

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

PAUL NICHOLS, GAVIN WAX, and GARY GREENBERG

Petitioners,

Index No. \_\_\_\_\_

v.

**PETITION**

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

Respondents.

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

**PRELIMINARY STATEMENT**

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

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

**August primary election, allowing time for the adoption of new constitutional maps, the dissemination of correct information to voters, the completion of the petitioning process, and compliance with federal voting laws.”** *Id.* at \*12–13.

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

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

5. ***This Petition bridges that gap.*** Petitioners ask this Court to apply the Court of Appeals’ analysis of State Respondents’ unconstitutional redistricting process to the State Assembly legislation and declare the constitutional infirmity of the Assembly map—as the Supreme Court in *Harkenrider* did once already on March 31, 2022.

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

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

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

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

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

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

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

### PARTIES

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

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

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

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

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

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

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

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

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

### **JURISDICTION AND VENUE**

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

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

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

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

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

### **FACTUAL BACKGROUND**

#### **I. The “Scourge” of Gerrymandering**

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

24. Gerrymandering is the political manipulation of voting district boundaries to serve nakedly partisan ends—shuffling minority party votes into uncompetitive majority-dominant districts (where the minority votes are meaningless); dividing and conquering powerful communities and neighborhoods; and stacking majority-party blocks to flip or secure districts that are considered too “competitive” by the majority party.

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

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

27. As one author succinctly explained:

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

28. Consider, for example, Staten Island and the redistricting in 2022 of Congressional District 11. Before 2022, Staten Island—traditionally Republican and considered a community of interest—was part of a congressional district that covered Staten Island and adjacent southern portions of Brooklyn (as Staten Island itself was not large enough to comprise an entire district). But with the new 2022 district map, Congressional District 11 stretches into northwest Brooklyn, pulling in liberal populations and giving Democrats a chance to win the seat.

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

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

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

## II. The People Amend the Constitution and Adopt Redistricting Reforms

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

72. Of particular relevance here, the Supreme Court voided the Assembly map because “[t]he same faulty process was used for all three maps” and “[t]herefore new maps will need to be prepared for the Assembly Districts as well.” *Id.* at 10.

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

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

75. Six days later, on April 27, 2022, the New York Court of Appeals reversed the Fourth Department, reinstating the Supreme Court's decision that **“the legislature and the IRC deviated from the constitutionally mandated procedure”** and so the Congressional, Senate, and Assembly maps were all defective. *Harkenrider III*, 2022 WL 1236822, at \*5.

76. **“[T]here can be no question,”** the Court of Appeals found, **“that the drafters of the 2014 constitutional amendments and the voters of this state intended compliance with the IRC process to be a constitutionally required precondition to the legislature's enactment of redistricting legislation.”** *Id.* at \*9. Indeed, **“no one disputes”** that the IRC and Legislature had **“failed to follow the procedure commanded by the State Constitution.”** *Id.* at \*1.

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

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

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

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

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

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

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

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

84. The Court of Appeals rejected the state respondents’ request to defer a remedy until after the 2022 election cycle. *Harkenrider III*, 2022 WL 1236822, at \*12. The Court of Appeals was “**confident that, in consultation with the Board of Elections, Supreme Court can swiftly develop a schedule to facilitate an August primary election, allowing time for the adoption of new constitutional maps, the dissemination of correct information to voters, the completion of the petitioning process, and compliance with federal voting laws, including the Uniformed and Overseas Citizens Absentee Voting Act.**” *Id.* at \*12.

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

May 20.<sup>4</sup> See *Harkenrider I*, NYSCEF Nos. [296](#) (Second Amended Order), [301](#) (Preliminary Order).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: . . . I don't think you disagree that, you know, the ruling is that the assembly maps are defective procedurally. So, what's the answer here? Do you just let those go for the next ten years?

[COUNSEL]: Yes. And here's the reason why. Because the New York Court of Appeals had an opportunity when we were there about two weeks ago to invalidate the assembly maps if they wanted.

. . .

If the Court of Appeals was of the view that the assembly maps should be invalidated, the Court of Appeals could have done that at that time, and it pointedly chose not to. And I commend the court to footnote number 15, which --

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

[COUNSEL]: Because it hadn't been challenged.

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

[COUNSEL]: And the thing is, constitutional violations go by the wayside all the time because they are not timely challenged.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

132. Yet, today, the Board of Elections protests that moving another primary would create “**additional, potentially unbearable burdens on the State’s election system.**”

*Harkenrider I*, NYSCEF No. [430](#) (Valentine Affidavit), ¶ 8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

\* \* \*

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

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

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

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

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

### **FIRST CAUSE OF ACTION**

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

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

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

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

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

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

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

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

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

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

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

160. **“[I]n consultation with the Board of Elections, Supreme Court can swiftly develop a schedule to facilitate an August primary election, allowing time for the adoption of new constitutional maps, the dissemination of correct information to voters, the completion of the petitioning process, and compliance with federal voting laws, including the Uniformed and Overseas Citizens Absentee Voting Act.”** *Id.* at \*12.

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

## SECOND CAUSE OF ACTION

### **Declaratory Judgment – Invalidate State Assembly Map (CPLR § 3001)**

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

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

164. This issue is ripe for judicial review.

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

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

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

### PRAYER FOR RELIEF

**WHEREFORE**, Petitioners pray for relief as follows:

*First*, declaring pursuant to CPLR § 3001 that the 2022 State Assembly map, *see* 2021–2022 N.Y. Reg. Sess. Leg. Bills A.9040-A and A.9168, is void based upon the constitutional flaws in its adoption previously found by the Court of Appeals;

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

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

*Fourth*, enjoining Respondents to open designating and independent nominating petition periods, *see* N.Y. Elec. Law §§ 6-134, 6-138, for Statewide, Congressional, State Assembly, State Senate, and local offices with deadlines sufficient for current candidates to obtain new designating petition signatures or run independently, and for potential candidates to newly qualify for primary elections or as an independent in the general election;

*Fifth*, suspending or enjoining the operation of any other state laws, or vacating any certifications or other official acts of the acts of the New York State Board of Elections or other governmental body, that would undermine this Court's ability to offer effective and complete relief for the November 2022 elections and related primaries;

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

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

Dated: New York, NY  
May 15, 2022

Respectfully submitted,

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