributed**. For such data, there is a standard formula for computing a **confidence interval**, which describes how likely it is that the mean value of each statistic computed from the ensemble data is accurate. The input required for this formula is:

- the sample size (in this case, 100,000),
- the sample mean (shown in Table 13 for numbers of districts with 0, 1, or 2 incumbents),
- the standard deviation (shown in Table 13 for numbers of districts with 0, 1, or 2 incumbents),
- the “confidence level,” i.e., the desired probability that the true mean value is contained within the computed confidence interval.

54. Using a confidence level of 99.999%, confidence intervals for the mean numbers of districts with 0, 1, and 2 incumbents are shown in Table 14.¹⁶ As this computation shows, the large size of the ensemble results in a very high degree of confidence in the results.

Table 14: Confidence intervals for mean numbers of districts with 0, 1, or 2 incumbents in incumbent ensemble

	Mean	99.999% confidence interval
Districts with 0 incumbents	14.99	14.95 - 15.03
Districts with 1 incumbent	120.62	120.54 - 120.70
Districts with 2 incumbents	13.79	13.75 - 13.83

55. Meanwhile, the values for the actual incumbent addresses---2 districts with 0 incumbents, 146 districts with 1 incumbent, and 2 districts with 2 incumbents---are 4.59 standard deviations below, 4.48 standard deviations above, and 4.17 standard deviations below the

¹⁶ These confidence intervals were computed using the Confidence Interval Calculator at <https://www.calculator.net/confidence-interval-calculator.html>.

respective mean values for these statistics. The probability of such a result occurring by chance if the 2022 Assembly plan was **not** drawn to accommodate incumbent addresses is less than 0.01%. In fact, these values are so rare that they **never** occurred in the entire ensemble of 100,000 sets of addresses; the most extreme values observed for any set of “incumbent” addresses in the ensemble were:

- 4 districts with 0 incumbents;
- 142 districts with 1 incumbent;
- 3 districts with 2 incumbents.

Furthermore, each of these extreme values occurred only 2 or 3 times in the entire ensemble of 100,000 sets of addresses.

56. As noted in Footnote 1 on p. 5, proxy addresses were used for 9 of the 150 actual incumbent addresses. It is possible some of these incumbents are actually located in other 2022 Assembly districts than I have assumed based on these addresses, and that the actual number of 2022 Assembly districts with 1 incumbent is less than 146. In the worst-case scenario, in which all 9 of these incumbents were located in different districts than these addresses would indicate, the actual number of 2022 Assembly districts with 1 incumbent could theoretically be as low as 137.

57. Table 15 shows, for each possible number of actual districts with 1 incumbent between 137 and 146, the number of standard deviations above the mean that this number represents and the corresponding likelihood that this outcome could have occurred by chance if the plan were not drawn to accommodate incumbent addresses.

Table 15: Probability of numbers of districts with 1 incumbent occurring by chance

	Standard deviations above the mean	Probability
137 districts	2.89	0.19%
138 districts	3.07	0.11%
139 districts	3.25	0.06%
140 districts	3.42	0.03%
141 districts	3.60	0.02%
142 districts	3.78	0.01%
143 districts	3.95	< 0.01%
144 districts	4.13	< 0.01%
145 districts	4.31	< 0.01%
146 districts	4.48	< 0.01%

58. Even under the worst-case scenario of 137 districts with 1 incumbent, the probability of this outcome occurring by chance if the plan were not drawn to accommodate incumbent addresses is less than 1 in 500, and this probability drops rapidly as the number of districts with 1 incumbent increases. For instance, if the plan contained 142 districts with 1 incumbent, the probability of this outcome occurring by chance would be approximately 0.01%, or about 1 in 10,000.

59. **Conclusion:** For the 2022 Assembly district plan, the actual set of incumbent addresses is a very extreme outlier compared to a large ensemble of randomly selected “theoretical” incumbent addresses from each 2012 Assembly district. Notwithstanding the asymmetry of conditional probability (cf. Footnote on p. 7), it is extremely unlikely that this plan was drawn without consideration of the incumbent addresses and a deliberate intention to maximize the number of districts containing exactly 1 incumbent.

SUMMARY OF ANALYSIS

60. In order to address the question of whether the 2022 Assembly plan was deliberately designed to accommodate incumbent addresses, I performed two independent and complementary analyses:

- I constructed three ensembles of 50,000 valid district plans each for New York State Assembly districts, each with a different set of region-aware constraints typically considered in redistricting. For each plan in the ensembles, I used the addresses of the current incumbent Assembly members to compute the numbers of districts that would contain 0, 1, 2, or 3 incumbents in that plan. I then compared the statistical range of outcomes for these measures to the values for the 2022 Assembly plan. The values for the 2022 Assembly plan are a very extreme outlier compared to the statistical ranges of all three ensembles, particularly among plans with similar core population movement, which correlates strongly with the number of districts with a single incumbent across the ensemble.
- I constructed an ensemble of 100,000 sets of “theoretical” incumbent addresses by randomly selecting one Census block from each 2012 district for each set to represent the “incumbent” addresses. For each set of addresses in this ensemble, I computed the numbers of districts that would contain 0, 1, 2, or 3 “incumbents” in the 2022 Assembly plan. I then compared the statistical range of outcomes for these measures to the values for actual incumbent addresses. The actual addresses were a very extreme outlier---more extreme, in fact, than **any** of the sets of addresses in the ensemble. The probability of this outcome occurring by chance if the 2022 Assembly plan had **not** been deliberately

designed to accommodate incumbent addresses is less than 0.01%. Even allowing for possible inaccuracies in the 9 incumbent addresses for which proxy addresses were used, this probability estimate remains accurate even if the actual number of districts with 1 incumbent is as low as 142. Even in the worst-case scenario in which all 9 proxy addresses are located in the wrong 2022 Assembly district, the probability of this outcome occurring by chance remains less than 1 in 500.

61. Based on the results of these analyses, I consider it almost certain that the 2022 Assembly plan was deliberately designed in part to maximize the number of districts containing a single incumbent Assembly member.

FILED: NEW YORK COUNTY CLERK 08/08/2022 09:47 PM


INDEX NO. 154213/2022

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Dated: Boulder, Colorado
July 28, 2022


Jeanne N. Clelland, Ph.D.

State of Colorado
County of Boulder
The foregoing instrument was acknowledged before me
this 28 day of July, 2022,
by Jeanne N. Clelland

Notary Public
08/28/2024
My Commission Expires

ZOE B SCOTT
Notary Public
State of Colorado
Notary ID # 20204030068
My Commission Expires 08-28-2024

CERTIFICATE OF CONFORMITY

STATE OF NEW YORK

COUNTY OF NEW YORK

The undersigned does hereby certify that he is an attorney-at-law duly admitted to practice in the State of New York, and is a resident of Brooklyn in the State of New York that he is a person duly qualified to make this certificate of conformity pursuant to Section 299-a of the Real Property Law of the State of New York; that he is fully acquainted with the laws of the State of New York pertaining to the acknowledgment or proof of deeds of real property to be recorded therein; that the foregoing acknowledgment by Dr. Jeanne Clelland named in the foregoing instrument taken before Zoe B. Scott, a notary public (or other officer) was taken in the manner prescribed by such laws of the State of Colorado, being the state in which it was taken; and that it duly conforms with such laws and is in all respects valid and effective in such state.

Dated: New York, New York
August 2, 2022



Peter A. Devlin

Sworn and subscribed to me
before this 2nd day of August 2022



Notary Public

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July 28, 2022

EDUCATION:

- Ph.D., Mathematics, Duke University, May 1996
Advisor: Robert Bryant
Dissertation: *Geometry of conservation laws for a class of parabolic partial differential equations*
- M.A., Mathematics, Duke University, May 1993
- B.S. summa cum laude, Mathematics, Duke University, May 1991

ACADEMIC EMPLOYMENT:

- Professor of Mathematics, University of Colorado, Fall 2014 - present
- Associate Professor of Mathematics, University of Colorado, Fall 2007 - Spring 2014
- Assistant Professor of Mathematics, University of Colorado, Fall 1998 - Spring 2007
- National Science Foundation Postdoctoral Research Fellow, Institute for Advanced Study, Princeton, NJ, Fall 1996 - Spring 1998. Advisor: Phillip Griffiths

GRANTS, AWARDS, AND HONORS:

- University of Colorado Undergraduate Research Opportunities Program (UROP) Team Grant, August 2021 - May 2022, \$3,000
- University of Colorado Undergraduate Research Opportunities Program (UROP) Team Grant, August 2019 - May 2020, \$3,000
- Nominated for Haimo Teaching Award, Mathematical Association of America, March 2019
- Burton W. Jones Teaching Award, Rocky Mountain Section of the Mathematical Association of America, March 2018
- Boulder Faculty Assembly Excellence in Teaching and Pedagogy Award, March 2018
- Simons Foundation Collaboration Grant for Mathematicians, September 2017 - August 2022, \$42,000
- University of Colorado Arts & Sciences Fund for Excellence travel award, April 2017, \$1,500

- Nominated for Burton W. Jones teaching award, Rocky Mountain section of the Mathematical Association of America, January 2017
- National Science Foundation grant DMS-1321212 (co-PI), “Conference/Workshop: New Directions in Exterior Differential Systems,” February 2013 - February 2014, \$40,000
- National Science Foundation grant DMS-1206272, “Isometric Embedding and Other Problems in Geometry and Differential Equations,” September 2012 - August 2015, \$165,000
- National Science Foundation grant DMS-0908456, “Topics in the Geometry of Differential Equations,” August 2009 - July 2012, \$90,912
- American Institute of Mathematics SQuaRE (Structured Quartet Research Ensemble) workshop grant, March 2009 - March 2011
- University of Colorado Dean’s Fund for Excellence grant, December 2003
- Residence Life Academic Teaching Award, Department of Housing and the Committee on Learning & Academic Support Services, University of Colorado, Spring 2003
- University of Colorado Junior Faculty Development Award, March 2001
- Awarded membership, Institute for Advanced Study, Princeton, NJ, Fall 1996 - Spring 1998
- National Science Foundation Mathematical Sciences Postdoctoral Research Fellowship, awarded February 1996
- Awarded three Association for Women in Mathematics travel grants: January 1995, July 1996, January 1998
- Graduate student teaching award – Award for demonstrated excellence in teaching from the L.P. and Barbara Smith Endowment, Duke University Department of Mathematics, August 1995 and July 1996
- National Science Foundation Graduate Fellowship, awarded Fall 1991
- Alice T. Schafer Prize, Association for Women in Mathematics, Spring 1991
- Phi Beta Kappa, Spring 1990

RESEARCH AND CREATIVE WORKS:

Peer-reviewed articles:

- (1) J. Clelland, H. Colgate, D. DeFord, B. Malmskog, and F. Sancier-Barbosa, “Colorado in Context: Congressional Redistricting and Competing Fairness Criteria in Colorado,” *J Comput Soc Sc* (2021), <https://doi.org/10.1007/s42001-021-00119-7>
- (2) J. Clelland, D. DeFord, and M. Duchin, “Aftermath: The Ensemble Approach to Political Redistricting,” *Math Horizons* 27 (2020), no. 3, 34-35.
- (3) R.L. Bryant and J.N. Clelland, “Flat metrics with a prescribed derived coframing,” *SIGMA* 16 (2020), 004, 23 pages. Published electronically at <https://www.emis.de/journals/SIGMA/2020/004/>.

- (4) J.N. Clelland and T. Klotz, "Beltrami fields with non-constant proportionality factor via moving frames," *Arch Rational Mech Anal* (2019), <https://doi.org/10.1007/s00205-019-01481-7>.
- (5) J.N. Clelland, Y. Hu, and M.W. Stackpole, "Dynamic Equivalence of Control Systems and Infinite Permutation Matrices," *SIGMA* 15 (2019), 063, 16 pages. Published electronically at <https://www.emis.de/journals/SIGMA/2019/063/>.
- (6) J.N. Clelland, T.A. Ivey, N. Tehseen, and P.J. Vassiliou, "Isometric Embedding and Darboux Integrability," *Geometriae Dedicata* 203 (2019), 353-388. Published electronically at <https://doi.org/10.1007/s10711-019-00441-5>.
- (7) J.N. Clelland and T.A. Ivey, "Geometric characterization and classification of Bäcklund transformations of sine-Gordon type," *Journal of Integrable Systems* 3 (2018), 1-44. Published electronically at <https://doi.org/10.1093/integr/xyy018>.
- (8) J.N. Clelland, "A counterexample to Matsumoto's conjecture regarding absolute length vs. relative length in Finsler manifolds," *Reports on Mathematical Physics* 82 (2018), 21-26.
- (9) G.-Q. Chen, J. Clelland, M. Slemrod, D. Wang, and D. Yang, "Isometric embedding via strongly symmetric positive systems," *The Asian Journal of Mathematics* 22 (2018), 1-40.
- (10) N. Bushek and J.N. Clelland, "Geometry of centroaffine surfaces in \mathbb{R}^5 ," *SIGMA* 11 (2015), 001, 24 pages. Published electronically at <http://www.emis.de/journals/SIGMA/2015/001/>.
- (11) J.N. Clelland and J.M. Miller, "A characterization of hyperbolic affine flat, affine minimal surfaces in \mathbb{A}^3 ," *Differential Geometry and Its Applications* 36 (2014) 134-148.
- (12) J. Clelland, E. Estrada, M. May, J. Miller, S. Peneyra, and M. Schmidt, "A Tale of Two Arc Lengths: Metric notions for curves in surfaces in equiaffine space," *Proceedings of the American Mathematical Society* 142 (2014), 2543-2558.
- (13) J.N. Clelland and P.J. Vassiliou, "A Solvable String on a Lorentzian Surface," *Differential Geometry And Its Applications* 33 Suppl. (2014) 177-198.
- (14) B. Carlsen and J.N. Clelland, "The geometry of lightlike surfaces in Minkowski space," *Journal of Geometry and Physics* 74 (2013) 43-55.
- (15) J.N. Clelland, C.G. Moseley, and G.R. Wilkens, "Geometry of optimal control for control-affine systems," *SIGMA* 9 (2013), 034, 31 pages. Published electronically at <http://www.emis.de/journals/SIGMA/2013/034/>.
- (16) J.N. Clelland, "Totally quasi-umbilic timelike surfaces in $\mathbb{R}^{1,2}$," *Asian Journal of Mathematics* 16 (2012) 189-208.
- (17) J.N. Clelland, C.G. Moseley, and G.R. Wilkens, "Geometry of control-affine systems," *SIGMA* 5 (2009), 095, 28 pages. Published electronically at <http://www.emis.de/journals/SIGMA/2009/095/>.
- (18) J.N. Clelland and T.A. Ivey, "Bäcklund transformations and Darboux integrability for nonlinear wave equations," *Asian Journal of Mathematics* 13 (2009) 15-64.
- (19) J.N. Clelland, M. Kossowski, and G.R. Wilkens, "Second-order type-changing evolution equations with first-order intermediate equations," *Journal of Differential Equations* 244 (2008) 242-273.
- (20) J.N. Clelland, M. Kossowski, and G.R. Wilkens, "Constructing topologically distinct energy-critical curves in the path space of the Euclidean line," *Journal of Differential Equations* 241 (2007) 305-331.

- (21) J.N. Clelland, C.G. Moseley, and G.R. Wilkens, "Geometry of sub-Finsler Engel manifolds," *Asian Journal of Mathematics* 11 (2007) 699-726.
- (22) J.N. Clelland and C.G. Moseley, "Sub-Finsler geometry in dimension three," *Differential Geometry And Its Applications* 24 (2006) 628-651.
- (23) J.N. Clelland and T.A. Ivey, "Parametric Bäcklund transformations I: Phenomenology," *Transactions of the American Mathematical Society* 357 (2005) 1061-1093.
- (24) J.N. Clelland, "Homogeneous Bäcklund transformations of hyperbolic Monge-Ampère systems," *Asian Journal of Mathematics* 6 (2002) 433-480.
- (25) J.N. Clelland, "A Bäcklund transformation for timelike surfaces of constant mean curvature in $\mathbb{R}^{1,2}$," *Bäcklund and Darboux Transformations. The Geometry of Solitons*, 141-150, CRM Proc. Lecture Notes 29, American Mathematical Society, Providence, RI, 2001.
- (26) J.N. Clelland, "On the intermediate integral for Monge-Ampère equations," *Proceedings of the American Mathematical Society* 128 (2000) 527-531.
- (27) J.N. Clelland, "Geometry of conservation laws for a class of parabolic PDEs II: Normal forms for equations with conservation laws," *Selecta Mathematica (New Series)* 3 (1997) 497-515.
- (28) J.N. Clelland, "Geometry of conservation laws for a class of parabolic partial differential equations," *Selecta Mathematica (New Series)* 3 (1997) 1-77.
- (29) J.A. Nielsen, "Rewritable sequencings of groups," *Ars Combinatoria* 36 (1993) 207-214.

Submitted articles:

- (30) C. Millar, T. Mitchell, A. Mazurek, A. Chhabra, A. Beghini, J. Clelland, A. McRobie, and W. Baker, "On designing plane-faced funicular gridshells," submitted April 2021.
- (31) J.N. Clelland, T.J. Klotz, and P.J. Vassiliou, "Dynamic Feedback Linearization of Control Systems with Symmetry," submitted March 2021.
- (32) J.N. Clelland and Y. Hu, "On absolute equivalence and linearization I," submitted July 2020.

Peer-reviewed Book:

- (33) J.N. Clelland, *From Frenet to Cartan: The Method of Moving Frames*, Graduate Studies in Mathematics 178, American Mathematical Society (2017), 414 pp.

Preprints:

- (34) J. Clelland, N. Bossenbroek, T. Heckmaster, A. Nelson, P. Rock, and J. VanAusdall, "Compactness statistics for spanning tree recombination," <https://arxiv.org/abs/2103.02699>.
- (35) J.N. Clelland and P.J. Vassiliou, "Strings attached: New light on an old problem," <https://arxiv.org/abs/1302.6672>.

Reports:

- (36) J. Clelland, "Response Report in Support of Governor Evers's Proposed District Plans," submitted to the Wisconsin Supreme Court, December 15, 2021. Available online at <https://www.wicourts.gov/courts/supreme/origact/2021ap1450.htm>.

- (37) J. Clelland, “Expert Report in Support of Governor Evers’s Proposed District Plans,” submitted to the Wisconsin Supreme Court, December 30, 2021. Available online at <https://www.wicourts.gov/courts/supreme/origact/2021ap1450.htm>.
- (38) J. Clelland, D. DeFord, B. Malskog, and Flavia Sancier-Barbosa, “Ensemble Analysis for 2021 State Legislative Redistricting in Colorado, Part 2: Comparison of Final Approved Plans to Ensembles” submitted to the Colorado Independent Legislative Redistricting Commission, October 21, 2021. Available online at <https://coloradoincontext.wordpress.com/>.
- (39) J. Clelland, D. DeFord, B. Malskog, and Flavia Sancier-Barbosa, “Ensemble Analysis for 2021 Congressional Redistricting in Colorado, Part 2: Comparison of Final Approved Plan to Ensembles,” submitted to the Colorado Independent Congressional Redistricting Commission, October 4, 2021. Available online at <https://coloradoincontext.wordpress.com/>.
- (40) J. Clelland, D. DeFord, B. Malskog, and Flavia Sancier-Barbosa, “Ensemble Analysis for 2021 State Legislative Redistricting in Colorado” submitted to the Colorado Independent Legislative Redistricting Commission, September 26, 2021. Available online at <https://coloradoincontext.wordpress.com/>.
- (41) J. Clelland, D. DeFord, B. Malskog, and Flavia Sancier-Barbosa, “Ensemble Analysis for 2021 Congressional Redistricting in Colorado,” submitted to the Colorado Independent Congressional Redistricting Commission, September 10, 2021. Available online at <https://coloradoincontext.wordpress.com/>.

Opinion pieces:

- (42) J.N. Clelland, “Boulder Council elections disfavor minority representation,” Guest Opinion in *The Daily Camera*, January 3, 2020. Available online at <https://www.dailycamera.com/2020/01/03/jeanne-clelland-boulder-council-elections-disfavor-minority-representation/>.
- (43) J.N. Clelland, “The court seeks a standard to measure partisan gerrymandering. Mathematicians came up with one.” Sunday Guest Opinion in *The Daily Camera*, July 7, 2019. Available online at <https://www.dailycamera.com/2019/07/06/opinion-jeanne-clelland-the-court-seeks-a-standard-to-measure-partisan-gerrymandering-mathematicians-came-up-with-one/>.
- (44) J.N. Clelland, “The Mathematics of Gerrymandering and the Supreme Court,” blog post on Mathematical Association of America “Math Values” blog, July 2, 2019. Available online at <https://www.mathvalues.org/masterblog/the-mathematics-of-gerrymandering-and-the-supreme-court>.

Published software packages:

- (45) Cartan, a software package for Maple to perform computations involving differential forms in general, and to perform Cartan-Kähler analysis of linear Pfaffian exterior differential systems in particular. Available at <http://math.colorado.edu/~jnc/Maple.html>.

Archived lecture material:

- (46) J.N. Clelland, “Lie groups and the method of moving frames,” lecture notes from invited Summer 1999 Graduate Workshop at the Mathematical Sciences Research Institute, Berkeley, CA, 85 pages, available at <http://math.colorado.edu/~jnc/MSRI.html>.

(Streaming videos of the nine workshop lectures available at
<http://www.msri.org/publications/video/index2.html>.)

CONSULTING WORK:

- Ensemble analysis consultant to the Colorado Independent Legislative Redistricting Commission, August 2021 - October 2021
- Consulting expert for The Brennan Center For Justice regarding The Ohio Organizing Collaborative, et. al., vs. Ohio Redistricting Commission, et. al., October 2021
- Testifying expert for Governor Tony Evers regarding Johnson vs. Wisconsin Elections Commissions, November 2021 - January 2022

LECTURES AND PRESENTATIONS:

Invited conference talks:

- (1) “Redistricting and gerrymandering: When is a district map “fair”?” Invited talk at 2nd Annual Conference in Mathematics and Politics, Institute for Mathematics and Democracy, May 2022
- (2) “District compactness in the ReCom sampling method,” AMS Spring Southeastern Section Meeting, University of Virginia, March 2020 — CANCELLED due to COVID-19
- (3) “Gerrymandering: What is it, how can we measure it, and what can we do about it?,” plenary talk at SIAM Front Range Applied Mathematics Student Conference, CU-Denver, March 2020
- (4) “Beltrami fields with non-constant proportionality factor via moving frames,” AMS/MAA Joint Mathematics Meetings, Denver, CO, January 2020
- (5) “Isometric embedding via strongly symmetric positive systems,” invited plenary talk at Midwest Geometry Conference, Iowa State University, September 2019
- (6) “Gerrymandering: What is it, how can we measure it, and what can we do about it?,” keynote talk at Rocky Mountain Section meeting of the Mathematical Association of American, Fort Lewis College, Durango, CO, April 2019
- (7) “The Will of the People: How we vote and why it matters,” invited talk at Voting Rights Data Institute, Tufts University, June 2018
- (8) “The Good, the Bad, and the Ugly: The Cartan algorithm for overdetermined PDE systems,” invited semi-plenary talk for session on Symbolic Analysis at the Foundations of Computational Mathematics conference, Barcelona, Spain, July 2017
- (9) “Towards a classification of quasi-linear Bäcklund transformations of wavelike PDEs, and a new example,” AMS Southeastern Section meeting, Charleston, SC, March 2017
- (10) “Beltrami fields with non-constant proportionality factor via moving frames,” AMS Central Section Meeting, Minneapolis, MN, October 2016
- (11) “Isometric embedding via strongly symmetric positive systems,” Conference on PDEs and Free Boundary Problems, University of Pittsburgh, March 2015
- (12) “The geometry of lightlike surfaces in Minkowski space,” SIAM Conference on Applied Algebraic Geometry, Colorado State University, Ft. Collins, CO, August 2013

- (13) "The geometry of lightlike surfaces in Minkowski space," New Directions in Exterior Differential Systems: a conference in honor of Robert Bryant's 60th birthday, Estes Park, CO, July 2013
- (14) "Sub-Finsler geometry in dimensions three and four," Differential Geometry and Continuum Mechanics Workshop, International Centre for Mathematical Sciences, Edinburgh, Scotland, June 2013
- (15) "A Tale of Two Arc Lengths," AMS Western section meeting, Tucson, AZ, October 2012
- (16) "A Tale of Two Arc Lengths," Southeast Geometry Conference, College of Charleston, March 2012
- (17) "Equivalence of geometric structures in control theory via moving frames," Chern Centennial Conference, Mathematical Sciences Research Institute, Berkeley, CA, November 2011
- (18) "Equivalence of geometric structures in control theory via moving frames," AMS Eastern section meeting, Ithaca, NY, September 2011
- (19) "Equivalence of geometric structures in control theory via moving frames," plenary talk at the Workshop on Moving Frames in Geometry, Centre de Recherches Mathématiques, Montreal, CA, June 2011
- (20) "Bäcklund transformations and Darboux integrability for nonlinear wave equations," Texas Geometry and Topology Conference, Texas Tech University, February 2011
- (21) "Totally quasi-umbilic timelike surfaces in $\mathbb{R}^{1,2}$," AMS central section meeting, St. Paul, MN, April 2010
- (22) "Bäcklund transformations and Darboux integrability for nonlinear wave equations," Mini Workshop on Differential Systems, Utah State University, November 2009
- (23) "Sub-Finsler geometry in dimensions three and four," Mini Workshop on Differential Systems, Utah State University, November 2009
- (24) "Geometry of control-affine systems," AMS southeastern section meeting, Raleigh, NC, April 2009
- (25) "Sub-Finsler geometry in dimensions three and four," Mathematical Sciences Research Institute Workshop on Exterior Differential Systems and the Method of Equivalence, May 2008
- (26) "Bäcklund transformations and Darboux integrability for nonlinear wave equations," Lehigh University Geometry and Topology Conference, October 2007
- (27) "Sub-Finsler geometry in dimensions three and four," 80ème Rencontre entre physiciens théoriciens et mathématiciens: "Géométrie de Finsler (Mathématiques et Physique)," Institut de Recherche Mathématique Avancée, Strasbourg, France, September 2007.
- (28) "Sub-Finsler geometry in dimensions three and four," Southeast Geometry Conference, College of Charleston, March 2006
- (29) "Geometry of sub-Finsler Engel manifolds," AMS central section meeting, Lincoln, NE, October 2005
- (30) "Sub-Finsler geometry in dimension three," Lehigh University Geometry and Topology Conference, June 2004
- (31) "Sub-Finsler geometry in dimension three," Southeast Geometry Conference, College of Charleston, March 2003

- (32) “Sub-Finsler geometry in dimension three,” AMS central section meeting, Madison, WI, October 2002
- (33) “Homogeneous Bäcklund transformations of hyperbolic Monge-Ampère systems,” Southeast Geometry Conference, University of Georgia, April 2002
- (34) “Bäcklund transformations of hyperbolic Monge-Ampère equations,” Soliton Equations: Applications and Theory conference, University of Colorado at Colorado Springs, August 2001
- (35) “Bäcklund transformations of hyperbolic Monge-Ampère equations,” Lehigh University Geometry and Topology Conference, June 2001
- (36) “Bäcklund transformations of hyperbolic Monge-Ampère equations,” Southeast Geometry Conference, College of Charleston, March 2000
- (37) “Bäcklund transformations of hyperbolic Monge-Ampère equations,” Robby Fest, a conference in honor of Robert Gardner, University of North Carolina, October 1999
- (38) “Homogeneous Bäcklund transformations of hyperbolic Monge-Ampère equations,” AARMS-CRM Workshop on Bäcklund and Darboux Transformations, June 1999
- (39) “Homogeneous Bäcklund transformations of hyperbolic Monge-Ampère equations,” First Workshop on Formal Geometry and Mathematical Physics, Utah State University, May 1999
- (40) “Some classical results on Bäcklund transformations,” First Workshop on Formal Geometry and Mathematical Physics, Utah State University, May 1999
- (41) “Bäcklund transformations of hyperbolic Monge-Ampère systems,” AWM workshop, Baltimore, MD, January 1998
- (42) “Geometry of conservation laws for parabolic PDEs,” AMS Summer Research Institute on Differential Geometry and Control, University of Colorado, Boulder, July 1997
- (43) “Geometry of conservation laws for parabolic PDEs,” Geometry Festival, Duke University, March 1997
- (44) “Geometry of conservation laws for parabolic PDEs,” Southeast Geometry Conference, University of South Carolina, May 1996

Invited seminar talks:

- (45) “Colorado in Context: Using Mathematics to Detect and Prevent Gerrymandering in Colorado and Beyond” (joint talk with Beth Malmskog), New York University Math and Democracy Seminar, November 2021
- (46) “Gerrymandering: What is it, how can we measure it, and what can we do about it?,” Applied Math Seminar, Northeastern Illinois University, February 2020
- (47) “Gerrymandering: What is it, how can we measure it, and what can we do about it?,” Institute for Policy Research, Northwestern University, February 2020
- (48) “Isometric embedding via strongly symmetric positive systems,” University of Minnesota, March 2018
- (49) “Isometric embedding via strongly symmetric positive systems,” Wichita State University, March 2018
- (50) “Isometric embedding via strongly symmetric positive systems,” Duke University, June 2015

- (51) "Isometric embedding via strongly symmetric positive systems," Australian National University, April 2015
- (52) "Isometric embedding via strongly symmetric positive systems," University of Sydney (Australia) Geometry Seminar, March 2015
- (53) "Isometric embedding via strongly symmetric positive systems," Texas A&M University, February 2015
- (54) "Equivalence of geometric structures in control theory via moving frames," Australian National University, November 2012
- (55) "Equivalence of geometric structures in control theory via moving frames," Universidade de Brasilia, June 2012
- (56) "Bäcklund transformations and Darboux integrability for nonlinear wave equations," Texas A&M University, November 2009
- (57) "Constructing topologically distinct energy-critical curves in the path space of the Euclidean line," University of Wisconsin, February 2009
- (58) "Sub-Finsler geometry in dimensions three and four," Duke University, October 2006
- (59) "Conservation laws for second-order evolution equations," Kansas State University, April 2006
- (60) "Sub-Finsler geometry," Colorado State University, January 2005
- (61) "Sub-Finsler geometry in dimension three," University of Colorado, Colorado Springs, April 2003
- (62) "Bäcklund transformations of hyperbolic Monge-Ampère equations," Department of Applied Mathematics Dynamics seminar, University of Colorado, February 2002
- (63) "Bäcklund transformations of hyperbolic Monge-Ampère equations," University of Chicago, October 2001

Invited colloquium talks:

- (64) "Gerrymandering: What is it, how can we measure it, and what can we do about it?" Calvin University, February 2022
- (65) "A Tale of Two Arc Lengths," Australian National University, November 2012
- (66) "A Tale of Two Arc Lengths," Instituto de Matematica, Universidade Federal do Rio de Janeiro, June 2012
- (67) "Classical results on Bäcklund transformations," Texas A&M University, November 2009
- (68) "PDEs for geometers and vice-versa: Intro to exterior differential systems," Wake Forest University, April 2009
- (69) "PDEs for geometers and vice-versa: An introduction to exterior differential systems," Wesleyan University, March 2008
- (70) "PDEs for geometers and vice-versa: An introduction to exterior differential systems," Kansas State University, April 2006
- (71) "PDEs for geometers: Introduction to exterior differential systems," Lehigh University, December 1996
- (72) "PDEs for geometers: Introduction to exterior differential systems," University of Georgia, November 1996

Invited talks for students:

- (73) “The Will of the People: How we vote and why it matters,” CU-Boulder math club, April 2019
- (74) “The Will of the People: How we vote and why it matters,” Fairview High School math club, January 2019
- (75) “The Poincaré conjecture in dimension 2, or why topologists can’t tell their donuts from their cups of coffee,” Wake Forest University, March 2017
- (76) “The Poincaré conjecture in dimension 2, or why topologists can’t tell their donuts from their cups of coffee,” Calvin College Math Club, October 2010
- (77) “The Poincaré conjecture in dimension 2, or why topologists can’t tell their donuts from their cups of coffee,” Wesleyan University Math Club, March 2008
- (78) “The Poincaré conjecture in dimension 2, or why topologists can’t tell their donuts from their cups of coffee,” Duke Math Alumni Lecture Series, Duke University, October 2006

Public lectures/presentations:

- (79) “Gerrymandering: What is it, how can we measure it, and what can we do about it?” Duke Nashville/Duke Colorado Alumni Fireside chat, January 2022
- (80) “Redistricting and Gerrymandering: When is a district map “fair”?” Ethics and Ecological Economics (EEE) Forum on “The Right to Vote: The National Context and Colorado’s Story,” November 2021
- (81) “Assessing Partisan Bias in Redistricting Using Ensemble Analysis” (joint with Beth Malmskog), presentation to the Colorado Independent Congressional Redistricting Commission, August 2021
- (82) “Assessing Partisan Bias in Redistricting Using Ensemble Analysis” (joint with Beth Malmskog), presentation to the Colorado Independent Legislative Redistricting Commission, June 2021
- (83) “What Can Mathematics Tell Us About Fairness for Redistricting?” Gerrymandering and Congressional Redistricting meeting, sponsored by the Library of Congress Phillip Lee Phillips Map Society and the Rocky Mountain Map Society, January 2021.
- (84) “What Can Mathematics Tell Us About Fairness for Redistricting in Colorado?” Connecting Colorado for Fair Redistricting: A Public Symposium and Call to Action (online), September 2020. Video of talk available online at <https://www.youtube.com/watch?v=xn0ziuy2PI&feature=youtu.be&t=7275>
- (85) “Math vs. Gerrymandering: Using math to work for fair maps in Colorado and everywhere,” joint talk with Beth Malmskog, Free and Equal Elections Foundation Annual Electoral Reform Symposium, Denver, CO, Dec. 7, 2019. Video of the entire symposium available at <https://www.youtube.com/embed/FDZYPhGkK-4>; talk starts at 33-minute mark.
- (86) “The Will of the People: How we vote and why it matters,” League of Women Voters of Boulder County Community Conversation, November 10, 2019. Video of the talk available at <https://www.youtube.com/watch?v=nK34leqGbLs&feature=youtu.be>.
- (87) “POINCARÉ WAS RIGHT: If it looks like a sphere and quacks like a sphere, then it IS a sphere! (So why is this worth a Fields Medal?),” Math Awareness Month Lecture, University of Colorado, April 2007

Podcasts:

- (88) Featured guest on “My Favorite Theorem” podcast, Episode 11, January 2018. Podcast and accompanying Scientific American blog post available at <https://blogs.scientificamerican.com/roots-of-unity/jeanne-clellands-favorite-theorem/>

Posters:

- (89) “Conservation laws for parabolic PDEs,” Julia Robinson Celebration of Women in Mathematics, Mathematical Sciences Research Institute, July 1996
- (90) “Exterior differential systems and conservation laws for partial differential equations,” AWM workshop, San Francisco, CA, January 1995

TEACHING EXPERIENCE AND ACCOMPLISHMENTS:**Invited lecture series:**

- “Lie groups and Cartan’s method of moving frames,” mini-course of six lectures, Universidade de Brasilia, June 2012
- “Lie groups and the method of moving frames,” invited series of nine lectures, Summer Graduate Workshop at the Mathematical Sciences Research Institute, Berkeley, CA, July 1999

Postdoctoral fellows supervised:

- Yuhao Hu, Fall 2018 - Spring 2020
- Sunita Vatuk, Fall 2009 - Spring 2010

Ph.D. students supervised:

- Peter Rock, Ph.D. student 2019 - present
- Boramey Chhay, Ph.D. student (secondary advisor) 2015 - 2016
- Pearce Washabaugh, Ph.D. student (secondary advisor) 2015 - 2016
- Mason Pelfrey, Ph.D. student 2014 - 2017
- Taylor Klotz, Ph.D. student 2015 - 2020 – Ph.D. received August 2020
Dissertation: *Geometry of Cascade Feedback Linearizable Control Systems*
- Matthew Stackpole, Ph.D. student 2008 - 2011 – Ph.D. received May 2011
Dissertation: *Dynamic equivalence of control systems via infinite prolongations*
- Christopher Catone, Ph.D. student 2000 - 2006 – Ph.D. received August 2006
Dissertation: *Projective equivalence of Finsler and Riemannian surfaces*

M.A./M.S. students supervised:

- Brendt Gerics, M.A. student 2017 - 2018 – M.A. received May 2018
- Rachel Benefiel, M.A. student 2016 - 2017 – M.A. received May 2017
- Jessica Burkhart, M.A. student 2012 – M.A. received August 2012
- Nathaniel Bushek, M.A. student 2009 - 2010 – M.A. received May 2010
- Jason Boisvert, M.S. student 2005 - 2006 – M.S. received December 2006
- Anne Cervino, M.A. student 2002 – M.A. received May 2002

Undergraduate research projects supervised:

- Catherine Brennan, Maxwell Fogler, Robi Huq, and Xianoming Wang, Undergraduate Research Opportunities Program (UROP) project on Mathematical Analysis of Redistricting in Colorado and Massachusetts, Fall 2021.
- Nicholas Bossenbroek, Thomas Heckmaster, Adam Nelson, and Jade VanAusdall, Undergraduate Research Opportunities Program (UROP) project on Mathematical Analysis of Legislative Redistricting in Colorado, Fall 2019.
- Nicholas Bossenbroek, Thomas Heckmaster, Adam Nelson, and Jade VanAusdall, 6 week summer REU project on Discrete Geometry and Applications to Redistricting, Summer 2019.

Undergraduate honors theses supervised:

- Catherine Brennan, *An Analysis of Gerrymandering on Single and Multi Member Legislative Districts*, *summa cum laude* honors, Fall 2021
- Peter Rock, *Uses of Mathematics in Computer Animation and 3D Rendering Software*, *summa cum laude* honors, Spring 2018
- Jonah Miller, *A characterization of affine minimal and affine flat surfaces*, *summa cum laude* honors, Spring 2013
- Brian Carlsen, *The Geometry of Null Surfaces in Minkowski Space*, *summa cum laude* honors, Spring 2012

Independent study courses supervised:

- James Stephan (undergraduate), Lie groups and Cartan's method of moving frames, Spring 2018
- Peter Rock and James Stephan (undergraduates), Lie groups and Cartan's method of moving frames, Fall 2017
- Brendt Gerics (M.A. student), Lie groups and Cartan's method of moving frames, Spring 2017
- Duff Baker-Jarvis, Akaxia Cruz, Rachel Helm, Peter Joeris, and Joshua Karpel (undergraduates), Lie groups and Cartan's method of moving frames, Spring 2013
- Edward Estrada, Molly May, and Jonah Miller (undergraduates), Lie groups and Cartan's method of moving frames, Part 2, Spring 2012
- Edward Estrada, Molly May, Jonah Miller, and Sean Peneyra (undergraduates), Lie groups and Cartan's method of moving frames, Fall 2011
- Brian Carlsen (undergraduate) and Michael Schmidt (M.A. student), Lie groups and Cartan's method of moving frames, Fall 2010
- Bryan Kaufman (undergraduate) and Nathaniel Bushek (M.A. student), Lie groups and Cartan's method of moving frames, Fall 2009
- Sam Galler (Boulder High School student), Geometry of Curves and Surfaces, Spring 2007

New courses developed:

- FYSM 1000: First-Year Seminar: "How Not To Be Wrong"
- MATH 4230/5230: Differential Geometry of Curves and Surfaces
- MATH 4810/5810: Special Topics in Mathematics: Mathematics of Redistricting

Courses taught:

- Professor of Mathematics, University of Colorado:
 - FYSM 1000-040: First-Year Seminar: “How Not To Be Wrong” – Fall 2017
 - MATH 2001: Introduction to Discrete Math – Spring 2019, Fall 2019
 - MATH 3430: Ordinary Differential Equations – Spring 2018, Fall 2019
 - MATH 4230/5230: Differential Geometry of Curves and Surfaces – Fall 2014, Fall 2016, Fall 2018, Fall 2020
 - MATH 4470/5470: Introduction to Partial Differential Equations – Spring 2016, Spring 2020, Spring 2021
 - MATH 4810/5810: Special Topics in Mathematics: Mathematics of Redistricting – Fall 2020
 - MATH 6230: Introduction to Differential Geometry I – Spring 2016, Spring 2018, Spring 2019
 - MATH 6240: Introduction to Differential Geometry II – Fall 2015
- Associate Professor of Mathematics, University of Colorado:
 - MATH 2001: Introduction to Discrete Math – Spring 2010, Fall 2011
 - MATH 2400: Calculus III – Fall 2012
 - MATH 3130: Introduction to Linear Algebra – Spring 2009, Spring 2011
 - MATH 4200: Introduction to Topology – Spring 2011, Spring 2014
 - MATH 4230: Geometry of Curves and Surfaces – Fall 2008, Fall 2009, Fall 2010, Fall 2012
 - MATH 4430: Ordinary Differential Equations – Spring 2010
 - MATH 4470: Introduction to Partial Differential Equations – Fall 2008, Spring 2012
 - MATH 5470: Introduction to Partial Differential Equations – Spring 2012
 - MATH 6230: Introduction to Differential Geometry I – Spring 2014
- Assistant Professor of Mathematics, University of Colorado:
 - MATH 1300: Calculus I – Spring 1999, Fall 2005
 - MATH 2300: Calculus II – Spring 2000
 - MATH 2420: Honors Calculus III – Fall 2001
 - MATH 3200: Introduction to Topology – Spring 2003
 - MATH 4230: Geometry of Curves and Surfaces – Spring 2001, Spring 2003, Spring 2005, Spring 2007
 - MATH 4430: Ordinary Differential Equations – Fall 1998, Fall 1999, Spring 2002 (2 sections), Fall 2002, Spring 2006 (2 sections), Spring 2007
 - MATH 6230: Introduction to Differential Geometry I – Fall 2006
 - MATH 6240: Introduction to Differential Geometry II – Spring 1999, Spring 2001, Spring 2005
 - MATH 6350: Complex Variables I – Fall 1999, Fall 2002
 - MATH 6360: Complex Variables II (Introduction to Algebraic Curves) – Spring 2000
- Instructor, Duke University:
 - Introductory Calculus II – Fall 1994, Fall 1995
 - Introductory Calculus III – Spring 1995

- Teaching Assistant, Duke University Talent Identification Program:
 - Taught Algebra I to gifted 7th grade students – Summer 1988

SERVICE AND OUTREACH ACTIVITIES:

Service to the Department of Mathematics, University of Colorado:

- Chair, Primary Unit Evaluation Committee for Assistant Professor Magdalena Czubak's Tenure and Promotion to Associate Professor, Fall 2019
- Chair, Primary Unit Evaluation Committee for Assistant Professor Magdalena Czubak's Comprehensive Review, Fall 2017
- Chair, Primary Unit Evaluation Committee for Instructor Faan Tone Liu's Reappointment and Promotion to Senior Instructor, Fall 2017
- Associate Chair for Undergraduate Studies, Fall 2012 - Spring 2017 (on sabbatical Spring 2015)
- Faculty mentor to Magdalena Czubak, Fall 2016 - present
- Faculty mentor to Anca Radalescu, Fall 2010 - Spring 2014
- Department representative to Mathematical Sciences Research Institute Sponsors Day, March 2013
- Faculty Course Supervisor (a.k.a. "Calc Czar") for MATH 1300 (Calculus I), Fall 2005
- Kempner Colloquium chair, Fall 1999 - Spring 2000
- Hiring committees:
 - Chair, Stochastic and deterministic differential equations faculty hiring committee, Fall 2019
 - Chair, Differential geometry faculty hiring committee, Fall 2015 - Spring 2016
 - Chair, Calc czar hiring committee, Spring 2013
 - Member, IT staff position hiring committee, Spring 2013
 - Member, Analysis faculty hiring committee, Fall 2012 - Spring 2013
 - Member, Geometry faculty hiring committee, Fall 2011 - Spring 2012
 - Member, IT staff position hiring committee, Fall 2011 - Spring 2012
 - Member, Differential equations faculty hiring committee, Spring 2006
 - Member, Algebra faculty hiring committee, Spring 2003
 - Member, Analysis faculty hiring committee, Spring 2002
 - Member, Algebraic topology faculty hiring committee, Spring 2000
- Graduate exam committees:
 - Member, Geometry/topology preliminary exam committee, January 2020
 - Member, Geometry/topology preliminary exam committee, August 2018
 - Member, Geometry/topology preliminary exam committee, January 2018
 - Member, Geometry/topology preliminary exam committee, August 2016
 - Member, Geometry/topology preliminary exam committee, August 2014
 - Member, Geometry/topology preliminary exam committee, January 2013
 - Member, Geometry/topology preliminary exam committee, January 2012
 - Member, Analysis preliminary exam committee, August 2001

- Member, Algebra preliminary exam committee, January 1999
- Member, Masters degree exam committee for Rebecca Wilczak, April 2012
- Member, Masters degree exam committee for Ivyl Boyce, July 2006
- Member, Masters degree exam committee for Daniel Champion, May 2005
- Member, Masters degree exam committee for Catherine Moody, April 2004
- Member, Masters degree exam committee for Lynn Schooley, April 2000
- Member, Masters degree exam committee for Kimberly Wey, April 2000
- Member, Masters degree exam committee for Keri Kornelson, November 1999
- Member, Qualifying exam committee for Ian Miller, April 2021
- Member, Qualifying exam committee for Zachary Gray (Department of Computer Science), March 2019
- Member, Qualifying exam committee for Albany Thompson, September 2018
- Member, Qualifying exam committee for Braden Balentine, December 2017
- Member, Qualifying exam committee for Carlos Pinilla, May 2016
- Member, Qualifying exam committee for Jonathan Belcher, November 2015
- Member, Qualifying exam committee for Jae Min Lee, September 2015
- Member, Qualifying exam committee for Boramey Chhay, April 2014
- Member, Qualifying exam committee for Pearce Washabaugh, January 2014
- Member, Qualifying exam committee for Chao Ma, October 2010
- Member, Qualifying exam committee for Christopher Seaton, November 2001
- Member, Ph.D. thesis exam committee for Albany Thompson, April 2021
- Member, Ph.D. thesis exam committee for Carlos Pinilla, April 2021
- Member, Ph.D. thesis exam committee for Zachary Gray (Department of Computer Science), October 2019
- Member, Ph.D. thesis exam committee for Pearce Washabaugh, March 2017
- Member, Ph.D. thesis exam committee and second reader for Matthew Krupa, July 2016
- Member, Ph.D. thesis exam committee for John Davenport, October 2007
- Member, Ph.D. thesis exam committee for Christopher Brown, November 2004
- Member, Ph.D. thesis exam committee for William Kirwin, March 2004
- Other departmental committees:
 - Member, Primary Unit Evaluation Committee for Nathaniel Thiem's promotion to Full Professor, Fall 2020
 - Member, Primary Unit Evaluation Committee for Sean O'Rourke's tenure and promotion, Fall 2020
 - Member, Awards Committee, Fall 2018 - Fall 2020
 - Member, First-Year Mathematics Committee, Fall 2018 - Spring 2019
 - Member, Primary Unit Review Committee for Sean O'Rourke's reappointment, Fall 2018
 - Member, Teaching Quality Framework committee, Fall 2017 - Spring 2018
 - Member, Executive Committee, Fall 2011 and Fall 2013 - present
 - Chair, Task Force on Reappointment, Promotion, and Tenure, Fall 2010 - Spring 2012

- Member, Task Force on Reappointment, Promotion, and Tenure, Fall 2007 - Fall 2008
- Member, Primary Unit Review Committee for Stephen Preston's tenure and promotion, Fall 2012
- Member, Primary Unit Review Committee for Stephen Preston's reappointment, Fall 2009
- Member, Computer Committee, Fall 2008 - Fall 2012
- Member, Graduate Committee, Fall 2008 - Spring 2010
- Member, Undergraduate committee, 1998 - 2005
- Member, Math 350 redecoration committee, Spring 2008

Service/Outreach Activities for the University of Colorado:

- Campus sponsor for The Center for Bright Kids Summer Programs, January 2019 - August 2020
- Member, Academic Affairs Advisory Committee, Fall 2017 - Spring 2021
- Gave an interview to U.S. News & World Reports on how incoming freshmen planning to major in math can prepare over the summer, June 2014:
<http://www.usnews.com/education/best-colleges/articles/2014/06/23/get-a-jump-start-on-college-classes-as-a-stem-major>
- Member, Academic Advising Center promotional committee, Fall 2012
- University of Colorado Representative, Rocky Mountain Mathematics Consortium Board of Directors Meeting, New Orleans, LA, January 2007
- Volunteered for Girl Scout Badge Day, sponsored by the Women In Engineering Program at the University of Colorado, October 2006
- Co-organized Department of Mathematics public lecture "Real Estate in Hyperbolic Space: Investment Opportunities for the New Millennium" by Dr. Colin Adams of Williams College, April 2006
- Member, Appeals Committee on Academic Rules and Policies, Fall 2005 - Spring 2006
- Math consultant for "Breaking the Code," a production of the University of Colorado Department of Theater and Dance, October 2005
- Co-organized Department of Mathematics public lecture "Soap Bubbles and Mathematics" by Dr. Frank Morgan of Williams College, April 2004
- Co-organized Department of Mathematics public lecture "Mathemagics" by Dr. Arthur Benjamin of Harvey Mudd College, March 2002
- Consultation regarding a Mathematica computation for Patrick Weidman, University of Colorado Department of Mechanical Engineering, October 2002
- Gave a presentation on utilizing university resources at a CRCW panel discussion, October 2001
- Gave a math presentation for a Brownie troop, November 2000

Service to the National Science Foundation:

- Member, Grant review panel, February 2014, February 2016
- Member, Division of Mathematical Sciences Committee of Visitors, February 2013

Service to the American Mathematical Society:

- Chair, Western Section Program Committee, 2018
- Member, Western Section Program Committee, 2017

Service to the Association for Women in Mathematics:

- Schafer Prize committee, 1999 - 2001 (committee chair in 2000 and 2001)

Conferences/Special sessions co-organized:

- Co-organized special session on “Geometry of Differential Equations” for American Mathematical Society/Mathematical Association of America Joint Meetings, Denver, CO, January 2020
- Co-organized Geometry and Analysis Day, University of Colorado, October 2018
- Co-organized working group in Calibrated Geometry at Women in Geometry conference, Banff International Research Station, Banff, Canada, November 2015
- Co-organized “New Directions in Exterior Differential Systems: a conference in honor of Robert Bryant’s 60th birthday,” Estes Park, CO, July 2013
- Co-organized Mathematical Sciences Research Institute Workshop on Exterior Differential Systems and the Method of Equivalence in honor of Robert B. Gardner, May 2008
- Co-organized Association for Women in Mathematics workshop at the American Mathematical Society/Mathematical Association of America Joint Mathematics Meetings, New Orleans, LA, January 2007
- Co-organized special session on “Geometry of Differential Equations” for American Mathematical Society Fall Central Section meeting, Lincoln, NE, October 2005
- Co-organized special session on “Geometry of Partial Differential Equations” for American Mathematical Society Fall Central/Western Joint Section meeting, Boulder, CO, October 2003

Manuscripts refereed/reviewed:

- Referee for:
 - **2022:** *Election Law Journal*
 - **2021:** *CASC-2021 (Computer Algebra in Scientific Computing), Differential Geometry And Its Applications, Journal of Geometry and Physics, SIGMA (Symmetry, Integrability, and Geometry: Methods and Applications)*
 - **2020:** *The Hokkaido Mathematical Journal, Journal of Geometry and Physics, Journal of Differential Equations, Journal of Mathematical Analysis and Applications*
 - **2019:** *Journal of Nonlinear Mathematical Physics*
 - **2018:** *Applied Mathematics and Computation, Communications in Analysis and Geometry, The Hokkaido Mathematical Journal, International Journal of Geometric Methods in Modern Physics, Journal of Geometric Analysis, Linear Algebra And Its Applications, Reports on Mathematical Physics*
 - **2017:** *Geometriae Dedicata, Differential Geometry and its Applications, Journal of Geometric Analysis*
 - **2016:** *Applied Mathematics and Computation, Journal of Geometry and Physics*

- **2015:** *Communications in Analysis and Geometry, Proceedings of the Royal Society of Edinburgh, Series A*
- **2014:** *Communications in Analysis and Geometry, Differential Geometry And Its Applications, ICMS Proceedings* volume on “Differential Geometry and Continuum Mechanics,” *Journal of Differential Equations, Journal of Nonlinear Science, SIGMA (Symmetry, Integrability, and Geometry: Methods and Applications)*
- **2013:** *Brazilian Journal of Physics, Canadian Mathematical Bulletin, Differential Geometry and its Applications, Journal of Geometry and Physics, Journal of Mathematical Analysis and Applications, Mathematical Communications*
- **2012:** *Differential Geometry and its Applications, Journal of Geometry and Physics, Journal of Mathematical Analysis and Applications, Letters in Mathematical Physics, Mathematical Communications, SIGMA (Symmetry, Integrability, and Geometry: Methods and Applications)*
- **2010:** *Mathematical Communications, Journal of Geometry and Physics, Journal of Mathematical Analysis and Applications, Osaka Journal of Mathematics*
- **2009:** *Communications in Analysis and Geometry, Duke Mathematical Journal, Journal of Lie Theory*
- **2008:** *Advances in Mathematics, Differential Geometry and its Applications, Journal of Lie Theory*
- **2007:** *Duke Mathematical Journal*
- **2006:** *Foundations of Computational Mathematics, Journal of Mathematical Analysis and Applications, Journal of Zhejiang University Science*
- **2005:** *Journal of Differential Equations*
- **2003:** *Proceedings of the American Mathematical Society, Transactions of the American Mathematical Society*
- **2002:** *Canadian Journal of Mathematics, Journal of Differential Equations*
- **1999:** *Transactions of the American Mathematical Society*
- **1998:** *Differential Geometry and Control, Proceedings of Symposia in Pure Mathematics*
- Reviewer for *zbMATH*, May 2018 - present
- Reviewer for *Mathematical Reviews*, January 2016 - present
- Reviewer for *Zentralblatt*, January 2013 - September 2014

Grant proposals reviewed:

- Reviewer for Banff International Research Station workshop proposal, November 2017
- Reviewer for Natural Sciences and Engineering Research Council of Canada grant proposal, December 2010
- Reviewer for National Science Foundation grant proposals, January 2001, July 2013

External Ph.D. theses reviewed:

- External Reviewer for Ph.D. thesis of Sara Froehlich, McGill University, November 2016
- External Reviewer for Ph.D. thesis of Sunita Vatuk, Princeton University, July 2009
- External Reviewer for Ph.D. thesis of Dennis The, McGill University, July 2008

Miscellaneous outreach activities:

- Co-leader of Voting Methods Team of the League of Women Voters of Boulder County, January 2022 - present
- Gave an interview about Project NExT for Science's NextWave, Science magazine's career-oriented online publication, March 1999

PROFESSIONAL DEVELOPMENT ACTIVITIES:

- Leadership Education for Advancement and Promotion (LEAP) workshop participant, 2005
- Project NExT (New Experiences in Teaching) fellow, Mathematical Association of America, 1998-2000
- Area Teaching Scholars Program participant, University of Colorado, 1998-1999
- Teaching workshop participant, Princeton University Department of Mathematics, January 1998

PROFESSIONAL AFFILIATIONS:

- American Mathematical Society (AMS)
- Mathematical Association of America (MAA)
- Association for Women in Mathematics (AWM)
- MGGG Redistricting Lab
- Institute for Mathematics and Democracy, Wellesley College

**Affirmation of Peter A. Devlin Concerning the Appropriate Process
to Redraw the Assembly Map, dated August 8, 2022**

[pp. 1145 - 1146]

FILED: NEW YORK COUNTY CLERK 08/08/2022 09:47 PM

NYSCEF DOC. NO. 109

INDEX NO. 154213/2022

RECEIVED NYSCEF: 08/08/2022

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

**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 Affirmation in support of Petitioners' Memorandum of Law
Concerning the Appropriate Process to Redraw the Assembly Map in response to this Court's
Order dated June 29, 2022, requesting submissions on the "the proper means by which to redraw
the state assembly map as ordered by the Appellate Division." NYSCEF No. [98](#).

3. Attached hereto as Exhibit 1 is a true and correct copy of the Proposed
Supplemental Letter-Brief of *Amicus Curiae* The League of Women Voters of New York State
dated April 24, 2022, and filed with the Court of Appeals in *Harkenrider v. Hochul*.

4. Attached hereto as Exhibit 2 is a true and correct copy of the Brief of *Amicus Curiae* The League of Women Voters of New York State in Support of Petitioners dated April 14, 2022, and filed with the Appellate Division, Fourth Department, in *Harkenrider v. Hochul*.

5. Attached hereto as Exhibit 3 is a true and correct copy of the curriculum vitae of Dr. Jonathan Cervas, revised May 2022, available at <https://www.polisci.uci.edu/~jcervas/cv.pdf>.

Dated: New York, New York
August 8, 2022



Peter A. Devlin

**Exhibit 1 to Devlin Affirmation-
Proposed Supplemental Letter Brief of Amicus Curiae The League
of Women Voters of New York State dated April 24, 2022,
filed with the Court of Appeals in Harkenrider v. Hochul
[pp. 1147 - 1152]**

FILED: NEW YORK COUNTY CLERK 08/08/2022 09:47 PM

NYSCEF DOC. NO. 110

INDEX NO. 154213/2022

RECEIVED NYSCEF: 08/08/2022

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April 24, 2022

Hon. John P. Asiello
Chief Clerk & Legal Counsel to the Court
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207
filecoa@nycourts.gov

Re: Harkenrider v. Hochul, A.D. No. CAE22-00506; Proposed Supplemental Letter-Brief of
Amicus Curiae The League of Women Voters of New York State

Dear Mr. Asiello:

We submit this proposed supplemental letter-brief, pursuant to the guidance of the Clerk's Office, of the League of Women Voters of New York State (the "League"), which was granted leave to participate as *amicus curiae* in the Fourth Department. The League has been in existence for more than 80 years and has affiliated entities all over the country. The League is a non-partisan, grassroots organization that has stood for, among other goals, fair and equitable representation for the people of New York through redistricting of legislative and congressional districts that are untainted by gerrymandering. See Bierman Aff. ¶8.¹ The League supported and educated the voters about the 2014 Amendment at issue in this appeal, and therefore has a keen interest in its outcome. McGuire Aff. ¶3. The League respectfully refers the Court to and incorporates by reference its Fourth Department *amicus curiae* brief, and limits this proposed supplemental submission to certain points in response to the decision of the Fourth Department.

¹ "Bierman Aff." refers to the Affidavit of Laura Ladd Bierman, dated April 14, 2022, in support of the League's motion in the Fourth Department for leave to file an *amicus curiae* brief. "McGuire Aff." refers to the Affirmation of James M. McGuire, dated April 14, 2022, in support of the same motion. "LWV Br." refers to the Brief of *Amicus Curiae* the League of Women Voters of New York State, dated April 14, 2022, submitted in the Fourth Department. "Slip Op." refers to the slip opinion issued by the Fourth Department in this appeal. The undersigned represents that no party or counsel for any party contributed content to this proposed supplemental letter-brief or participated in the preparation of it in any other manner; and no person or entity (including Holwell Shuster & Goldberg LLP, which is representing the League pro bono) contributed money for such purpose.

**I. The Constitution Clearly Directs A Judicial Remedy
For Violations Of The Process Mandated By The 2014 Amendment.**

There is no dispute that the process mandated by the 2014 Amendment was violated here by the failure of the Independent Redistricting Commission (“IRC”) to submit a second set of redistricting maps (and implementing legislation) to the Legislature to approve or reject in an up-or-down vote. The plurality decision of the Fourth Department did not say otherwise. Instead, the plurality “conclude[d] that the New York State Constitution is silent as to the appropriate procedure to be utilized in th[at] event.” Slip Op. at 3. That conclusion is gravely wrong.

First, the 2014 Amendment sets forth its procedural directions in unmistakably mandatory terms. “*The process*” for redistricting “established” by Section 4, 5, and 5-b “*shall govern*” redistricting unless a court is “*required* to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.” Art. III, Section 4(e) (emphases added). As part of that process, “the redistricting commission *shall* prepare a second redistricting plan and the necessary implementing legislation for such plan.” Art. III, Section 4(b) (emphasis added). And “[s]uch legislation *shall* be voted upon, *without amendment*, by the senate or assembly and, if approved by the first house voting upon it, such legislation shall be delivered to the other house *immediately* to be voted upon *without amendment*.” *Id.* (emphases added); see also LWV Br. at 4–7, 10–13 (further analyzing plain text and citing case law).

Second, if there has been a “violation of law,” including the procedural dictates of the Constitution, Section 4(e) charges the courts to order one of two specified remedies—the adoption of a new redistricting plan or a change to a pre-existing plan. Although Section 5 allows for the Legislature to “have a full and reasonable opportunity to correct” the “legal infirmities” of a “law establishing congressional or state legislative districts,” that remedial path, necessarily, can be available only when it is possible for the Legislature to correct the “legal infirmities.” Here, the Legislature is incapable of curing the procedural violation. Thus, Section 4(e)’s express charge to the Judiciary must be respected; the Court should order one of the two specified remedies contemplated by that subsection.

As Justice Curran noted in dissent, the alternative reading—whereby the Legislature would always be permitted to adopt its own maps regardless of procedural violations or even a failure by the Legislature to fund the IRC, subject only to review by the courts for compliance with the 2014 Amendment’s substantive guarantees—would gut Section 4(e) and the mandatory IRC process:

In my view, a ‘violation of law’ under section 4(e) is a broader concept than the ‘legal infirmities’ in the apportionment plan under section 5. The former includes a violation of law occasioned by action or inaction of the IRC or the legislature in funding or constituting the IRC. Such actions or inactions are violations of law with respect to the process for redistricting established by section 4(e) that are not logically curable except by judicial intervention. . . . I submit that any other reading of section 4(e) renders the IRC a useless formality.

Slip Op. at 13–14 (Curran, J., dissenting in part) (citation omitted).

In response to this clear constitutional construction, the plurality asserted that the 2014 Amendment does not “expressly prohibi[t] the legislature from assuming its historical role of redistricting and apportionment if the IRC fails to complete its own constitutional duty.” *Id.* at 4.² This contention is puzzling. It is evident from the text and context of the 2014 Amendment that the whole point of the amendment was to curtail the Legislature’s “historical role” in redistricting in order to facilitate a process that would lead to less-partisan results. It is impossible to read the carefully crafted, multi-step procedure adopted by the People—including legislative appointment of IRC members, public hearings on the IRC’s work, a “record of votes taken” by the IRC members when they are divided, a first set of IRC maps and a legislative vote without amendment on them, and then a second set of IRC maps and a legislative vote without amendment on that second try—and conclude that the intent of the 2014 Amendment was anything other than a dramatic change to “business as usual.” *See* LWV Br. at 7–9 (summarizing process provisions).

Indeed, the People were promised exactly such a change. As the League pointed out in its *amicus curiae* brief in the Fourth Department, the official text of the ballot question presented to the voters advised that, pursuant to the then-proposed amendment, “the legislature may *only* amend the redistricting plan if the commission’s plan is rejected *twice* by the legislature.”³ And participants in the public debate on the proposal—including members of the Legislature—repeatedly described the amendment in the same terms. *See* LWV Br. at 9, 19–21.

Placed in this context, the 2014 Amendment makes abundantly clear that the Legislature is not empowered to act in place of the IRC, which the amendment created precisely to curtail the Legislature’s power. If the IRC fails to act, there is a “violation of law” that a court must remedy. That the amendment did not list every single eventuality in which there is a “violation of law” does not make the amendment any less clear as applied here. Constitutional text need not shout to speak clearly—or to merit this Court’s respect. *M’Culloch v. Maryland*, 17 U.S. 316, 407 (1819) (“A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.”).

The situation here recalls an earlier constitutional dispute in this Court’s history, when this Court held, over a two-judge dissent, that the Constitution limited the Legislature’s plenary power even though it did not make express what was necessarily implied. In *Pataki v. New York State Assembly*, 4 N.Y.3d 75 (2004), the central question before this Court was the meaning and scope of the “no-alteration” provision of Article VII, Section 4, which states: “The Legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein.” *Id.* at 83–84 (plurality). As this Court observed, “Several of these sections [of the constitutional amendments adopting executive budgeting] vest certain legislative power in the

² It is on this basis that the plurality held that the 2021 statute allowing the Legislature to act in the event the IRC failed to fulfill its constitutional obligations (L 2021, ch. 633, §1) is not unconstitutional.

³ NYLS Constitutional History, 2014 Ballot Proposal 1, at 15 (hereinafter “Amendment Hist.”) (emphases added). The ballot text is also available at [https://ballotpedia.org/New_York_Redistricting_Commission_Amendment_Proposal_1_\(2014\)](https://ballotpedia.org/New_York_Redistricting_Commission_Amendment_Proposal_1_(2014)).

Governor, creating a limited exception to the rule stated in article III, §4 of the Constitution: ‘The legislative power of this state shall be vested in the senate and assembly.’” *Id.* at 83. The Governor and the Legislature disputed whether various enactments by the Legislature constituted impermissible “alter[ations]” of items of appropriation submitted by the Governor. The dispute arose precisely because the executive budgeting amendments did not expressly address what types of enactments would impermissibly “alter” the items of appropriation submitted by the Governor. The Governor argued that these enactments “violate the plain terms of [the no-alteration provision of article VII, §4.]” *Id.* at 88.

This Court agreed, reasoning that if the no-alteration provision were given the meaning contended for by the Legislature, “it would be a completely formal, ineffectual requirement.” *Id.* at 89. The Court went on to observe:

If the Legislature disagrees with the Governor’s spending proposals, it is free, as the no-alteration clause provides, to reduce or eliminate them; it is also free to refuse to act on the Governor’s proposed legislation at all, thus forcing him to negotiate. But it cannot adopt a budget that substitutes its spending proposals for the Governor’s.

Id. at 91; *see also id.* at 81 (explaining that five members of the Court joined the plurality’s reasoning and conclusion on this issue).

The Court’s reasoning in *Pataki v. Assembly* applies equally here. There, as here, the Constitution plainly limited the Legislature’s plenary power on a specific subject. There, as here, the Constitution established a particular procedure for enactments on that subject—indeed, here the procedure is more elaborate than in *Pataki v. Assembly*. And there, as here, the amendment in question granted the Legislature a limited power as part of that procedure without expressly prohibiting the Legislature from exercising that power to supplant the alternative procedure entirely. Given these circumstances, this Court came to the inevitable conclusion that the Constitution meant what it plainly said in imposing the procedure; the Court thus refused to render that procedure ineffectual. It should do the same here.

Finally, the Fourth Department plurality appeared to rely on the fact that the current Legislature adopted the 2021 statute allowing it to act in place of the IRC after the People rejected, in November 2021, a second constitutional amendment on redistricting that would have granted the Legislature that power. *See* Slip Op. at 4. This line of reasoning is passing strange. Courts typically refuse to accord any interpretive weight to one enactment based on the failure to amend it later. *See, e.g., Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186–87 (1994) (“[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute,” because “several equally tenable inferences may be drawn from such inaction[.]”); *Mashnouk v. Miles*, 55 N.Y.2d 80, 87–88 (1982) (“In the face of such conflicting inferences [regarding the meaning of legislative inaction], no particular significance can be attributed to the Legislature’s failure to adopt these amendments.”). In any event, if any conclusion should be drawn from the failure of the 2021 amendment, it is that the People rejected the amendment because they did *not* want to grant the Legislature the very power that it now asserts here. And it is not hard to see why—the failed 2021 amendment would have gutted the process established by the 2014 Amendment that the People actually *did* adopt. The

subsequent 2021 statute sought to achieve the same result; this Court should not permit the Constitution to be so easily subverted.

II. The 2014 Amendment's Process Provisions Provide Substantive Protections Against Gerrymandering

Lurking behind the plurality's rejection of a judicial remedy for the undisputed procedural violation here is a want of respect for the procedure the People adopted. Indeed, at the oral argument in the Fourth Department, one of the members of the panel described the IRC process mandated by Constitution as mere "window-dressing."⁴ Nothing could be further from the truth, and this Court should reaffirm that constitutional procedures may not be disregarded based on subjective assessments of their worth. Indeed, the IRC's creation and the process for redistricting enacted by the 2014 Amendment reflect this State's participation in a vital effort across the nation to address the toxic problem of partisan gerrymandering. *See Ariz. State Legislature v. Ariz. Independent Redistricting Comm'n*, 576 U.S. 787, 798 (2015) (noting that "[s]everal . . . States, as a means to curtail partisan gerrymandering, have . . . provided for the participation of commissions in redistricting" and that "[s]tudies report that nonpartisan and bipartisan commissions . . . create districts both more competitive and more likely to survive legal challenge").

What the current Legislature and the Fourth Department plurality missed is that the redistricting procedure mandated by the Constitution was carefully designed to further substantive goals and values—accountability, deliberation, and some independence from the worst of the partisan political process. *See* LWV Br. at 7–9. Consider, first, that the IRC was designed for accountability and transparency. The IRC's members are appointed by and are accountable to legislative leaders, who in turn are accountable to the people. On top of that, the IRC must hold public hearings and comply with transparency and data-sharing obligations. And its members' votes are publicly recorded whenever the IRC is unable to obtain the seven votes needed to approve a map. The IRC is designed both to be accountable and to utilize an independent process meant to make a bipartisan result more likely.

At the same time, the 2014 Amendment requires the Legislature to follow a specifically prescribed procedure in respect of the IRC's map-drawing. For example, the Legislature must return an up-and-down vote on the IRC's maps, furthering accountability and placing primary responsibility for the map-drawing in the hands of the IRC. And requiring a second round of back-and-forth between the IRC and the Legislature gives the IRC-driven process (which is more likely to achieve a workable political compromise) yet another opportunity to work. In other words, the 2014 Amendment is more than its substantive prohibition on gerrymandering; the Amendment established procedural requirements that would render gerrymandering *less* likely to happen in the first place, because more difficult and politically costly. Enforcing those procedural requirements would, by contrast, make political negotiation and compromise *more* likely. Here, as in other areas of constitutional law, structural requirements serve substantive

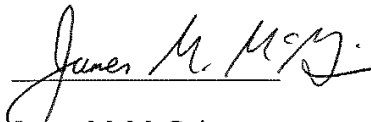
⁴ Recording of Oral Argument at 1:10:19–1:11:09 (Apr.20, 2022), available at <https://ad4.nycourts.gov/njs/term/argument/calendar?date=2022-04-20T00:00:00.000Z&venue=1>.

ends. *Cf. Bowsher v. Synar*, 478 U.S. 714, 730 (1986) (“The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.”).

Thus, to the extent that the Fourth Department was concerned about the Judiciary becoming overly involved in superintending redistricting, that concern should have militated *in favor of* enforcing the Constitution’s prescribed process. Courts are often right to exercise restraint when delicate questions involving politics are presented to it. But this is a situation where, by not enforcing the procedural requirements of the 2014 Amendment according to their plain terms and not imposing the remedies envisioned for a “violation of [that] law,” the Court will invite further persistent judicial involvement in redistricting. That is because refusing to enforce the mandatory process will mean the Legislature will once again have exclusive control over redistricting. That would lead to more extreme and frequent partisan gerrymanders, which would in turn be challenged in court as violations of the anti-gerrymandering prohibition in the 2014 Amendment. The Judiciary would therefore find itself in the position of having to supervise redistricting—as substantive evaluator of maps rather than enforcer of procedural rules—in perpetuity.

On the other hand, enforcing the process the People adopted to encourage political compromise, negotiation, and deliberation will make judicial intervention *less* likely. Once bitten, the members of the IRC and the leaders who appoint them will be twice shy. Such was the calculation the People took in adopting the 2014 Amendment. To be sure, its carefully-specified process does not *guarantee* that the scourge of gerrymandering will be eliminated, but the Judiciary should give that framework a chance to work. The Court would thereby honor the promise of the amendment—an independent redistricting process that conduces to competitive elections rather than protection of incumbents or particular political parties.

Respectfully submitted,



James M. McGuire
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Gregory J. Dubinsky

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cc: All counsel of record

**Exhibit 2 to Devlin Affirmation-
Brief of Amicus Curiae The League of Women Voters of New
York State in Support of Petitioners dated April 14, 2022, filed
with the Appellate Division, Fourth Department, in Harkenrider
v. Hochul
[pp. 1153 - 1178]**

FILED: NEW YORK COUNTY CLERK 08/08/2022 09:47 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 111

RECEIVED NYSCEF: 08/08/2022

FILED: APPELLATE DIVISION - 4TH DEPT 04/18/2022 12:17 PM

CAE 22-00506

NYSCEF DOC. NO. 47

RECEIVED NYSCEF: 04/18/2022

**New York Supreme Court
Appellate Division—Fourth Department**

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,

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

Respondents-Appellants.

**BRIEF OF *AMICUS CURIAE* THE LEAGUE OF WOMEN
VOTERS OF NEW YORK STATE IN SUPPORT OF
PETITIONERS**

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INTEREST OF THE AMICUS

Amicus the League of Women Voters of New York State (the “League”) is a nonpartisan, not-for-profit organization dedicated to promoting the informed and active participation of citizens in government. As part of its mission to empower citizens and strengthen public participation in government, the League works to increase voter registration and turnout, encourages its members and the people of New York to exercise their right to vote as guaranteed by the Constitution, and strives to protect that right from unnecessary barriers to full participation in the electoral process. Formed in 1919 after the passage of a constitutional amendment granting women’s suffrage, the League has evolved to become a guardian of the voting rights of all eligible voters in New York. The League is affiliated with the League of Women Voters of the United States and has 45 local leagues throughout New York.

In March 2012, the League and Citizens Union of the City of New York (the “Citizens Union”) issued a joint press release calling on Governor Cuomo and the Legislature to negotiate a constitutional amendment on redistricting that would achieve the permanent reform that those groups had sought for decades. As discussed below, after a substantial public campaign led by the League and Citizens Union, that reform was achieved.

QUESTION PRESENTED

Whether the Independent Redistricting Commission's undisputed violation of its obligations under Article III, Section 4, which sets out the exclusive process for redistricting congressional and state legislative districts, permits the Legislature to disregard the process and assume power over redistricting that the People denied it in 2014, or whether the Judiciary should remedy the Commission's violation, as required by Article III, Section 4 of the Constitution.

PRELIMINARY STATEMENT

This appeal raises a question of monumental importance: whether the courts will enforce the procedural requirements adopted by the People in the New York Constitution to prevent partisan gerrymandering, which were designed to sharply curtail the Legislature's power over redistricting. Here, that constitutionally mandated process was indisputably vitiated by a combination of the Independent Redistricting Commission's ("IRC") abrogation of its constitutional responsibilities and the Legislature's brazen disregard of the required process—with predictable consequences.

The problem of partisan gerrymandering has long been recognized in New York. As far back as 1966, the League announced its Statement of Position that “whoever is responsible for districting should utilize an impartial commission for drawing the lines.” In 2007, the Committee on Election Law of the Association of the Bar of the City of New York called for a “comprehensive amendment of the reapportionment and redistricting provisions of the New York State Constitution.”¹

As the Committee stated:

Under the current system of redistricting, as practiced during the last three decades of divided partisan control of the Legislature, individual legislators find themselves more beholden to their leaders for re-election than to their constituents. This form of incumbency protection produces noncompetitive elections, permanent legislative deadlock, and a Legislature unresponsive to the will and interests of the voters. A constitutional amendment is necessary to mandate redistricting criteria, and to guarantee a process for decennial redistricting that will foster electoral competition and responsive government.²

¹ New York City Bar Committee on Election Law, A Proposed New York State Constitutional Amendment to Emancipate Redistricting from Partisan Gerrymanders: Partisanship Channeled for Fair Line-Drawing, at 1 (Mar. 2007), *available at* https://www.nycbar.org/pdf/report/redistricting_report03071.pdf.

² *Id.*

In 2014, historic reform at long last came when the People approved a comprehensive and meticulously crafted amendment to the reapportionment and redistricting provisions of Article III of the Constitution (the “Amendment”). For the first time, the Constitution outright banned partisan gerrymandering. As a critical part of its scheme to combat partisan gerrymandering, moreover, the Amendment curtailed the role and authority of the Legislature—composed of the officials elected under the adopted electoral maps—in the redistricting process. It did so by, *inter alia*, establishing an Independent Redistricting Commission charged with the duty of developing redistricting plans for submission to the Legislature, and by prescribing in detail how redistricting maps are to be effectuated. The principal limitation, as stated in the official text of the ballot question presented to the voters, is that “the legislature may *only* amend the redistricting plan if the commission’s plan is rejected twice by the legislature.”³

The courts have now been called upon to address the consequences of the IRC’s flagrant failure to carry out the obligation the People entrusted it to perform under Article III, Section 4(b). That is the duty to “prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such a plan” within fifteen days of being notified that its first redistricting plan or

³ NYLS Constitutional History, *2014 Ballot Proposal 1*, at 15 (hereinafter “Amendment Hist.”) (emphasis added). The ballot text is also available at [https://ballotpedia.org/New_York_Redistricting_Commission_Amendment_Proposal_1_\(2014\)](https://ballotpedia.org/New_York_Redistricting_Commission_Amendment_Proposal_1_(2014)).

plans and implementing legislation had not become law. There is no question the IRC failed to do this. Thus, this Court must decide whether the Amendment prescribes what is to happen as a result—and, if so, whether the Legislature complied with that prescription.

The answer is clear: the plain language of the Amendment prescribes what must happen here. The Amendment added a new subsection (e) to Article III, Section 4 that provides as follows:

The 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 except to the extent that a court is required to order the adoption of, or change to, a redistricting plan as a remedy for a violation of law.

Article III, §4(b) (emphases added). The Amendment thus makes clear beyond cavil both that the process it ordains is the exclusive process for effectuating redistricting and that the Judiciary is empowered to remedy redistricting plans that violate the law.

The Amendment also allowed a limited remedial power for the Legislature (thus qualifying the Judiciary's remedial power to this extent) by adding the following two sentences at the end of Section 5:

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.

Article III, §5.

The Amendment contemplates two possible scenarios—one in which the Legislature is able to correct a legal infirmity and one in which it cannot—and allocates remedial power to the legislative and judicial branches accordingly. Thus, the Legislature is authorized to correct legal infirmities in redistricting laws that it is capable of correcting. In such instances, it has “a full and reasonable opportunity” to do so. But where, as here, a legal infirmity *cannot* be corrected by the Legislature, subsection (e) of Section 4 provides that the Judiciary—not the Legislature— is “required” to remedy the violation of law. Such a remedy is what the Supreme Court adopted here by providing for, albeit conditionally, the appointment of a special master to draw non-gerrymandered maps consistent with the Amendment's requirements.

Respondents below ask that this careful scheme be tossed aside, such that the Legislature be permitted to step into the breach created by the failure of the IRC. Respondents would have the Legislature, upon the failure of the IRC to comply with its mandate, originate and enact a second set of redistricting maps of the Legislature's own design. That approach would manifestly undo the deliberate two-tiered allocation of remedial power established by the Amendment, and with it the Amendment's very purpose. That is, Respondents below would have this Court

restore to the Legislature the plenary power it had before the Amendment curtailed that power—which the Amendment curtailed precisely in order to reduce the opportunities for its abuse. Indeed, as is evident from the Amendment’s text, the very purpose of the IRC’s creation and duties was exactly to check and limit the Legislature’s power over redistricting. That is why the Amendment unmistakably entrusted the remedy for the IRC’s violation of Section 4(b)’s procedural strictures to the non-political branch, the Judiciary.

THE AMENDMENT’S PROCESS PROVISIONS

As this Court is fully aware of the background facts and the nature of the violation of the Amendment, the League will only summarize briefly certain key provisions that are designed to produce bipartisan or at least less partisan redistricting legislation. They do so by enhancing the accountability of the members of the IRC to the legislative leaders and thus, critically, the accountability of the leaders for their appointees’ performance.

- *Accountability through appointment.* Eight of the IRC’s ten members are directly accountable to the legislative leaders who appointed them, and the leaders are accountable to the people for the performance of their appointees; the two other members, appointed by the members in a manner so as to effectively ensure that each is appointed by the leaders of one party, are

thereby also accountable to these leaders. Section 5-b(a)(1)-(5). In addition, the Amendment stipulates that, “[t]o the extent practicable, the members of the [IRC] shall reflect the diversity of the residents of this state with regard to race, gender, language, and geographic residence and to the extent practicable the appointing authorities shall consult with organizations devoted to protecting the voting rights of minority and other voters concerning potential appointees to the commission.” Section 5-b(c).

- *Accountability through public education and participation.* No less than twelve hearings around the state are required so that the public is able “to review, analyze, and comment upon [draft redistricting] plans and . . . develop alternative redistricting plans for presentation to the commission at the public hearings.” Moreover, the draft plans and “relevant data, and related information” must be made “widely available to the public, in print form and using the best available technology.” Section 4(c)(6).
- *Accountability by prohibiting amendment.* The Legislature not only must vote on the IRC’s proposed redistricting legislation, it must vote without amendment. Section 4(b) of the Amendment thus prevents legislators from diluting their accountability for their mandatory votes on the IRC’s proposed legislation. That requirement also imposes accountability on the Governor (in the event that the Legislature adopts the IRC’s proposed legislation) because

her veto power becomes tantamount to an up-or-down vote on the IRC's proposed maps and implementing legislation.

- *Accountability through transparency.* The Amendment requires a “record of the votes taken” by the members of the IRC whenever the commission is unable to obtain seven votes to approve a redistricting plan. Section 5-b(g). By requiring the votes of the members to be recorded when the proposed legislation does not command significant bipartisan support, the Amendment encourages the members to work toward obtaining broad bipartisan support. And it also enhances the accountability of the legislative leaders for the performance by their appointees of their duties.

Senator Nozzolio, who spoke on the Senate floor as the representative for the joint resolution, concisely stated, albeit in part, the critical importance of the Amendment's process provisions:

Mr. President, ... this measure is establishing an independent process, a process that is requiring individuals to put together a product, a product that must be voted on by the Legislature. And those votes [have] consequences ... [T]here will be an enormous amount of citizen input, an enormous amount of process that the public will have an opportunity to engage in.

For the Legislature then to ... as well as the Governor—to ignore that process in any way I believe certainly would be contrary to the public interest.

Senate Debate, January 23, 2013, on Assembly Print Number 2086, Concurrent Resolution of the Senate and Assembly, at 227-28.

ARGUMENT

I. The Amendment Requires The Judiciary To Remedy The Failure Of The IRC And The Legislature To Adhere To the Process The Amendment Mandates.

The parties do not dispute that the Amendment—specifically, Article III, Section 4(b)—was violated when the IRC failed to submit a second redistricting plan and implementing legislation to the Legislature and the Legislature responded by enacting a redistricting plan of its own design. Rather, the parties disagree with respect to the legal consequences of this violation. The ultimate question for this Court is whether the Amendment requires the Judiciary to adopt redistricting maps as a result of this violation or to disregard the violation by permitting the Legislature’s maps to stand.⁴ As shown below, the text of the Amendment establishes both that the process it prescribes for effectuating redistricting maps is the exclusive process for redistricting and that, because the IRC’s violation cannot be corrected by the Legislature, the Judiciary is required to adopt redistricting maps. In other words, as the Amendment sets forth, the Legislature can adopt a redistricting plan and enact implementing legislation only if implementing legislation submitted

⁴ Nothing in the Amendment suggests that the answer to this question turns on a judicial resolution of the dispute between the parties about which appointees should be blamed. The League takes no position on *that* issue.

by the IRC twice fails to become law. The foregoing conclusions are compelled not only by the Amendment's plain text, but also by the Amendment's purpose and by the history surrounding the Amendment's adoption.

A. The Text of the Amendment
Clearly Requires a Judicial Remedy For Procedural Violations.

“In the construction of constitutional provisions the language used, if plain and precise, should be given its full effect.” *People v. Rathbone*, 145 N.Y. 434, 438 (1895). Indeed, “[i]t must be very plain—nay, absolutely certain—that the people did not intend what the language they have employed, in its natural signification, imparts, before a court will feel itself at liberty to depart from the plain reading of a constitutional provision.” *Id.* at 440.

The full effect of the “plain and precise” words of the new subsection (e) of Section 4 is not open to question. “*The process*” for redistricting “*established*” by Section 4, 5, and 5-b “*shall govern*” redistricting unless a court is “*required*” to order the adoption of or changes to, a redistricting plan as a remedy for a violation of law.” Art. III, Section 4(b) (emphasis added). And “[t]he process” “established” by the other parts of the Amendment is phrased in equally unqualified terms: “[T]he redistricting commission *shall* prepare a second redistricting plan and the necessary implementing legislation for such plan.” Art. III, Section 4(b) (emphasis added). And “[s]uch legislation *shall* be voted upon, without amendment, by the senate or assembly and, if approved by the first house voting upon it, such legislation *shall* be

delivered to the other house immediately to be voted upon without amendment.” *Id.* (emphasis added). Indeed, the same unqualified language applies to the IRC’s obligation to submit its first redistricting plan and implementing legislation. Thus, this is the exclusive process for redistricting set forth in the Constitution.

As to remedies for violations of that process, the “full effect” of the “plain and precise” constitutional text is also apparent. The remedy for a violation is the exclusive province of the legislature when the violation is curable by the legislature, and the exclusive province of the courts when the violation is not so curable. Section 5, as amended, also makes clear when a court is “*required*” to remedy such a violation and when the legislature “*shall*” have a full and fair opportunity to correct the law’s legal infirmities.” *Id.* Pursuant to Section 4(e), the courts are charged with ordering one of two specified remedies for a violation of law (the adoption of a new redistricting plan or a change to a pre-existing plan). In turn, under Section 5, when a redistricting law is found to violate the provisions of Article III, the law “*shall* be invalid in whole or in part.” Art. III, Section 5. Unquestionably, moreover, when the Amendment was framed the members of the Legislature knew that violations of these process requirements could occur.

Because the violation at issue here cannot be corrected by the Legislature—which cannot, of course, modify the constitutional deadlines so as to permit the IRC to perform its constitutional duty—the foregoing “plain and precise” language of

Sections 4(b) and 5 sets forth what this Court must do. “Here the language of the constitutional provision speaks its meaning with sufficient clarity to make further inquiry unnecessary.” *People v. Carroll*, 3 N.Y. 2d 686, 689 (1958). That is, because Supreme Court was “required to order the adoption of . . . a redistricting plan as a remedy,” this Court must affirm so much of Supreme Court’s order that provides for the appointment by the court of a neutral expert to prepare redistricting maps.⁵

Thus, the reliance of Respondents below on *Cohen v. Cuomo*, 19 N.Y.3d 196 (2012), is misplaced. The linchpin of the Court of Appeals’ decision in *Cohen* was “the Constitution’s silence” with respect to the formula for calculating the size of the Senate. *Id.* at 202. But the Amendment is *not* silent here—as discussed, it clearly prescribes when the Judiciary must remedy a violation of law, including of the Amendment’s procedural requirements. For the same reason, the Legislature’s invocation of the 2021 statute (L. 2021, C. 633.01) in order to ignore the IRC’s failure to submit a second set of redistricting maps and implementing legislation, and instead draw maps of the Legislature’s own design, violates the Amendment and is therefore unconstitutional.

⁵ The Amendment makes clear that so much of Supreme Court’s order that permitted the legislature to submit maps for its review is unconstitutional. The same is true of so much of the order that required the maps to “receive sufficient bipartisan support,” as it imposes a non-justiciable (and unauthorized) standard.

B. The Amendment's Prescribed Procedure Is a Critical Protection Against Partisan Gerrymandering

The clarity of the text is reason enough to enforce it. But enforcement of the Amendment's plain terms is all the more important because the process mandated by the Amendment is no mere nicety. The two-step procedure guarantees the People a full opportunity to obtain the benefits of nonpartisan—or at least less partisan—redistricting whenever the legislation implementing the IRC's first redistricting plan does not become law. It is a two-fold check, imposing on the IRC the obligation, in the event that partisanship, bad faith, or lassitude creeps into its first deliberation, to try again. The IRC's work thus becomes all the more visible, and its members all the more accountable—in line with the accountability provisions described above. *Supra* pp. 7-9. These reasons, among others, are why the official ballot described the proposal as providing that “the legislature *may only* amend the redistricting plan if the commission's plan is rejected twice by the legislature.” Amendment Hist. at 15. (emphasis added).

By necessary implication, if the Legislature can originate and vote on legislation implementing its own redistricting plan despite the failure of the IRC to perform its constitutional duty to submit a second redistricting plan and implementing legislation, the People will be irrevocably deprived of the second opportunity conferred by the process mandated by the Amendment. That is to say, the check on the Legislature's power—the check that is the very purpose of the IRC

and the duties entrusted to it by the Amendment—would vanish at this important stage of the redistricting process.

It gets worse. Because the obligation on the IRC to submit a second redistricting plan and implementing legislature is set forth in terms as unqualified as the IRC's obligation to submit the first, then whatever holding this Court reaches will apply equally to a failure by the IRC to submit a *first* redistricting plan and implementing legislation. In other words, as a matter of logic and text, what is true of the remedy for a failure at the second step must also be true at the first step—there is no textual basis for distinguishing them. Thus, should this Court permit the Legislature's arrogation to itself of power over redistricting in the circumstances here, the Legislature would necessarily be free to originate and vote on legislation implementing its own redistricting plan despite a failure by the IRC to submit a first redistricting plan and implementing legislation. The position of Respondents below leads ineluctably to the nullification of the Amendment—indeed, what is at stake here is whether the check the Amendment created the IRC to supply will exist *at all*. *Cf. Samuels, Kramer & Co. v. C.I.R.*, 930 F.2d 975, 991-92 (2d Cir. 1991) (rejecting interpretation that “would render many of the Constitution's provisions superfluous”).

By contrast, consider the salutary effect on the constitutional design and structure if this Court were to hold, as it should consistent with the text of Section

4(e) and Section 5, that because the Legislature cannot correct such a constitutional violation, the courts must adopt a redistricting plan. By insisting that the remedial provisions of the Amendment must be enforced as written, this Court would give the members of the IRC a powerful incentive to perform their constitutional duties, and give the legislative leaders who appoint them a powerful incentive to spur them to do so. Surely the uncertain contours of a judicial reapportionment plan would encourage political compromises, compromises that, perforce, would reduce the possibility of abusive gerrymandering. *Cf.* 3 James Boswell, *Boswell's Life of Johnson*, entry for September 19, 1777, p. 167 (1934) (Dr. Samuel Johnson) (“Depend upon it, sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully.”).⁶

Respondents below have raised the concern that, if the procedural strictures of the Amendment are enforced by a court, then disturbing consequences could follow. Specifically, they object that four members of the IRC could force redistricting to the courts by faithlessly refusing to meet or otherwise failing to fulfill their obligations. For this reason, as two of the Respondents say, enforcing the Amendment’s procedural requirements as contemplated in the Amendment itself and Section 4(e) would be “absurd.”⁷

⁶ Available at <https://www.bartleby.com/73/369.html>.

⁷ Memorandum of Law of the Senate Majority Leader and Speaker of the Assembly in support of Appellants’ Motion to Clarify that the Trial Court’s Order is Not in Effect Or, In The Alternative, For A Stay Pending Appeal at 15.

That argument is remarkable. Because, these Respondents say, members of the IRC *could* conceivably act in bad faith, therefore the Judiciary should simply throw up its hands and permit the Legislature to jettison the Amendment's redistricting procedure entirely. This makes no sense, and is tantamount to nullifying the Amendment. Indeed, courts should not deem a statutory provision absurd based on assumptions that public officers will act improperly. *See Hirshfield v. Craig*, 239 N.Y. 98, 109 (1924) (rejecting proposed interpretation of statute and observing "[t]he Courts will not assume that public officers will act dishonestly or dishonorably"). This precept surely applies with even greater force in the interpretation of a constitutional provision. And to indulge Respondents' alarmism is inconsistent with the respect the courts owe to other constitutional officials. *See People ex rel. Spitzer v. Cuomo*, 42 A.D.3d 126, 138 (1st Dep't 2007) ("A due respect for the competence of the Legislature requires us to conclude that the . . . choices it made were considered choices."), *aff'd*, 11 N.Y.3d 64 (2008). Moreover, the fundamental purpose of the Amendment is to assign to the **IRC** the primary role in designing a redistricting plan and implementing legislation. That the IRC may not function perfectly is no reason to refuse to enforce the process required by the Amendment. Perhaps, as anticipated by two of the Amendment's advocates, the

process is not perfect.⁸ But the solution—if there is to be one—to purported imperfections can only be an amendment of the Constitution in accordance with another constitutional process, the amendment process set forth in Article XIX, Section 1. There is certainly no warrant for the courts to nullify the Amendment on the basis of concern that it will not work perfectly.

In any event, if, as Respondents claim to fear, IRC members might not fulfill their duty to attend, a simple solution is available. The last meeting before a constitutional deadline can be set for a day—perhaps as little as one day—before the meeting. Then, if a quorum is not obtained because of the refusal of a sufficient number of IRC members to attend, a writ of mandamus can be issued to compel those members “to perform [the] duty enjoined upon [them] by law.” CPLR 7803(1). Of course, however, a warning that the writ would be sought likely would be sufficient to induce members not to shirk their constitutional obligation.

II. By Enforcing The Procedure Required By The Amendment, This Court Would Reflect The Understanding Conveyed To The People Before They Adopted It

The available evidence from the period leading up to the adoption of the Amendment—including the official ballot putting the question to the People—

⁸ Five Reasons To Vote Yes For the Redistricting Reform Constitutional Amendment, League of Women’s Voters of New York State and Citizens Union of the City of New York, at 4 (“While the redistricting constitutional amendment is not perfect, it is a significant improvement over the current flawed process that produced gerrymandered lines in 2012 and every decade before that going back to the 1970s.”).

confirms what the text and logic of the Amendment make clear. The text of the official description—the “Form of Submission”—of the Amendment that voters saw when they cast their votes, the Assembly Memorandum and the Senate Introducer’s Memorandum in support of the Joint Resolution and description of the anti-gerrymandering proposal that would become the Amendment by the Legislature circulated by advocates like the League and others, all show that the People understood the Amendment to require that the two-stage IRC redistricting process would be followed. Indeed, the public debate repeatedly emphasized that the Legislature would be prohibited from drawing up its own redistricting plan until the IRC had proposed two plans of its own, and those two plans had been publicly rejected by the Legislature in up-or-down votes.

First and foremost, the Form of Submission described the Amendment to the voters, in relevant part, as follows:

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 ... 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.⁹

⁹ Amendment Hist. at 15 (emphasis added). The Election Law requires such a form, Election Law Section 4-108(2), as well as an abstract of the proposed amendment, Elec. Law § 4-108(1)(d). The Attorney General is required by subsection (3) of Section 4-108 to advise the Board of Election “in the preparation and submission of such abstract and such form of submission.”

One must ask: How could the voters possibly have understood the Amendment to mean that the Legislature need *not* twice reject the commission’s redistricting plan before the Legislature could amend the commission’s plan?

The Assembly Memorandum and the Senate Introducer’s Memorandum in support of the Concurrent Resolution both state that the IRC “shall submit to the legislature its proposed district plans, and the legislature[] shall vote upon them without amendment. *If* the legislature fails to pass such plans *twice* it may amend such plans and then vote upon them.” (emphasis added). There is a wealth of other supporting materials.¹⁰

In the face of this clear evidence—in addition to the equally if not more clear text of the Amendment the People adopted on the basis of the understanding above—to nevertheless permit the IRC to fail to do its duty and the Legislature to exploit that failure to step into the breach would be to nullify the process at the heart of the anti-gerrymandering protection and express limitation on the power of the Legislature that the People understood they adopted and imposed in 2014. And, to boot, the members of the Legislature would avoid all accountability to the electorate

¹⁰ See, e.g., League of Women Voters of New York State & Citizens Union, *2014 Constitutional Amendment on New York State Redistricting* (“The legislature will only be able to amend the lines of a Commission’s plan(s) if it fails to achieve legislative approval after **two** “up or down” votes without amendments[.]”) (emphasis in original); Citizens Union Foundation, *Rigged To Maintain Power: How NYS’ 2012 Redistricting Protected Incumbents and Continued Majority Party Control* 7 (Oct. 2014) (“If the legislature twice failed to approve a commission’s plan, it would not be permitted to start over.”), available at <https://nyelectionsnews.files.wordpress.com/2014/10/cu-report-rigged-to-maintain-power.pdf>.

for the votes the Amendment requires them to cast on the second redistricting plan. This Court should not countenance such a betrayal of the will of the People of New York.

CONCLUSION

For all of the foregoing reasons, the League respectfully submits that this Court should modify Supreme Court's order by reversing so much of the order that permits the Legislature to submit redistricting maps and, instead, directing the Supreme Court to retain forthwith a neutral expert to prepare redistricting maps.

Dated: New York, New York
April 14, 2022

Respectfully submitted,

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**Exhibit 3 to Devlin Affirmation-
Curriculum Vitae of Dr. Jonathan Cervas, revised May 2022
[pp. 1179 - 1182]**

FILED: NEW YORK COUNTY CLERK 08/08/2022 09:47 PM

NYSCEF DOC. NO. 112

INDEX NO. 154213/2022

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PUBLICATIONS

- 2022* **11 - Using Folded Seats-Votes Curves to Compare Partisan Bias in the 2020 Presidential Election with Partisan Bias in the Five Other Presidential Elections in the 21st Century.** Jonathan Cervas and Bernard Grofman. 2022. *Presidential Studies Quarterly*, June. [\[READ ONLINE\]](#)
- 10 - Turning Communities of Interest Into a Rigorous Standard for Fair Districting.** Samuel S.-H Wang, Sandra J. Chen, Richard F. Ober, Jr., Bernard Grofman, Kyle T. Barnes, and Jonathan Cervas. 2022. *Stanford Journal of Civil Rights & Civil Liberties*, 18, 101. [\[READ ONLINE\]](#)
- 9 - Why Donald Trump Should be a Fervent Advocate of Using Rank-Choice Voting in 2024.** Jonathan Cervas and Bernard Grofman. 2022. *PS: Political Science & Politics*, 55(1), 1-6. [\[READ ONLINE\]](#)
- 2021* **8 - A Systems Framework for Remedying Distortions in U.S. Democracy.** Sam Wang, Jonathan Cervas, Bernard Grofman, and Keena Lipsitz) 2021. *Proceedings of the National Academy of Science*, 118(50), e2102154118. [\[READ ONLINE\]](#)
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- 2018 2 - Can State Courts Cure Partisan Gerrymandering: Lessons from League of Women Voters v. Commonwealth of Pennsylvania (2018). Bernard Grofman and **Jonathan Cervas**. 2018. *Election Law Journal*, 17(4): 264-285. [\[READ ONLINE\]](#)
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OTHER PUBLICATIONS

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- 2020 How Likely is Trump to Lose the Popular Vote but Win the Electoral College? **Jonathan Cervas** and Bernard Grofman. *Medium.com "3Streams"* [\[READ ONLINE\]](#)
- These Are the Political Consequences of Excluding Undocumented Immigrants from Apportionment. Angela Ocampo and **Jonathan Cervas**. 2020. *Medium.com "3Streams"* [\[READ ONLINE\]](#)
- 2018 Pennsylvania has to draw new congressional districts but getting rid of gerrymandering will be harder than you think. Bernard Grofman and **Jonathan Cervas**. 2018. *The Washington Post*. [\[READ ONLINE\]](#)

IN PROGRESS

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AMICUS CURIAE

2020 Hagopian v. Dunlap, Amicus Curiae with Princeton Electoral Innovation Lab [\[READ ONLINE\]](#)

ASSISTANT TO THE SPECIAL MASTER

2019-2020 *Wright v. Sumter County Board of Elections and Registration*. U.S. District Court, Middle District of Georgia (2020) [\[court opinion\]](#)

2018-2019 *Bethune-Hill v. Virginia State Board of Elections*. U.S. District Court for the Eastern District of Virginia (2019) [\[court opinion\]](#)

2017 *Navajo Nation v. San Juan County, UT*. United States District Court for the District of Utah (2018) [\[court opinion\]](#)

EXPERT WITNESS

Moore v. Lee, Case No. 22-0287-IV (2022). Chancery Court of Tennessee

INVITED TALKS

“Measuring Compactness” Pennsylvania Redistricting with Geographers: Communities of Interest Criteria and Beyond, American Association of Geographers [\[Slides\]](#)

2021 “Tools for Identifying a Partisan Gerrymander”. Princeton University Wintersession.

2019 “2019 NCSL Capitol Forum (Legislative Options for Redistricting Post-conference)”. National Conference of State Legislatures.

“Redrawing the Virginia legislative map: the Bethune-Hill racial gerrymandering case”. Princeton University.

2018 “Triple Play: Election 2018, Census 2020 and Redistricting 2021.” University of Houston, Hobby School.

2016 “Representation of Non-Eligible Resident Populations in Legislative Bodies” Center for the Study of Democracy Graduate Student Conference, UC Irvine.

2015 “Asymmetry in State Grant Distribution: Why Proximity to the State Capital Matters” Western Political Science Association, San Diego, California.

SERVICE TO THE DISCIPLINE

Referee: American Journal of Political Science, Political Geography, Election Law Journal, Public Choice, Political Research Quarterly

FILED: NEW YORK COUNTY CLERK 08/08/2022 09:47 PM

NYSCEF DOC. NO. 112

INDEX NO. 154213/2022

RECEIVED NYSCEF: 08/08/2022

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Letter from Jim Walden to the Honorable Laurence L. Love, dated
August 25, 2022
[pp. 1183 - 1188]



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August 25, 2021

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:

As you know, we represent Petitioners in this Special Proceeding. Yesterday, the Court seemed inclined—over Petitioners’ objection—to order the Independent Redistricting Commission (“IRC”) to redraw the Assembly map under the Court’s supervision, and subject to additional processes (including party submissions and expert reports). Respondents submitted a proposed Order to Show Cause to that effect, and we asked for permission to make suggestions to that proposed order, which the Court granted.


Attached is Petitioner’s proposed order, which does not constitute a waiver of our objection (for the reasons discussed yesterday) to the IRC’s involvement. However, even assuming the Court abides Respondent’s request for the IRC to have a role in re-drawing the map, their order goes much too far at this juncture. There are two problems.


First, on the substance, some of the requested relief is premature and potentially inaccurate, including references to constitutional provisions that do not apply in this context. On that point, the Court has not heard from the IRC directly, which is independent of the Respondents. The IRC has rights, which should be abided, including the right to oppose being added as a necessary party or substantive objections to the role the Respondent’s want the Court to foist on it. According, we have re-drafted the proposed order to give the IRC the opportunity to be heard before the Court prematurely seeks to describe the anticipated role without the IRC’s opportunity to be heard.

Second, the Respondent’s order essentially asks the Court to recognize the IRC as being comprised on only nine members, when the Constitution plainly requires that the existing vacancy be filled.

This order corrects both issues. We include redline and clean versions for the Court’s convenience.

Respectfully submitted,





Jim Walden

*Attorneys for Petitioners Paul Nichols
and Gary Greenberg*

cc: All Counsel (via e-filing and email)

At IAS Part 63, Room 355 of the
Supreme Court of the State of New
York, New York County, at the
New York County Courthouse at
60 Centre Street, New York, NY
10007 on the ____ day of
_____, 2022

PRESENT: Hon. Laurence R. Love, J.S.C.

-----	X	
PAUL NICHOLS, GAVIN WAX,	:	Index No. 154213/2022E
AND GARY GREENBERG,	:	
	:	
Petitioners,	:	[Proposed]
	:	<u>ORDER TO SHOW CAUSE</u>
-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.	:	
-----	X	

Upon reading and filing: (i) the Order of the Appellate Division, First Department, entered on June 10, 2022 [NYSCEF Doc. No. 99]; (ii) the parties various submissions on the proper means to re-draw the invalidated Assembly map~~Memorandum of Law of Respondent Speaker of the Assembly Carl Heastie e filed on August 8, 2022;~~ (iii) ~~the Affirmation of Elaine M. Reich with the exhibits thereto e filed on August 8, 2022;~~ and (iv) ~~all of the papers and proceedings heretofore had herein;~~

AND good cause having been shown therefor, it is hereby

ORDERED, that the New York State Independent Redistricting Commission (“IRC”), or its attorneys, shall show cause before the Court at IAS Part 63, Room 355, of the Courthouse at 60 Centre Street, New York, NY 10007, on , 2022 at A.M./P.M., or as soon thereafter as counsel may be heard, why an Order should not be made and entered:

(a) adding the IRC as a necessary party to this Action,

(b) directing the IRC, under the supervision of the Court, and consistent with the requirements of the New York State Constitution, to re-draw the invalidated Assembly Map,

(c) re-constituting itself, before undertaking the process to re-draw the map, by filling the current vacancy to comply with constitutional requirements. ~~comprised of the following members, David Imamura, Chair, Eugene Benger, Ross Brady,~~

~~John Conway III, Dr. Ivelisse Cuevas Molina, Elaine Frazier, Lisa Harris, Charles Nesbitt and Willis H. Stephens, Jr., or their attorneys show cause before the Court at IAS Part 63, Room 355, of the Courthouse at 60 Centre Street, New York, NY 10007, on _____, 2022 at _____ A.M./P.M., or as soon thereafter as counsel may be heard, why an Order should not be made and entered:~~

~~1. Adding the New York State Independent Redistricting Commission as Respondent to this~~

proceeding;

2. ~~Requiring the Independent Redistricting Commission to initiate the constitutional process for amending the Assembly district map, and to formulate a proposed Assembly map no later than a date to be determined by the Court;~~

3. ~~Further requiring the Independent Redistricting Commission and Respondents thereafter to follow the procedural steps set forth in Article III, §§ 4 and 5 b of the New York State Constitution with respect to the adoption of a remedial Assembly district map; and~~

4. ~~Granting such other and further relief as the Court deems just and appropriate; and it is further~~

ORDERED, that service of a copy of this Order and the papers upon which it is granted, on or before A.M./P.M. on , 2022 by: (a) Federal Express or other overnight delivery service on David Imamura, Chair, Eugene Benger, Ross Brady, John Conway III, Dr. Ivelisse Cuevas-Molina, Elaine Frazier, Lisa Harris, Charles Nesbitt and Willis H. Stephens, Jr. waiving the requirement of a signature, addressed to said commissioners at either 250 Broadway, 22nd Floor, New York, N.Y. 10007 or 302A Washington Avenue Ext., Albany, N.Y. 12203, being the offices of the New York State Independent Redistricting Commission; and (b) via email to each commissioner: David Imamura imamurad@nyirc.gov,

Eugene ~~Benger~~ bengere@nyirc.gov, Ross ~~Brady~~ bradyr@nyirc.gov, John ~~Conway~~

~~conwayj@nyirc.gov~~, Ivelisse Cuevas Molina cuevasmolina@nyirc.gov, Elaine Frazier

frazier@nyirc.gov, Lisa Harris harrislr@nyirc.gov, Charles Nesbitt nesbittc@nyirc.gov, Willis

Stephens, Jr. stephensw@nyire.gov shall be good and sufficient service; and it is further

ORDERED, that the current Parties to this proceeding may make submissions, of no more than 10 pages, responding to the IRC's submissions answering papers, if any, shall to be served by e-filing, on or before on _____, 2022 at _____ A.M./P.M..

_____, 2022.

ENTER.

Hon. Laurence R. Love, J.S.C.

Letter from Jim Walden and Peter A. Devlin to the Honorable Laurence
L. Love, dated September 1, 2022
[pp. 1189 - 1191]



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September 1, 2022

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 write to inform the Court of a submission in a related matter by a current majority of the Commissioners of the Independent Redistricting Commission (IRC). In *Hoffman v. N.Y. State Independent Redistricting Commission*, five Commissioners have taken the *same* position advanced by Petitioners here on the issue of the proper remedy for an invalidated district map; namely, that it is unconstitutional for the IRC to reconvene and submit a new map to the Legislature.¹ The Commissioners' submission is attached hereto as Exhibit A.

In *Hoffman*, ten New York voters filed a verified petition against the IRC seeking a mandamus order requiring the IRC to reconvene and submit a new Congressional map to the Legislature. See Amended Verified Petition for Writ of Mandamus, No. 904972-22 (Sup. Ct. Albany Cnty. Aug. 4, 2022) (NYSCEF No. [47](#)). The action is still pending. The petition's requested remedy is the same that Respondents seek here with respect to the invalidated Assembly map.

A majority of the IRC has since moved to dismiss the petition, arguing that the requested remedy would be unconstitutional.² Just as Petitioners have argued here, the five IRC Commissioners argue that both Article III's plain text and the Court of Appeals' decision in *Harkenrider* foreclose the requested remedy. That is because, as the Commissioners likewise explain, a court-ordered map is the exclusive remedy provided for in Article III, and, further, Article III contains an immovable deadline of February 28, 2022, for the IRC to submit maps to the Legislature:

The last date that the IRC could have possibly and lawfully submitted a second set of maps to the legislature was, under the explicit language of the Constitution,

¹ The five Commissioners are: Ross Brady, John Conway III, Lisa Harris, Charles Nesbitt, and Willis H. Stephens.

² Three members of the IRC did not join the motion to dismiss; rather, they submitted a verified answer indicating that they "do not oppose the relief identified in the first paragraph of Petitioners' prayer for relief as set forth in the Amended Petition." Verified Answer of Respondents David Imamura, Ivelisse Cuevas-Molina, & Elaine Frazier at 14, *Hoffman* (Aug. 26, 2022) (NYSCEF No. [105](#)).

February 28, 2022 (six months ago). This deadline, as the Court of Appeals emphatically noted, “has long since passed.” *Harkenrider*, at *12. There is no provision in the Constitution that would allow for a post-hoc reconvening of the IRC for the purpose of doing that which could only have been constitutionally performed on or before February 28, 2022. . . .

A court-ordered redistricting plan . . . is not only contemplated by the Constitution, it is the exclusive remedial action authorized by the Constitution for procedural or substantive violations in the redistricting process, such as, as here, the IRC’s non-compliance with the mandate to timely submit a second set of plans upon the Legislature’s rejection of its first set, or the Legislature’s unauthorized and unilateral usurpation of the redistricting authority, or both.

It should be noted that the arguments suggested by the instant Petition have already been thoroughly foreclosed not only by the plain language of the Constitution, but by no lesser authority than the Court of Appeals just a few months ago. . . .

Referring in part to the plain directive in the Constitution for a court to order a reapportion plan as a remedy, the Court of Appeals explained that “this is not a scenario where the Constitution fails to provide specific guidance or is silent on the issue.” *Harkenrider*, at *8 (internal citations and quotations omitted). The Court thus observed that: “[i]t is no surprise, then, that the Constitution dictates that the IRC-based process for redistricting established therein ‘*shall* govern redistricting in this state *except* to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.’” *Id.* (citing art III, §4(e) (emphasis added by the Court)). . . .

In other words, there is no going back to address a prior error through a process not permitted or provided by the Constitution, let alone where the exclusive constitutional process for correcting any such error has already taken place. Moreover, as the Court of Appeals recognized, “[t]he procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure. The deadline in the Constitution for the IRC to submit a second set of maps has long since passed.” *Harkenrider*, at *12.

See Ex. A, at 10–16.

The IRC majority’s argument—identical to Petitioners’—underscores Petitioners’ position that the appropriate remedy here is for the Court to oversee proceedings with a special master to adopt a

new Assembly map. A court-ordered map is the only avenue allowed by the plain text of Article III and the Court of Appeals' decision in *Harkenrider*.

Respectfully submitted,

A handwritten signature in dark ink, reading "Jim Walden", is positioned above a horizontal line.

Jim Walden
Peter A. Devlin

*Attorneys for Petitioners Paul
Nichols and Gary Greenberg*

cc: All Counsel (via e-filing and e-mail)

**Exhibit A to Letter-
Memorandum of Law in Support of the Commissioner Respondents'
Motion to Dismiss and in Opposition to Order to Show Cause, dated
August 26, 2022
[pp. 1192 - 1213]**

FILED: ALBANY COUNTY CLERK 08/26/2022 09:16 PM

NYSCEF DOC. NO. 109

INDEX NO. 904972-22

RECEIVED NYSCEF: 08/26/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

Anthony S. Hoffmann; Marco Carrion; Courtney Gibbons;
Lauren Foley; Mary Kain; Kevin Meggett; Clinton Miller;
Seth Pearce; Verity Van Tassel Richards; and Nancy Van
Tassel,

Index No.: 904972-22

Petitioners,

For an Order and Judgement Pursuant to Article 78 of the
New York Civil Practice Law and Rules

- against -

The New York State Independent Redistricting
Commission; Independent Redistricting Commission
Chairperson David Imamura; Independent Redistricting
Commissioner Ross Brady; Independent Redistricting
Commissioner John Conway III; Independent Redistricting
Commissioner Ivelisse Cuevas-Molina; Independent
Redistricting Commissioner Elaine Frazier; Independent
Redistricting Commissioner Lisa Harris; Independent
Redistricting Commissioner Charles Nesbitt; and
Independent Redistricting Commissioner Willis H.
Stephens,

Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS
AND IN OPPOSITION TO ORDER TO SHOW CAUSE**

MESSINA PERILLO HILL LLP
285 West Main Street, Suite 203
Sayville, New York 11782
(631) 582-9422

Attorneys for Respondents
Commissioner – Ross Brady
Commissioner – John Conway III
Commissioner – Lisa Harris
Commissioner – Charles Nesbitt
Commissioner – Willis H. Stephens

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Independent Redistricting Commissioner Ross Brady, Independent Redistricting Commissioner John Conway III, Independent Redistricting Commissioner Lisa Harris, Independent Redistricting Commissioner Charles Nesbitt, Independent Redistricting Commissioner Willis H. Stephens, (collectively hereinafter the “Moving Respondents”), by their attorneys, Messina Perillo Hill LLP, hereby respectfully submit the within Memorandum of Law in Support of their Motion to Dismiss, brought pursuant to CPLR 3211(a)(1), (5), (7) and CPLR 7804(f), the Amended Petition and Proceeding as against said Moving Respondents, together with such other and further relief as the Court deems just and proper. The Memorandum of Law is also submitted in opposition to the Petitioners’ Order to Show Cause.

PRELIMINARY STATEMENT

This Article 78 proceeding in the nature of a mandamus to compel has no valid basis in law. The sole relief it seeks is to compel the New York State Independent Redistricting Commission (the “IRC”) to act without legal authority and in violation of the New York State Constitution. Specifically, the Petition imagines that it is legally permissible and logistically possible for the IRC and its members to advance a second set of proposed maps to the Legislature (sometime, at the earliest, after September 9, 2022, the return date of this Petition) despite the fact that the Constitution requires and only permits such act to take place on or before February 28, 2022—a date that passed some six months ago. There is simply no legal authority for this request, and, in fact, the remedy sought is wholly unconstitutional. Not only does the Petition seek to compel this plainly unconstitutional and impossible outcome, it does so brazenly after the Court of Appeals gave extensive treatment to the constitutional provisions at issue and thoroughly foreclosed the arguments suggested by this Petition.

The plain language of the Constitution provides that a court may order a redistricting plan in order to remedy a violation of law. NY Const. Art. III, §4(e). Such judicial intervention was required after a) the IRC was found to have not submitted a second set of maps as required by the Constitution and b) the Legislature unilaterally and without legal or constitutional authority seized control of the redistricting process and proceeded to enact into law a redistricting plan that was an egregious partisan gerrymander. The Petition only concerns itself with the first of these violations and largely glosses over the second. More importantly, the Petition fails to reckon with the fact that the Constitution sets forth a procedure for remedying such violations—and that is through judicial intervention and a court-ordered redistricting plan. And that remedy has already been undertaken and completed. Petitioners appear to disapprove of the existence of a judicial remedy, and perhaps even more so, to be displeased with certain of the results of the court-ordered redistricting plan (the Petition concerns only the congressional districts)—but this mandamus proceeding is hardly the venue for seeking an amendment to the Constitution or a different outcome to the redistricting process. The Petition should be denied and the proceeding should be dismissed.

BACKGROUND

Every ten years, once census data is made available, New York State’s senate, assembly and congressional districts must be reapportioned to account for any population shifts and potential changes in the state’s allotted number of congressional representatives. See N.Y. Const., Art. III, § 4. This process is known as “redistricting.”

In 2014, the New York State Constitution was amended with the passage of a set amendments addressed at eliminating partisan gerrymandering in the redistricting of election

districts. See N.Y. Const., Art. III, § 4(c)(5). Prior to said amendments, the State Legislature had exclusive control over the redistricting process. See Harkenrider v. Hochul, 2022 N.Y. Slip Op., 02833, 2022 WL 1236822, *1 (2022) (“In New York, prior to 2012, the process of drawing district lines was entirely within the purview of the legislature,[] subject to state and federal constitutional restraint and federal voting laws, as well as judicial review.”). This control by the Legislature resulted in stalemates “often necessitating federal court involvement in the development of New York’s congressional maps.” Id. It also resulted in “allegations of partisan gerrymandering...” Id. The 2014 amendments changed “both the substantive standards governing the determination of district lines and the redistricting process” itself. Id., at *2

Pursuant to the 2014 amendments, the New York State Independent Redistricting Commission (the “IRC”) was established to determine the district lines. See N.Y. Const., Art. III, §§ 4 & 5-b. The IRC is a bi-partisan commission, which consists of ten members appointed by the majority and minority leaders of the State Legislature, meeting the criteria set forth in the State Constitution. See id., at § 5-b(a)-(c). The IRC is obliged to undertake the initial drawing of a set of proposed redistricting maps within a constitutionally mandated timeline. Id. The proposed maps are then to be submitted to the Legislature for a vote, without amendment. Id. Should these initial maps be rejected, the IRC is to prepare a second set of maps, (once again within a constitutionally mandated timeline) for the Legislature to vote on, again without amendment. See N.Y. Const., Art. III, § 4. If this second set of maps is rejected, only then can the Legislature make amendments to the IRC’s proposed maps. Id. If necessary, failures in the redistricting process are subject to redress through judicial intervention and a court-ordered process of preparing redistricting maps and plan. Id.

As a result of population change, New York State lost a congressional seat and other existing districts were “malapportioned” necessitating a redistricting. Harkenrider, 2022 WL 1236822, *2. As such, starting with the next redistricting cycle after the passage of the amendments (the 2020 cycle) the IRC was formed. The various commissioners were appointed, and the IRC commenced its work, holding the numerous (not less than 12) required public hearings through 2021. See N.Y. Const., Art. III, § 4 (“The independent redistricting commission shall conduct not less than one public hearing on proposals for the redistricting of congressional and state legislative districts in each of the following (i) cities: Albany, Buffalo, Syracuse, Rochester, and White Plains; and (ii) counties: Bronx, Kings, New York, Queens, Richmond, Nassau, and Suffolk.”).

In December 2021 and January 2022, after the public hearings concluded, the IRC met and ultimately was unable to agree on a set of proposed maps. “According to members appointed by the minority party, after agreement had been reached on many of the district lines, the majority party delegation of the IRC declined to continue negotiations on a consensus map, insisting they would proceed with discussions only if further negotiations were based on their preferred redistricting maps.” Harkenrider, 2022 WL 1236822, *2. The IRC was to submit the proposed redistricting plan (and the accompanying implementing legislation) on or before January 1, 2022, or as soon as practicable thereafter, but no later than January 15, 2022. See, N.Y. Const. Art. III, § 4(b).

Given its impasse, in early January 2022, the IRC submitted two sets of proposed redistricting plans to the Legislature (a set from each delegation) as per the Constitution. See id., and N.Y. Const., Art. III, § 5-b(g). These maps were rejected by the Legislature. Upon being notified of the rejection, the IRC was charged with preparing a second set of proposed plans for

legislative review within 15 days (specifically, on or before January 25). See, N.Y. Const. Art. III, § 4(b) (“If either house shall fail to approve the legislation implementing the first redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto, each house or the governor if he or she vetoes it, shall notify the commission that such legislation has been disapproved. Within fifteen days of such notification and in no case later than *February twenty-eighth*, the redistricting commission shall prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan.”)(Emphasis added).

On January 24, 2022, the day before the 15-day deadline expired, and over a month before the IRC’s February 28, 2022, deadline to complete the redistricting process, “the IRC announced that it was deadlocked and, as a result, would not present a second plan to the legislature.” Harkenrider, 2022 WL 1236822, *2.

Within a week of the IRC’s January 24, 2022 announcement, the Democratic controlled Legislature, without “consultation or participation by the minority Republican Party” prepared and enacted new redistricting maps. Id. On February 3, 2022, the New York State Governor signed this new redistricting legislation into law.

On the same day, February 3, 2022, various New York State voters commenced a proceeding under New York State Constitution Article III, § 5 and Unconsolidated Laws § 4221, Harkenrider v. Hochul, No. E2022-0116CV, in Steuben County,¹ alleging that the “process by which the 2022 maps were enacted was constitutionally defective because the IRC failed to submit a second redistricting plan as required....and, as such, the legislature lacked authority to compose and enact its own plan.” Harkenrider, 2022 WL 1236822, *3. That proceeding also alleged that the congressional map was unconstitutionally gerrymandered because it “‘packed’ minority-party

¹2022 WL 1819491, at *1 (Sup. Ct., Steuben Co., Mar. 31, 2022).

voters into a select few districts and ‘cracked’ other pockets of those voters across multiple districts.” Id.

After trial, “the Supreme Court declared the congressional, state senate and state assembly maps ‘void’ under the State Constitution” and that the congressional map “violated the constitutional prohibition on gerrymandering....” Id. An appeal followed, and a divided Appellate Division vacated the declaration that the senate and assembly maps were unconstitutional but otherwise affirmed and remitted. Id., at * 4. The parties thereafter cross appealed as of right to the Court of Appeals, resulting in a decision ultimately remitting the matter to the Supreme Court who, with the assistance of the special master, was directed to “adopt constitutional maps with all due haste.” Id., at *13.

In Harkenrider, the Court of Appeals found that where a redistricting plan is void and unconstitutional, as was the case here, the State Constitution authorizes the judiciary to step in and “order the adoption of, or changes, to a redistricting plan.” Id., at *12; and N.Y. Const., Art. III, § 4(e) (“The 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 except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.”). Specifically, the Court of Appeals held -- not that the IRC should propose new maps -- but that, “[w]here as here, legislative maps have been determined unenforceable, we are left in the same predicament as if no maps had been enacted. Prompt judicial intervention is both necessary and appropriate to guarantee the People’s right to a free and fair election.” Harkenrider, 2022 WL 1236822, *12.

At paragraph 14 of the Amended Petition, Petitioners misleadingly imply that the Court of Appeals determined that the only 2022 elections will occur under the court-ordered plan and

proceed to suggest, without any legal authority or basis whatsoever, that subsequent elections should occur under plans adopted through the IRC and the Legislature. As Petitioners well know, however, the Court of Appeals directed a course of action, in adherence with §4(e) of the Constitution, that required a court-order adoption of a redistricting plan to apply through the next decennial cycle.

The Petitioners herein did not seek to intervene in Harkenrider proceeding at any time. Petitioners did not commence this proceeding until June 28, 2022.

Petitioners herein did not seek to commence a mandamus proceeding when the IRC announced it was deadlocked on January 24, 2022, nor did they object when the Governor signed into law the Legislature-drawn plans on February 3, 2022.

Petitioners herein did not seek to commence a mandamus proceeding at any time prior to the IRC's February 28, 2022 Constitutional deadline which foreclosed the time period within which the IRC could act. The IRC had and has no authority to act beyond this date. See N.Y. Const., Art. III, § 4(b).

ARGUMENT

STANDARD OF REVIEW

In evaluating a motion to dismiss, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. See Goshen v. Mutual Life Ins. Co. of NY, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 (2002). However, bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference. See Ruffino v. New York City Tr. Auth., 55 A.D.3d 817, 818, 865 N.Y.S.2d 667, 668-69 (2d Dept 2008).

Article 78 motions to dismiss and “objections are appropriately afforded review similar in nature to that applied to defenses raised in a pre-answer motion to dismiss pursuant to CPLR 3211.” Lally v. Johnson City Cent. Sch. Dist., 105 A.D.3d 1129, 1131, 962 N.Y.S.2d 508 (3d Dep’t 2013). Mandamus to compel is an extraordinary remedy that is available only in limited circumstances. See Hene v. Egan, 206 A.D.3d 734, 735–36, 170 N.Y.S.3d 169, 171 (2d Dep’t 2022) (citing County of Fulton v. State of New York, 76 N.Y.2d 675, 678, 564 N.E.2d 643; Klostermann v. Cuomo, 61 N.Y.2d 525, 463 N.E.2d 588). “[T]he remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion.”

POINT I

THE PETITION FAILS TO STATE A CLAIM

The Amended Petition (“Petition”) fails to state a claim upon which relief may be granted because it seeks to compel an action that is unconstitutional. In the lone prayer for relief, the Petition asks this Court to command the IRC to submit “a second round of proposed congressional districting plans for consideration by the Legislature” for use in “subsequent elections this decade.” See Petition at p. 20. We are presently at the end of August 2022. The last date that the IRC could have possibly and lawfully submitted a second set of maps to the legislature was, under the explicit language of the Constitution, February 28, 2022 (six months ago). This deadline, as the Court of Appeals emphatically noted, “has long since passed.” Harkenrider, at *12. There is no provision in the Constitution that would allow for a post-hoc reconvening of the IRC for the purpose of doing that which could only have been constitutionally performed on or before February 28, 2022. Thus, despite citing the IRC’s non-compliance with a constitutional mandate as the basis for this

proceeding, Petitioners ask for a remedy that would itself violate the very same section of the Constitution.²

Petitioners here seek to compel the IRC to comply with a mandate to provide a second set of maps, but they refer only to a portion of the mandate (that the submission be made) while largely ignoring that the mandate required the maps to be submitted by an absolute deadline (no later than February 28, 2022). All of the dates in Article III, §4(b) regarding the submission of plans by the IRC, the section upon which this mandamus action relies, explicitly concern the year “two thousand twenty-two” and following subsequent decennial census in years “ending in two”; i.e., 2022, 2032, 2042 and so forth. Thus, the deadline was and is, immutably, February 28, 2022. The Constitution does not contemplate or permit a “do over” or re-setting of the deadline to some date other than or subsequent to February 28, 2022. This proceeding seeks to have the Court compel a course of action that reverts three phases back in the process that has already played out. There is no legal authority for such recourse in the Constitution (which, as discussed, below expressly sets forth the sole remedy). Here again, because the proceeding seeks to compel an action that is unconstitutional, it fails as a matter of law and must be dismissed.

The relief sought by the Petition fails for the additional but related reason that the Petition ignores that the Constitution expressly provides the singular and exclusive remedy for the very kind of violation that the Petitioners complain of herein. This is not a situation where a novel remedy needs to be fashioned because of an absence of authority. To the contrary, the Constitution

²See Council of City of New York v. Bloomberg, 6 N.Y.3d 380, 388 (2006) (“The theory the Council advocates would put the courts in the unacceptable position of directing an officer to violate his or her oath of office by enforcing an unconstitutional law, and would contradict the principle that ‘mandamus is never granted for the purpose of compelling the performance of an unlawful act’”) citing People ex rel. Sherwood v. State Bd. of Canvassers, 129 N.Y. 360, 370, 29 N.E. 345 [1891].

already addresses what must happen in the event of a violation. Moreover, here, that constitutionally prescribed remedial process has already taken place.

The New York State Constitution, Article III, § 4(e) unambiguously provides as follows:

The 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 *except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.*

N.Y. Const. Art III, §4(e) (emphasis added).

A court-ordered redistricting plan, thus, is not only contemplated by the Constitution, it is the exclusive remedial action authorized by the Constitution for procedural or substantive violations in the redistricting process, such as, as here, the IRC's non-compliance with the mandate to timely submit a second set of plans upon the Legislature's rejection of its first set, or the Legislature's unauthorized and unilateral usurpation of the redistricting authority, or both.³ Here, in the face of such violations, that constitutional process was invoked in the context of Harkenrider and resulted, after review and remand by the Court of Appeals, in a court-ordered redistricting plan.

Implicitly, the Petitioner's sole prayer for relief is also a request to, for all purposes other than the 2022 election cycle, invalidate and replace the lawfully adopted redistricting plan that emerged from the Harkenrider proceeding. Here again, such relief is plainly unconstitutional. If the Constitution intended to provide that if judicial intervention were required to correct a violation of law, any resulting court-ordered redistricting plan would temporarily remain in place only for

³"Where, as here, legislative maps have been determined to be unenforceable, we are left in the same predicament as if no maps has been enacted." Harkenrider at *12.

so long as it took to correct the violation through non-judicial means, the Constitution would say as much. It does not.

It should be noted that the arguments suggested by the instant Petition have already been thoroughly foreclosed not only by the plain language of the Constitution, but by no lesser authority than the Court of Appeals just a few months ago. To begin with, the Court recognized that “the Constitution explicitly authorizes judicial oversight of remedial action in the wake of a determination of unconstitutionality” (Harkenrider, at *12)⁴ This proceeding impermissibly seeks to replace the constitutionally authorized remedial course of action with an entirely *ultra vires* mechanism of the Petitioners’ own invention. The Court of Appeals, however, has explained that it declined to engage or indulge in interpreting the state constitution through “interstitial and interpretive gloss” in a manner that “substantially alters the specific law-making regimen.” Harkenrider at *6, quoting Matter of King v. Cuomo, 81 NY2d 247, 253 (1993). It is never appropriate to ask the courts to effectively draft legislation that does not exist, a prohibition that is all the more pronounced when it comes to the Constitution. And, to be sure, to attempt to do so by the incongruous and unavailing mechanism of an Article 78 mandamus provision is misplaced and misguided in the extreme.

Referring in part to the plain directive in the Constitution for a court to order a reapportionment plan as a remedy, the Court of Appeals explained that “this is not a scenario where the Constitution fails to provide specific guidance or is silent on the issue” Harkenrider, at *8 (internal citations and quotations omitted). The Court thus observed that: “[i]t is no surprise, then, that the

⁴As the Court of Appeals recognized, New York’s past redistricting efforts have often necessitated federal judicial intervention. Harkenrider at *1 (citing Favors v. Cuomo, 2012 WL 928223, at *1 (E.D.N.Y. Mar. 19, 2012); Rodriguez v. Pataki, 2002 WL 1058054 (S.D.N.Y. May 24, 2002); Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt, 796 F.Supp. 681 (E.D.N.Y.1992).

Constitution dictates that the IRC-based process for redistricting established therein ‘*shall* govern redistricting in this state *except* to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.’” Id. (citing art III, §4(e)(emphasis added by the Court). Indeed, the Court emphasized that by providing that the IRC process shall govern “except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law,” the Constitution specifically provides for and authorizes a court-ordered redistricting plan as the exclusive remedy for the precise circumstances that exist herein. See Harkenrider, at *12, fn. 20.

In other words, there is no going back to address a prior error through a process not permitted or provided by the Constitution, let alone where the exclusive constitutional process for correcting any such error has already taken place. Moreover, as the Court of Appeals recognized, “[t]he procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure. The deadline in the Constitution for the IRC to submit a second set of maps has long since passed.” Harkenrider, at *12.

“[I]n any event, here, due to the procedural constitutional violations and the expiration of the outer February 28th constitutional deadline for IRC action, the legislature is incapable of unilaterally correcting the infirmity.” Harkenrider, at *12, fn. 19. So too is the IRC incapable of engaging in a post-hoc corrective action. The IRC has no constitutional authority to submit a reapportionment plan after February 28, 2022, nor to do so after the constitutionally-authorized procedure for judicial adoption of a reapportionment plan already been executed and completed.

The petitioners in the Harkenrider proceeding asserted that the 2022 maps enacted by the legislature were constitutionally defective both because the IRC did not submit a second redistricting plan and because the legislature lacked authority to compose and enact its own plan.

Either or both of these violations triggered the exclusive remedial action set forth in the constitution—the court ordering of a redistricting plan. See N.Y. Const., Art III §4(e); Harkenrider, at *12 (“Where, as here, legislative maps have been determined to be unenforceable, we are left in the same predicament as if no maps has been enacted.”).

By determining that there were such violations, the Supreme Court declared the legislature’s congressional, senate, and assembly maps void (having also separately determined that they were unconstitutionally gerrymandered) and, following appellate review by the Appellate Division and Court of Appeals, the latter of which confirmed and upheld the Supreme Court’s rulings, the exclusive remedial and sole remaining path under the Constitution to adopt a reapportionment plan was carried out and furthered by the Harkenrider Court. That plan has been adopted in full compliance with the Constitution (indeed, the very same section, Art. III, §4, that the Petitioners herein cite and rely upon, but only in self-serving half-measures). This proceeding is effectively an attempted end-run around Harkenrider and attempt to obtain a contrary result. It seeks to undo that which has already been vetted through the state’s highest court and required by the plain language of the state constitution.

It is notable that in the final numbered paragraph of the Amended Petition, Petitioners offer the following conclusion: “The Court of Appeals was correct: The IRC failed to complete its mandatory duty to submit a second set of congressional plans to the Legislature for consideration.” Am. Pet. at 65. Emblematic of the entire Petition, this offering tells only half (or perhaps less than half) the story. It tellingly omits reference to the fact that well before the February 28, 2022 deadline arrived, the Legislature unilaterally wrested redistricting authority to itself and proceeded to enact maps that were widely criticized for being egregious partisan gerrymanders and were deemed, for that reason, to be unconstitutional by the Court of Appeals. More importantly, it

completely fails to recognize that the Court of Appeals (the same one that Petitioners says was “correct”), determined that the Supreme Court, Steuben County, properly determined that, as a result of both the IRC’s and Legislature’s procedural constitutional violations, the authority prescribed by §4(e) thereof, a court-ordered redistricting plan was the exclusive remedy available under the Constitution.

POINT II

MANDAMUS RELIEF IS NOT APPROPRIATE OR AVAILABLE

Mandamus relief is not warranted or appropriate. As set forth above, the relief sought by this proceeding is unavailable because it seeks to compel an act that is not permitted by the express language of the Constitution. Nor may mandamus be used to compel an act that is impossible, impracticable, or to address an issue that has become moot. Because mandamus will not be granted to compel the performance of an act where compliance is impossible, or to compel a body or officer to perform an act that is not within his or her authority or for which no legal basis exists, it is not available to the Petitioners herein. See CPLR § 7803(1); and generally, CPLR §7801 et seq.

Mandamus to compel is “an extraordinary remedy that lies only to compel the performance of acts which are mandatory, not discretionary, and only when there is a clear legal right to the relief sought.” Curry v. New York State Educ. Dept., 163 A.D.3d 1327, 1330 (3d Dep’t 2018) citing Matter of Shaw v. King, 123 A.D.3d 1317, 1318-1319 (3d Dep’t 2014)(internal quotation marks and citation omitted).

“Manifestly, mandamus does not lie to compel an official act for which no legal basis exists.” Matter of Altamore v Barrios-Paoli, 90 N.Y.2d 378, 384-85 (1997) (“petitioners have

failed to allege any basis upon which the Director would have had the authority to extend the 7022 list beyond the scheduled May 25, 1995, expiration date”). Nor may mandamus compel an unconstitutional act. See Council of City of New York v Bloomberg, 6 N.Y.3d 380, 388 (2006)(“The theory the Council advocates would put the courts in the unacceptable position of directing an officer to violate his or her oath of office by enforcing an unconstitutional law, and would contradict the principle that ‘mandamus is never granted for the purpose of compelling the performance of an unlawful act’”)(citing People ex rel. Sherwood v. State Bd. of Canvassers, 129 N.Y. 360, 370, 29 N.E. 345 [1891]).

Likewise, “Mandamus will not lie to compel a public official to perform a vain or useless or illegal act,” Matter of Thorsen v. Nassau County Civ. Serv. Comm’n, 32 A.D.3d 1037, 1037-38 (2d Dep’t 2006).

Furthermore, courts are precluded, “from considering questions which, although once live, have become moot by passage of time or change in circumstances.” Matter of Jenkins v. Astorino, 121 A.D.3d 997, 999 (2d Dep’t 2014) (citing Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714, 409 N.E.2d 876). In Jenkins, the court reasoned that “inasmuch as the 2012 budget expired and was superseded, the issues raised on this appeal have been rendered academic.” See id.

The Petitioners’ challenge is moot. Pursuant to the State Constitution the IRC is required to complete its redistricting role by February 28, 2022. It has no authority to proceed beyond that date. In Harkenrider, 2022 WL 1236822 the New York State Court of Appeals determined that: “the procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure” and, under the circumstances presented, the New York State Constitution required the judiciary “‘order the adoption of, or change to, a redistricting plan,’ in

the absence of a constitutionally viable legislative plan.” Id., at *12; and see N.Y. Const. Art. III §4(e). The judiciary has done so.

Here, the Petition for a writ of Mandamus fails for all of the above reasons. It seeks to compel an unlawful and unconstitutional act; to compel Respondents to act in a manner for which they have no authority; to compel an act that is impossible and impracticable; to compel an act to address an issue that is moot and to which the Petitioners have no clear legal right.

Likewise, while acknowledging that the 2021 legislation that purported to fill “gaps” in the Constitution’s redistricting procedure was struck down by the Court of Appeals, the Petition’s frequent reference to that legislation seems to impermissibly urge this Court to act as if it hadn’t been stricken. The 2021 legislation, however, was properly invalidated because it was a transparent attempt to achieve that which failed at the voting booth—when the People were asked to vote on a proposed constitutional amendment and declined to do so.

Although attempting to use an Article 78 mandamus proceeding as the vehicle, the goal and purpose of this litigation is more candidly revealed in paragraphs 51 through 56 of the Petition, where Petitioners critique the court-ordered maps and redistricting plan from Harkenrider. Petitioners, it appears, would prefer different maps. That wish or desire, however, is not a proper basis for this mandamus proceeding. Any perceived basis to seek review of the Harkenrider maps should have been sought in that court and in that proceeding, or some appeal directly therefrom.

As previously discussed, to the extent that this proceeding suggests that the court-ordered redistricting plan coming out of Harkenrider could merely serve as a placeholder until the redistricting process could be re-engaged from some interim point from its past proceedings, that suggestion has no basis in the law and is completely unconstitutional. As a result of the constitutional process by which the 2022 redistricting plan was required to be court-ordered, the

Harkenrider maps serve to define legislative districts through the next census (2030) and redistricting cycle. See Harkenrider, at *14 (Troutman, dissenting in Part) (describing application of the court-ordered maps for “the next ten years”).

POINT III

THE PETITION IS UNTIMELY

The Petitioners’ challenge must be dismissed as untimely. The limitations period applicable to a mandamus to compel proceeding is four months after the body in question has refused to act. See CPLR 217 & 8701 et seq. Here, the Amended Petitioner alleges that the IRC announced that it was deadlocked and would not be submitting a map on January 24, 2022. See Am. Pet. at paras. 37-39. This was well before its constitutional deadline of February 28, 2022. Upon this alleged declaration by the IRC, Petitioners made no demand that the NYSIRC prepare a proposed map. Nor did Petitioners seek judicial intervention at any time between January 24, 2022 and February 28, 2022, when it may have arguably been actionable and not yet moot—nor did they seek it any time within the four-month limitations period as calculated from January 24, 2022.

The Petition alleges that the IRC announced that it was deadlocked on January 24, 2022. The constitutional deadline for the IRC to submit a second set of maps was February 28, 2022. Any mandamus action seeking to compel the IRC to take certain actions could have been brought within that window of time. After February 28, 2022 passed, however, compliance with that constitutional provision became a temporal impossibility. In order for mandamus to have even been theoretically viable, it would have had to have been brought sometime between January 24,

2022, and February 28, 2022. After February 28, 2022, there was no authority or ability for the IRC to continue to act under the Constitution.

Moreover, the four-month statute of limitations applicable to this Mandamus claim would run from when Petitioner first knew or should have known that the act they would seek to compel was not going to happen. See CPLR 217. That date would have been January 24, 2022 when the IRC announced that it was deadlocked.

For these same reasons, in addition to being untimely under the applicable limitations period, this proceeding is also barred by laches – it is clear that the Petitioners were perfectly happy to ignore the NYSIRC if the Legislature’s February 3, 2022 maps were upheld, rather than being set aside by the Court of Appeals. See League of Women Voters of New York State v. New York State Bd. of Elections, 206 A.D.3d 1227, 1229, 170 N.Y.S.3d 639, 641–42, leave to appeal denied, 38 N.Y.3d 909, 190 N.E.3d 570 (2022), reargument denied, 38 N.Y.3d 1120 (3rd Dep’t 2022)(“We agree with respondent that dismissal of the petition/complaint is required under the equitable doctrine of laches – a ‘threshold procedural issue’ that was raised as an objection in point of law in respondent’s answer (Matter of Schulz v. State of New York, 81 N.Y.2d 336, 347, 599 N.Y.S.2d 469, 615 N.E.2d 953 [1993]; see CPLR 7804[f]; 404[a]). Laches is ‘an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party’”).

POINT IVNO RELIEF IS AVAILABLE AS AGAINST THE INDIVIDUAL MOVING RESPONDENTS

The mandamus relief sought by the Petition cannot be deemed to apply to compel any one individual (i.e., one of the Moving Respondents herein) to take an action that can only be taken by the IRC as a whole, or at a minimum, by a quorum thereof.

CONCLUSION

For the Foregoing reasons, it is respectfully submitted that the within proceeding be dismissed in its entirety and that the Court grant Moving Respondents such other and further relief as the Court deems just and proper. In addition, if this motion to dismiss is denied, in whole or in part, Moving Respondents reserve the right to answer the Amended Petition. See CPLR 7804(f) & CPLR 3211(f).

Dated: August 26, 2022
Sayville, New York

Respectfully submitted,

MESSINA PERILLO HILL LLP

Timothy Hill
Vincent J. Messina, Jr.
Lisa A. Perillo
Timothy Hill

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FILED: ALBANY COUNTY CLERK 08/26/2022 09:16 PM

NYSCEF DOC. NO. 109

INDEX NO. 904972-22

RECEIVED NYSCEF: 08/26/2022

Certification of Compliance (Word Limit)

Timothy Hill hereby certifies that the Memorandum of Law complies with the applicable Rules of Court in that the Memorandum contains 5992 words.

_____*Timothy Hill*_____
Timothy Hill

Letter from Craig R. Bucki to the Honorable Laurence L. Love, dated
September 2, 2022
[pp. 1214 - 1217]



Via NYSCEF

September 2, 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 (the “Speaker”), we respond to the email and letter submitted yesterday by Petitioners’ counsel in this proceeding.

Email of Peter A. Devlin

In his email of September 1, 2022 (accompanying this letter as **Exhibit A**), Mr. Devlin urges this Court to consider Common Cause’s proposed amicus brief. Like Senate Majority Leader Andrea Stewart-Cousins, the Speaker opposes Mr. Devlin’s request.

This Court has established a process for seeking *amicus curiae* status, and Common Cause did not follow it. Specifically, a non-party must seek amicus status by motion on notice. *Kruger v. Bloomberg*, 1 Misc. 3d 192, 198 (Sup. Ct. N.Y. County 2003). Doing what Common Cause did — simply emailing a proposed amicus brief to the Court, and to some (but not all) counsel of record — was insufficient. This Court should therefore disregard the proposed submission, which was not accompanied or preceded by a motion seeking *amicus curiae* status. In any event, Common Cause cannot satisfy the factors this Court analyzes when determining whether to accept an amicus brief. *See id.*

If this Court nevertheless accepts Common Cause’s proposed brief, it should also consider two related emails (accompanying this letter as **Exhibits B** and **C**) on which this Court was copied on August 24, 2022: one from Petitioners’ counsel Jim Walden,

ATTORNEYS AT LAW

CRAIG R. BUCKI PARTNER DIRECT 716 847 5495 CBUCKI@PHILLIPSLYTLE.COM



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thanking Common Cause for its submission; and another from Alexis Grenell (who appears to be Common Cause's media consultant), suggesting how Common Cause might leverage its submission to gain media attention. These emails are critical for viewing Common Cause's proposed amicus brief in the appropriate context.

Letter of Jim Walden

In his letter dated September 1, 2022, Mr. Walden informs this Court of a memorandum of law submitted by certain members of the Independent Redistricting Commission ("IRC") in *Matter of Hoffmann v. New York State Independent Redistricting Commission* (Sup. Ct. Albany County, Index No. 904972-22). Dkt. No. 117. Mr. Walden highlights purported similarities between contentions asserted in that submission and arguments asserted by Petitioners here.

Notwithstanding Mr. Walden's letter, this Court should withhold judgment until the IRC takes a position in *this* lawsuit. Only last week, Mr. Walden himself urged this Court to "give the IRC the opportunity to be heard." Dkt. No. 113. And that is what this Court's Order to Show Cause does. Dkt. No. 115. As per the Order to Show Cause, the IRC's members can speak for themselves in a written submission by September 15, 2022, and in person before this Court on September 16, 2022, without Mr. Walden's assistance.

Further, the positions of IRC members in this lawsuit need not mirror their positions in *Hoffmann*, because the proceedings are materially different in at least two respects. First, *Hoffmann* concerns New York's Congressional district map, which was invalidated and then re-drawn by the Steuben County Supreme Court with the aid of a special master. Here, by contrast, the Assembly map will be re-drawn for the first time. Stated differently, the issue here is how to develop a remedy for a procedurally unconstitutional Assembly map, not how (or whether) to replace a Congressional map that the Steuben County Supreme Court already imposed as a remedy for a prior Congressional map deemed unconstitutional.

Second, the petitioners in *Hoffmann* request an order that would compel the IRC to resume its previous Congressional map-drawing process prescribed by Article III, § 4,



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of the New York Constitution by issuing a second recommended Congressional map that was originally due by February 28, 2022. Here, by contrast, the Speaker asks this Court to require the IRC to begin anew the State Constitution's prescribed process for developing an Assembly district map, in view of the First Department's Order on June 10, 2022, that the Assembly map should be redrawn "in accordance with NY Const, art III, § 5-b." Dkt. No. 99, p. 3. And as this Court recognized, § 5-b requires that the IRC be convened "[o]n or before February first of each year ending with a zero *and at any other time a court orders that congressional or state legislative districts be amended*" (emphasis added). Dkt. No. 98 (quoting N.Y. CONST. art. III, § 5-b(a)).

In any event, the memorandum of law in *Hoffmann* misapprehends the law — as Petitioners do here.

For example, both contend that the IRC can never be compelled to propose remedial district maps. Dkt. No. 107, pp. 9-11; Dkt. No. 109, pp. 12, 14. But that position is incompatible with the New York Constitution, which provides that the IRC "shall" be established "any ... time a court orders that congressional or state legislative districts be amended." N.Y. CONST. art. III, § 5-b(a).

Additionally, Petitioners and the *Hoffmann* submission mischaracterize the Court of Appeals' decision in *Matter of Harkenrider v. Hochul*, ___ N.Y.3d ___, 2022 WL 1236822 (Apr. 27, 2022). The remedy in that lawsuit does not dictate the appropriate remedy in this one. When *Harkenrider* was decided, elections were on the near horizon, and insufficient time remained for the IRC to reconvene and propose remedial maps. Not so here — the 2024 elections are nearly two years away. And as the Speaker has explained, "[c]ourts have long recognized that redistricting plans developed in accordance with the state's redistricting process are favored over court-imposed plans." Dkt. No. 100, p. 6 (collecting cases). The constitutionally-mandated IRC process is unquestionably feasible here, unlike in *Harkenrider*, so the last-resort remedy of a Court-drawn remedial map is unnecessary. Cf. N.Y. CONST. art. III, § 4(e) (authorizing a court to "order the adoption of ... a redistricting plan," but only "to the extent" that remedy is "required").



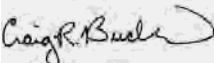
Hon. Laurence L. Love
Page 4

September 2, 2022

For these reasons, this Court should reject Common Cause's proposed amicus brief, and it should reject Petitioners' misguided interpretation of the New York Constitution.

Very truly yours,

Phillips Lytle LLP

By 

Craig R. Bucki
CRBSBS3
Enclosures

Exhibit A to Letter-
Email from Peter A. Devlin, dated September 1, 2022
[pp. 1218 - 1220]

FILED: NEW YORK COUNTY CLERK 09/02/2022 02:27 PM

NYSCEF DOC. NO. 119

INDEX NO. 154213/2022

RECEIVED NYSCEF: 09/02/2022

From: Peter A. Devlin <pdevlin@wmhlaw.com>
Sent: Thursday, September 1, 2022 3:07 PM
To: Eric Hecker; SFC-Part63-Clerk@nycourts.gov; Drudolf@nycourts.gov; Mjgolia@nycourts.gov
Cc: slerner@commoncause.org; dchill@graubard.com; jlessem@graubard.com; seth.farber@ag.ny.gov; Alex Goldenberg; aaron@nyelectionlaw.com; Alice Reiter; ereich@graubard.com; Craig R. Bucki; Jim Walden; kevin.murphy@elections.ny.gov; brian.quail@elections.ny.gov; Steven B. Salcedo; aaron.suggs@elections.ny.gov; Rebecca A. Valentine
Subject: RE: Letter re Nichols et al v. Hochul et al., Index No. 154213/2022

Your Honor,

Petitioners will defer to Common Cause to address any concerns the Court may have with the form of Common Cause's *amicus* submission. We write to respond to the Senate Majority Leader's request that the Court disregard the submission.

Whether this Court considers a submission from a party seeking to be heard *amicus curiae* rests solely in the Court's discretion. Siegel, N.Y. Prac. § 525 (6th ed.). And where, as here, a case involves "questions of important public interest," then "leave is generally granted to file a brief as *amicus curiae*." *Colmes v. Fisher*, 151 Misc. 222, 223 (Sup. Ct., Erie County 1934).

As the Court likely knows, Common Cause is a nonprofit and nonpartisan organization built on grassroots support. It is committed to good government and fair elections and has been an advocate for fair redistricting in New York, giving voice to New Yorkers who would otherwise not be heard. For an *amicus* submission, the organization's letter could not be more apt.

Further, Respondents are not prejudiced. Considering that the Independent Redistricting Commission (IRC) must show cause two weeks from now—on September 16 per the Court's recent order—why the IRC should not be added as a party, Respondents have ample time to respond to Common Cause's submission if they so choose before this Court decides the issues on remand.

Petitioners thus respectfully urge the Court to consider Common Cause's views.

Sincerely,

Peter A. Devlin (he/him)
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250 Vesey Street, 27th Floor
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FILED: NEW YORK COUNTY CLERK 09/02/2022 02:27 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 119

RECEIVED NYSCEF: 09/02/2022

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From: Eric Hecker <ehecker@chwillp.com>
Sent: Thursday, September 1, 2022 11:07 AM
To: SFC-Part63-Clerk@nycourts.gov; Drudolf@nycourts.gov; Mjgolia@nycourts.gov
Cc: slerner@commoncause.org; dchill@graubard.com; jlessem@graubard.com; seth.farber@ag.ny.gov; Alex Goldenberg <agoldenberg@chwillp.com>; aaron@nyelectionlaw.com; Alice Reiter <areiter@chwillp.com>; ereich@graubard.com; Craig Bucki <cbucki@phillipslytle.com>; Jim Walden <jwalden@wmhlaw.com>; kevin.murphy@elections.ny.gov; brian.quail@elections.ny.gov; ssalcedo@phillipslytle.com; aaron.suggs@elections.ny.gov; rvalentine@phillipslytle.com; Peter A. Devlin <pdevlin@wmhlaw.com>
Subject: Re: Letter re Nichols et al v. Hochul et al., Index No. 154213/2022

External Email - Caution before clicking links.

Apologies, I am resending the email I just sent a moment ago, but this time copying all counsel of record on NYSCEF. Counsel, please see below.

Eric Hecker
 Cuti Hecker Wang LLP
 305 Broadway, Suite 607
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From: Eric Hecker <ehecker@chwillp.com>
Date: Thursday, September 1, 2022 at 11:01 AM
To: SFC-Part63-Clerk@nycourts.gov <SFC-Part63-Clerk@nycourts.gov>, Drudolf@nycourts.gov <Drudolf@nycourts.gov>, Mjgolia@nycourts.gov <Mjgolia@nycourts.gov>
Cc: slerner@commoncause.org <slerner@commoncause.org>, jwalden@wmhlaw.com <jwalden@wmhlaw.com>, pdevlin@wmhlaw.com <pdevlin@wmhlaw.com>, aaron.keith.suggs@elections.ny.gov <aaron.keith.suggs@elections.ny.gov>, Craig Bucki <cbucki@phillipslytle.com>, Alex Goldenberg <agoldenberg@chwillp.com>, Alice Reiter <areiter@chwillp.com>
Subject: Re: Letter re Nichols et al v. Hochul et al., Index No. 154213/2022

Justice Love's Chambers:

I represent the Senate Majority Leader in this proceeding.

It just came to my attention that the Executive Director of Common Cause, Susan Lerner, attempted to submit a purported amicus letter brief by email last week. Not only was it improper of her to submit by email without filing it through NYSCEF, she failed to copy me or my colleagues even though we are counsel of record for a Respondent who has appeared. Below is the email exchange, which I just received this morning.

We respectfully ask the Court to disregard Ms. Lerner's improper purported submission, and we respectfully ask all counsel to be vigilant not to engage in any communications with the Court without copying all counsel of record.

FILED: NEW YORK COUNTY CLERK 09/02/2022 02:27 PM

NYSCEF DOC. NO. 119

INDEX NO. 154213/2022

RECEIVED NYSCEF: 09/02/2022

Respectfully submitted,

Eric Hecker
Cuti Hecker Wang LLP
305 Broadway, Suite 607
New York, New York 10007
Tel: 212.620.2600
Email: hecker@chwilp.com
Pronouns: he/him/his

From: Susan Lerner <slerner@commoncause.org>

Sent: Wednesday, August 24, 2022 2:01 PM

To: SFC-Part63-Clerk@nycourts.gov

Cc: Jim Walden <jwalden@wmhlaw.com>; Peter A. Devlin <pdevlin@wmhlaw.com>;
aaron.keith.suggs@elections.ny.gov; cbucki@phillipslytle.com; Esq. <ssalcedo@phillipslytle.com>

Subject: Letter re Nichols et al v. Hochul et al., Index No. 154213/2022

External Email - Caution before clicking links.

Attached please find our letter submitted as amicus in the above matter.

Susan Lerner

Susan Lerner
Executive Director, Common Cause/NY
t: 212-691-6421
m: 917-670-5670
80 Broad Street, Suite 2703
New York, NY 10004

Exhibit B to Letter-
Email from Jim Walden, dated August 24, 2022
[pp. 1221 - 1222]

FILED: NEW YORK COUNTY CLERK 09/02/2022 02:27 PM

NYSCEF DOC. NO. 120

INDEX NO. 154213/2022

RECEIVED NYSCEF: 09/02/2022

From: Jim Walden <jwalden@wmhlaw.com>
Sent: Wednesday, August 24, 2022 6:58 PM
To: Susan Lerner; SFC-Part63-Clerk@nycourts.gov
Cc: Peter A. Devlin; aaron.keith.suggs@elections.ny.gov; Craig R. Bucki; Steven B. Salcedo
Subject: RE: Letter re Nichols et al v. Hochul et al., Index No. 154213/2022

Thank you

Jim Walden
Walden Macht & Haran LLP
250 Vesey Street, 27th Floor
New York, New York 10281
O: (212) 335-2031
C: (646) 645-6377
jwalden@wmhlaw.com
www.wmhlaw.com

Note our new address effective January 1, 2021

This email message comes from a law firm and it may contain information that is confidential, privileged and/or attorney work product, subject to all privileges and protections. If you are not an intended recipient, any dissemination, distribution or copying of this email or any of its attachments is strictly prohibited. Please immediately notify the sender by replying to this email and please delete the message and any attachments. Thank you.

From: Susan Lerner <slerner@commoncause.org>
Sent: Wednesday, August 24, 2022 2:01 PM
To: SFC-Part63-Clerk@nycourts.gov
Cc: Jim Walden <jwalden@wmhlaw.com>; Peter A. Devlin <pdevlin@wmhlaw.com>; aaron.keith.suggs@elections.ny.gov; cbucki@phillipslytle.com; Esq. <ssalcedo@phillipslytle.com>
Subject: Letter re Nichols et al v. Hochul et al., Index No. 154213/2022

External Email - Caution before clicking links.

Attached please find our letter submitted as amicus in the above matter.

Susan Lerner

Susan Lerner
Executive Director, Common Cause/NY
t: 212-691-6421
m: 917-670-5670
80 Broad Street, Suite 2703

FILED: NEW YORK COUNTY CLERK 09/02/2022 02:27 PM

NYSCEF DOC. NO. 120

New York, NY 10004

INDEX NO. 154213/2022

RECEIVED NYSCEF: 09/02/2022

Exhibit C to Letter-
Email from Alexis Grenell, dated August 24, 2022

FILED: NEW YORK COUNTY CLERK 09/02/2022 02:27 PM

NYSCEF DOC. NO. 121

INDEX NO. 154213/2022

RECEIVED NYSCEF: 09/02/2022

From: Alexis Grenell <agrenell@gmail.com>
Sent: Wednesday, August 24, 2022 2:32 PM
To: Susan Lerner
Cc: SFC-Part63-Clerk@nycourts.gov; Esq.; pdevlin@wmhlaw.com;
aaron.keith.suggs@elections.ny.gov; Craig R. Bucki; Steven B. Salcedo
Subject: Re: Letter re Nichols et al v. Hochul et al., Index No. 154213/2022

Susan, can we give this to a reporter for a Monday exclusive, and then either blast a release or if you're up for it do a zoom press conf? I think it may be the most efficient use of your time so you're not just taking incoming from reporters.

On Wed, Aug 24, 2022 at 2:00 PM Susan Lerner <slerner@commoncause.org> wrote:

Attached please find our letter submitted as amicus in the above matter.

Susan Lerner

Susan Lerner
Executive Director, Common Cause/NY
t: 212-691-6421
m:917-670-5670
80 Broad Street, Suite 2703
New York, NY 10004

--

Alexis Grenell, MPA
917-327-1180 (c)
@agrenell

**Undersigned Respondents' Response to Order to Show Cause, dated
September 15, 2022
[pp. 1224 - 1229]**

FILED: NEW YORK COUNTY CLERK 09/15/2022 04:13 PM

NYSCEF DOC. NO. 156

INDEX NO. 154213/2022

RECEIVED NYSCEF: 09/15/2022

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

- - - - - X
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

Index No. 154213/2022

IAS Part 63

Hon. Laurence R. Love, J.S.C.

**RESPONSE TO ORDER TO
SHOW CAUSE**

Respondents.

Respondents David Imamura, Ivelisse Cuevas-Molina, and Elaine Frazier (“Undersigned Respondents”), by their attorneys Jenner & Block LLP, respectfully respond to the Court’s Order to Show Cause ([Dkt. No. 115](#)) regarding whether the New York State Independent Redistricting Commission (“IRC”) should be added as a Respondent to this proceeding.

Undersigned Respondents do not oppose the IRC being named as a Respondent to this proceeding. However, Undersigned Respondents respectfully request that if the IRC is named as a Respondent to this proceeding, that the individual Commissioners of the IRC also be named as additional Respondents. The Undersigned Respondents are represented by Jenner & Block LLP in this proceeding and expect that Commissioners Ross Brady, John Conway III, Lisa Harris, Charles Nesbitt, and Willis H. Stephens, Jr. of the IRC will be represented by separate counsel in

this proceeding, in accordance with the September 9, 2022 certification by the Attorney General attached hereto as Exhibit A.

Undersigned Respondents also attach hereto as Exhibits B and C affidavits from IRC Commissioners Dr. John Fleteau and Mr. Yovan Samuel Collado, who were not named in the Court's Order to Show Cause. In his affidavit, Dr. Fleteau explains that he previously served on the IRC during the 2020 redistricting cycle and was reappointed to the IRC on August 1, 2022 after briefly resigning. Mr. Collado explains in his affidavit that he was appointed to the IRC on September 6, 2022 to replace Commissioner Eugene Bengier, who resigned as of September 2, 2022 (after the Court's Order to Show Cause was issued). Dr. Fleteau and Mr. Collado further state in their affidavits that although they were not named in the Court's Order to Show Case, they consent to being joined as additional Respondents with the other Commissioners should the Court choose to join the Commissioners as Respondents in this matter, and Dr. Fleteau and Mr. Collado would intend in that instance to retain Jenner & Block LLP as their counsel.

Finally, the Undersigned Respondents and Dr. Fleteau and Mr. Collado are aware that Respondent Speaker of the Assembly Carl Heastie has proposed that the proper means for redrawing the State Assembly map in accordance with Article III, § 5-b is for the IRC to initiate the constitutional process for amending the Assembly district map based on the 2020 census data by formulating a proposed Assembly map and thereafter to follow the procedural steps set forth in Article III, §§ 4 and 5-b of the New York State Constitution with respect to the adoption of a remedial Assembly district map. Undersigned Respondents, along with Dr. Fleteau and Mr. Collado, do not oppose the means for redrawing the state Assembly map proposed by Respondent Speaker of the Assembly Carl Heastie and are prepared to undertake that duty should the Court order them to do so.

FILED: NEW YORK COUNTY CLERK 09/15/2022 04:13 PM

INDEX NO. 154213/2022

NYSCEF DOC. NO. 156

RECEIVED NYSCEF: 09/15/2022

DATED: September 15, 2022
New York, New York

Respectfully Submitted,

By: /s/ Jeremy H. Ershow

Jeremy H. Ershow
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*Attorneys for David Imamura,
Ivelisse Cuevas-Molina, and Elaine
Frazier*

CERTIFICATE OF COMPLIANCE WITH 22 N.Y.C.R.R. § 202.8-b

This Response complies with 22 N.Y.C.R.R. § 202.8-b because it contains 466 words, excluding the caption and signature block. The word-count was generated by the word-processing system used to prepare this document.

DATED: September 15, 2022
New York, New York

Respectfully Submitted,

By: /s/ Jeremy H. Ershow

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*Attorney for David Imamura, Ivelisse
Cuevas-Molina, and Elaine Frazier*

TO: WALDEN MACHT & HARAN LLP
Jim Walden
250 Vesey Street, 27th Floor
New York, NY 10281

Counsel for Petitioners Paul Nichols, Gavin Wax, and Gary Greenberg

WALDEN MACHT & HARAN LLP
Peter Augustin Devlin
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Counsel for Respondent Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins

GRAUBARD MILLER
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New York, NY 10174

Counsel for Speaker of the Assembly Carl Heastie

FILED: NEW YORK COUNTY CLERK 09/15/2022 04:13 PM

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RECEIVED NYSCEF: 09/15/2022

PHILLIPS LYTLE LLP
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Steven Briggs Salcedo
Rebecca Anne Valentine
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Counsel for Speaker of the Assembly Carl Heastie

NEW YORK STATE BOARD OF ELECTIONS
Kevin Gordon Murphy
Brian Lee Quail
Aaron Keith Suggs
40 North Pearl Street, Suite 5
Albany, NY 12207

Counsel for Respondent New York State Board of Elections

Above parties served by NYSCEF

Exhibit A-
Letter from Roderick Arz to David Imamura, dated September 9, 2022, with
attachment
[pp. 1230 - 1239]

FILED: NEW YORK COUNTY CLERK 09/15/2022 04:13 PM

NYSCEF DOC. NO. 157

INDEX NO. 154213/2022

RECEIVED NYSCEF: 09/15/2022



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF STATE COUNSEL

September 9, 2022

By Email

David Imamura
c/o Karen Blatt
Co-Executive Director
New York State Independent Redistricting Commission
blattk@nyirc.gov

Re: *Nichols et al. v. Hochul et al.*
Supreme Court, New York County Index No. 154213/2022

Dear Mr. Imamura:

The Office of the Attorney General (“OAG” or the “Office”) has reviewed your August 30, 2022 request for Attorney General representation, made on your behalf by Karen Blatt, pursuant to N.Y. Public Officers Law Section 17 (“POL § 17”) in *Nichols et al. v. Hochul et al.*, Supreme Court, New York County Index No. 154213/2022 (“the Lawsuit”). The defense and indemnification of State officers and employees are subject to the terms and conditions of POL §§ 17 and 17-a¹ and this letter.

Certification of Private Counsel to Represent You

Based on the information currently available to this Office, we have determined that it would be inappropriate for the Attorney General to represent you in the Lawsuit. We are, however, certifying to the State Comptroller under POL § 17 that you are entitled to be represented by the in the Lawsuit subject to the condition that you, together with Ivelisse Cuevas-Molina, Eugene Benger, and Elaine Frazier are required to be represented by the same private counsel in the Lawsuit.

Upon this Office’s certification to the State Comptroller, the State will pay reasonable attorneys’ fees and litigation expenses to such private counsel during the pendency of the Lawsuit, subject to (1) certification by the head of your employing agency, the New York State Independent Redistricting Commission, that you are entitled to representation under POL § 17, and (2) the audit and warrant of the State Comptroller. We suggest that you share this letter with your attorney and

¹ For your review and consideration, enclosed are copies of POL §§ 17 and 17-a.

Karen Blatt
September 9, 2022
Page 2 of 3

that their attorney contact Assistant Counsel Caitlin Heim in the Office of the State Comptroller at (518) 474-3444.

Approval of Settlements and Indemnification of Settlements and Judgments

POL §§ 17 and 17-a set forth the conditions under which the State will indemnify you or pay a judgment or settlement. Your attention is called to subdivision 3(a) of POL § 17, which provides that the State will indemnify you in the amount of any judgment obtained against you in any state or federal court, or in the amount of any settlement of a claim, or will pay such judgment or settlement, provided that the act or omission from which the judgment or settlement arose occurred while you were acting within the scope of your public employment or duties and did not result from intentional wrongdoing on your part. In the event the State indemnifies you or pays a judgement or settlement on your behalf, you will be deemed to have released the State, its agencies, officers, and employees from any claims for indemnification or payment you might have under POL §§ 17 and 17-a.

Subdivisions 3(b) and 3(d) of POL § 17 set forth the procedures for review and approval of a settlement or judgment that may be subject to indemnification or payment by the State. When a settlement is proposed, POL § 17(3)(b) requires the head of your employing agency or designee to review and certify the proposed settlement. If the proposed settlement is consistent with the provisions of POL § 17, the head of your employing agency or designee will certify the proposed settlement and submit such proposed settlement and the certification to this Office for review and approval. Therefore, should you and your private counsel wish to consider settlement, you must contact the head of your employing agency or designee and this Office before any settlement is finalized.

Within thirty days of entry of a final judgment or settlement of a claim, if the judgment or settlement is consistent with the provisions of POL § 17, the head or your employing agency or designee will certify the judgment or settlement for payment. The head or your employing agency or designee then submits its certification to this Office. If this Office concurs with that certification, payment will be made following the audit and warrant of the State Comptroller.

Conditions for Interposing a Compulsory Counterclaim

If private counsel who represents you under POL § 17 determines that it would be legally appropriate, beneficial to his defense, and in the interest of the State to interpose a counterclaim on your behalf, your counsel may do so, subject to the following conditions.

1. In order for your private counsel to represent you on such a compulsory counterclaim, you must agree that if you are presented with a proposed settlement of the action against you and you reject the settlement, you waive any claims for indemnification or payment you might have under POL § 17 for the amount of any judgment, costs, and attorneys' fees awarded against you in excess of the amount of the proposed settlement.

Karen Blatt
September 9, 2022
Page 3 of 3

2. You must assign to the State any damages awarded to you on the counterclaim up to an amount equal to any judgment, costs, and attorneys' fees awarded to the plaintiff against you. If there is an award in your favor in excess of any award, including costs and attorneys' fees, to the plaintiff, that excess amount will belong to you. And in the event that your private counsel is successful on your counterclaim and the plaintiff is denied any recovery, the entire amount of the judgment will belong to you.
3. Finally, if the plaintiff withdraws the claims against you in the Lawsuit or the claims against you are dismissed before trial but your counterclaim remains pending, private counsel will no longer represent you at State expense on the counterclaim and you will waive any claims for indemnification or payment you might have under POL § 17 for the amount of any judgment, costs, and attorneys' fees awarded against you.

This letter and the provisions of POL §§ 17 and 17-a should be carefully reviewed by you and your private counsel. It is important that all procedures be followed.

Sincerely,

Roderick Arz
Assistant Attorney General
28 Liberty St.
New York, NY 10005
(212) 416-8633
Roderick.Arz@ag.ny.gov

Enclosures

McKinney's Consolidated Laws of New York Annotated
 Public Officers Law (Refs & Annos)
 Chapter 47. Of the Consolidated Laws
 Article 2. Appointment and Qualification of Public Officers (Refs & Annos)

McKinney's Public Officers Law § 17

§ 17. Defense and indemnification of state officers and employees

Effective: April 16, 2021

Currentness

1. (a) As used in this section, unless the context otherwise requires the term “employee” shall mean any person holding a position by election, appointment or employment in the service of the state, including clinical practice pursuant to subdivision fourteen of section two hundred six of the public health law, whether or not compensated, or a volunteer expressly authorized to participate in a state-sponsored volunteer program, but shall not include an independent contractor. The term employee shall include a former employee, his estate or judicially appointed personal representative and persons who assist the education department or the department of health as consultants or expert witnesses in the investigation or prosecution of alleged professional misconduct, licensure matters, restoration proceedings, or criminal prosecutions for unauthorized practice pursuant to title eight of the education law or title II-A of the public health law.

(b) For the purposes of this section, the term “employee” shall include members, officers and other persons in the employment of the New York state energy research and development authority, members of the board of directors, officers and other persons in the employment of the New York state science and technology foundation, and members of the board of directors, officers and other persons in the employment of the New York state olympic accommodations control corporation or serving on its board of directors on or before June thirtieth, nineteen hundred eighty.

(c) For the purposes of this section, the term “employee” shall include members of the state patient qualification review board appointed by the commissioner of health pursuant to article thirty-three-A of the public health law.

(d) For the purposes of this section, the term “employee” shall include directors, officers and employees of the facilities development corporation.

(e) For the purposes of this section, the term “employee” shall include directors, officers and employees of the environmental facilities corporation.

(f) For the purposes of this section, the term “employee” shall include ombudsmen designated under section five hundred forty-four and section five hundred forty-five of the executive law, and shall include such ombudsmen without regard to whether they are volunteers or paid staff of the office for the aging or of designated substate ombudsman programs under the direction of the office.

(g) For the purposes of this section, the term “employee” shall include the members of the board, officers and employees of the greenway heritage conservancy for the Hudson river valley or the greenway council.

(h) For the purposes of this section, the term “employee” shall include members of the board, officers and employees of the New York local government assistance corporation.

(i) For purposes of this section, the term “employee” shall include the officers and employees of the Central Pine Barrens joint planning and policy commission.

(j) For purposes of this section, the term “employee” shall include directors, officers and employees of the dormitory authority.

(k) For the purposes of this section only, the term “employee” shall include any member, director, officer or employee of a soil and water conservation district created pursuant to section five of the soil and water conservation districts law who is working on a project which receives funding from the state and has received approval by the state soil and water conservation committee or who is carrying out the powers and duties pursuant to article two of the soil and water conservation districts law by working with any agency of the state as defined by subdivision five of section three of the soil and water conservation districts law.

(l) For the purposes of this section and consistent with the provisions of section 13 of a chapter of the laws of 1997, amending the public authorities law, the public health law, the public officers law, chapter 41 of the laws of 1997 relating to providing a retirement incentive for certain public employees, and the civil service law, relating to the creation of the Roswell Park Cancer Institute corporation and providing for the rights, powers, duties and jurisdiction of such corporation, the term “employee” shall include directors, officers and employees of the Roswell Park Cancer Institute corporation.

(m) For the purposes of this section, the term “employee” shall include the members of the spinal cord injury research board within the department of health.

(n) For the purposes of this section, the term “employee” shall include directors, officers, and employees of the Governor Nelson A. Rockefeller empire state plaza performing arts center corporation.

(o) For the purposes of this section, the term “employee” shall include the directors, officers and employees of the state of New York mortgage agency.

(p) Repealed by L.2012, c. 60, pt. D, § 10, eff. March 30, 2012.

(q) For the purposes of this section, the term “employee” shall include the members, officers and employees of the tobacco settlement financing corporation.

(r) For the purposes of this section, the term “employee” shall include the directors, officers, and employees of the state of New York municipal bond bank agency and the directors, officers, employees, trustees and other managers (however denominated), of any tax lien entity (as defined in subdivision sixteen of section twenty-four hundred thirty-two of the public authorities law) of the state of New York municipal bond bank agency.

(s) For the purposes of this section, the term “employee” shall include the members of the board, officers and employees of the Niagara river greenway commission.

(t) For the purposes of this section, the term “employee” shall include the members of the board, officers and employees of the dormitory authority for purposes of section sixteen hundred eighty-l of the public authorities law.

(u) [Expires and deemed repealed Dec. 31, 2025, pursuant to L.2007, c. 58, pt. H, § 4.] For the purposes of this section, the term “employee” shall include the members of the empire state stem cell board within the department of health.

(v) For the purposes of this section, the term “employee” shall include the members of the board, and officers and employees of the New York city off-track betting corporation.

(w) For purposes of this section, the term “employee” shall include a person certified by the office of court administration and paid by the city of New York to serve as a guardian ad litem in an action or proceeding pending in the housing part of the civil court of the city of New York.

(x) For the purposes of this section, the term “employee” shall include the members of the board, officers and employees of the dormitory authority for purposes of section sixteen hundred eighty-q of the public authorities law.

(y) For purposes of this section, the term “employee” shall include members of the board, officers and employees of the New York state thruway authority or its subsidiaries.

(z) For purposes of this section, the term “employee” shall include members of the governing board, officers and employees of the New York state canal corporation.

2. (a) Upon compliance by the employee with the provisions of subdivision four of this section, the state shall provide for the defense of the employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties; or which is brought to enforce a provision of section nineteen hundred eighty-one or nineteen hundred eighty-three of title forty-two of the United States code and the act or omission underlying the action occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties. This duty to provide for a defense shall not arise where such civil action or proceeding is brought by or on behalf of the state.

(b) Subject to the conditions set forth in paragraph (a) of this subdivision, the employee shall be entitled to be represented by the attorney general, provided, however, that the employee shall be entitled to representation by private counsel of his choice in any civil judicial proceeding whenever the attorney general determines based upon his investigation and review of the facts and circumstances of the case that representation by the attorney general would be inappropriate, or whenever a court of competent jurisdiction, upon appropriate motion or by a special proceeding, determines that a conflict of interest exists and that the employee is entitled to be represented by private counsel of his choice. The attorney general shall notify the employee in writing of such determination that the employee is entitled to be represented by private counsel. The attorney general may require, as a condition to payment of the fees and expenses of such representation, that appropriate groups of such employees be represented by the same counsel. If the employee or group of employees is entitled to representation by private counsel under

the provisions of this section, the attorney general shall so certify to the comptroller. Reasonable attorneys' fees and litigation expenses shall be paid by the state to such private counsel from time to time during the pendency of the civil action or proceeding subject to certification that the employee is entitled to representation under the terms and conditions of this section by the head of the department, commission, division, office or agency in which such employee is employed and upon the audit and warrant of the comptroller. Any dispute with respect to representation of multiple employees by a single counsel or the amount of litigation expenses or the reasonableness of attorneys' fees shall be resolved by the court upon motion or by way of a special proceeding.

(c) Where the employee delivers process and a request for a defense to the attorney general as required by subdivision four of this section, the attorney general shall take the necessary steps including the retention of private counsel under the terms and conditions provided in paragraph (b) of subdivision two of this section on behalf of the employee to avoid entry of a default judgment pending resolution of any question pertaining to the obligation to provide for a defense.

3. (a) The state shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim, or shall pay such judgment or settlement; provided, that the act or omission from which such judgment or settlement arose occurred while the employee was acting within the scope of his public employment or duties; the duty to indemnify and save harmless or pay prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing on the part of the employee.

(b) An employee represented by the attorney general or by private counsel pursuant to this section shall cause to be submitted to the head of the department, commission, division, office or agency in which he is employed any proposed settlement which may be subject to indemnification or payment by the state and if not inconsistent with the provisions of this section such head of the department, commission, division, office or agency in which he is employed shall certify such settlement, and submit such settlement and certification to the attorney general. The attorney general shall review such proposed settlement as to form and amount, and shall give his approval if in his judgment the settlement is in the best interest of the state. Nothing in this subdivision shall be construed to authorize the state to indemnify and save harmless or pay an employee with respect to a settlement not so reviewed and approved by the attorney general.

(c) Nothing in this subdivision shall authorize the state to indemnify or save harmless an employee with respect to fines or penalties, or money recovered from an employee pursuant to article seven-a of the state finance law; provided, however, that the state shall indemnify and save harmless its employees in the amount of any costs, attorneys' fees, damages, fines or penalties which may be imposed by reason of an adjudication that an employee, acting within the scope of his public employment or duties, has, without willfulness or intent on his part, violated a prior order, judgment, consent decree or stipulation of settlement entered in any court of this state or of the United States. The attorney general shall promulgate such rules and regulations as are necessary to effectuate the purposes of this subdivision.

(d) Upon entry of a final judgment against the employee, or upon the settlement of the claim, the employee shall cause to be served a copy of such judgment or settlement, personally or by certified or registered mail within thirty days of the date of entry or settlement, upon the head of the department, commission, division, office or agency in which he is employed; and if not inconsistent with the provisions of this section, such judgment or settlement shall be certified for payment by such head of the department, commission, division, office or agency. If the attorney general concurs in such certification, the judgment or settlement shall be paid upon the audit and warrant of the comptroller. On or before January fifteenth the comptroller, in consultation with the department of law and other agencies as may be appropriate, shall submit to the governor and the legislature an annual accounting of judgments, settlements, fees, and litigation expenses paid pursuant to this section during the preceding and current fiscal years. Such accounting shall include, but not be limited to the number, type and amount of claims so paid, as well as an estimate of claims to be paid during the remainder of the current fiscal year and during the following fiscal year.

4. The duty to defend or indemnify and save harmless prescribed by this section shall be conditioned upon (i) delivery to the attorney general or an assistant attorney general at an office of the department of law in the state by the employee of the original or a copy of any summons, complaint, process, notice, demand or pleading within five days after he is served with such document, and (ii) the full cooperation of the employee in the defense of such action or proceeding and in defense of any action or proceeding against the state based upon the same act or omission, and in the prosecution of any appeal. Such delivery shall be deemed a request by the employee that the state provide for his defense pursuant to this section.

5. The benefits of this section shall inure only to employees as defined herein and shall not enlarge or diminish the rights of any other party nor shall any provision of this section be construed to affect, alter or repeal any provision of the workers' compensation law.

6. This section shall not in any way affect the obligation of any claimant to give notice to the state under section ten of the court of claims act or any other provision of law.

7. The provisions of this section shall not be construed to impair, alter, limit or modify the rights and obligations of any insurer under any policy of insurance.

8. The provisions of this section shall apply to all actions and proceedings pending upon the effective date thereof or thereafter instituted.

9. Except as otherwise specifically provided in this section, the provisions of this section shall not be construed in any way to impair, alter, limit, modify, abrogate or restrict any immunity available to or conferred upon any unit, entity, officer or employee of the state or any other level of government, or any right to defense and/or indemnification provided for any governmental officer or employee by, in accordance with, or by reason of, any other provision of state or federal statutory or common law.

10. If any provision of this section or the application thereof to any person or circumstance be held unconstitutional or invalid in whole or in part by any court of competent jurisdiction, such holding of unconstitutionality or invalidity shall in no way affect or impair any other provision of this section or the application of any such provision to any other person or circumstance.

11. The provisions of this section shall not apply to physicians who are subject to the provisions of the plan for the management of clinical practice income as set forth in the policies of the board of trustees, title 8, New York codes, rules and regulations, regarding any civil action or proceeding alleging some professional malpractice in any state or federal court arising out of the physician's involvement in clinical practice as defined in that plan, provided however, that the provisions of this section shall apply when a claim or proceeding arises while the physician was acting on behalf of the state within the scope of such physician's public employment or duties.

Credits

(Added L.1978, c. 466, § 1, eff. Aug. 5, 1978. Amended L.1980, c. 704, § 1; L.1980, c. 866, § 8; L.1981, c. 208, § 5; L.1981, c. 228, § 2; L.1982, c. 507, § 1; L.1982, c. 613, § 1; L.1983, c. 190, § 1; L.1983, c. 309, § 1; L.1983, c. 697, § 2; L.1984, c. 204, § 2; L.1984, c. 440, § 8; L.1985, c. 768, § 1; L.1986, c. 844, §§ 1, 2; L.1989, c. 719, § 2; L.1991, c. 2, § 8; L.1991, c. 748, § 12; L.1991, c. 749, § 16; L.1992, c. 293, § 11; L.1992, c. 499, § 16; L.1993, c. 262, § 15; L.1995, c. 83, § 188; L.1996, c. 484, § 1; L.1997, c. 5, § 16, eff. Oct. 14, 1997; L.1998, c. 338, § 3, eff. Jan. 1, 1999; L.2000, c. 250, § 1, eff. Aug. 16, 2000; L.2000, c. 455, § 1, eff. Sept. 20, 2000; L.2001, c. 345, § 1, eff. Sept. 19, 2001; L.2001, c. 383, pt. Z, § 7, eff. October 29, 2001; L.2003,

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INDEX NO. 154213/2022

NYSCEF § 97. Defense and indemnification of state officers and employees, NY PUB OFF § 17

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c. 62, pt. D3, § 4, eff. May 15, 2003; L.2003, c. 435, § 1, eff. Aug. 26, 2003; L.2004, c. 96, § 1, eff. May 25, 2004; L.2004, c. 460, § 3, eff. March 20, 2005; L.2005, c. 488, § 1, eff. Aug. 9, 2005; L.2006, c. 311, § 2, eff. July 26, 2006; L.2007, c. 6, § 79, eff. March 13, 2007; L.2007, c. 58, pt. H, § 2, eff. April 9, 2007, deemed eff. April 1, 2007; L.2008, c. 115, § 25, eff. June 17, 2008; L.2010, c. 131, § 5, eff. June 18, 2010; L.2010, c. 510, § 1, eff. Sept. 17, 2010; L.2011, c. 58, pt. C, § 4, eff. March 31, 2011; L.2012, c. 60, pt. D, § 10, eff. March 30, 2012; L.2013, c. 57, pt. GG, § 36, eff. March 29, 2013; L.2015, c. 58, pt. G, § 4, eff. April 13, 2015; L.2017, c. 58, pt. LL, § 2, eff. April 20, 2017; L.2021, c. 56, pt. HH, § 1, eff. April 16, 2021.)

McKinney's Public Officers Law § 17, NY PUB OFF § 17

Current through L.2022, chapters 1 to 247. Some statute sections may be more current, see credits for details.

End of Document

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McKinney's Consolidated Laws of New York Annotated
 Public Officers Law (Refs & Annos)
 Chapter 47. Of the Consolidated Laws
 Article 2. Appointment and Qualification of Public Officers (Refs & Annos)

McKinney's Public Officers Law § 17-a

§ 17-a. Reimbursement of funds paid by state agencies and state entities
 for the payment of awards adjudicated in sexual harassment claims

Effective: April 12, 2018

Currentness

1. As used in this section, the term “employee” shall mean any person holding a position by election, appointment, or employment in the service of the state of New York, whether or not compensated. The term “employee” shall include a former employee or judicially appointed personal representative.

2. Notwithstanding any law to the contrary, any employee who has been subject to a final judgment of personal liability for intentional wrong-doing related to a claim of sexual harassment, shall reimburse any state agency or entity that makes a payment to a plaintiff for an adjudicated award based on a claim of sexual harassment resulting in a judgment, for his or her proportionate share of such judgment. Such employee shall personally reimburse such state agency or entity within ninety days of the state agency or entity's payment of such award.

3. If such employee fails to reimburse such state agency or entity pursuant to subdivision two of this section within ninety days from the date such state agency or entity makes a payment for the financial award, the comptroller shall, upon obtaining a money judgment, withhold from such employee's compensation the amounts allowable pursuant to section fifty-two hundred thirty-one of the civil practice law and rules.

4. If such employee is no longer employed by such state agency or entity such state agency or entity shall have the right to receive reimbursement through the enforcement of a money judgment pursuant to article fifty-two of the civil practice law and rules.

Credits

(Added L.2018, c. 57, pt. KK, subpt. C, § 1, eff. April 12, 2018.)

McKinney's Public Officers Law § 17-a, NY PUB OFF § 17-a

Current through L.2022, chapters 1 to 247. Some statute sections may be more current, see credits for details.

**Exhibit B-
Affidavit of Dr. John Flateau, sworn to September 15, 2022, with
exhibit
[pp. 1240 - 1243]**

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

- - - - - x

PAUL NICHOLS, GAVIN WAX, AND GARY
GREENBERG

Petitioners,

-against-

Index No. 154213/2022

IAS Part 63

Hon. Laurence R. Love, J.S.C.

**AFFIDAVIT OF DR. JOHN
FLATEAU**

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.

COUNTY OF KINGS)

STATE OF NEW YORK) SS:

DR. JOHN FLATEAU, of full age, being duly sworn, hereby deposes and says as
follows:

1. I served as a Commissioner on the New York State Independent Redistricting Commission ("IRC") during the 2020 redistricting cycle.
2. I briefly resigned from the IRC in 2022, but was reappointed on August 1, 2022 by Senate Majority Leader and Temporary President Andrea Stewart-Cousins. A copy of my re-appointment letter is attached as Exhibit 1.
3. I do not oppose the IRC being named as a Respondent in this proceeding, nor do I oppose myself being named as an individual Respondent.

4. Should I be named as a Respondent in this action, I intend in that instance to retain Jenner & Block LLP, counsel for Commissioners David Imamura, Ivelisse Cuevas-Molina, and Elaine Frazier, as my counsel.

5. I do not oppose the means for redrawing the state Assembly map proposed by Respondent Speaker of the Assembly Carl Heastie and I am prepared to undertake that duty should the Court so order.

DATED: September 15, 2022
Brooklyn, New York

John F. Plateau
John Plateau

Sworn to before me this
15th Day of SEPTEMBER, 2022

Richard Plateau
Notary Public



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EXHIBIT 1

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NYSCEF DOC. NO. 159

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ANDREA STEWART-COUSINS
35TH SENATE DISTRICT
TEMPORARY PRESIDENT OF THE SENATE
MAJORITY LEADER



THE SENATE
STATE OF NEW YORK

ROOM 907 LEGISLATIVE OFFICE BUILDING
ALBANY, NEW YORK 12247
(518) 455-2585
FAX (518) 426-6511

ROOM 332 STATE CAPITOL
ALBANY, NEW YORK 12247
(518) 455-2715
FAX (518) 426-6544

DISTRICT
28 WELLS AVENUE, BUILDING 3
YONKERS, NEW YORK 10701
(914) 421-4011
FAX (914) 421-0979

E-MAIL
SCOUSIN50@NYSENATE.GOV

August 1, 2022

Alejandra Paulino
Secretary of the Senate
New York State Capitol Building
Albany, NY 12224

Dear Secretary Paulino,

Pursuant to Section 5-b of Article III of the State Constitution and Section 94 of the Legislative Law, the Temporary President of the Senate appoints two members to the Independent Redistricting Commission. Please be advised that I am appointing Dr. John Flateau to this Commission.

Sincerely,

Andrea Stewart-Cousins
Temporary President of the Senate
New York State Senate

CC: Dr. John Flateau
Eric J. Katz, Esq., Counsel to the Senate Majority

**Exhibit C-
Affidavit of Yovan Samuel Collado, sworn to September 13, 2022, with
exhibit
[pp. 1244 - 1247]**

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

- - - - - x
PAUL NICHOLS, GAVIN WAX, AND GARY
GREENBERG

Petitioners,

Index No. 154213/2022

-against-

IAS Part 63

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

Hon. Laurence R. Love, J.S.C.

**AFFIDAVIT OF YOVAN
SAMUEL COLLADO**

Respondents.

BRONX COUNTY)

STATE OF NEW YORK) SS:

YOVAN SAMUEL COLLADO, of full age, being duly sworn, hereby deposes and says

as follows:

1. I was appointed to the New York State Independent Redistricting Commission ("IRC") by Speaker of the Assembly Carl Heastie on September 6, 2022, to replace Commissioner Eugene Benger, who resigned from the IRC on September 2, 2022. A copy of my appointment letter is attached as Exhibit 1.
2. I do not oppose the IRC being named as a Respondent in this action, nor do I oppose myself being named as an individual Respondent.

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3. Should I be named as a Respondent in this action, I intend in that instance to retain Jenner & Block LLP, counsel for Commissioners David Imamura, Ivelisse Cuevas-Molina, and Elaine Frazier, as my counsel.

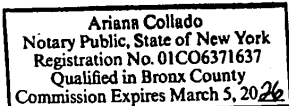
4. I do not oppose the means for redrawing the state Assembly map proposed by Respondent Speaker of the Assembly Carl Heastie and I am prepared to undertake that duty should the Court so order.

DATED: September 13, 2022
Bronx, NY


Yovan Samuel Collado

Sworn to before me this
13th Day of September, 2022


Notary Public



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EXHIBIT 1

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NYSCEF DOC. NO. 161

RECEIVED NYSCEF: 09/15/2022

CARL E. HEASTIE
SpeakerTHE ASSEMBLY
STATE OF NEW YORK
ALBANYRoom 932
Legislative Office Building
Albany, New York 12248
518-455-9781
FAX: 518-455-54591446 East Gun Hill Road
Bronx, New York 10469
718-654-6539
FAX: 718-654-6836250 Broadway, Suite 2301
New York, New York 10007
212-312-1400
FAX: 212-312-1418

September 6, 2022

Honorable Andrea Stewart-
Cousins
Temporary President and
Majority Leader
New York State Senate
Capitol, Room 330
Albany, New York 12247Honorable Robert G. Ort
Republican Conference Leader
New York State Senate
LOB, Room 907
Albany, New York 12247Honorable William Barclay
Minority Leader
New York State Assembly
LOB, Room 933
Albany, New York 12248

Dear Colleagues,

I hereby appoint Yovan Samuel Collado, of the Bronx, New York, as
members of the Independent Redistricting Commission effective
immediately replacing Eugene Bengier, who resigned.

Sincerely yours,

CARL E. HEASTIE
SPEAKER

CEH:bh

cc: Yovan Samuel Collado
Karen Blatt
Douglas Breakell

Letter from Susan Lerner to the Honorable Laurence L. Love, dated
September 15, 2022
[pp. 1248 - 1252]



80 Broad Street, #2703
New York, NY 10004
212.691.6421

www.commoncause.org/ny

September 15, 2022

Having had substantial difficulty logging on to NYSCEF while traveling, we resubmit this letter via NYSCEF upon achieving access..

Via Email [SFC-Part63-Clerk@nycourts.gov]
August 24, 2022

Hon. Laurence L. Love
New York Supreme Court, County of New York
60 Centre Street
New York, NY 10007

Re: Nichols, et al v. Hochul, Index No. 154213/2022

Dear Judge Love,

Common Cause/New York hereby submits this letter as an amicus regarding the hearing currently on the Court's calendar concerning the appropriate process to redraw the Assembly map.

Introduction

Common Cause is a national nonpartisan advocacy organization founded in 1970 working to ensure that every vote counts, that every eligible voter has an equal say, that our elections represent the will of the people, and that our government is of, by, and for the people. Common Cause/New York is one of the most active state chapters within Common Cause, with tens of thousands of members and activists in every county of New York State.

Fair redistricting is a major policy focus for Common Cause across the country. Our national Redistricting & Representation Program helps members of the public play an active role in shaping their own representation, leading efforts to create fairer, more inclusive and impartial processes for drawing districts. We also litigate to challenge partisan and racial gerrymanders in state and federal courts around the country. Common Cause has been involved in redistricting litigation in 11 states this cycle as either a party or amicus brief participant, including cases currently active in Florida, Georgia, Michigan, North Carolina and Texas, in addition to this case.

Common Cause/New York is actively engaged in assisting members of the public and organizational partners to understand and participate in the redistricting process at the state and local level through our series of community mapping workshops. In the last redistricting cycle, Common Cause/New York was the only organization to draw statewide maps for both houses of the Legislature and Congress

that were based on extensive input from communities of interest and Voting Rights Act-protected classes. Portions of the Common Cause congressional map were expressly adopted by the federal court and formed the basis for several upstate districts in the past cycle congressional map. This cycle, we actively participated in assisting coalition partners and members of the public to map their neighborhoods and prepare testimony to the New York Redistricting Commission. We directly filed over 100 pages of comments to the Commission on the Commission's proposed maps. Additionally, we drew and submitted reform maps for congressional and state senate districts, again based on extensive input from communities of interest and Voting Rights Act-protected classes and provided live testimony, as well as extensive written comments, before the special master in the now concluded *Harkenrider v. Hochul* lawsuit. Our participation was acknowledged in the special master's report and several of our proposed districts were expressly incorporated into the final congressional and state senate maps.

Accordingly, we are familiar not only with the law and policy governing redistricting but the actual process and challenge of drawing fair and nonpartisan district lines. Organizationally and on behalf of our members, Common Cause/New York has a long-standing interest in ensuring a fair and open redistricting process that results in maps that reflect the public interest rather than partisan interests. We offer our comments herein in that spirit.

The Commission and the Legislature Have No Further Role

Common Cause/New York believes that it would be an error, both legally and practically, to refer the redrawing of the Assembly maps back to the now all-but-defunct Redistricting Commission or the New York Legislature.

The New York Constitution provides that in the event that a redistricting plan is found to be in violation of the law, it is the responsibility of the court to adopt a map which cures the deficiency. The language of the recently adopted redistricting provision is clear:

The 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, *except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.*
N.Y.S. Constitution, Art. III, §4(e) [emphasis added].

Where a redistricting plan has been found by a court to violate the law, the constitution recognizes an alternate process from the Redistricting Commission or the Legislature drawing the lines. As the Court of Appeals recognized in *Harkenrider v. Hochul*, 2022 N.Y. LEXIS 874 at *25 (2022), there is nothing in the language of the constitutional provision that would justify reading in an expanded role for either the Redistricting Commission or the Legislature once a redistricting plan has been found to violate the law. Indeed, upon finding that “[f]ailure to follow the prescribed constitutional procedure warrants invalidation of the legislature’s congressional and state senate maps”, the Court of Appeals ruled

“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.” *Harkenrider v. Hochul*, 2022 N.Y. LEXIS 874 at *2. Just as the Court of Appeals refused a role for the Commission or the Legislature in redrawing congressional and state senate maps found to violate the law¹ so should this Court deny the Commission or the Legislature the opportunity to redraw the invalidated Assembly districts.

In addition to the plain text of the redistricting provision, our understanding of this provision is influenced by private discussions held in 2012 with Executive Chamber staff engaged in negotiating the now-adopted redistricting provision. In response to concerns that the proposed negotiated constitutional redistricting provision might result in the Legislature ultimately being able to draw partisan maps, staff who negotiated the provision asserted that any deficiencies in the proposed procedure would result in the maps being redrawn by a court. And indeed, for the congressional and state senate maps, that has been the result.

Additionally, we believe there has been no change in circumstances that indicate the Redistricting Commission is now more likely to be able to come to agreement and draw a consensus map than it was when it very publicly failed in its constitutionally required obligations to do so in December, 2021 and January, 2022. In fact, it is our understanding that the Commission has lost virtually all of its staff to local redistricting efforts and would have to be reorganized to be able to even attempt, yet again, to draw maps. The very public implosion of the Commission resulted in public dismay and increased cynicism. To invite a display of continued dysfunction and a waste of public resources does not further any public interest.

As prior events showed, the Commission remains under the control of the elected officials who appointed it, validating our worst fears about the process outlined by the constitutional provision. It is this harsh reality, which subverts the public’s expressed desire for fair, non-partisan redistricting in adopting the constitutional redistricting provision, which we believe motivates the defendants’ request that the redrawing of the Assembly maps be remanded to the Commission and the Legislature. Even if the Commission were to resolve its perpetual logjam and produce a map, allowing the Legislature a role in redrawing the maps contravenes the purpose of the redistricting constitutional provision as recognized by the Court of Appeals in *Harkenrider*. As the Legislature has already demonstrated, it is prepared to ignore the will of the people “by creating and enacting maps in a nontransparent manner,” *Harkenrider* at *2, serving its own interest at the expense of the public interest.

This Court should follow the clear command of the Court of Appeals in the *Harkenrider* decision, reject the partisan attempt by the Assembly to reinsert itself into the redistricting process, and appoint a special master to draw the new Assembly districts.

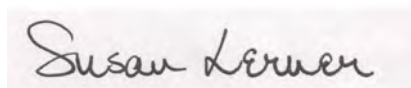
¹ “The procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure.” *Harkenrider v. Hochul*, 2022 N.Y. LEXIS 874 at *35.

There Is Ample Time for The Selection of a Special Master and for Public Input

The situation regarding the selection of a Special Master to draw Assembly districts in a transparent and non-partisan manner is markedly different from that facing the trial court in the *Harkenrider* litigation. There is not an impending deadline for redrawing the district lines, unlike the situation in *Harkenrider*, where a Special Master had to be found who was available to draw new congressional and state senate maps in a matter of weeks, rather than months. That short time frame undoubtedly limited the number of candidates, resulting in the appointment of an individual with experience only assisting a Special Master and no firsthand familiarity with any part of New York, a large and very diverse state. While regarded as non-partisan, the resulting state senate and congressional maps reflect the lack of familiarity with New York's communities and lack of time to hear from communities around the state who could have provided invaluable details and nuance. We urge the Court to consider a range of various experts in choosing the Special Master with special attention to firsthand familiarity with New York.

We also urge the Court to ensure that the process of redrawing the Assembly districts is transparent and that there is ample opportunity for public input. Whoever is ultimately named as the Special Master should be required to hold a sufficient number of hearings around the state to provide a reasonably accessible opportunity for members of the public to provide testimony on any proposed map, as well as receive written comments directly from the public.

Respectfully submitted,



Susan Lerner, Esq., Executive Director
Common Cause/New York

cc (Via email)

Jim Walden, Esq. (jwalden@wmhlaw.com)
Peter A. Devlin, Esq. (pdevlin@wmhlaw.com)
Aaron S. Foldenauer Esq. (aaron@nyelectionlaw.com)
Craig R. Bucki, Esq. (cbucki@phillipslytle.com)
Steven Briggs Salcedo, Esq. (ssalcedo@phillipslytle.com)
Aaron Keith Suggs, Esq. (aaron.keith.suggs@elections.ny.gov)



Letter from Aaron S. Foldenauer, Jim Walden and Peter A. Devlin
to the Honorable Laurence L. Love, dated September 15, 2022
[pp. 1253 - 1254]

Law Office of Aaron S. Foldenauer

September 15, 2022

VIA NYSCEF

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
Notice of Order in Related Action and of Article Published by the Chair of the IRC

Dear Justice Love:

On behalf of Petitioners, we write to inform the Court of (a) a recent decision in *Hoffman v. N.Y. State Independent Redistricting Commission*, No. 904972-22 (Sup. Ct. Albany Cty. Sept. 12, 2022) (attached hereto as **Exhibit A**) and (b) a recent op-ed authored by David Imamura, the Chair of the Independent Redistricting Commission (the “IRC”) (attached hereto as **Exhibit B**), both of which are highly pertinent to the issues under consideration by the Court.

On Monday, September 12, in *Hoffman*, Justice Lynch issued a Decision and Order that denied a request that the IRC be afforded a second chance to draft new congressional lines for the next election cycle (i.e., 2024). Ex. A at 2 (“The question is whether the IRC has the authority to now submit a second redistricting plan corresponding to the 2020 federal census. I think not!”).

The Court emphasized the “record demonstration of the IRC’s inherent inability to reach a consensus on a bipartisan plan,” and concluded that “directing the IRC to submit a second plan would be futile!” Ex. A at 12.

The Chair of the IRC, David Imamura, made a similar admission in a recent op-ed he authored in the New York political publication, *City & State*. David Imamura, *Opinion: New York’s Redistricting Process is Doomed to Fail*, available at <https://www.cityandstateny.com/opinion/2022/05/opinion-new-yorks-redistricting-process-doomed-fail/366581/>. Mr. Imamura wrote that the IRC’s redistricting process “is doomed to fail.” Ex. B. at 2. Noting that the IRC is evenly divided between five Republican and five Democratic commissioners, “[t]he commission essentially could not buy pens or paper clips without all ten commissioners agreeing.” *Id.* at 1.

Mr. Imamura concluded that the IRC “will *never* be able to come up with a single set of maps.” *Id.* at 2 (emphasis added).

Justice Lynch’s decision, along with Mr. Imamura’s admission that the IRC “will *never* be able to come up with a single set of maps,” underscore Petitioners’ position that the appropriate remedy is for the Court to oversee proceedings with a special master to adopt a new Assembly Map.

Respectfully submitted,

/s/ Aaron S. Foldenauer

Aaron Foldenauer
Attorney for Petitioner Gavin Wax

/s/ Jim Walden

Jim Walden
Peter A. Devlin

*Attorneys for Petitioners Paul
Nichols and Gary Greenberg*

cc: All Counsel of Record (via NYSCEF)

**Exhibit A to Letter-
Notice of (a) Related Court Decision and (b) Op-Ed by the
Chair of the IRC
[pp. 1255 - 1268]**

INDEX NO. 904972-22

NYSCEF DOC. NO. 170

RECEIVED NYSCEF: 09/12/2022

THE STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

Anthony S. Hoffman; Courtney Gibbons;
Lauren Foley; Seth Pearce; and Nancy
Van Tassel, Marco Carrión, Mary Kain, Kevin Meggett,
Reverend Clinton Miller, and Verity Van Tassel Richards,

Petitioners,

-against-

DECISION AND ORDER
Index No. 904972-22
RJI No. 01-22-ST2408
(Hon. Lynch, J.)

The New York State Independent redistricting
Commission; Independent Redistricting Commission
Chairperson David Imamura; Independent Redistricting
Commissioner Ross Brady; Independent Redistricting
Commissioner John Conway III; Independent Redistricting
Commissioner Ivelisse Cuevas-Molina; Independent
Redistricting Commissioner Elaine Frazier; Independent
Redistricting Commissioner Lisa Harris; Independent
Redistricting Commissioner Charles Nesbitt; and
Independent Redistricting Commissioner Willis H. Stephens,

Respondents,

And

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's,

Intervenor-Respondents.

INTRODUCTION

This is an Article 78 proceeding in the form of mandamus (CPLR § 7803(1)) to compel Respondents to timely prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan corresponding to the 2020 federal census pursuant to Article III, Sections 4 and 5(b) of the New York Constitution. Petitioners seek a new redistricting plan for successive elections, after the 2022 election, until such time as a new redistricting plan is adopted following the 2030 federal census.

Intervenors-Respondents and Respondents, Independent Redistricting Commissioners: Ross Brady; John Conway III; Lisa Harris; Charles Nesbitt and Willis H. Stephens, all moved to dismiss the proceeding, claiming the redistricting process based on the 2020 federal census is complete, governing all elections until the redistricting process begins anew following the 2030 federal census. This claim is predicated on the constitutional framework providing for redistricting every ten (10) years based on the then current census. Respondents David Imamura, Ivelisse Cuevas-Molina, and Elaine Frazier do not oppose the relief requested in the Petition.

The IRC failed to submit a second redistricting plan for the legislature's review before February 28, 2022. The question is whether the IRC has the authority to now submit a second redistricting plan corresponding to the 2020 federal census. I think not!

PRIOR REDISTRICTING LITIGATION

The factual history of the 2022 redistricting is well laid out in Matter of Harkenrider v. Hochul, 204 A.D. 3d 1366 [4th Dept. 2022], modified 2022 N.Y. LEXIS 874 [2022]. A few points bear mention.

First, the Court recognized the makeup of the IRC as follows:

“From a procedural standpoint, the Constitution — as amended in 2014 — requires that, **every ten** years commencing in 2020, an

"independent redistricting commission" comprising 10 members — eight of whom are appointed by the majority and minority leaders of the senate and assembly and the remaining two by those eight appointees — shall be established (*see* NY Const, art III, § 5-b [a]).” (Id. at 16) (Emphasis added)

Next, the Court recognized the IRC’s failure to submit a second redistricting plan to the Legislature, to wit:

“In December 2021 and January 2022, however, **negotiations** between the IRC members **deteriorated** and the IRC, **split along party lines**, was unable to agree upon consensus maps. According to the IRC members appointed by the minority party, after agreement had been reached on many of the district lines, the majority party delegation of the IRC **declined to continue negotiations on a consensus map**, insisting they would proceed with discussions only if further negotiations were based on their preferred redistricting maps.

As a result of their disagreements, the IRC submitted, as a first set of maps, **two proposed redistricting plans to the legislature — maps from each party delegation** — as is constitutionally permitted if a single consensus map fails to garner sufficient votes (*see* NY Const, art III, § 5-b [g]). The legislature voted on this first set of plans without amendment as required by the Constitution and rejected both plans. **The legislature notified the IRC of that rejection, triggering the IRC's obligation to compose — within 15 days — a second redistricting plan for the legislature's review** (*see* NY Const, art III § 4 [b]). On January 24, 2022 — the day before the 15-day deadline but more than one month before the **February 28, 2022 deadline**—the IRC announced that it was **deadlocked** and, as a result, would not present a second plan to the legislature.” (Id. at 6-7) (Emphasis added)

The Court recognized the failure to submit a second redistricting plan resulted from lack of bipartisan work by IRC Members.

Petitioners claim the Legislature contemplated non-action by the IRC, alleging:

“The Legislature had anticipated this possibility and passed legislation in 2021 (the “2021 Legislation”) purportedly filling a gap in the New York constitutional language by authorizing the

Legislature to pass a redistricting plan in the event that the IRC failed to submit redistricting plans. See L 2021, ch 633 (stating that “if the commission does not vote on any redistricting plan or plans, for any reason . . . each house shall introduce such implementing legislation with any amendments each house deems necessary”).¹

The Supreme Court found that the 2021 legislation was unconstitutional. The Appellate Division vacated that finding and held the 2021 legislation was not void ab initio, recognized the legislature’s authority to enact the plan, but ultimately found the maps were invalid due to unconstitutional partisan gerrymandering in violation of Const. Article III §4 (c) (5) (204 A.D. 3d 1366, 1369-1370). The Court of Appeals disagreed, holding the legislature was without authority to undertake the drawing of the district lines in the first instance, since two redistricting plans had not been first submitted to and rejected by the legislature in accord with the procedure set forth in Article III §4 (Matter of Harkenrider v. Hochul, 2022 N.Y. LEXIS 874, p. 19-20 [2022]).

The Appellate Division held that the Constitution was “silent” relative to the procedure to follow in the event of an IRC impasse (204 A.D. 3d 1366, 1369). The Court of Appeals, once again, disagreed, and recognized that the Constitution did, in fact, provide a judicial remedy, holding,

“...that the Constitution dictates that the IRC-based process for redistricting established therein “*shall* govern redistricting in this state *except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law*” (NY Const art III, § 4 [e]).”

¹ NYSCEF Doc. No. 47 Amended Petition ¶ 8.

By providing a judicial remedy upon the adoption of NY Const Art III, § 4 [e], the Legislature was not unmindful of the potential that political differences which could undermine the integrity of the redistricting process.

The Court of Appeals implemented a remedy, holding,

“We therefore remit the matter to Supreme Court which, with the assistance of the special master and any other relevant submissions (including any submissions any party wishes to promptly offer), shall adopt constitutional maps with all due haste.” (Id. 36-37)

Upon remitter, Petitioners Courtney Gibbons, Seth Pearce, Nancy Van Tassel, Verity Van Tassel Richards participated in the public review process by filing a letter with the Court seeking the following relief:

“...we urge this court to ensure that the map drawn by the Special Master only be used for the 2022 congressional election.”²

By Decision and Order dated May 20, 2022, corrected by Decision and Order dated June 2, 2022, the Court (McAllister, J.) certified the 2022 Congressional Maps prepared by the Special Master “as being the official approved 2022 Congressional map....”³ The Court did not limit the maps to the 2022 election.

CONSTITUTION

The Constitution requires IRC to propose redistricting plans every ten years commencing in two thousand twenty-one, with the first plan to be submitted no later than January 15, 2022. In turn, an approved redistricting plan is in full force and effect until the next plan is approved

² NYSCEF Doc. No. 68 p. 1 – letter dated May 18, 2022 - Harkenrider v. Hochul, Index No. E2022-0116CV – Letter on behalf of DCCC and New York Voters **Lauren Foley**, Belinda de Gaudemar, Lauren Furst, **Courtney Gibbons**, **Seth Pearce**, Leah Rosen, Susan Schoenfeld, **Nancy Van Tassel**, **Verity Van Tassel Richards**, and Ronnie White, Jr. (emphasis added to identify Petitioners herein).

³ See Harkenrider et al v. Hochul et al, Supreme Court, Steuben County Index No. E2022-0116CV – NYSCEF Doc. No. 670 @ p. 5 and NYSCEF doc. No. 696.

based upon the subsequent federal decennial census taken in a year ending in zero unless modified pursuant to court order, i.e., ten (10) years.

NY Const. Article III, Section 4 (b) and (e) provide, inter alia:

“(b) The independent redistricting commission established pursuant to section five-b of this article shall **prepare a redistricting plan to establish** senate, assembly, and **congressional districts every ten years commencing in two thousand twenty-one**, and shall submit to the legislature such plan and the implementing legislation therefore on or before January first or as soon as practicable thereafter but no later than **January fifteenth in the year ending in two beginning in two thousand twenty-two**. The redistricting plans for the assembly and the senate shall be contained in and voted upon by the legislature in a single bill, and the congressional district plan may be included in the same bill if the legislature chooses to do so. The implementing legislation shall be voted upon, without amendment, by the senate or the assembly and if approved by the first house voting upon it, such legislation shall be delivered to the other house immediately to be voted upon without amendment. If approved by both houses, such legislation shall be presented to the governor for action. If either house shall fail to approve the legislation implementing the first redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto, each house or the governor if he or she vetoes it, shall notify the commission that such legislation has been disapproved. **Within fifteen days of such notification and in no case later than February twenty-eighth, the redistricting commission shall prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan.** Such legislation shall be voted upon, without amendment, by the senate or the assembly and, if approved by the first house voting upon it, such legislation shall be delivered to the other house immediately to be voted upon without amendment. If approved by both houses, such legislation shall be presented to the governor for action.

(e) The **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 **except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.**

A reapportionment plan and the districts contained in such plan **shall be in force until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero unless modified pursuant to court order.”** (Emphasis added)

Notwithstanding the intent of the Constitution that approved plans be in place for 10 years, Petitioners seek judicial relief to limit the plans adopted on May 20, 2022, to the 2022 election, and to compel the IRC to submit a second plan based on the 2020 census for consideration by the legislature and to be implemented in the 2024 Congressional election and thereafter in successive elections.

MOTION TO DISMISS⁴

Movants seek to dismiss the Petition on both procedural and substantive grounds, to wit:

(1) the petition is an improper collateral attack on the Decision and Order dated May 20, 2022, corrected by Decision and Order dated June 2, 2022, referenced above;⁵ (2) that the requested relief violates the Constitution;⁶ (3) that the proceeding is time-barred;⁷

STATEMENT OF LAW

First, the Court will address the claims that this proceeding is an improper collateral attack on the Decision and Order of the Supreme Court, Steuben County. Next, the Court will address the timeliness of the proceeding. Last, the Court will address the constitutional question on the merits, in context of a motion to dismiss for failure to state a cause of action.

⁴ Oral argument of the record took place this date.

⁵ NYSCEF Doc. No. 70 – Intervenor Memo of Law Point 1, p. 11-13.

⁶ NYSCEF Doc. No. 70 – Intervenor Memo of Law Point 1, p. 13-18; NYSCEF Doc. No. 109 – Memo of Law Points 1 and 2.

⁷ NYSCEF Doc. No. 70 – Intervenor Memo of Law Point 1, p.18-21. NYSCEF Doc. No. 109 – Memo of Law Point 3.

COLLATERAL ATTACK

There is no question that several Petitioners, as members of the public, participated in the Steuben County litigation by writing a letter to the Court. Petitioners were not, however, parties to that litigation.⁸ Resolution of the so-called collateral attack claim, necessitates a determination of whether the subject claim is barred under res judicata or whether the issue is barred by collateral estoppel. They are not.

In Simmons v. Trans Express, 37 N.Y.3d 107, 111-112 [2021], the Court held, inter alia:

"Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. One linchpin of res judicata is **an identity of parties actually litigating** successive actions against each other: the doctrine applies **only when a claim *between the parties* has been previously brought to a final conclusion**. Importantly, the claim preclusion rule extends beyond attempts to relitigate identical claims. We have consistently applied a transactional analysis approach in determining whether an earlier judgment has claim preclusive effect, such that once a claim is brought to a final conclusion, *all other claims arising out of the same transaction or series of transactions* are barred, even if based upon different theories or if seeking a different remedy. This rule is grounded in public policy concerns, including fairness to the parties, and is intended to ensure finality, prevent vexatious litigation and promote judicial economy"...

Collateral estoppel, or issue preclusion, is related to, but distinct from, the doctrine of res judicata. Collateral estoppel prevents "a party from **relitigating** in a subsequent action or proceeding an *issue* clearly raised in a prior action or proceeding and decided against that party . . . whether or not the . . . causes of action are the same." (Internal quotations and citations omitted; emphasis added)

⁸ In his May 20, 2022, Decision and Order, Justice McAllister noted that he had received approximately 3000 comments. See Harkenrifer et al v. Hochul et al, Supreme Court, Steuben County Index No. E2022-0116CV – NYSCEF Doc. No. 670 @ p. 2.

Here, the submission of a letter to the Court as part of a public comment process, did not afford Petitioners a full and fair adjudication on the merits of the subject claim. Frankly, Justice McAllister did not even address the issue of whether the approved 2022 Congressional Map was limited to the 2022 election.⁹ The claims and issue raised here are not barred.

TIMELINESS OF ACTION

Movants claim that the limitations period began on January 24, 2022, the date of the IRC deadlock, and/or no later than February 28, 2022, the last day that the IRC was authorized to submit a second redistricting plan under the Constitution, rendering the commencement of the proceeding untimely. I disagree.

The statute of limitations for an Article 78 proceeding is four months (CPLR 217 (1)). The issue, however, is not what the limitations period is. Rather, the issue is when did it begin to accrue.

CPLR § 203 (a) provides:

“Accrual of cause of action and interposition of claim. The **time** within which an action must be commenced, except as otherwise expressly prescribed, **shall be computed from the time the cause of action accrued** to the time the claim is interposed.” (Emphasis added)

In Utica Mut. Ins. Co. v. Avery, 261 A.D.2d 802, 803 [3d Dept. 1999], the Court held,

⁹ See Harkenrider et al v. Hochul et al, Supreme Court, Steuben County Index No. E2022-0116CV – NYSCEF Doc. No. 670.

“A cause of action accrues upon the occurrence of all events essential to the claim such that the plaintiff would be entitled to judicial relief.”

(See also, Guglielmo v. Unanue, 244 A.D.2d 718, 721 [3d Dept. 1997], where the Court held,

“The Statute of Limitations is triggered upon accrual of the cause of action (CPLR 203 [a]). Either under contract or tort, accrual occurs when ... the party would be entitled to obtain relief in court and when the claim becomes enforceable.”)

Since a Court will not render an advisory opinion, to obtain relief, there must be a justiciable controversy (see In Re Workmen’s Compensation Fund, 224 N.Y. 13 [1918] [Cardozo, J.] where the Court held, “The function of the courts is to determine controversies between litigants...They do not give advisory opinions.”) As of January 24, 2022, and/or February 28, 2022, there simply wasn’t a justiciable controversy between Petitioners and the IRC.

Once the IRC announced a deadlock, the Legislature adopted its own redistricting map, and the new law was signed by the Governor on February 3, 2022, in advance of the February 28, 2022, date set forth in the constitution. It wasn’t until May 20, 2022, that the new 2022 Congressional Maps went into effect. At that time, a justiciable controversy existed between Petitioners and the IRC, commencing the limitations period. This proceeding was commenced on June 28, 2022, and it is timely.

CAUSE OF ACTION

Movant’s moved to dismiss the Petition pursuant to CPLR R 3211 (a) (5) (7) and 7804 (f).¹⁰ The review standard requires that the allegations be deemed true for purposes of the motion (See Lichtensteiger v. Housing & Development Administration, 40 A.D.2d 810 [1st Dept. 1972];

¹⁰ NYSCEF Doc. Nos. 69-70, 106.

Chanko v. Am. Broad Companies, Inc., 27 N.Y. 3d 46, 52 [2016]; Conklin v Laxen, 180 A.D.3d 1358, 1362 [4th Dept. 2020]; Piller v Tribeca Dev. Group LLC, 156 A.D.3d 1257, 1261 [3d Dept. 2017]).

In Wedgewood Care Ctr. v. Kravitz, 2021 N.Y. App. Div. LEXIS 4836, p. 9 [2d Dept. 2021], the court recognized,

“Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, **or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.**”

However, “allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration, nor to that arguendo advantage”. (Emphasis added; internal quotations and citations omitted)

Here, the facts are not in dispute, and resolution as a matter of law is appropriate.

As set forth above, on May 20, 2022, the Court certified the 2022 Congressional maps in accord with the Court of Appeals remittal and NY Const. Article III, Section 4 (e). The Constitution clearly states that the redistricting shall take place “every ten years commencing in two thousand twenty-one.” In this Court’s view, the Congressional maps approved by the Court on May 20, 2022, corrected by Decision and Order dated June 2, 2022, are in full force and effect, until redistricting takes place again following the 2030 federal census. While the constitution does provide for judicial relief, the requested relief to restrict the 2022 maps to the 2022 election violates the constitutional mandate that an approved map be in effect until a subsequent map is adopted after the federal decennial census. In turn, there is no authority for the IRC to issue a second redistricting plan after February 28, 2022, in advance of the federal census in 2030, in the first instance, let alone to mandate such plan be prepared.

The point made is that the Constitutional mandate that approved redistricting maps be in place for a reasoned period, ten years, is to provide stability in the election process. Petitioner's sought-after relief runs afoul of that intent, for it would provide a path to an annual redistricting process, wreaking havoc on the electoral process. Moreover, Petitioner fails to account for the record demonstration of the IRC's inherent inability to reach a consensus on a bipartisan plan. Put another way, directing the IRC to submit a second plan would be futile! Hence, the judicial remedy exists within the Constitutional structure.

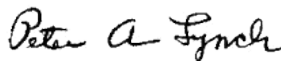
It is the judgment of this Court, that there is no enforceable remedy available to Petitioners to limit the 2022 Congressional redistricting map to the 2022 election, nor to compel the IRC to submit a second redistricting plan corresponding to the 2020 federal census. Motion to dismiss is granted.

CONCLUSION

For the reasons more fully stated above, the motions to dismiss the Petition are Granted.

This memorandum constitutes both the decision and order of the Court.¹¹

Dated: Albany, New York
September 12, 2022



PETER A. LYNCH, J.S.C

PAPERS CONSIDERED:

All e-filed pleadings, with exhibits.¹²

¹¹ Compliance with CPLR R 2220 is required.

¹² Including e-filings in Harkenrifer et al v. Hochul et al, Supreme Court, Steuben County Index No. E2022-0116CV.

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**Exhibit B to Letter-
Article titled "Opinion: New York's redistricting process
is doomed to fail"
[pp. 1269 - 1270]**

CUOMO



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[With A New Austerity Measure, Mayor Eric Adams Asks Agencies To Cut Budgets By 3%](#)



NEW YORK

Opinion: New York's redistricting process is doomed to fail

Here's why it's already time to reform the state's Independent Redistricting Commission.



David Imamura ABRAMS FENSTERMAN, LLP.

By **DAVID IMAMURA** | MAY 6, 2022

For the last year I have served as chair of New York State's first ever Independent Redistricting Commission. Created by the voters via a 2014 state constitutional amendment, the commission was ostensibly designed to remove partisanship from redistricting and end gerrymandering in the Empire State once and for all. However, it is safe to say that the new process failed spectacularly. The commission was unable to agree on district lines. The state Legislature then took over the process, but the lines they drew were overturned by the courts. Now a judicial special master will draw New York's district lines.

While the courts and some parties have laid blame on the commission for failing to perform its duty, it is the commission structure established by the state's constitution that is actually to blame. The commission was created in 2014 by the then Republican-controlled state Senate and now former Gov. Andrew Cuomo. Realizing that the Democrats might soon take full control of the state government, the governor and the Republicans intentionally created a system that would not work. Under this process the Commission was required to be evenly split, five Democrats and five Republicans. The state constitution also required seven votes to do anything, which functionally meant that every decision had to be unanimous. The commission essentially could not buy pens or paper clips without all ten commissioners agreeing.

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CITY & STREAM



[In the sky with Skye: State Senator John Liu takes us in a propeller plane](#)

[TUNE IN | PAST EPISODES](#)

With redistricting chaos, support grows for consolidating all New York primary elections in August**Who is the man tasked with redrawing New York's new district lines?**

With five Democrats and five Republicans who had very different views on how districts should be drawn and, in particular, how various communities of interest should be respected in accordance with the constitutional criteria, it became clear that the commission would not reach agreement. Without a tie breaker (surprise!), the Commission eventually deadlocked.

Add to this Republican intransigence. My counterpart, former state Sen. Jack Martins, the Republican vice chair of the commission, clearly was interested in running for office again. In our marathon negotiating sessions, again and again we would come back to Nassau County (his home), and again and again we would be unable to agree on the districts where he conceivably would run.

Two months after the commission reached a stalemate, I was shocked but not surprised to see Jack announce his candidacy for New York State Senate in a district that he himself had been trying to draw mere weeks before.

The courts have faulted the commission for failing to send a second set of maps to the Legislature by the constitutionally imposed deadline. I want to be clear about why we were unable to do so. When the time came to send our second set of maps to the Legislature, our Republican colleagues refused to even attend a meeting to hold a vote on the maps we were proposing. Since the state Constitution requires a seven-person quorum and since the five Republican Commissioners refused to hold a meeting, it was impossible to vote out maps to send to the Legislature. It is thus particularly frustrating that the Court of Appeals invalidated the new district lines in part on the fact that we did not have a final vote. Seeing how this all played out, I realize now that this was likely the Republican strategy all along – refuse to hold a vote to set up their lawsuit when the Legislature took over the process.

While I can blame Republican intransigence, ultimately no matter who is appointed to the commission, New York's current redistricting process is doomed to fail. A politically appointed, evenly divided Redistricting Commission will never be able to come up with a single set of maps. The Court of Appeals has now created a process where courts will always draw the district lines.

If we are going to have a truly independent, voter-driven redistricting process, we need to reform New York State's Independent Redistricting Commission. It needs a tie breaker vote, and it needs members who are appointed through a competitive non-political process.

I am proud of the work the commission did. We traveled across the state, holding 24 public hearings where we listened to over 700 speakers. The commission ultimately received over 3,000 submissions from the public, where every day New Yorkers had the chance to make their voices heard. Their work will ultimately be submitted to the Special Master and the Court for their review in drawing new maps.

The opportunity for a true, functioning redistricting commission is there. Other states have commissions that function and are not procedurally designed to fail. New York deserves better than the broken redistricting process it currently has. There is a way to truly incorporate public input into drawing districting lines, we just need to find it. [c](#)

David Imamura is chair of the New York State Independent Redistricting Commission.

Transcript of Proceedings, dated August 24, 2022
[pp. 1271 - 1318]

FILED: NEW YORK COUNTY CLERK 10/21/2022 12:24 PM

NYSCEF DOC. NO. 189

INDEX NO. 154213/2022

RECEIVED NYSCEF: 10/21/2022

1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 63

- - - - - X

PAUL NICHOLS, GARY GREENBERG, and GAVIN
WAX,

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

Respondents.

- - - - - X

Supreme Courthouse
60 Centre Street
New York, New York 10007
August 24, 2022

B E F O R E :

HONORABLE LAURENCE L. LOVE,
Justice of the Supreme Court

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AMM

FILED: NEW YORK COUNTY CLERK 10/21/2022 12:24 PM

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NYSCEF DOC. NO. 189

RECEIVED NYSCEF: 10/21/2022

2

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ASHLEY MILLAN
SENIOR COURT REPORTER

AMM

Proceedings

1 THE COURT: Good morning to all sides. We are here
2 on the matter of Nichols v. Governor Hochul, et al., Index
3 154213 of 2022. If I could first get appearances of all
4 sides, starting with counsel for petitioner.

5 MR. WALDEN: Jim Walden. Good morning, your Honor.
6 Thank you for having us.

7 MR. FARBER: Good morning, your Honor. Seth Farber
8 with the Attorney General's office for Governor Hochul.

9 MR. BUCKI: Good morning, your Honor. Craig Bucki
10 from the Law Firm of Phillips Lytle, LLP, on behalf of
11 Assembly Speaker Carl Heastie.

12 MR. HECKER: Eric Hecker from Cuti, Hecker, Wang,
13 for the Senate Majority Leader.

14 THE COURT: Good morning to all sides. I know,
15 obviously, we're here in person this morning, but I know we
16 also have the public access open, as well, for those who are
17 observing. It's nice to see everyone back, sort of, I will
18 say.

19 As everyone knows, I initially dealt with this
20 matter related to the original petition that was filed back
21 on May 12th of this year, addressing the status of the
22 assembly maps for the primary and general election. I'm not
23 going to go through, in full detail, the history, I think
24 everyone here is very well-versed in it in terms of what
25 occurred between my initial ruling, the Appellate Division,

AMM

Proceedings

1 what occurred with the Court of Appeals. All of that, as
2 the parties know, resulted in the decision from the First
3 Department back on June 10th of this year, where obviously
4 they agreed with the main part of my ruling in terms of not
5 delaying the primary, which obviously occurred in June;
6 however, the Appellate Division did find that the assembly
7 map from February of 2022 was invalid based on the
8 procedural infirmity as previously determined by the Court
9 of Appeals in the related litigation.

10 Based on that, they sent the case back to me,
11 essentially, to determine the best way to move forward with
12 the redrawing of those maps following the constitutional
13 requirements, and for that new map to be put in place, at
14 the earliest, for the 2024 election cycle. So obviously our
15 timeline is now different than the timeline we were dealing
16 with when you were all before me back in May with the
17 pressure of having to do something in an extremely short
18 timeframe.

19 Additionally, I will just point out that, following
20 that decision of the Appellate Division, obviously I could
21 have theoretically just taken that decision from the Court
22 and just proceeded to issue a ruling on how I believed the
23 matter should proceed, I thought it was more appropriate to
24 hear from both sides on the record in terms of what options
25 they thought were most appropriate, and set up a schedule

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1 for that to occur with a return date for oral argument. I
2 know both sides uploaded their positions, I know respondent
3 also included, as part of that their belief, that the
4 Independent Redistricting Commission should be added as a
5 party to this matter, and we will obviously address that, as
6 well.

7 I think it goes without saying, but I will say it
8 anyway, that we're dealing with an unprecedented situation.
9 There's obviously, through redistricting fights over the
10 years, those turning into litigation is probably more of the
11 norm than the exception, but the situation that we have
12 before us, where we're dealing with just the maps for one
13 house of the Legislature that still need to be addressed, to
14 my belief, that has never occurred before, and also this is
15 the first time dealing with the cycle since the 2014
16 constitutional provisions were put in place that the Court
17 of Appeals decision had followed.

18 So with that said, I want to turn first to
19 petitioner's counsel and give you an opportunity to be heard
20 on this matter, and then we will go forward from there.

21 MR. WALDEN: Thank you, Judge Love, and I want to
22 say thank you very much for the process that you put place.
23 We are grateful for the opportunity to be heard both on
24 papers and in writing, and I will be quick, your Honor, I do
25 not think this needs to be a long argument, because the

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1 essential issue here is very clear, how to redraw the
2 assembly map.

3 Judge, a little context is important here, right?
4 Since the time of our argument, I made the point to this
5 Court, as I made it to the First Department and I wanted to
6 make to the Court of Appeals, that we're in an unprecedented
7 era in another way, as well, which is we have red and purple
8 states across the country gerrymandering and rigging maps.
9 We have New York politicians and some of the most
10 influential academic thinkers in the nation decrying that
11 effort, and we have the same thing going on here.

12 And what really surprised me, your Honor, is that
13 -- this is a pro bono case for us, we did this on our dime.
14 We hired one of the nation's leading statisticians to
15 conduct an analysis, a very detailed analysis called the
16 Extreme Outlier Test, and this is not a test that she made
17 up, although God knows she has the brain power to do it,
18 she's a triple degree holder from Duke, she's a
19 distinguished professor at the University of Colorado
20 Boulder, she's been doing this for 25 years, she has
21 reviewed this kind of analysis time and time again, but she
22 was applying a test that was embraced by none other than
23 Eric S. Lander, who's on the National Academy of Sciences,
24 the National Academy of Medicine, a professor at Harvard and
25 MIT. And their analysis is one that is proven, when you

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1 have a map that demonstrates itself to be an extreme
2 outlier, then it is a map that is rigged.

3 Her analysis comes down to the last paragraph, and
4 I will read it for the Court, as I'm sure your Honor has
5 read it. Based on the results of these analyses, I
6 considered it almost certain that the 2022 assembly plan was
7 deliberately designed in part to maximize the number of
8 districts containing a single incumbent assembly member. It
9 was the incumbent protection plan that we had labeled it all
10 along. And so this is why it's relevant, your Honor. I'm
11 getting to the point. Now your Honor has to decide how to
12 redraw the map, and in our view, it isn't unprecedented.

13 There were two maps that were declared
14 unconstitutional. One, it's an unconstitutional germander,
15 and because of the constitutional procedural illegality, and
16 one that was only declared unconstitutional for the -- and
17 we keep calling it procedural, but the process matters -- a
18 procedural violation that was dictated not just by the
19 Legislature twice, but by New York voters in amending the
20 Constitution, and there, Justice McAllister determined to
21 use a special master to redraw the map. Why? Because in
22 Justice McAllister's view, the Constitution is clear, once
23 there is a violation, the Legislature does not get a do-over
24 for any error that it can no longer correct.

25 And the respondents in this case disagreed, and

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1 they took it to the Fourth Department, and then they took it
2 to the Court of Appeals, and the Court of Appeals could not
3 have been more clear, and how the respondents time and time
4 again tried to lead you into error with the advocacy in
5 their briefs is surprising, because this is the language of
6 the Court of Appeals, it couldn't be clearer.

7 Finally, the State respondents protest that the
8 Legislature must be provided a, quote, full and reasonable
9 opportunity to correct legal infirmities in redistricting
10 legislation. That's true, that's in the Constitution. The
11 Court then goes on, the procedural unconstitutionality of
12 the congressional and Senate maps is, at this juncture,
13 incapable of legislative cure.

14 Now, if the Court of Appeals had stopped there --
15 your Honor, if I can continue for one more minute, I want to
16 be very responsive to your questions, as always.

17 THE COURT: Go ahead, counsel.

18 MR. WALDEN: If the Court of Appeals had stopped
19 there, I could understand the respondents using creative
20 advocacy in saying, well, "at this juncture" means because
21 there was an election coming up, and that's what they put in
22 their brief, that's what they want you to believe, but what
23 they did was they didn't quote the next sentence where the
24 Court of Appeals clearly identifies what it was talking
25 about. It says "the deadline in the Constitution for the

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1 IRC to submit a second set of maps has long since passed,
2 and if that wasn't clear enough, the Court of Appeals
3 dropped a footnote clarifying that the deadline it was
4 referring to was the February 28, 2022 deadline, which is
5 the last deadline to submit the second set of maps.

6 So the Court of Appeals clearly held, without any
7 ambiguity, that if there is a violation that the Legislature
8 can't cure, the appropriate remedy is judicial.

9 Now, your Honor --

10 THE COURT: Counsel, I will give you an opportunity
11 to continue, but --

12 MR. WALDEN: I have to switch glasses because I
13 can't see distance or reading, sorry.

14 THE COURT: I understand. The Court of Appeals
15 also said in that same decision, you made reference, quote,
16 that together the 2014 amendments created an exclusive
17 process of redistricting that was designed to promote
18 citizen participation, fair representation, and confidence
19 in elections, thereby pressuring in a new era of
20 bipartisanship and transparency. I know you quoted that
21 within your own papers.

22 The Court of Appeals, within their decision that
23 they were dealing with in the case that was before them
24 prior to the 2022 elections, repeatedly made reference to
25 the benefits of the Independent Redistricting Commission

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1 that was set up per the constitutional amendments that were
2 put into place, and the entire purpose behind that was to
3 try to avoid a lot of the issues that you've raised, which
4 we know have always been out there on a national level in
5 terms of concerns of potential gerrymandering or things
6 being done by others who may have been involved in the
7 redistricting process. So that entire process, which
8 obviously did not work in the 2022 cycle --

9 MR. WALDEN: Was intentionally sidestepped --

10 THE COURT: Well, counsel, I'm not going to
11 reiterate the history of what occurred with the members of
12 the Independent Redistricting Commission and the maps and
13 the timeline and what the Legislature did, and obviously the
14 Court of Appeals has already issued their rulings on all of
15 that, but I do think it would be disingenuous to not
16 acknowledge the fact that the Court of Appeals was issuing a
17 decision based on a specific timeline for the upcoming
18 election cycle, which is what they were addressing.

19 So the reality is that, now, and I agree with you
20 when I said it myself, this is an unprecedented situation, I
21 think we can all degree with that, but the Appellate
22 Division decision that sent the matter back to me is very
23 specific in stating that it should follow the constitutional
24 requirements and that this is for the 2024 election cycle.
25 So that entire compressed time pressure situation, which led

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1 to the special master being appointed and going through that
2 process with the Senate and congressional maps occurred, now
3 we have a situation where we literally have a two-year
4 window before a new map needs to be in place for an election
5 cycle.

6 And I would think, and obviously I will hear
7 further from you, but I would think there would be a
8 preference to have the maps drawn through a full Commission
9 that potentially goes through mandated hearings throughout
10 the state and goes through a full detailed process, rather
11 than having myself, potentially, through the benefit of a
12 special master that I might appoint, just arbitrarily on
13 their own create a map.

14 MR. WALDEN: Well, your Honor, first of all, as I
15 said to you when I met you for the first time back in May, I
16 like to agree as much as possible, so I agree with you that
17 the amendments to the Constitution that were twice passed by
18 the Legislature and approved by the voters of the state are
19 important, amazing policy, and if they were followed, it
20 could have been a road map for the rest of the country.
21 Unfortunately, the Legislature got cold feet and decided
22 that they wanted to sidestep, and that's why we're here.

23 And so the important part of *Harkenrider* that your
24 Honor did not focus on is the deterrent effect of the
25 judicial remedy. That's the whole reason the Senate put it

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1 in. The Senate realized, because they're in the Senate,
2 that politicians will be politicians, and right after the
3 amendments were passed, we saw gamesmanship in terms of
4 trying to move the goal post and change the rules that were
5 beaten back by the Courts, and still, despite that, we had
6 legislators who decided that their desire to protect
7 incumbents was more important than the will of the voters.

8 And that's why *Harkenrider* says very clearly, when
9 a map is determined to be unenforceable and void, it's as if
10 it didn't exist, this is the reason that there is a judicial
11 remedy, to create deterrence so that legislators won't do
12 this again.

13 And your Honor, there is no constitutional
14 mechanism that applies here. I saw this citation, and it
15 really is just a citation, in the First Department's order
16 that cross-references 5-b, I don't know if that was a
17 mistake, I don't know what they meant by that, they didn't
18 explain it, but 5-b, which is the provision of the
19 Constitution that establishes the requirements of the IRC,
20 has a dating provision. It is only applicable in two
21 circumstances; one, every ten years, which means that its
22 duties begin in February of the year ending in zero and the
23 final map has to be submitted in the year ending in two, so
24 in this year, it would be February of 2020 and February of
25 2022.

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1 Harkenrider said that constitutional date cannot
2 move, and so it was violated, and based on that, the IRC can
3 have no more role, A, and B, only if there's an amendment to
4 a map. The First Department did not ask this Court to amend
5 an otherwise valid map, it declared the map unconstitutional
6 and declared for it to be redrawn.

7 So from my perspective, I might as well have cited
8 the motor vehicle and traffic safety law as opposed to 5-b,
9 which doesn't apply. They don't make an argument that it
10 would apply. First of all, there is no IRC right now. The
11 Constitution requires a committee with 10 members, it only
12 has nine, we don't know what happened to the remaining one,
13 but at a minimum, it would have to be reconstituted.

14 Number two --

15 THE COURT: Counsel, I believe the Constitution
16 gives, if there's a vacancy in the IRC, it can be filled, I
17 think it's supposed to be filled within a 30-day window, if
18 necessary.

19 MR. WALDEN: All I'm saying, your Honor, is, I
20 agree with you, I think we're in agreement that the
21 Constitution requires 10, there's a process to fill a
22 vacancy, I don't know how long that vacancy has been around
23 because the gentleman disappeared, his website, or he's no
24 longer on the website, so we have an IRC that's not
25 constituted yet, they're not a party. This has been

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1 scheduled for some time, they could have made a motion, they
2 didn't make a motion, and so from my perspective, adding the
3 IRC as a necessary party is a complete charade.

4 There's no constitutional provision that they can
5 cite that says, in this circumstance, the IRC has a role.
6 But your Honor, if that's your inclination, I can make a
7 proposal to you, and it's a proposal that I made to them and
8 they rejected it, and when I tell you what the proposal is,
9 you will know exactly why, because you're a very experienced
10 person who's no stranger to the political system in New
11 York.

12 My proposal is this: You want the IRC to redraw
13 the map in the first instance, reconstitute it so that it's
14 appropriate, I will consent to them being a necessary party
15 in this, agree that the Court should have a special master
16 to evaluate the IRC's map, publish the map, go through the
17 process, it's not a constitutional process but they can
18 still hold public hearings and seek input, the respondents
19 can give input, but then submit that map to Justice Love,
20 let him consult with the special master and get briefs from
21 the parties, and then let the Court decide, as the Court
22 must under *Harkenrider*, what the appropriate map is.

23 However, in allowing the IRC to draw the map in the
24 first instance, let's agree that the Court order has to be
25 consistent with the Constitution by not allowing political

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1 gerrymandering, and there's a very easy way for you to put
2 in an order something that the IRC has to follow, and that
3 language is simple. Whatever criteria you use to redraw the
4 map, you may not consider incumbent and challenger
5 addresses, because that's what Dr. Clelland's affidavit
6 proves, what her report proves is that it was impossible,
7 literally, statistically impossible for them to have drawn
8 the map that they wanted you to rubber stamp back in May
9 without considering incumbent and --

10 THE COURT: Counsel, just to be clear, I understand
11 what your expert's affidavit states and everything it went
12 through, but at the end of the day, that map is no longer
13 under discussion.

14 MR. WALDEN: I agree, so it can't be amended, and
15 if it can't be amended, then the IRC can have no role under
16 the Constitution. We agree there.

17 THE COURT: Just to be clear, and obviously I'm
18 going to hear from respondent shortly, but if I am now in
19 the role where it's up to me to determine how to proceed to
20 come up with a new assembly map to be put in place for an
21 election that is taking place two years from now, would you
22 agree that there is more benefit to have that process take
23 place, where it is being done by an Independent
24 Redistricting Commission that holds hearings throughout the
25 state and essentially, to use your words, essentially we

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1 have a do-over of the process, and not only a do-over of the
2 process, potentially, but this time a do-over of the process
3 where all of the players involved, the IRC as well as the
4 Legislature and the Governor and everyone else involved,
5 already knows what happened the first time and knows that if
6 there was potentially a repeat of a similar situation, we're
7 all going to end up, at that point, back, in all likelihood,
8 in front of me, where there's a much shorter timeframe and
9 we're back in a similar situation where potentially there is
10 no option other than choosing a special master at that point
11 and having an assembly map put into place where it's
12 literally being done on the background and experience and
13 drawing of a map by one individual with me approving it,
14 that versus a full constitutional process that was put in
15 place.

16 MR. WALDEN: So your Honor, that would be fair to
17 the question that I think you're asking me, which is would
18 it be better to have the IRC do it as opposed to having
19 someone under the Court's direction do it.

20 THE COURT: Correct.

21 MR. WALDEN: So I just want to ask you a question.
22 Under either scenario, IRC or special master, at the end of
23 the day, regardless of what anyone else does, is the map
24 coming to you, you're going to accept expert opinion or our
25 submissions with our experts, you're going to look at the

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1 map, you're going to make changes that you think are
2 appropriate, and then you're going to issue a map, is that
3 what you mean?

4 THE COURT: Counsel, I mean, theoretically,
5 obviously, if I adopt what you are suggesting in your papers
6 and arguing here this morning, I would select a special
7 master, have that special master put together what they
8 believe is a fair map, and theoretically I would approve
9 that map. And there, in all likelihood, would be some
10 appeals of that decision, and that would be the map that
11 would be in place and could just as easily essentially go
12 back to what was supposed to be the original process that
13 was intended by the Constitution, have the IRC go through
14 the full process over again from scratch, come up with --
15 you know, present their map to the Legislature, see if the
16 Legislature approves it, sends it back for the second map,
17 goes through what was listed as appropriate, I will call it
18 tweaking of the map that's allowed under what was designed
19 as the constitutional process, and that map potentially then
20 being the one that will be utilized.

21 MR. WALDEN: Your Honor, I'm afraid maybe I didn't
22 ask my question in the appropriate way. Let's put the
23 special master aside, right, so if you want to use the IRC,
24 what I think -- it doesn't matter whether I think one's
25 better than the other, the special master is going to have

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1 public input, as well, that's what happened in Steuben
2 County, he had proceedings all over the state, he accepted
3 thousands of comments.

4 THE COURT: Counsel, with all due respect, the
5 process, and I understand the time constraints that everyone
6 was under, but to talk about that time process with how the
7 maps were ultimately put together for the Congressional and
8 State Senate was a very compressed time period, and the
9 amount of public input that actually occurred in there, I
10 think, was just limited by the realities of the timeframe.

11 MR. WALDEN: I agree, your Honor, but as you said
12 before, I agree with you wholeheartedly, you can design the
13 process, you can work with the special master, he or she
14 could have hearings throughout the state, they can do
15 exactly what the IRC did.

16 THE COURT: Counsel, I understand what your
17 question was back to the Court, is it your belief that the
18 only person that can confirm and put in place the assembly
19 maps for the 2024 election is myself, versus going through a
20 legislative process?

21 MR. WALDEN: Your Honor, if there is a juggler on
22 the table, you put your thumb on it, because that's what
23 this is all about. They want the last crack, and if you
24 look at Dr. Clelland's affidavit, you know why, because they
25 can change two percent, assuming that they don't do

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1 something else, they can change two percent, and then that
2 two percent, they can save at least 25 incumbents, according
3 to her analysis.

4 THE COURT: Counsel, here's my question: Why
5 should the people of New York not have the opportunity to
6 have the Independent Redistricting Commission and a full
7 Legislature made up of members that they have elected into
8 their roles, why should they not have the opportunity to
9 come up with the new assembly maps, versus myself or any
10 other individual judge, if it's not necessary?

11 MR. WALDEN: Because, your Honor, that's what the
12 constitutional amendments require. The Court has a role.
13 Your Honor, I think that I have a very different view of the
14 public's confidence in the Court, as opposed to the public's
15 confidence in them, based on the shenanigans that have
16 occurred in this case. I think the public would be much
17 more accepting of a map that came from a Court in these
18 circumstances.

19 And there's a second important component to that,
20 your Honor, which I don't know, I know it puts you in an
21 awkward position, I understand that we all live in the same
22 city and political circles are relatively incestuous, but
23 they brought this on themselves, and if a Court doesn't say
24 here -- this is the language of *Harkenrider*, there has to be
25 consequences to the Legislature. If you give them a

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1 do-over, all you're doing is incentivizing them to do it
2 again.

3 And your Honor, how much money have they spent of
4 the public's money defending an unconstitutional map?

5 THE COURT: Counsel, if there is a do-over, if I
6 give them the opportunity for a do-over and we end up in the
7 exact same position, then they know what the ultimate
8 results are going to be, and I'm obviously going to turn to
9 them in a moment, but I'm just trying to get clear of you,
10 you know, and I think I'm clear of what your position is,
11 that the Legislature should have no role in this, that they
12 should essentially be punished for what occurred the first
13 time, and that it's now up to the Court itself to determine
14 what the assembly lines should be.

15 MR. WALDEN: Your Honor, this is not me, this is
16 the Court of Appeals. The Court of Appeals was crystal
17 clear about this. I'm not making this up, I quoted the
18 language from the case, that language was not dependent on
19 the imminence of the election, it was a matter of
20 constitutional principal, they said it matters. But your
21 Honor, to be clear, the reason --

22 THE COURT: Counsel, I get that, but the Court of
23 Appeals also, throughout their decision, repeatedly talks
24 about what the benefits were of the Independent
25 Redistricting Commission and how everything was set up in

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1 the state through what was passed as constitutional
2 amendments and the enabling legislation, and that entire
3 process was set up for a lofty goal of doing things the
4 right way, and the best way possible.

5 MR. WALDEN: Your Honor, the right way is not
6 abiding by eight of the ten constitutional requirements.
7 *Harkenrider's* position to put its imprimatur on the special
8 master hinged on the other parts of the Constitution that
9 require court action, and they made the same argument here
10 that they made in *Harkenrider*, and it was rejected there,
11 they're claiming that it was because of the imminence of the
12 election and it wasn't. I can go back and quote the
13 language again, your Honor, but it was based on the
14 importance of the constitutional principle.

15 But understand, your Honor, I made an offer to
16 resolve this, and why did they reject it? Because if you
17 ask them point-blank, your Honor, they will say that your
18 Honor should essentially delegate this to the IRC and the
19 Legislature and let a constitutional provision that does not
20 apply in these circumstances, or if they can't make a case
21 that 5-b applies here, because it doesn't, to let that
22 process play out so that if they change the map in a way
23 that's clearly gerrymandering, and that final step of the
24 analysis that you have no authority whatsoever to either
25 take expert testimony or change the lines with the expert's

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1 help. And that's why I thought that my proposal was a very
2 elegant solution. I'm sorry that sounded completely self
3 congratulatory, I didn't it mean it that way, your Honor,
4 but I was trying to reach across the aisle here.

5 And I read *Harkenrider*, I believe in the importance
6 of a bipartisan process when it doesn't get sidestepped
7 intentionally, but I have no problem with the IRC, not in a
8 constitutional process, but in a constitutional-like
9 process, under the Court's supervision, drawing the map in
10 the first instance, having its public hearing, getting its
11 public input, having you have an expert at your side once
12 those maps come in and you get the report from the IRC,
13 having the expert then be your subject matter expert, as I
14 certainly would need if I were sitting where you were
15 sitting, in order to say, listen, you know, this is clearly
16 gerrymandering, these districts were gerrymandered or not,
17 and then the Court decides what the map looks like in
18 consultation with the special master.

19 Why doesn't that work, your Honor? That gives you
20 the constitutional bipartisan process that you're looking
21 for, but has teeth in it so that the voters know that the
22 Court is not abdicating a responsibility back to the fox who
23 robbed the hen house.

24 THE COURT: All right, counsel, I understand your
25 position, thank you.

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1 With that, let me turn to respondent's counsel and
2 give you an opportunity to be heard.

3 MR. FARBER: Good morning, your Honor. Seth Farber
4 on behalf of Governor Hochul. I will be brief.

5 As we indicated, your Honor, in the letter of
6 August 8th, we concur with the position taken by the
7 assembly speaker. We believe that Article III of the State
8 Constitution provides that matters of redistricting are in
9 the province of the Independent Redistricting Commission
10 subject to the approval of the Legislature and the
11 ultimately approval or veto of the Governor.

12 Since the issue before the Court does concern
13 elections in 2024, there's ample time to permit operation of
14 the process envisioned by the State Constitution. And
15 accordingly, we respectfully submit this that Court should
16 remand this matter to the Independent Redistricting
17 Commission for further proceedings, as your Honor indicated
18 during argument. The remedies suggested by the petitioner
19 are presently premature and inappropriate.

20 Thank you, your Honor. I will defer to co-counsel.

21 THE COURT: Thank you, counsel.

22 MR. BUCKI: Yes, your Honor. First of all, I know
23 we have people watching on the live stream, would your Honor
24 prefer, given the technology, that I sit or that I stand?

25 THE COURT: You can sit, it's not a problem. I

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1 will not be offended. Go ahead.

2 MR. BUCKI: The State Constitution provides for an
3 orderly process in this circumstance, and the process is
4 pretty straightforward. First of all, under the order that
5 was issued by the First Department on June 10th, it demanded
6 to this Court for consideration of the proper means for
7 redrawing the state assembly map in accordance with New York
8 Constitution Article III Section 5-b.

9 Now, Mr. Walden just said that this must have been
10 some mistake. We disagree. We would submit that it's now
11 law of the case from the First Department that, whatever
12 method is selected by this Court for the redrawing of the
13 map, that it needs to be in accordance with Section 5-b of
14 Article III. And what does Section 5-b of Article III
15 provide for? The Commission process that we have been
16 talking about for the entirety of this morning's hearing.

17 And indeed, under Section 5-b(a), it says on or
18 before February first of each year ending with a zero,
19 that's not this situation, and at any other time a Court
20 orders that congressional or state legislative districts be
21 amended, an Independent Redistricting Commission shall,
22 mandatory, be established to determine the district lines
23 for congressional and state legislative offices.

24 Now, Mr. Walden says that redrawing the map somehow
25 is not amending the map. We would respectfully disagree.

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1 We would submit any kind of change you make to the map,
2 whether it's a tiny change or a wholesale change, is an
3 amendment of the map, and we would submit that is the
4 circumstance that applies. And so in fact, this procedure
5 of going through the Commission and then, yes, having the
6 Legislature consider and potentially enact the proposals
7 that come from the Commission, that is the process that is
8 constitutionally prescribed.

9 And I'm glad that Mr. Walden made reference to the
10 proposal that he made yesterday that, yes, we did reject.
11 The reason why we rejected it is because that is not the
12 process that the Constitution prescribes, because what
13 Mr. Walden wants to do is cut the Legislature out of the
14 process entirely. And when one looks at Section 4 of
15 Article III, in view of Section 5-b of Article III, it
16 absolutely does provide a role for the Legislature in that
17 process.

18 Now, that does not mean that this Court would have
19 no role either. We would submit that, in fact, the Court
20 can have a role by exercising supervision over the process,
21 and that's why, for example, we suggested in our papers that
22 the Court set, even though we have approximately two years
23 until the next elections take place, that's why we suggested
24 that the Court set deadlines by which the Commission would
25 need to satisfy its charge.

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1 THE COURT: Right, and counsel, on that point I
2 think the suggested dates were, and maybe it was a typo or
3 not, but it looked like they were a pretty short timeframe
4 in terms of the suggested dates, just to raise why you're
5 suggesting such a condensed time period when we literally
6 have two years before these districts would be coming into
7 play.

8 MR. BUCKI: The reason why is no one ever knows
9 what can happen over the course of two years. One would
10 have thought that starting things off on February 1st of
11 2020 would have resulted in a timely plan that would not
12 have required imposition of a new map by a Court with the
13 assistance of a special master, but what was not foreseen is
14 the effect of a global pandemic, what was not foreseen is a
15 delay of the census results, although we now have the census
16 results. But what Mr. Walden is telegraphing today in
17 court, it could very well be that one of his clients or
18 somebody else entirely may choose to levy some challenge,
19 meritorious or not, to whatever map might happen to come,
20 and then we would be back in front of your Honor having a
21 hearing and a trial with respect to the substantive merit of
22 that map.

23 And so we have offered a relatively tightened-up
24 timeframe to afford sufficient time for the entire process
25 to play out so that one does not end up in a situation like

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1 was encountered in *Harkenrider*, whereby the Court of
2 Appeals, in its wisdom, saw no choice but to say that the
3 Court needed to impose a new map with the assistance of a
4 special master.

5 So really, the tightened-up timeframe is suggested
6 because it's impossible to know what the future will hold,
7 and we certainly anticipate that whatever this Court may
8 order concerning the proper procedure, there may be appeals,
9 and who knows how long those would take notwithstanding the
10 preference that election cases typically get on the
11 Appellate Court calendars, so that would be the reason why.

12 But as I said, this Court could retain supervision
13 and jurisdiction of the process so that, for example, if one
14 were to have a situation like happened in the last go-around
15 earlier this year, whereby there was a deadlock at the
16 Commission, it was in fact suggested by the Court of Appeals
17 that a mandamus proceeding, for example, be commenced in
18 order to compel the Commission to break its deadlock. This
19 Court would be able to retain jurisdiction so that, if there
20 is a deadlock, this Court can help to break the deadlock,
21 and so there absolutely is a role for the Court, but what
22 Mr. Walden wants to do is to cut out the Legislature. And I
23 understand that, as I said back on May 23rd, his clients
24 have differences with the Legislature, both personal
25 differences and policy differences, and so it is no wonder

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1 that they want to cut the Legislature out of the process,
2 but that is not what the Constitution provides for in this
3 circumstance.

4 So whereas they have this orderly process that the
5 Constitution prescribes, we would submit that what
6 Mr. Walden wants is chaos in contrast to order. And it's
7 the kind of chaos that we have seen in the most recent
8 congressional elections, because the special master drew the
9 entire congressional map, and so as a consequence, we had a
10 circumstance like two very senior democrats representing
11 Manhattan, who have been members of Congress since 1992,
12 pitted against each other all because the special master
13 wanted to prioritize the compactness of a district over
14 other constitutional factors.

15 And I would submit that who lost were the people of
16 the State of New York, who lost were the people of Manhattan
17 who had two senior democrats in the leadership, and who lost
18 were the people who, for example, Congressman Nadler's old
19 district, that district was intended for years to be a
20 predominantly Jewish district, and that district was
21 entirely dismantled by the special master because he had no
22 appreciation for and the respect for the history as to how
23 the core of that district was put together.

24 Another example is in the Steuben County
25 redistricting litigation, there were comments upon comments

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1 upon comments by people from the tiny city of Amsterdam, New
2 York, who've said we have had Paul Tonko as our
3 representative for decades, both at the Assembly and then
4 later at Congress, and now all of a sudden we have been
5 taken out of the congressional district that is centered
6 upon the capital region of New York State, even though we
7 have concerns that are very similar of those of Albany and
8 Schenectady and Troy, and the special master said, well, in
9 the interest of compactness, that isn't what I want to do.

10 THE COURT: Counsel, I'm sorry to jump in, but
11 obviously, if I followed along with what your papers are
12 suggesting in terms of essentially giving a do-over to the
13 Independent Redistricting Commission with, as you said,
14 myself retaining ultimate jurisdiction in a case where
15 there's a potential issue, obviously the system didn't work
16 the way it was intended to the first time around, which is
17 what ultimately resulted in the Congressional and State
18 Senate maps being drawn by the special master who did it.

19 And I certainly am not oblivious to the fact that
20 I'm sure there were many people who were very happy with
21 what the special master did, and I'm sure there were plenty
22 of people who were outraged by what the special master did,
23 he used the criteria that he used, and that's what the Court
24 approved in that situation.

25 I suspect that if ultimately this comes back to me

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1 because the Independent Redistricting Commission and
2 Legislature are unable to complete the process, per what the
3 Court of Appeals has already set out is the proper
4 methodology, if it ultimately comes back to me where I'm
5 theoretically appointing, whether it's that same special
6 master or a brand new special master, I suspect that
7 there'll be plenty of people who like what the results are
8 and hate what the results are, that's the nature of
9 redistricting, no matter what. I think it's one of those
10 situations where you certainly can't please everyone.

11 So you expressing the views that the Legislature
12 was not happy with what the special master did, I understand
13 that and I respect that position, but that's where it ended
14 up. So my concern is, if I do ultimately follow your
15 suggestion, along with the Governor's, and put this back for
16 essentially a do-over with the Commission, that I would like
17 to think that everyone would do it properly this time so
18 that it doesn't have to end up back in front of me or
19 another Court where the ultimate map is being determined by
20 a handful of people rather than the process that was
21 intended.

22 MR. BUCKI: And actually, I'm not expressing the
23 view of the Legislature concerning with what the special
24 master did. With respect to the Maloney and Nadler race,
25 that was a view expressed publicly in a statement by the

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1 League of Women Voters, a brief Mr. Walden relies upon, and
2 that was published in the New York Post just a couple of
3 months ago. And with respect to the views about taking
4 Amsterdam out of the capital region district, all of those
5 views are set forth in I would say literally hundreds of
6 letters and e-mails the special master received from the
7 people who live in and around Amsterdam.

8 So these are people who were displeased with the
9 circumstance. Now, obviously the Court of Appeals, in its
10 wisdom, decided that that was what was required, but here
11 that is not what is required and it's not what is
12 constitutionally prescribed. Mr. Walden's thesis is that
13 the judicial remedy is the only option, and that's a quote
14 directly from his papers, and we would submit, first of all,
15 the First Department established the law of the case, to do
16 the redistricting in accordance with Section 5-b of Article
17 III of the State Constitution, and that's what provides for
18 the Commission process.

19 With respect to Section 4-e, upon which Mr. Walden
20 so heavily relies on, it says, quote, the process for
21 redistricting congressional and state legislative districts
22 established by this section and sections 5 and 5-b of this
23 article shall govern redistricting, except to the extent
24 that a Court is required to order the adoption of or changes
25 to a redistricting plan as a remedy for a violation of law.

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1 And we would submit that, in Mr. Walden's argument,
2 what he does is he either leaves out or de-emphasizes the
3 key terms to the extent and required in Section 4-e of
4 Article III. So first of all, we would submit that, in
5 order for the Court to be required to impose a map, that one
6 needs to view that requirement through the prism of what
7 *Harkenrider* said, which was that no legislative fix was
8 possible at this juncture. And in fact, Justice Pitt at the
9 First Department, when we were together on June 10th, she
10 caught upon that issue right away in the argument, and she
11 confronted Mr. Walden with that language, and he didn't have
12 much of a response.

13 And further, Mr. Walden quotes a statement in
14 *Harkenrider* in his papers in which the Court said that the
15 Legislature was incapable of unilaterally correcting the
16 infirmity in the assembly map. We are not asking for a
17 unilateral correction of the infirmity, because that is not
18 what the Constitution prescribes. The Constitution
19 prescribes the Commission process to take place, and then,
20 at that point, the Legislature can act, rather than the
21 Legislature simply acting on its own without any kind of
22 guidance or assistance from the Commission or without any
23 supervision of the Court.

24 And so we would submit that, to the extent that a
25 Court is required to order the adoption, well, it isn't

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1 required for the Court to self-impose a new map at this
2 point because we have until 2024 to develop a new map, and
3 that's why the Commission process should be followed.

4 Now, Mr. Walden's response to that is, well, there
5 were deadlines for January and February, and those deadlines
6 have long passed. We would submit that those deadlines,
7 which were set forth in Article III, Section 4 of the
8 Constitution, those are deadlines that, when one looks at
9 the language in its totality, those are deadlines that apply
10 to the traditional decennial redistricting that's supposed
11 to take place every year ending in a two in the timeframe of
12 January and February after all of these different
13 redistricting hearings have taken place and after all the
14 necessary census data has been gathered. Nothing in
15 Section 4 says that that's the only time that the
16 Redistricting Commission can ever meet or can ever
17 contemplate changes, and nothing says that's the only time
18 when you can have a redistricting, and so that's why, under
19 Section 5-b, it says that there can be a time a Court orders
20 that congressional or state legislative districting be
21 amended, and then that's when the Commission can act, as
22 well.

23 So we would submit that the whole argument about
24 deadlines is a red herring, because this is a time when a
25 Court has ordered changes to the map. And when a Court

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1 orders changes to the map, particularly when the Court
2 expressively holds that Section 5-b of Article III be
3 followed, that that is the time for the Commission process
4 to be followed --

5 THE COURT: Counsel, let me bring this up at this
6 juncture, I know within part of the papers that you filed
7 you also filed papers suggesting that the Court sua sponte
8 sign off on an order to show cause to add the Independent
9 Redistricting Commission as a named party to this matter.
10 Obviously, they were not a named party in the action in
11 Steuben County or the action that was originally before the
12 Court, but I just want to be clear, why do you believe that
13 the IRC needs to be specifically added as a party to this
14 case rather than potentially the Court issue an order saying
15 X, Y, and Z is a process of proceeding with a new map?

16 MR. BUCKI: If the Court is of the view that that
17 is all that is required, we would certainly respect that.
18 At the same time, we did want to offer a proposed order to
19 show cause.

20 THE COURT: I understand, I was just curious if you
21 want to amplify why you believe they would need to be added
22 on as a named entity.

23 MR. BUCKI: The reason why we offered the order to
24 show cause was to accommodate the argument, should it be
25 made, that the Commission can only be ordered to do

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1 something if its members were parties to this proceeding and
2 had an opportunity to be heard, that it is impossible,
3 should that be argued, that an order -- that members of a
4 Commission would be compelled to do something when they were
5 not a party to the proceeding.

6 THE COURT: Counsel, let me also be clear, because
7 again, you know, it's been said several times that it's an
8 unprecedented situation, when the IRC was constituted as a
9 Commission, it was a Commission for a specific purpose for a
10 specific election cycle. I did not see anything that talked
11 about an ending for the Commission, but with that being
12 said, is it your position that it currently constitutes -- I
13 believe nine of the ten members are still actively
14 available, or technically serving on the Commission -- is it
15 your position that that existing Commission, with the
16 vacancy potentially being filled, are the ones that should
17 be serving in that role, versus an entirely new IRC
18 potentially being constituted?

19 MR. BUCKI: Unless and until those will no longer
20 be the Commissioners, we would submit that those nine
21 Commissioners would be the Commissioners. And we further
22 understand that the vacancy in the 10th position is soon to
23 be filled, if it needs to be, so that the Commission can go
24 forward with a complete complement of members at the number
25 10.

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1 THE COURT: And counsel, just so I'm clear, your
2 rationale for this Court adding the IRC as a named party is
3 because, theoretically, one or more members of the existing
4 IRC may indicate that they believe the Court has no --
5 doesn't have the power to have them do the job that they're
6 supposed to do?

7 MR. BUCKI: The purpose of offering the order to
8 show cause was to accommodate and nullify any kind of
9 argument that the Commissioners or anyone could make that
10 they can't be ordered to do anything because they would not
11 be parties to this proceeding.

12 THE COURT: I understand. You can proceed if you
13 have anything further.

14 MR. BUCKI: Sure. Another point that I think
15 really bears mentioning, again, this ties in with the theme
16 of reading language out of constitutional provisions,
17 reading language out of a judicial decision, as Mr. Walden
18 does, he states that the First Department voided the 2022
19 enactive assembly map, and so because that map is void,
20 there is no map, and so therefore there's nothing to amend,
21 and that's why Section 5-b of Article III, which speaks of
22 the Commission acting when a Court orders an amendment, does
23 not apply. And I refer the Court to what the First
24 Department actually said, which is, quote, upon the formal
25 adoption and implementation of a new state assembly map that

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1 conforms with the procedural and substantive constitutional
2 and statutory requirements, the February 2022 assembly map
3 will become void and of known fact.

4 And in fact, the 2022 assembly map, as per the
5 First Department, and the Court of Appeals did not disturb
6 that determination, that map is indeed being used for the
7 2022 elections, and the assembly members who are elected on
8 November 8th are going to be representing those 150
9 districts as they are configured under the enacting 2022
10 map.

11 So we would submit that a map is in place, it is
12 true that it needs to be changed, it is true that the
13 procedural unconstitutionality was found and that the First
14 Department directed the change, but there is a map to be
15 changed, and so the argument that somehow there is no map in
16 existence such that there can be no amendment, we would
17 submit that that argument falls apart.

18 The last area where I would like to touch upon
19 briefly is the issue of the opinions that are offered by Dr.
20 Clelland, whose affidavit Mr. Walden and his clients offer
21 for the very first time long after we had our initial
22 proceedings back on May 23rd, and I could nitpick in great
23 detail --

24 THE COURT: Well, counsel, let me just short
25 circuit it in this fashion. The expert affidavit that was

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1 offered was offered on the specific proposed assembly map
2 that, to my mind, is based on the Court of Appeals decision.
3 And specifically the First Department decision sending it
4 back to me found that that map no longer exists in terms of
5 whatever will come out of this process in terms of the
6 assembly map that would be presented for the 2024 election.

7 Now, I will say this: If the exact or almost exact
8 same assembly map comes out of the process, potentially
9 there may be a challenge made, in all likelihood first in
10 front of me and wherever it goes from there, with claims
11 that the constitutional criteria that's been set out in
12 terms of each of the areas, I know there were a number of
13 areas, that the map was supposed to take into consideration.

14 So if somebody is objecting to what that ultimate
15 map turns out to be, those exact same arguments or similar
16 ones might be before the Court, but to go through it at this
17 juncture, I think, is unnecessary, because there's no actual
18 map in front of me at this point.

19 MR. BUCKI: And actually, that was going to be my
20 first point, and we would agree wholeheartedly that this is
21 a tempest in a teapot much to do about nothing, because
22 these are opinions with respect to a map that the First
23 Department has directed to be changed. And what I think
24 really bears emphasis, so that I don't have to go into all
25 of the detail about all of the deficiencies in Professor

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1 Clelland's analysis is that, back in the petition, page 29,
2 docket number one, the petitioner sought a declaration that
3 the 2022 assembly map was, quote, void based upon the
4 constitutional flaws in its adoption previously found by the
5 Court of Appeals, unquote.

6 And then when we were all together on May 23rd, at
7 docket number 95, the transcript of that proceeding, your
8 Honor said, quote, when Mr. Walden was speaking, your Honor
9 said, quote, to be clear, I think you had said as part of
10 your argument is your only claim to strike the assembly maps
11 and to do the other items based upon the procedural
12 unconstitutionality, or are you seeking a claim that there
13 are other issues in terms of potential gerrymandering and
14 other things that have gone on, which would in all
15 likelihood require the Court to hear and potentially go
16 through a similar bench trial to what may have occurred
17 before Judge McAllister?

18 Mr. Walden answered. Quote, your Honor, to be
19 crystal clear -- and he used that same phrase earlier today
20 as well, so he likes that phrase -- again, I'm sorry if I
21 wasn't crystal clear before, the issue here is what
22 everybody here is referring to as procedural
23 unconstitutionality, end quote.

24 So either Mr. Walden was being crystal clear then
25 or crystal clear now, but it can't be both. And so we would

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1 submit that if Mr. Walden had any issue as a substantive
2 matter with the map, the time to raise it was back in May,
3 that argument is waived, and I will just give one case from
4 the First Department on that issue, *Loreley Financing*
5 *(Jersey) No. 28, Ltd. v. Merrill Lynch, Pierce, Fenner &*
6 *Smith, Inc.*, 196 AD3d 434, from the First Department of
7 2021, and we would submit that the opinions have no merit.

8 THE COURT: Again, as I said, the whole issue in
9 terms of the expert affidavit, I understand the arguments
10 that were put forward in it, but to me, all of that is
11 irrelevant at this stage of proceedings. As I said, there
12 may be a time in the future that we're addressing those
13 issues, and I suspect, if and when that occurs, there will
14 be expert affidavits from both sides, and maybe more than
15 one, so there will be plenty of time to deal with that down
16 the road, if it's necessary.

17 MR. BUCKI: And we would certainly agree to the
18 irrelevance, but I think the reason why the petitioners now
19 offer it beyond the time when we have an opportunity to
20 engage in any kind of cross examination is because they want
21 to try to bolster their argument that the Legislature should
22 simply be cut out of the process.

23 THE COURT: I understand, counsel.

24 MR. BUCKI: And we would submit that that is not
25 what the Constitution provides for, and if Mr. Walden were

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1 to say that somehow there is, to use his words,
2 gerrymandering and rigging of maps, that was not his
3 argument all the way back in May when the petition was first
4 brought, and in fact, to this date, no one has brought any
5 kind of substantive challenge to the state assembly map that
6 was enacted, which is a map that upwards of 15, even,
7 republicans from the state assembly have given affidavits
8 stating that it's fair.

9 So there is no basis for anyone to say that somehow
10 the State Legislature cannot be trusted to do its
11 constitutional duty, which is prescribed by the Constitution
12 of the State of New York to act as its authority is set
13 forth in Article III, Section 4, as a result of the
14 completion of the Commission process under Section 5-b.

15 THE COURT: Thank you, counsel. I will turn to the
16 Senate.

17 MR. HECKER: Nothing at this time.

18 THE COURT: I could understand that.

19 Mr. Walden, just to turn back to you briefly.

20 MR. WALDEN: Your Honor, I'm not going to extend my
21 impose on your graciousness, I'm going to leave it to what I
22 have to say.

23 First of all, on Clelland's affidavit, it is
24 relevant, and this is what I'd ask. Please don't sign their
25 order. I just got it. Let me mark it up, because if

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1 Clelland's affidavit counsels you to do anything, it's to
2 reserve more power and discretion if there are problems that
3 come up during this process, assuming you're going to go
4 with the IRC process. So all I'm asking for is, and this is
5 why I think Clelland's analysis is not only important, but
6 chilling, to allow --

7 THE COURT: But counsel, there's a process. My
8 overriding point is, there needs to be a map in existence
9 before someone can turn around and say there's something
10 wrong with it.

11 MR. WALDEN: I understand.

12 THE COURT: So whatever analysis was made was made
13 in reference to the 2022 map, which the First Department
14 indicated that, based on the infirmities and the findings of
15 the Court of Appeals, was in place solely for this two-year
16 window and will be replaced by whatever the new assembly map
17 is for the 2024 election.

18 So her analysis, the analysis, once there's a new
19 map, there may be similar issues that come up, and those
20 will be addressed at the time. It's just premature to go
21 through it at this point.

22 MR. WALDEN: Your Honor, I'm sorry, I'm clearly not
23 making my point clear enough, because I understand what
24 you're saying, but that was not what I was arguing. My
25 request, I will make it as simple as possible, was just let

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1 me mark up their order. That's all I want, to be able to
2 mark up their order. I just reviewed it for the first time
3 this morning --

4 THE COURT: The proposed order to show cause in
5 terms of adding the IRC?

6 MR. WALDEN: Correct, but it also outlines a
7 process, your Honor. And what's notable in it is it lacks a
8 final paragraph that says no map will be used other than one
9 that is approved by the Court. And there is another
10 important deficiency, your Honor, and I am confident that
11 what I'm about to say is something that would be acceptable
12 to this Court, which is, if you're going to allow the IRC
13 this mulligan, which again, this thing is not authorized
14 either by the First Department's order, that's not what the
15 First Department's order says, but certainly not by
16 *Harkenrider*, but if you choose to do it --

17 THE COURT: Counsel, the First Department's order
18 is very clear in stating that my role is to proceed with
19 this process, and specifically cites the constitutional
20 provisions.

21 MR. WALDEN: I understand, your Honor, but it
22 doesn't explain what it means, and there would be no role
23 for you to have. If what they meant was you have to go back
24 to the IRC, that's not what it says, but if that's what it
25 meant, the order doesn't make any sense, there's nothing to

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1 remand to. It's not as though 5-b has a process that's not
2 clear and prescribed, it is, so the First Department could
3 have said we're reconvening the IRC. They left it for you
4 to decide in the first instance, the appropriate mechanism.
5 If they meant to say that 5-b was the only appropriate
6 mechanism, which is the way they want you to read that
7 order, there would be no decision left for you to render.
8 It is in accord with 5-b to say I find that 5-b doesn't
9 apply because we're not in a zero year, and this is not an
10 amendment, it's a redraw, and so I'm going to do this other
11 process.

12 Now, you can embrace the spirit of 5-b by having
13 the IRC have a role, and I have proposed that as an
14 alternative. My only suggestion on the order, your Honor,
15 is that you make it -- if you're going to go to the IRC
16 process as opposed to the special master, is that you retain
17 a special master to guide you once you get the map. That's
18 not a big ask. And number two, that you specifically direct
19 the IRC that, whatever criteria they use, they cannot refer
20 or consider incumbent and challenger addresses. That is the
21 constitutional evil, that is the antidemocratic nature of
22 what is before you, which is they figured out where everyone
23 lived and drew the lines around them, that's what Clelland's
24 analysis shows dispositively.

25 The Constitution doesn't allow that. The 2012

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1 amendments specifically have a non-gerrymandering provision
2 that includes partisan gerrymandering. In that way, it is a
3 very robust constitutional amendment. So the only language
4 I'm asking for is language I'm sure the respondents are not
5 going to disagree with because it's in the Constitution, and
6 it will be enacted when you direct the IRC to not consider
7 incumbent or challenger addresses in drawing the lines.

8 So this is all by way of saying please let me mark
9 up the order, please consider my proposals, and that's my
10 request.

11 THE COURT: Thank you, counsel.

12 MR. BUCKI: Your Honor, we would be very much
13 opposed to that. Mr. Walden can mark up whatever he wants.
14 What's astounding to me is that he didn't review the order
15 to show cause until this morning, as he admits. But I go
16 back to the League of Women Voters brief that Mr. Walden
17 offered this Court. The League of Women Voters brief that
18 was submitted to the Fourth Department took the position
19 that the Court can order new -- that the Court, in a
20 situation such as this, needed to order the adoption of a
21 new redistricting plan.

22 So we would submit that ordering a plan is very
23 different from ordering the adoption of a new plan, and
24 ordering the adoption of a new plan, which is what the
25 League of Women Voters advocated, and which is what the

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1 Constitution would prescribe in a situation like this, would
2 contemplate that, if there are certain individuals who would
3 want to bring a challenge substantively to any new map that
4 may be enacted in the future, then that would be their
5 prerogative, but in terms of who actually adopts the map
6 when all is said and done after the Commission process, that
7 would be the Legislature, because that is the process for
8 which the Constitution provides.

9 MR. WALDEN: Your Honor, let me translate that to
10 you in two ways, your Honor. I'm sorry, I have the last
11 word, your Honor.

12 THE COURT: I have the last word, but I will give
13 you the second to last word.

14 MR. WALDEN: Let me translate the two things you
15 just heard from the speaker's counsel. Number one, they
16 want the IRC to be able to include incumbent and challenger
17 addresses when drawing the lines. Why would that happen
18 unless they were partisan gerrymandering?

19 THE COURT: Counsel, the IRC, if it is given the
20 opportunity, essentially, for a do-over, has a very clear
21 parameter set up constitutionally in terms of the criteria
22 that they are supposed to be utilizing.

23 MR. WALDEN: They're not exclusive.

24 THE COURT: Incumbency is one of those items, but
25 it is not the one and only item. There are references in

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1 terms of keeping communities together, in terms of the
2 population size of the districts. You know, there's a whole
3 litany of things that are supposed to be followed beyond
4 just the -- and I agree with you, the issue in terms of,
5 quote, protecting incumbents is one of the items that is
6 there.

7 MR. WALDEN: They should not be considering. They
8 shouldn't be changing the lines to draw challengers out the
9 way they did in this map. I'm literally asking for language
10 that comes from the Constitution. So can I have that
11 opportunity to mark it up?

12 THE COURT: Counsel, if you want an opportunity to
13 present your own proposed order to show cause on the issue
14 of whether the Court should add the IRC to this proceeding
15 as a named party, I will give you an opportunity to do so,
16 but at the end of the day, whether -- and I will make that
17 determination of whether they should be added as a named
18 party to these proceedings, but --

19 MR. WALDEN: Your Honor -- I should write this
20 down, because I believe this is the only time this happens,
21 I agree with Mr. Bucki, if you're going to go through this
22 process, you have to have the IRC before you, they have to
23 reconstitute it so it's constitutional, and the IRC has to
24 be before you, and I agree with them and I will put that in
25 writing. All I'm asking for, your Honor, is a courtesy that

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1 is very common, which is they propose their own order to
2 show cause, my request simply is that I have the opportunity
3 to mark it up. I can do it today, give you the
4 opportunity --

5 THE COURT: Counsel, I will give you the
6 opportunity if you upload something on NYSCEF by the end of
7 the day, I would say by 2 o'clock tomorrow. If you're able
8 to upload something, I will certainly take that into
9 consideration and proceed from there.


10 MR. WALDEN: Okay, thank you.

11 THE COURT: So with that said, I'm going to go
12 ahead and close the proceedings at this time. I will ask
13 counsel to order the transcript of today's proceedings and
14 we will conclude with that. Take care.

15 MR. WALDEN: Thank you, your Honor.

16 * * *

17 Certified to be a true and accurate transcript of the foregoing
18 proceedings.

19 

20 ASHLEY MILLAN
21 Senior Court Reporter
22
23
24
25

AMM

Transcript of Proceedings, dated September 16, 2022
[pp. 1319 - 1367]

FILED: NEW YORK COUNTY CLERK 10/21/2022 12:24 PM

NYSCEF DOC. NO. 190

INDEX NO. 154213/2022

RECEIVED NYSCEF: 10/21/2022

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: CIVIL TERM : PART 63

-----x
PAUL NICHOLS, GAVIN WAX, AND GARY GREENBERG,

INDEX NO.
154213-2022

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.

-----x
60 Centre Street
New York, New York

September 16, 2022

B E F O R E: HONORABLE LAURENCE L. LOVE,
J U S T I C E

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AH

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22

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24

Alecia Hines,
Senior Court Reporter

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1 COURT OFFICER: Come to order.

2 THE COURT: Good morning. Please be seated.

3 Good morning, all. I see we have a slightly fuller house
4 than last time which makes sense under the circumstances.
5 But we're here again in the action of Paul Nichols, et al.,
6 versus Governor Kathy Hochul, et al., index 154213 of 2022.

7 I just want to again just get clear for the record,
8 first, counsel for the petitioner, just have your
9 appearance.

10 MR. DEVLIN: Peter Devlin for Walden, Macht and
11 Haran.

12 MR. WALDEN: Jim Walden for Walden, Macht and Haran.
13 Good morning, Judge.

14 THE COURT: Good morning.

15 MR. FOLDENAUER: Aaron Foldenauer. Law office of
16 Aaron S. Foldenauer for petitioner, Gavin Wax.

17 THE COURT: And on behalf respondents.

18 MR. BUCKI: Yes, good morning, your Honor. Craig
19 Bucki from Phillips Lyte, LLP, in Buffalo, New York on
20 behalf of Assembly Speaker Heastie. And I should say that
21 in the gallery with me today are my co-counsel, also
22 representing Speaker Heastie, C. Daniel Chill, and Elaine
23 Reich from the Graubard Miller Law Firm, also on behalf of
24 the Speaker.

25 MR. FARBER: Good morning, your Honor. Seth Farber

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1 with the Attorney General's Office for Governor Hochul.

2 MR. HECKER: Eric Hecker from Cuti, Hecker, Wang, on
3 behalf of the senate majority leader.

4 THE COURT: And I know notices of appearance were
5 uploaded yesterday on behalf of additional respondents
6 related to the order to show cause that is the subject of
7 today's appearance.

8 Can I just have counsel who filed the notice of
9 appearances identify themselves.

10 MR. ERSHOW: Yes, your Honor. My name is Jeremy
11 Ershow. I'm here on behalf of Commissioners Imamura, Elaine
12 Frazier and Cuevas-Molina. I've moved for the pro hac
13 admission of my colleague, Jess Amunson, who's here with me
14 today. If your Honor would like to correct that motion,
15 Ms. Amunson is prepared to speak today as the primary
16 speaker on behalf of those parties.

17 THE COURT: Understood. And, Counsel, I think you
18 also filed a similar motion on behalf of attorney Samuel
19 Hirsch, is that accurate?

20 MR. ERSHOW: Yes, your Honor.

21 THE COURT: All right. We'll certainly get to the
22 that momentarily. I notice, notice of appearance was also
23 filed on behalf of some of the other commissioners.

24 MR. HILL: That's correct, your Honor. Good
25 morning.

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1 Timothy Hill for the commissioners Conway, Harris, Nesbit,
2 Stephens, and Brady.

3 THE COURT: Just to clarify. I know there was one
4 other commissioner that was listed within the affidavit of
5 service which was a Eugene Bengier. I did not see anyone who
6 had filed a notice of appearances on behalf of that
7 commissioner. If you can speak to that?

8 MR. ERSHOW: Yes. I can speak to that, your Honor.
9 Mr. Bengier was previously a member of the commission. He is
10 no longer a member of the commission as of one or two weeks
11 ago. His replacement has been named a commissioner,
12 Mr. Yovan Collado.

13 THE COURT: Do you or your colleague have the
14 spelling?

15 MR. ERSHOW: Yes, we do. C-O-L-L-A-D-O.

16 THE COURT: All right. Thank you, counselor. All
17 right, good morning to all counsel. Obviously, we're here
18 related to the --

19 I'm not going to rehash everything all over again
20 because we've obviously been through it at prior
21 appearances. But just a short version.

22 Again, back on June 10th of this year the Appellate
23 Division modified my earlier decision which went back to
24 May 27th of this year, essentially, remanding the case back
25 to me to address the issue of how best to proceed per the

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1 state constitutional requirements in terms of procedurally
2 redistricting of the assembly lines for the 2024 election
3 cycle.

4 Based on that, everyone was here before me back on
5 August 24th, and I received, both, written positions as well
6 as oral argument from the petitioners and respondents at
7 that time. The respondents had, as part of that process,
8 sought --

9 It was their belief that the Court should be adding an
10 independent redistricting commission as a party to the
11 action.

12 I heard the views of both sides on that date. I
13 received proposed language for that order to show cause.
14 And as both parties are aware, on to following day, on
15 August 25th, I did sign off on an order to show cause which
16 kept things, frankly, relatively limited just in terms of
17 essentially putting before the Court of whether the
18 independent redistricting commission should be added to
19 these proceedings. I know everyone was properly served, and
20 the affidavit of service was appropriately filed on
21 August 26th.

22 Following that process, I know a number of documents
23 were uploaded to NYSCEF yesterday. It ran from document
24 number 122 to 168. So before we get into the substance of
25 the order to show cause, I know within those filings there

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1 were two separate motions filed by counsel on behalf of
2 several of the commissioners seeking to have, both, and I
3 apologize if I mispronounce it. Is it Amunson?

4 MS. AMUNSON: Yes, Amunson.

5 THE COURT: Ms. Amunson, as well as motion sequence
6 number five to add Mr. Hirsch, both, to serve to be able to
7 appear pro hac vice in this matter.

8 I know everything was obviously literally just filed
9 yesterday, but was there any objection from any parties to
10 the Court granting that.

11 MR. DEVLIN: Your Honor, no objection from
12 petitioners.

13 THE COURT: And respondents?

14 MR. BUCKI: No objection on behalf of the Speaker.

15 THE COURT: All right. So based on that,
16 obviously, there will be a written order which will be
17 uploaded, but I can clarify for the bench here now that the
18 Court is going to grant pro hac vice status to both of those
19 individuals.

20 So with that said, Counsel, if you want to put your
21 appearance on the record, I'll let you.

22 MS. AMUNSON: Thank you, your Honor. Good morning.
23 Jessica Ring Amunson from Jenner and Block for commissioners
24 Imamura, Frazier, Cuevas-Molina.

25 Thank you.

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1 THE COURT: All right. Good morning.

2 all right, so let me do this, because we're obviously
3 kind-of covering several different items here.

4 First, I think --

5 Let me hear first, if I could, from counsel on behalf
6 of the three commissioners, the Chair and Ms. Frazier and
7 Cuevas-Molina.

8 So, Counsel, if you can just --

9 I do know what was filed, but if you want to just
10 share, and clarify what the position is of your client.

11 MS. AMUNSON: Yes, your Honor. My clients do not
12 oppose the commission being named as a respondent to this
13 matter, which was the subject of your Honor's order to show
14 cause. They, additionally, suggest that your Honor also
15 name as additional respondents the individual commissioners.
16 And along with our filing, we submitted affidavits from two
17 commissioners who were not named in your Honor's order to
18 show cause, but who are members of the commission, and who,
19 if named as respondents, would intend to retain us as their
20 counsel, and to join commissioners Imamura, Frazier, and
21 Cuevas-Molina in position that they have taken before this
22 Court.

23 THE COURT: All right. And, Counsel, I did see
24 those affidavits was were uploaded as well. But, again, for
25 the record, if you can just clarify who those two

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1 individuals are.

2 MS. AMUNSON: Of course, your Honor. It's
3 Dr. John Flateau, and Yovan Collado.

4 THE COURT: All right.

5 And I know Dr. Flateau was previously a commissioner,
6 and then was recently appointed by the senate majority on
7 August 1st, right?

8 MS. AMUNSON: That's correct, your Honor. He served
9 throughout the 2020 redistricting cycle three, then
10 resigned, then was reappointed on August 1st.

11 THE COURT: Okay. Thank you, Counsel.

12 All right. And I'll turn next to counsel for the
13 remaining commissioners. I know that you did file a notice
14 of appearance on behalf of those individuals. I did not see
15 anything else that had been filed, so I'll hear from you at
16 this time.

17 MR. HILL: That's correct. Thank you, your Honor.

18 So on behalf of commissioners, we do not oppose relief
19 sought by the order to show cause which was to add the
20 commission as a respondent. If that also means that the
21 individual commissioners would be added, I think that makes
22 sense.

23 THE COURT: Yes. I wanted to clarify that, as
24 well.

25 Would you have any objection if the individual

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1 commissioners were included in that?

2 MR. HILL: No.

3 THE COURT: Thank you. So with that said, I guess
4 we'll turn back to the petitioner's side.

5 Was there anything from anyone of you? We obviously
6 went through things in detail in the last appearance in
7 terms of some substantive matters. But with that said, is
8 there anything you wanted to add based on today's
9 proceedings?

10 MR. DEVLIN: Thank you, your Honor.

11 Peter Devlin on behalf of the petitioners. I want to
12 first note that it does not seem we have the entire IRC
13 before us today, so it is premature to hear all of their
14 views. We urge the Court to --

15 THE COURT: Who are we missing?

16 MR. DEVLIN: We're missing two of the members, I
17 believe. Have they been added now as respondents, and
18 appear --

19 THE COURT: Well, just to be clear, the order to
20 show cause that I signed was specifically for the
21 commission, itself, without listing the specific individual
22 commissioners as named parties. But, obviously, all of
23 those commissioners were served for the proceedings at this
24 time, heard from the two counsels, or between the two of
25 them represented, you know, indicate that they represent all

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1 of those commissioners, and that they have no objection to
2 adding individually as well as the commission, itself, being
3 added as a party.

4 MR. DEVLIN: Understood. And we only urge the
5 Court to hear their views on the constitutionality of the
6 remedy that respondents seek here before making a ruling.

7 THE COURT: Well, Counsel, I'm still --
8 As we discussed last time, I'm following the Appellate
9 Division's previous order which was for me to issue a new
10 order to follow what I believe is the constitutional
11 requirement. So I'm taking it as a given that the
12 commission, if they're asked to do so, they will follow
13 their constitutional duties as members of the commission.

14 MR. DEVLIN: I take that as a given, as well.

15 THE COURT: Right.

16 MR. DEVLIN: And with respect to the commission's
17 positions, I just want to point out that five of the members
18 have taken a position that the remedy that respondents seek
19 here for the IRC to convene and redraw the map, and submit
20 it to the legislature is not a constitutional remedy. So I
21 want to make that clear for the record. They made this
22 position up in the Albany case.

23 THE COURT: I was just gonna say, you're referring
24 to the Albany litigation that I believe the judge issued a
25 decision on this past Monday, I believe, dismissing that

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1 action.

2 MR. DEVLIN: Yes, your Honor.

3 THE COURT: All right. And that was --

4 Well, you know, obviously, I'm aware of that litigation,
5 and everything that was filed in it by concluding the
6 position of some commission members. But, frankly, I don't
7 see the two cases as related. And they were addressing much
8 different issues, in that case that the Albany case was
9 dealing with the congressional and state senate lines that
10 the Court of Appeals had already clearly spoken to. And,
11 you know, that process, obviously, was already completed

12 Specifically, for the situation with the assembly
13 lines, we're dealing with the decision. So thus far of what
14 the Court of Appeals has said, and Appellate Division are
15 matters of record at this stage, as well.

16 So but with that said, I'm certainly aware of what
17 transpired in that case.

18 MR. DEVLIN: Yes, your Honor. I agree that there
19 are some differences between the cases, but the relevant
20 similarities apply to the position that this commission has
21 taken which is that the respondents there asked for the IRC
22 to reconvene and redraw the map. And what the five
23 commissioners said, and I'll quote from their brief,
24 "The arguments suggested by the instant petition have
25 already been thoroughly foreclosed, not only by the plain

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1 language in the constitution, but by no lesser authority
2 than the Court of Appeals. The last date that the IRC could
3 have possibly, and lawfully submitted a second set of maps
4 the legislature was under the explicit language of the
5 constitution February 28, 2022, six months ago. This
6 deadline, as the Court of Appeals emphatically noted, has
7 long since passed."

8 So we with just want to emphasize that if they take a
9 contrary position in this Court that there is a
10 contradiction between the position that they've taken in the
11 of Hoffman case.

12 THE COURT: Understood, Counsel. Thank you.

13 MR. DEVLIN: Thank you.

14 MR. FOLDENAUER: Aaron Foldenauer on behalf of
15 petitioner Gavin Wax.

16 Petitioner Gavin Wax objects to the addition of the
17 IRC and its members as a party as a necessary because
18 petitioners respectfully submit that the IRC should not
19 reconvene and draw the maps.

20 Of course, even if they are added as a party, the
21 question still stands, Should the IRC actually redraw the
22 maps?

23 And, of course, there was a hearing a month ago, and
24 we stand on the arguments we submitted on paper, and that
25 were made by my co-counsel, Mr. Jim Walden. In particular,

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1 Section 4(e) of New York City State constitution which
2 clearly states that a court-ordered remedy is required at
3 this juncture. And we believe that Justice Lynch's decision
4 in the Albany action is highly relevant.

5 What Justice Lynch refers to at the end of his
6 decision is, quote, stability in the election process,
7 unquote. And we respectfully submit that having the IRC
8 reconvene now would undermine stability in the election
9 process. Because in the future 10 years from now, the IRC
10 will again be incentivize to punt, not reach an agreement
11 because they will know that a court is then willing to give
12 the IRC, quote, unquote, another chance.

13 THE COURT: Counsel, I suspect--although I've been
14 surprised before--but I suspect that before the next
15 election cycle post, the next census occurs that there
16 potentially might be some tweaking to the current
17 constitutional provisions governing the IRC.

18 I'm obviously not privy to that, and I'm not looking
19 to be privy to that. But what may occur --

20 You know, we're dealing with essentially a one-off
21 situation, and a very clear unique set of facts based on the
22 decisions that have been made between the Appellate
23 Division, and Court of Appeals where I'm solely looking at
24 the election for lines to be drawn for the 2024-election
25 cycle that would then obviously be in place for the

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1 remainder of this 10-year time period that I guess --
2 eight-year time period by the time we get to put it
3 into place. But what may happen in the future redistricting
4 situations, I suspect some others may have something to say
5 including, frankly, all of the people of the State of New
6 York. It would not surprise me if somebody has some
7 constitutional amendments proposed to that process before we
8 go through this all again. But with that said, I certainly
9 understand the concerns if everything does stay exactly as
10 it is currently constituted.

11 MR. FOLDENAUER: I appreciate that, your Honor. And
12 of course there may be changes to the constitution. But of
13 course we have to assume that we have to work with the
14 constitution that we have today.

15 THE COURT: Agreed.

16 MR. FOLDENAUER: And the process was set up with
17 five republicans and five democrats where they would be
18 forced to reach on agreement. I am worried about the
19 incentives that this would cause for the commission to,
20 again, kick the can down the road because a Court would
21 then, okay, say give you another chance. Give them another
22 chance.

23 And I think there are also practical problems with
24 reconvening the IRC. The IRC had a hard time getting
25 funding last year, and ended up with \$4 million in funding

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1 for its staff and other expenses. So for the IRC to
2 reconvene, that would result in a significant expense to the
3 taxpayer, a much more significant expense than hiring a
4 special master like Dr. Cervas who's very familiar with the
5 state, and the districts as they are, and could readily
6 redraw the lines.

7 Third, reconvening the IRC would be futile at this
8 juncture. And that's a point that Justice Lynch made in his
9 decision. He noted, quote, the record demonstration of the
10 IRC's inherent ability to reach a consensus on a bipartisan
11 plan, unquote, then concluding that for the IRC to submit,
12 quote, a second plan would be futile. Exclamation point.
13 And, of course, your Honor, I don't see exclamation points
14 in court decisions very often.

15 And I would remind everyone here, and remind the
16 Court, moving on to my third point, is that the futility of
17 reconvening the IRC as demonstrated by an op-ed written by
18 the chair, Mr. Imamura of IRC, himself.

19 And we'll remember when we were here several months
20 ago, counsel for the speaker made a lot of hay out of tweets
21 by my client, Gavin Wax, who is here today in the peach tie,
22 and also by Gary Greenberg concerning their knowledge of the
23 litigation. And that was one of the reasons I believe that
24 the Court initially denied the relief that we requested.

25 So in order to be fair, we also have to look to the

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1 statements of the IRC, itself, as to whether it even makes
2 sense for IRC to reconvene.

3 And in City and State, which is a prestigious
4 political publication here in New York, Mr. Imamura, and we
5 submitted this to the Court last night, made several key
6 very important statements.

7 He first said that, quote, The new process fails
8 spectacularly, unquote. He said further, quote, It is the
9 commission's structure established by the state's
10 constitution that is actually to blame. Unquote. He
11 further noted that because there were five democrats and
12 five republicans on the commission, he said, and I quote,
13 The commission essentially could not buy pens or paperclips
14 with all 10 commissioners agreeing, unquote. He said that
15 the commission had very different views on how a district
16 should be drawn.

17 And then most critically, and this is towards the
18 bottom of page two on the copy that was submitted to the
19 Court yesterday, Mr. Imamura, again, the chair of the IRC
20 said, and I quote, New York's current redistricting process
21 is doomed to fail. A politically appointed evenly divided
22 redistricting commission will never be able to come up with
23 a single set of maps, unquote.

24 Your Honor, we believe that the constitution is clear
25 for the reasons previously submitted. And then on top of

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1 that, you have the practical problems, and the admitted
2 futility of this process by the chair, Mr. Imamura.

3 THE COURT: Counsel, I'm aware of it. I saw the
4 article that was uploaded with the quotes. I will note, I
5 believe that article which came out, I think, in early May
6 of 2022 was referring to all of the maps collectively in
7 terms of the, at that time, the congressional senate and
8 assembly.

9 Certainly, whatever may be filed in the future in
10 this matter, or not, and how things play out, and obviously
11 I have not issued a written decision yet, and, frankly, I'm
12 going to be endeavoring to issue a decision as quickly as
13 possible so that everyone knows how to move forward in this
14 matter, but the fact that the commission will solely be
15 potential relief if they are given the job to do again would
16 only be addressing the assembly maps rather than issues that
17 they had to deal with the congressional and state senate
18 maps.

19 I would certainly hope if they are given that task
20 again, that even five democrats and five republicans will
21 somehow figure out a way to do what they were charged to do.
22 And, frankly, if they don't, then as we discussed, you know,
23 at the prior appearance, if they don't do that, it will at
24 that point certainly end up back before the Court and, you
25 know, other remedies will have to come into place if it gets

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1 to that, if that is the way that I ultimately rule.

2 But I certainly appreciate and understand the concerns
3 that you have with how the process failed to work the first
4 time around, and, obviously, everything that flowed from
5 that. But I do understand.

6 MR. FOLDENAUER: I appreciate, your Honor. And it's
7 a note of caution for the Court because then this Court owns
8 the process by whatever process this Court launches.

9 And I would note the assembly has more districts than
10 any of the other state senate and congressional. There is
11 150 districts to argue.

12 THE COURT: I understand that. I appreciate that.

13 MR. FOLDENAUER: I appreciate that. And two other
14 points, your Honor, and that might be it subject to the
15 Court's comments.

16 THE COURT: Hopefully, it will.

17 MR. FOLDENAUER: Yes. Number one, I actually
18 haven't even heard the actual substantive position of any of
19 the 10 commissioners as far as whether the commission should
20 be asked to redraw the lines. I've heard them say today
21 that they don't object to them being added as parties, but
22 that's very different than should. And that might be
23 helpful to the Court particularly in light of this article.
24 There's no evidence, or even suggestion that they actually
25 want to take on this task, or would be effective. So

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1 without that, I feel like this, what we see here in black
2 and white in this article would govern.

3 And then I would urge the Court, in whatever order
4 that the Court issues to outline what would happen next.
5 Let's assume--and, again, we argue that special master
6 should--but what if the IRC --

7 What if the Court orders the IRC to reconvene, and
8 then they fail to reach an agreement, then it definitely
9 should be a special master at that point, the petitioner
10 would submit. Because then you get to the point where
11 you're giving the legislature a second chance which isn't
12 outlined anywhere in the constitution.

13 THE COURT: I understand. Thank you.

14 MR. FOLDENAUER: Thank you, your Honor.

15 THE COURT: Thank you.

16 MR. WALDEN: I apologize, your Honor. I swore to
17 the nice court reporter I was going to do my best to keep
18 mouth shut. May I just be heard very briefly?

19 THE COURT: Briefly.

20 MR. WALDEN: Very briefly. And may I stay seated,
21 your Honor? I'm have some back problems. I don't mean any
22 disrespect to the Court.

23 THE COURT: You may.

24 MR. WALDEN: Three minutes or less, your Honor.

25 The respondents are now taking the position that the

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1 judicial oversight and creation of the new map is
2 unconstitutional, right. So you have two choices; one, is
3 clearly all of the parties agree that would be
4 constitutional. They advise against it. But there's the
5 second path that you're thinking about, your Honor. And I
6 just want to be clear that the First Department --

7 What we're gonna do is we're gonna submit the Albany
8 litigation. It is on all fours, right. The issue that they
9 conceded in that litigation is on all fours.

10 And so, your Honor, I just can you to do three things
11 because I think these three things ultimately would be the
12 procedural reason that First Department sends it back to you
13 anyway. And so the three things are as follows:

14 Not the attorney general's office, nor the IRC has
15 opined on the constitutionality of reconvening. We say that
16 it is not appropriate. We say that the Court, respectfully,
17 is misreading or is taking out of context the small little
18 reference in the Appellate Division's order.

19 THE COURT: It's a relatively short order.

20 MR. WALDEN: It is a relatively short order, your
21 Honor. And, your Honor, I understand that Court's position.
22 I'm not gonna reargue it. But without the attorney
23 general's position, and the IRC's position on the
24 constitutionality of reconvening, the First Department is
25 just doing to send it back here for that in any event

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1 because that was the whole reason that we, although
2 maintaining our objections, wanted to participate in this
3 process because we believed that the IRC would say sorry,
4 but we can't do this under the constitution, that's number
5 one;

6 Number two, before your Honor issues an order, I want
7 to be clear, your Honor, that Mr. Foldenauer's point of
8 futility is critical. We want Mr. Imamura in a chair. We
9 want to examine him because it is a waste of the Court's
10 time, a waste of taxpayer money --

11 All of these people are being paid on the respondents'
12 side with public money. And it's a waste of time to prolong
13 this through a process that IRC, itself, has said is doomed
14 to fail.

15 Third, your Honor, when you eventually get to whatever
16 your order is, you know, ample finding as Mr. Foldenauer
17 said, please, your Honor, make sure it's clear who owns the
18 process because they're trying to be clever by having you
19 invoke the constitution with the idea that the legislature's
20 vote is the end of the process. And that can't be right.
21 That would be an automatic reversal.

22 Even if the Court essentially, the way I'm looking at
23 this, using the IRC as the first cut, but ultimately, you
24 have to oversee and approve the map. There has to be
25 briefing by the parties, and then the decision is gonna come

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1 from you. And ultimately, it's gonna be your map, your
2 Honor. And if that's not clear in your order, I'd ask that
3 you make that clear because we think that, that is a
4 critically important part of the process for everyone.

5 THE COURT: Thank you.

6 MR. WALDEN: Is that short enough, your Honor?

7 THE COURT: You did a good job.

8 MR. WALDEN: Thank you.

9 THE COURT: All right, with that, I'll turn to the
10 respondent.

11 MR. BUCKI: Yes, your Honor. But with respect to
12 the process, we would submit the process should be what is
13 prescribed in Article 3, Sections 4 and 5-b. And in as much
14 as Mr. Walden may wish this were not the case, there is a
15 role for the legislature to play.

16 And now we do recognize that once a plan is enacted by
17 the legislature after the commission does its work, if the
18 petitioners want to raise a substantive challenge to that
19 map, they are certainly free to do so. But that should be
20 hashed out at that time.

21 Right now, rather than doing what Mr. Walden suggests,
22 the commission should simply be directed to do the work that
23 is required to do, and that the legislature, likewise,
24 should react to whatever the commission does in response to
25 its duties under Article 3, Section 4 of the constitution.

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1 And that would be how I submit the Court should proceed.

2 THE COURT: Counsel, assuming you would concede
3 that, and assuming I give the commission the opportunity to
4 essentially get a second bite at the apple to do what they
5 are charged to do under the constitution, and it follows
6 through that process with the role of the legislature, if
7 that process breaks down again, as it obviously did the
8 first time around, I assume you would concede as per what's
9 already been laid out from the Court of Appeals, etcetera,
10 that it would in all likelihood at that juncture come back
11 to me to in all likelihood utilize the special master, and
12 do that work on an individual basis rather than the full
13 commission with going through their roles --

14 MR. BUCKI: What I can say based upon the
15 Harkenrider decision is that if there were a breakdown in
16 the process such that there would not be from a procedural
17 matter two sets of maps issued by the IRC, and further that
18 there would not be enough time left for the IRC to do its
19 work, which was precisely the problem with the congressional
20 map, and senate map, and there was no time for IRC to fix
21 the procedural issue, then in that instance, because it was
22 required, given the exigencies of time, then yes, a special
23 master needed to be appointed in that circumstance. But I
24 would submit the circumstance in which we find ourselves
25 with respect to the assembly map is very different.

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1 First of all, your Honor can retain jurisdiction over
2 this matter and supervise the work of the IRC such that if
3 there is a break down in the process, you Honor can be
4 present to try to get all the commissioners in a room and
5 move the process along to try to get them to be able to
6 agree upon a map which that was not the case back in January
7 and February. There was no judge overseeing the process.
8 And indeed in the Harkenrider decision reference was made by
9 Judge DiFiore to the fact that mandamus could have been
10 sought against the commissioners to compel them to issue a
11 new map here. As long as the Court retains jurisdiction,
12 the Court can simply continue supervising the process.

13 In addition, in January and February the independent
14 redistricting commission thought, I think, that the matter
15 would go back to the legislature if they couldn't agree
16 because the legislature in the fall of 2021 had enacted a
17 statute that provided for the legislature to be able to act
18 if there was, in fact, a breakdown in the commission
19 structure.

20 And so it was pursuant to that statute that the
21 legislature acted. That statute was determined later on in
22 the Harkenrider decision to be invalidated. And so now the
23 IRC knows the state of play. It isn't so new anymore such
24 that the IRC knows that if there is a breakdown, the
25 likelihood goes up that the Court will have to draw the map

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1 instead of the legislature having any role.

2 And further, in January and February, you had three
3 maps at issue, congress, senate and assembly. Here, we're
4 only talking about the assembly. And I'm privy to what the
5 discussions were between and among the commissioners. But
6 who knows what kind of trading or discussions were taking
7 place between and among them viewing all of these three maps
8 together in totality whereas now, pursuant to a new process,
9 the IRC could simply focus on the assembly map, and the
10 assembly map only.

11 And so for all those reasons, I would submit that all
12 of the parade of horrors that Mr. Foldenauer complains
13 about, that this is going to be a process doomed to fail,
14 that is not necessarily true. And, in fact, Mr. Foldenauer
15 knows that it isn't true because in response to the letter
16 that he filed last night, it's my understanding, first of
17 all, Commissioner Imamura, Mr. Foldenauer knows what
18 Commissioner Imamura's position is going to be because on
19 September 13th which was Tuesday earlier this week, there
20 was a CLE program sponsored by the Bar Association of the
21 City of New York. And the title of that CLE program was New
22 York Redistricting. What happened? What's next? And would
23 be of the panelists at that CLE was Commissioner Imamura.
24 And it's my understanding, and we can certainly, I'm sure
25 because it was that virtual program, get a copy of the video

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1 of that program. And it's my understanding that
2 Commissioner Imamura said at that CLE that he believes that
3 there would not be a breakdown in the process if the
4 commission were charged with considering only the assembly
5 maps, and that his position with respect to the assembly
6 maps is very different from the position that he took in the
7 city and state op-ed article.

8 And you want to know, Judge, Mr. Foldenauer was there
9 as the CLE. We have friends in many different places. And
10 so it's disingenuous for Mr. Foldenauer to come before this
11 Court and misrepresent the position of Commissioner Imamura.

12 THE COURT: Well, what I will say is this,
13 obviously, something that, you know --

14 quotes in an article what may have been said at a CLE
15 program or, you know, any other kind of function is much
16 different than something that may be put in a formal
17 affidavit, you know, before the Court, or in any proceeding
18 before the Court.

19 So I understand the descriptions of, you know, that
20 both sides in terms of some individuals, but I'm obviously
21 going to stick to what's actually put in appropriate papers
22 by any of those individuals if it comes to it.

23 MR. BUCKI: And so I would say to the extent that
24 the Court may choose to give any credence to anything
25 Mr. Foldenauer represents, we would like an opportunity on a

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1 reasonable time frame to be able to respond in writing, but
2 of course, we land that to the Court's discretion.

3 What I am prepared to say, though, concerning legal
4 arguments is that, and I think we would be happy to brief
5 this as well should the Court find it necessary, but the
6 Hoffman case and this case are totally different cases.
7 They're like comparing apples and oranges because in Hoffman
8 what was requested was to replace a map that had been
9 drafted by Dr. Cervas, the special master in Steuben County,
10 and that had been so-ordered by Justice MacAlister. And
11 petitioners in Hoffman were looking to replace a map that
12 had already been imposed as a remedy for the constitutional
13 violation identified in Harkenrider.

14 Here, there is no remedial map on the table because
15 under the First Department order, it was the First
16 Department that directed this Court to determine what should
17 be the proper map remedy consistent with Article 3,
18 Section 5-b. And as we already argued on August 24th, we
19 would submit Section 5-b provides for the commission process
20 whereby then the legislature has the role that it does
21 constitutionally to approve or disapprove the maps that are
22 produced by the commission.

23 Second of all, in the Hoffman case, the petitioners
24 were looking to resume the constitutional process that had
25 been suspended in the January/February time frame when no

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1 second set of maps was issued.

2 Here, what we're asking for the Court to do is to
3 begin the process anew because we would submit under the
4 first sentence of Article 3, Section 5-b of the state
5 constitution, that is the circumstance that would trigger
6 the commission's involvement in this instance.

7 And, also, we do have the benefit of time. While not
8 looking to waste time, and I think that the process should
9 proceed expeditiously, there is no need for assembly map
10 until the winter of 2024 because the elections this year are
11 taking place under the map that was enacted in 2022. Such
12 that if there is some breakdown in the commission process,
13 there will be plenty of time for this Court to step in to
14 get the commission back on track. And if a map is enacted,
15 say, in the spring of 2023, or sooner, or even a little
16 later, then if there are substantive challenges to what that
17 map would happen to be, the petitioners are welcome to bring
18 those challenges at the appropriate time.

19 So we would submit that this case is very different
20 from the Hoffman case. And, further, petitioners should not
21 put words into the mouth of the republican commissioners.
22 They are represented by counsel. They are here today. And
23 I have no doubt that their counsel can, in response to your
24 Honor's questioning, state what their true position is with
25 respect to this case. And we should not leave it to the

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1 petitioners to prognosticate what their position is, or for
2 what it should be.

3 And, finally, there is no reason to submit that it
4 would be premature to have the members of the commission
5 joined. We have a full compliment of the commissioners.
6 All 10 have been appointed. Their counsel are here.
7 They've already demonstrated to your Honor that they do not
8 have any objection to being named. And with respect to the
9 two commissioners, Dr. Flateau, and Commissioner Collado,
10 who were named commissioners very recently but who are not
11 named in the Court's order to show cause, they have offered
12 affidavits to this Court stating that they know about to the
13 proceeding, that they recognize that they are commissioners,
14 and that they consent to being named as respondents.

15 So we have the positions of all 10 commissioners, all
16 of whom are willing to be named as respondents in this
17 proceeding. We submit that they should be named a
18 respondents in this proceeding. They should be joined. And
19 that the commission process should proceed as is required by
20 the constitution.

21 And further, that Mr. Foldenauer talks a lot about
22 Dr. Cervas, how he would be a good special master, I just
23 want to highlight the amicus letter, quote, unquote, that
24 was offered by Susan Lerner from Common Cause, and she had a
25 lot of criticism for the Dr. Cervas. She said that he was

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1 somebody who only assisted a special master before, and that
2 he had, quote, no first-hand familiarity with any part of
3 New York.

4 I would submit that people that do have first-hand
5 familiarity with New York would be the 10 commissioners who
6 are New York residents, and then the legislators who are
7 elected by the constituents to be the voice of the people in
8 the legislature. And that is the way that the process
9 should work. And now it can take place with your Honor's
10 supervision. And that's what we submit should happen here.

11 THE COURT: Thank you, Counsel.

12 With that said, I'll just turn further to counsel for
13 the various commissioners. Having heard from both sides, I
14 guess that will start with you based on what you've heard or
15 can add.

16 MS. AMUNSON: Yes. Thank you, your Honor.

17 I agree with your Honor that the Court should not be
18 relying on statements in op-eds or CLEs, etcetera.
19 Mr. Imamura is prepared to submit an affidavit if the Court
20 so requests. However, his position is already on the record
21 in what is filed here as well as the positions of
22 Ms. Frazier, Dr. Cuevas-Molina, Dr. Flateau, and Mr. Collado
23 that they do not object to being named as respondents, and
24 further that they do not object to the relief that has been
25 requested by the speaker, and that they are prepared to

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1 undertake the of redrawing the assembly map in order to do
2 so by this Court, and that they are prepared to do so
3 expeditiously.

4 MR. HILL: As a participant in the Hoffman
5 litigation, the distinction that your Honor and counsel made
6 are accurate that, that was a Article-75 proceeding
7 specifically asking for mandate to compel the commissioners
8 to do a very specific act as a very specific effectively
9 fictitious time in the past to go back and do something
10 within a time period in January and February of 2020.

11 In the process that went through the judicial remedy
12 under the constitution Section 4(e) and completed that
13 process. So there was a temporal problem, and there was a
14 constitutional problem that it had fully exhausted that
15 remedy and what was being sought, a very narrow and specific
16 mandate of relief that was being sought there was an
17 impossibility. So there is not an inconsistency in the
18 positions.

19 As far as this proceeding, if the Court orders it,
20 that's the only constitutional way we see that the IRC could
21 be compelled to act.

22 THE COURT: Well, Counsel, just to clarify, because
23 I know in terms of formal documents had been filed on behalf
24 of the commissioners you're representing essentially, the
25 only thing that was filed was a notice of appearance. So

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1 are you in a position at this stage as an officer of the
2 court to indicate one way or the other if the Court does
3 issue an order allowing the independent redistricting
4 commission essentially to get a second bite at the apple
5 solely related to the assembly maps, do you believe your
6 clients' views that they believe they could undertake?

7 MR. HILL: Yes, I think the accurate way to phrase
8 it is that if the Court orders that, that is the road that
9 they will take. And I'm sure they are all acting in good
10 faith in executing the Court's directive.

11 I would just say that, you know, the order to show
12 cause was specifically to the singular commission --

13 THE COURT: Right, which I readily understand. And
14 I think on a lot of what we're going through is new ground,
15 frankly, for everyone on all sides of the issue. So on one
16 side I want to make sure that everything is clarified in
17 terms of everyone's positions. And, although, we obviously
18 have what would appear at this point to be a descent amount
19 of time to get this right for the 2024 election. On the
20 other hand, two years certainly look like a very short
21 period of time if things do not go smoothly. So I'd like to
22 think things would go smoothly. They just rarely seem to.

23 So hopefully that will not be an issue this time
24 around. But I do appreciate your clarification that those
25 commissioners, along with the others, will obviously follow

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1 the directives of this Court, and we'll go from there.

2 Thank you.

3 MR. HILL: Thank you.

4 We also did notice that your Honor struck out the
5 other two requested relief in the order to show cause. And
6 so if your Honor were to grant the directive making us
7 respondents, I don't know at the time that the commission
8 comes back together collectively it may want to have some
9 input into the process.

10 THE COURT: Understood. And as I said at the
11 outset, I am aware that, you know, obviously that I struck
12 out certain proposed language within the order to show
13 cause. Frankly, it was my view that at this stage wanted to
14 keep things as clean and as simple as possible. But,
15 obviously, if I do, in fact, order that the commission
16 proceed with the process, I would anticipate that, you know,
17 I would obviously be retaining jurisdiction over this
18 matter, and would be getting as involved as necessary to
19 help things along.

20 So my hope, my very sincere hope would be that if the
21 commission is given an opportunity to do this again where
22 it's just on the assembly maps, and with all the knowledge
23 that they now have of how the Court of Appeals has ruled in
24 this matter previously, that the commission will be able to
25 successfully complete their task. I have no idea what the

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1 maps may look like, but hopefully they will follow the
2 constitutional requirements and things will proceed the way
3 they were meant to by the last time around. If they don't,
4 obviously, we'll cross that bridge when we get to it. But
5 those are all parts of the reason that I did not want to
6 start with the order to show cause, itself, getting bogged
7 down too much with specifics of what the commission should
8 or should not be doing.

9 But I would certainly hope from the proceedings, and
10 from what --

11 I think there will be a written decision that I intend
12 to enter relatively soon that will be a clear road map for
13 all sides on how to proceed, and that we can go from there.

14 All right. With that said, I believe it was addressed
15 in terms of the earlier statements from both counsel, but
16 just to be clear, again, I believe --

17 So on behalf of all 10 individual members of the
18 commission, it's your joining representation that they
19 consent to being added as parties individually to this
20 matter, is that correct?

21 MR. HILL: On behalf of the five that I represent,
22 that's accurate, yes.

23 MS. AMUNSON: And on behalf of the three that I
24 represent as well as the two who have submitted affidavits,
25 and who presumably will be certified for representation if

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1 they are added as respondents, I concur, your Honor.

2 THE COURT: Okay. See, we already have republicans
3 and democrats agreeing.

4 MR. WALDEN: Judge, I'm so happy that you made that
5 segue because I want to make the record clear, because I
6 didn't hear any opposition to any of the three things. In
7 fact, I heard consent. So maybe we're heading in the right
8 direction.

9 The first was if you're going to add the IRS as a
10 party, regardless of the individual commissioners, the Court
11 is owed an opinion from the IRC concerning whether or not
12 what you propose to do is constitutional. I think that you
13 won't even get a single submission from them. They won't be
14 able to agree on the constitutionality of this, and they
15 though that you probably guessed that they already have
16 correspondence on this, your Honor.

17 THE COURT: Counsel, with all due respect --

18 MR. WALDEN: Yes, sir.

19 THE COURT: If I issue an order indicating that the
20 commission is supposed to do something, and the commission
21 fails to do it, there will be repercussions to that one way
22 or the other. I'm not gonna predetermine how things may go
23 forward.

24 MR. WALDEN: I apologize, your Honor. I must have
25 not clearly articulated what I meant to be in conveying

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1 which is simply that I humbly suggest, your Honor, that the
2 first stage in the process is getting what the record lacks
3 right now which is the attorney general's position, and the
4 IRC's position on whether or not it is constitutionally
5 permissible for you to issue the order that you're
6 contemplating.

7 We've taken the position that, that is not
8 constitutional. Right. They have not taken a position at
9 all. The only entity or party that's taken a position is
10 Mr. Heastie. So given the fact that they are IRC, and that
11 they --

12 You should know whether or not that 10 commissioners
13 can come to a single position on whether or not the order
14 that you anticipate issuing is constitutional. This would
15 be a really important moment for you to test that, but also
16 to get the position on the record; that's number one.

17 Number two, your Honor, I heard--I apologize. Your
18 last name is?

19 MS. AMUNSON: Amunson.

20 MR. WALDEN: Amunson. I just didn't want to
21 mispronounce it.

22 I heard Ms. Amunson say that Mr. Imamura would
23 prepared to submit an affidavit. So it sounds like he's
24 willing to testify. And we believe that, putting aside the
25 CLE, the op-ed, and the position taken by the republicans

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1 raises a fair question that Mr. Aaron Foldenauer has put
2 into the record on futility of this whole process. So we
3 would like a hearing on futility. We're prepared to brief
4 that if you'd like, your Honor, and submit whatever.

5 To Mr. Bucki's point, there were technical problems on
6 that CLE, they don't have the audio unfortunately. I asked
7 for it, and they had technical problems which was why I
8 couldn't dial in remotely because I was interested in what
9 Imamura was gonna say.

10 And third, your Honor, and this is super important so
11 I just want to make sure that we're all on the same page. I
12 heard Mr. Bucki consent to what I had said was an important
13 part of any order that your Honor issues even preserving our
14 objections, and that's, that the map comes from the Court.
15 Right, so --

16 MR. BUCKI: That is not true, your Honor. I never
17 said that.

18 MR. WALDEN: That's why I am raising it now so that
19 I can make sure Mr. Bucki's interruption is not welcome.
20 my only point, your Honor, was the words he used--I don't
21 want to be accused of misquoting him--are retain
22 jurisdiction and supervise the IRC.

23 Now, putting aside whatever questions that might
24 raise, those were the words that he used. He envisions that
25 you would be essentially the special master--I know that's a

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1 popular phrase these days--essentially, the IRC, but at the
2 end of that process, your Honor, if you're in Section 5,
3 right, if the basis of your jurisdiction here is Section 5,
4 Section 5 is clearly a judicial remedy. So they can't have
5 it both ways. Right. Either we're in Section 5, and this
6 is a judicial process which is what he's now invited because
7 he said retain jurisdiction and supervise the IRC, or we're
8 back in Section 3. Right. So that's why I feel like
9 there's some clever lawyering going on here, your Honor.

10 THE COURT: Counsel, let me be clear. I know
11 exactly what counsel said on the record; and, obviously, I
12 have the record to refer back to but, you know, I believe
13 counsel had indicated that they agreed that this Court would
14 be retaining jurisdiction on this entire matter.

15 MR. WALDEN: And supervising the IRC.

16 THE COURT: Well, the word supervision brings a lot
17 of connotations to it in terms of what that might mean on a
18 legal process. I will just say this, and I think we can
19 leave it at that, I will be issuing a very, what I believe
20 will be a very clear written order on what I believe should
21 be occurring based on the direction I received from the
22 First Department, and my order will say what it says.

23 And I believe that once that order is issued, and
24 reviewed by all the parties, my hope would be that everyone
25 simply says it's a wonderful order and follows through with

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1 it. And if somebody happens to disagree with it, I suspect
2 that the First Department will be relatively quick to
3 express their opinion. And if for some reason somebody
4 disagrees with their views on the matter, and it would not
5 surprise me if the Court of Appeals may have an opportunity
6 to share their further views on it.

7 So as well we all know, there's a process. We'll
8 follow the process, and hopefully the end result one way or
9 the other--I shouldn't say hopefully--I know the final
10 result one way or the other, there will be assembly lines in
11 place for the 2024 election, and life will go on from that
12 stage.

13 So with that, at this juncture, I'm going to go
14 ahead --

15 MR. FOLDENAUER: Your Honor, one problem with the
16 IRC the first time around is that they did not have funding
17 from the legislature, and they had to coax the legislature
18 to get adequate funding. I presume right now that there is
19 no funding available for this next stage of the IRC. And
20 the legislature does not reconvene until January of next
21 year. And it would take matters of months for that to
22 happen.

23 THE COURT: I do not intend, or anticipate getting
24 into the budgetary process of how, or if the IRC needs
25 funding to do the things they need to do. I do not believe

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1 that's a role I need to get involved in at this point. And
2 I'll leave it at that.

3 And with that said, I'm going to go ahead and close
4 the proceedings at this time. It is my sincere hope that
5 once I do issue the order, I anticipate issuing that.
6 Hopefully I do not see any of you again, at least, on this
7 matter for some time, or maybe not at all.

8 MR. BUCKI: If I may just add, your Honor, my
9 understanding is that there is funding that's allocated.
10 And whatever funding the commission needs, I have no doubt
11 the assembly will take it up.

12 THE COURT: All right. Thank you, all. In
13 conclusion, I will just ask the parties to order a
14 transcript of today's proceedings so they are part of the
15 record, as well.

16 Thank you.

17 *****

18 Certified to be a true and accurate transcript of
19 the stenographic minutes taken within.

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Alecia Hines
Alecia Hines, RPR
Senior Court Reporter

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Certification Pursuant to CPLR §2105

CERTIFICATION PURSUANT TO CPLR § 2105

I, Peter A. Devlin, a member of the firm of Walden Macht & Haran LLP, attorneys for Petitioners-Appellants, hereby certify pursuant to § 2105 of the CPLR that the foregoing papers constituting the Record on Appeal have been personally compared by me with the originals filed herein and have been found to be true and complete copies of said originals and the whole thereof, all of which are now on file in the office of the clerk of the Supreme Court, County of New York.

Dated: November 7, 2022

Walden Macht & Haran LLP

By:



Peter A. Devlin
Attorneys for Petitioners-Appellants