

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF STEUBEN

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:  
TIM HARKENRIDER, GUY C. BROUGHT, :  
LAWRENCE CANNING, PATRICIA CLARINO, :  
GEORGE DOOHER, JR., STEPHEN EVANS, :  
LINDA FANTON, JERRY FISHMAN, JAY :  
FRANTZ, LAWRENCE GARVEY, ALAN :  
NEPHEW, SUSAN ROWLEY, JOSEPHINE :  
THOMAS, AND MARIANNE VOLANTE, :  
:

Petitioners, :

v. :

Index No.: E2022-0116CV

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

**GAVIN WAX'S MEMORANDUM OF LAW IN SUPPORT OF  
HIS MOTION TO INTERVENE AND HIS NEW CAUSE OF ACTION  
SEEKING TO INVALIDATE THE NEW YORK STATE ASSEMBLY MAP**

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Date: May 1, 2022

*Counsel for Petitioner-Intervenor Gavin Wax*

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Gavin Wax respectfully submits this Memorandum in support of his request to intervene and in support of his additional cause of action seeking to invalidate the State Assembly map which was improperly drawn by the New York State Legislature.

### **PRELIMINARY STATEMENT**

Based on the decision of the Court of Appeals last week, the only question before this Court is whether the State Assembly map will be permitted to stand in violation of the New York State Constitution. It was only because of two interrelated procedural technicalities—namely, Petitioners’ (1) failure to ask for the invalidation of the State Assembly map and (2) refusal to defend this Court’s *sua sponte* decision to strike down the State Assembly map on appeal—that the Court of Appeals declined to strike down the State Assembly map as unconstitutional.

Gavin Wax’s emergency motion to intervene squarely places the constitutionality of the State Assembly map before this Court and solves any potential legal challenge to this Court’s authority to make a decision regarding the State Assembly map. It is transparent that striking down the unconstitutional Congressional and State Senate maps, on the one hand, while allowing an unconstitutional State Assembly map to remain intact, on the other hand, would make no legal or practical sense. Worse yet, doing so would call into question the integrity and competence of the New York State government.

Now, the Court should take the logical next-step by following the clear rationale of the Court of Appeals decision and strike down the State Assembly map as unconstitutional. This would vindicate the rights of the People of the State of New York to ensure that all district lines are properly established, pursuant to a 2014 Constitutional Amendment that they themselves enshrined in the New York State Constitution.

### ARGUMENT

The Court of Appeals has already determined that the State Assembly map drafted by the New York State Legislature was subject to the same constitutional infirmities as the Congressional and State Senate maps. All this Court needs to do at this stage is (1) acknowledge that Petitioner-Intervenor's new cause of action now resolves any procedural technicalities that may have existed; (2) follow the logic of the Court of Appeals' decision and strike down the State Assembly map as procedurally unconstitutional; and (3) add the task of drafting a new State Assembly map to the just-started process among the Special Master and any interested parties such that all maps can be completed in a timely manner, and so that a primary election can be held on August 23, including State Assembly races, together with Congressional and State Senate races.

**I. BASED ON THE RECENT DECISION BY THE COURT OF APPEALS AND THE PENDING MOTION TO INTERVENE, THIS COURT SHOULD NOW RULE THE ASSEMBLY DISTRICTS TO BE UNCONSTITUTIONAL.**

In a landmark decision that was issued last Wednesday afternoon, the Court of Appeals definitively agreed with this Court's prior determination that "[t]he same faulty [and unconstitutional] process was used for all three maps," namely, the Congressional, State Senate, and State Assembly maps. Decision and Order, NYSCEF Doc. No. 243 at 10 (Mar. 31, 2022).

In deciding that the Congressional and State Senate maps were "procedurally unconstitutional," the Court of Appeals upheld the importance of the 2014 Constitutional Amendment enacted by the People of the State of New York, which charged the Independent Redistricting Commission (the "IRC"), *not* the legislature, to draw new maps in the first instance. Court of Appeals Decision at 28; *id.* at 23 ("In urging this Court to adopt their view that the IRC may abandon its constitutional mandate with no impact on the ultimate result and by contending that the legislature may seize upon such inaction to bypass the IRC process and

compose its own redistricting maps with impunity, the State respondents ask us to effectively nullify the 2014 amendments. This we will not do.”) The Court of Appeals noted that a “bipartisan process was placed in the State Constitution specifically to insulate it from capricious legislative action and to ensure permanent redistricting,” and held the legislatively drawn maps to be unconstitutional because they would allow “the legislature to avoid a central requirement of the reform amendments.” *Id.* at 22.

With respect to the State Assembly map, the Court of Appeals concluded that it is subject to the same “procedural infirmity” as the Congressional and State Senate maps, but did not fully reach a decision on the State Assembly map based on some combination of two interrelated procedural technicalities: That Petitioners (i) failed to raise the issue in their initial pleadings, and (ii) refused to litigate, on appeal, the trial court’s *sua sponte* decision on March 31, to invalidate the State Assembly map. *See id.* at 28 n.15.

Not only has the Court of Appeals stated that the State Assembly map is procedurally improper, but also, the Court specifically invited parties to “promptly offer” submissions so that this Court can “adopt constitutional maps with all due haste.” Court of Appeals Decision at 32. This, of course, is precisely the function of Petitioner-Intervenor’s emergency motion and new cause of action, which now squarely places the State Assembly maps before this Court. Now that Gavin Wax has moved to intervene, this Court has the authority to follow the logic of the Court of Appeals decision and rule that the enactment of the State Assembly map was procedurally unconstitutional.

**II. THIS MOTION TO INTERVENE IS TIMELY AND WAS FILED WITHIN DAYS OF THE COURT OF APPEALS DECISION.**

The Court of Appeals issued its decision on only Wednesday afternoon of last week, and Petitioner-Intervenor moved expeditiously to raise the issue of the constitutionality of the State Assembly maps before this Court.

Registered voters like Mr. Wax had every reason to believe that his interests were adequately represented by counsel for Petitioners, as demonstrated by the fact that this Court, in its March 31, 2022 Decision and Order, struck down all of the disputed maps, including the New York State Assembly maps. Decision and Order, NYSCEF Doc. No. 243 at 10 (Mar. 31, 2022) (“The court would note that not only are the Congressional District Maps and Senate District Maps void but the Assembly District Maps are void *ab initio* as well. The same faulty process was used for all three maps. Therefore new maps will need to be prepared for the Assembly Districts as well.”).

Inexplicably, following their landmark victory when this Court ruled all three sets of maps to be unconstitutional, Petitioners refused to defend this Court’s *sua sponte* decision to discard the State Assembly maps in rapid-fire appeals that followed. Buried in Petitioners’ April 15, 2022 Memorandum of Law to the Appellate Division was a short section of Petitioners’ filing which revealed that they would not make any argument in support of redrawing the State Assembly map, despite this Court’s decision to do just that. *See* Respondents’ Brief, CAE 22-00506, NYSCEF No. 43 (Apr. 15, 2022) (informing the Appellate Division merely that “if this Court and/or the Court of Appeals agree with Petitioners’ argument that the Legislature violated the Constitution’s procedural requirements in enacting the 2022 congressional map, the 2022 Assembly map would

likewise need to be invalidated for the same reason, upon the suit of any other voter.<sup>1</sup> It was only when the Court of Appeals noted in its decision last week that it became readily knowable that Petitioners had dropped any argument concerning the State Assembly map on appeal. *See* Court of Appeals Decision at 28 n.15 (noting that Petitioners “did not challenge in this Court the Appellate Division’s vacatur of the relief granted by [the] Supreme Court with respect to [the] assembly map”).

In other words, the issue as to whether the Court had authority to strike down the State Assembly map was never litigated at all, by Petitioners, on appeal. It is only because of that failure by Petitioners—one that unfolded only within the past two weeks as emergency appeals proceeded at a rapid-fire pace—that the Appellate Division and Court of Appeals were unable to issue decisions that could have directly addressed this Court’s authority to invalidate the State Assembly map, *sua sponte*.

Of course, the fact that Petitioner-Intervenor Gavin Wax is now appearing here and asserting a cause of action to invalidate the State Assembly map definitively resolves the issue as to whether the constitutionality of the State Assembly map is properly before this Court. Accordingly, now that the State Assembly map is squarely before it, this Court should invalidate the State Assembly map and direct the Special Master to prepare a new State Assembly map, as part of the process it is just beginning with respect to the Congressional and State Senate maps.

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<sup>1</sup> Only after the Petitioners refused to defend this Court’s ruling regarding the invalidity of the State Assembly map did it become clear that the Petitioners do not represent the interests of Gavin Wax and many other New Yorkers.

**III. THERE IS AMPLE TIME FOR THIS COURT TO ENSURE THAT A NEW STATE ASSEMBLY MAP IS DRAWN IN TIME FOR AN AUGUST 23 PRIMARY.**

Given that the Court of Appeals released its decision just days ago, the Special Master has yet to redraw any maps, and indeed, as discussed herein, submissions to the Special Master concerning the State Senate map are not due until later this week. There is more than ample time to fold in the task of redrawing the State Assembly map as part of the process involving the Special Master and any interested parties—which is a process that is just getting underway.

**A. The Court's Recent Orders Can Be Readily Amended to Allow Interested Parties to Submit Proposed State Assembly Maps and for the Special Master and the Court to Complete All Three Maps.**

Since the Court of Appeals issued its decision on Wednesday afternoon, this Court has issued several orders concerning a path forward to facilitate the drafting of maps that pass constitutional muster and which allow all relevant parties to be heard. In its Second Amended Order issued on April 29, this Court allowed all interested parties to submit proposed State Senate maps to the Court and the Special Master by May 4, and that there be a hearing held before the Special Master by May 6 concerning any proposed maps. Second Amended Order, NYSCEF No. 296 (Apr. 29, 2022). The order further provides that final Congressional and State Senate maps will be issued by May 20, and a separate order set the Congressional and State Senate primaries to be held on August 23, 2022. *Id.*; Preliminary Order, NYSCEF No. 301 (Preliminary Order, Apr. 29, 2022).

These orders can readily be amended to also encompass drawing a State Assembly map that passes constitutional muster on the same general timetable the Court has set forth, such that Congressional, State Senate, and State Assembly primaries could all be held on together on August 23. If the Court acts expeditiously with respect to this emergency motion to intervene, the Court could readily allow interested parties to submit proposed State Assembly maps to the



Special Master by later this week, or even just following the weekend on Monday, May 9. The Special Master would then still have more than enough time to submit his proposed State Assembly map (along with his proposed Congressional and State Senate maps) by May 16, 2022, so that final maps can be issued by May 20, 2022—precisely the schedule the Court set forth in its April 29 order. NYSCEF No. 296 at 2.

In other words, Petitioner-Intervenor’s cause of action seeking to invalidate the State Assembly map results in no prejudice to any interested party, because the Congressional and State Senate maps are already being redrawn such that the process can be readily expanded to include the State Assembly maps. The Court should proceed with invalidating the State Assembly map, because as this Court determined on March 31—logic that was convincingly adopted by the Court of Appeals—all three maps, including the State Assembly map, are “void *ab initio*” because “[t]he same faulty process was used for all three maps.” Decision and Order, NYSCEF No. 243 (Mar. 31, 2022).

Notably, this request to intervene is based on intervention as of right pursuant to NY CPLR Section 1012(a)(2), given Petitioners’ failure to adequately contest the State Assembly map in this action both in this Court and on appeal. But even if this request to intervene were to require the Court’s discretion, this request to intervene would also be appropriate given that it would not “unduly delay the determination of the action or prejudice the substantial rights of any party.” See NY CPLR § 1013 (2022). Indeed, not only will this request to intervene neither delay the action nor prejudice any party, but also, this request to intervene will vindicate the rights of all New Yorkers to elect representatives who represent districts whose lines are drawn fairly and pursuant to proper constitutional procedures.

**B. It is in the Public Interest to Grant the Request to Intervene.**

Citizens of New York will be disserved if they are forced to elect representatives pursuant to State Assembly district lines that were set by the New York State Legislature, in direct contravention of the Constitutional Amendment that was itself passed by the voters in 2014. Moreover, in a bicameral legislative body, it would hardly make sense for officials in one chamber to be elected under district lines drawn pursuant to a constitutionally sound process overseen by this Court and to allow, at the same time, elections to proceed that would select officials in the other chamber who are running in district lines that were chosen by the New York State Legislature itself in violation of the New York State Constitution. This Court should not permit a procedural technicality, and the failure of Petitioners to press the unconstitutionality of the State Assembly map on appeal over the past several weeks, to allow any unconstitutional maps to be used in electing this State's public officials.

Gavin Wax's request to intervene in this matter provides this Court with the clear and undisputed authority to ensure that free and fair elections are held across the State of New York and is fully consistent with the opinion and decision of the New York Court of Appeals. Accordingly, Petitioner-Intervenor requests that this Court vindicate the rights of New Yorkers to select their representatives based on district lines that are selected pursuant to a constitutional process and which promote the interests of democracy.

**CONCLUSION**

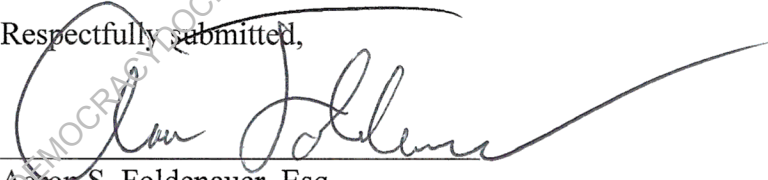
In its decision last week, the Court of Appeals determined that the State Assembly map was subject to the same unconstitutional procedures as were the Congressional and State Senate maps. Based on that landmark decision, the Congressional and State Senate maps will be redrawn in the weeks ahead, and a procedural technicality should not prevent the State Assembly map from also being re-drawn. Petitioner-Intervenor's new cause of action resolves any

procedural technicalities that may exist and empowers this Court to craft a new State Assembly map, with the assistance of the Special Master and any interested parties that may wish to be heard, as part of a process that has just gotten underway.

Petitioner-Intervenor Gavin Wax has accepted what was essentially an invitation by the Court of Appeals to squarely present the unconstitutionality of the State Assembly map to this Court. Accordingly, Mr. Wax respectfully requests that this Court invalidate the State Assembly map as procedurally unconstitutional and amend its recent orders to redraw the State Assembly map, along with the State Senate and Congressional maps, such that interested parties have a right to be heard and to direct that Congressional, State Senate, and State Assembly primaries all be held together on August 23, 2022.

Dated: May 1, 2022  
New York, NY

Respectfully submitted,



Aaron S. Foldenauer, Esq.

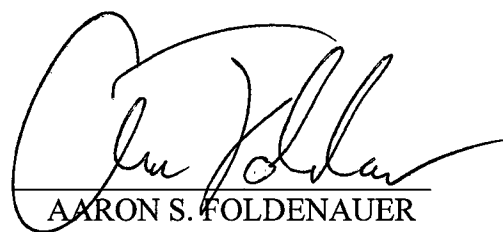
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**Word Count Certification Pursuant to Section 202.8-b**

I hereby certify pursuant to Part 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court that, according to the word count tool on Microsoft Word, the total number of words in this Memorandum of Law is 2,619 words.

Dated: New York, New York  
May 1, 2022



AARON S. FOLDENAUER

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