

To Be Argued By:
Brian Quail
Time Requested: 5 Minutes

Appellate Division – First Department Case No: 2022-02301

New York Supreme Court

PAUL NICHOLS, GAVIN WAX, GARY GREENBERG,

Petitioners – Appellants,

-against-

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

Respondents – Respondents,

BRIEF OF RESPONDENT-RESPONDENT
NEW YORK STATE BOARD OF ELECTIONS

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THE QUESTION PRESENTED

1. Did the Court below correctly conclude that it is too late in the electoral calendar to remove candidates for Member of Assembly from the June 28 primary ballot, redraw Assembly District lines and hold a new primary for such offices and all other offices impacted on August 23 or another even later date?

THE TRIAL COURT CORRECTLY ANSWERD THIS QUESTION BY CONCLUDING THERE WAS INSUFFICIENT TIME AND THUS PROPERLY DISMISSED THE PETITION BELOW.

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PRELIMINARY STATEMENT

Election officials are under unprecedented strain preparing for the August Congressional and State Senate primaries ordered in *Harkenrider v Hochul*, No. 60, 2022 WL 1236822 (N.Y. April 27, 2022). They are preparing for those offices to be contested at the August 23, 2022 primary in addition to preparing for the June 28, 2022 primary.

Cancelling the June Primary election for the Members of the Assembly at this time and requiring a complete do-over of many 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 ballot access processes and complete the primaries and subsequent judicial nominating conventions in time for the General Election on November 8.

STATEMENT OF FACTS

A. Relevant Legislative and Litigation History

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. (R.868). On March 31, 2022, Steuben County Supreme Court found the Assembly, Senate and Congressional maps constitutionally infirm. (R.868). The Appellate Division Fourth Department on April 24, 2021 reversed in part, holding only the Congressional lines violative of the State Constitution. *Harkenrider v Hochul*, No. 22-00506, 2022 WL 1193180 (4th Dept April 21, 2022).

On April 27, 2022, the Court of Appeals invalidated both 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. (R.868).

Though the *Harkenrider* Court had set a deadline of May 24, 2022 to finalize the congressional map (*Harkenrider v Hochul*. Index No. E2022-0116CV (*Steuben County Sup. Ct. 2022*, Doc. No. 258), the State Board of Elections asked the Court to "consider expediting the approval process . . . in any manner possible" owing to the short time to make an August primary feasible (R. 868). Later that day, the Court moved the deadline from May 24 to May 20 (R.868).

On May 20, 2021 the *Harkenrider* Court promulgated new State Senate and Congressional lines. (R.869).

In all, three courts have declined to invalidate the 2022 Assembly maps and cancel the 2022 June primary election. Gavin Wax and Gary Greenberg moved to intervene in *Harkenrider* on May 1st and 3rd respectively. (R. 869). 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. *Id.* The court held, *inter alia*, with the ballot for June 28th primary election already certified, intervention “would create total confusion.” *Id.*

By Order to Show Cause issued on May 19, 2022, the instant matter came before New York County Supreme Court. The Court denied the petition, by decision and order on May 27, 2022, and this appeal ensued. (R.231).

By Order to Show Cause issued May 24, 2022 Albany County Supreme Court in *League of Women Voters v New York State Board of Elections*, 2022 WL 1816345 (Supt Ct. Albany County June 2, 2022) entertained a challenge to the May 4, 2022 primary certification on the basis that the Assembly lines were invalid. The court denied this application by decision and order dated June 2, 2022. An appeal in the Third Department is pending.

B. The Special Master’s Redistricting Work in Harkenrider Required 32 Days

To draw twenty-six new Congressional district lines, the Steuben County Supreme Court engaged Dr. Jonathan Cervas as Special Master on April 18, 2022 while the appeals process in *Harkenrider* was unfolding. (R.450). After the Court of Appeals decision on April 27, 2022, Dr. Cervas' charge was extended to include preparation of sixty-three new State Senate district lines as well. (R.451).

On April 28, 2022, the Court in *Harkenrider v Hochul* ordered: (1) Dr. Cervas to release his proposed remedial congressional and State Senate maps by May 16, 2022; (2) after considering any comments submitted regarding his proposed maps, Special Master Cervas would then finalize the maps by May 20, 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 (R.451, 868).

The court approved the new district lines on May 20, 2022. From when the Special Master was first engaged to when lines were adopted thirty-two days elapsed. (R. 869).

C. June Primary Underway

The June 28, 2022 primary at which contested primaries for statewide offices, member of assembly and various local offices and party positions will be held nineteen days from the oral argument scheduled for this appeal. Early voting begins nine days from when this appeal will be argued. (R.336).

On May 4, 2022, as required by Election Law § 4-110, the State Board certified Assembly and statewide candidates for the June 28 primary. No court proceeding enjoined that certification. As of May 5, 2022, all other boards of elections certified primary contests for the June primary. (R.870)

The primary ballot for each party is a unified ballot that include candidates for any contested Assembly primary, Governor, Lieutenant Governor, and other elected offices (except for Congress and State Senate, which the *Harkenrider* Court moved to August 23) for the election district the ballot pertains to. Early voting and election day primary ballots are already printed for most jurisdiction. In all, upon information and belief, at least 4.5 million ballots.¹ (R.871).

Approximately 250,000² absentee ballots have been printed. Tens of thousands of absentee ballots have been issued to voters. Thousands of absentees have been voted and returned to election officials for canvassing. May 13, 2022

¹ At the time of hearing, the number reported was at least 700,00.

² At the time of hearing the number was reported as more than 200,000.

was the statutory deadline to mail primary ballots to military and overseas voters (Election Law §§ 10-108(1), 11-204(4). (R.871).

Candidates have waged their campaigns, going door-to-door- engaging volunteers to canvass voters, placing ads on the airwaves and on social media along with all manner of other campaign activities—expending considerable funds in the processs. (R.871)

Test ballots for pre-election testing voting machines have been printed. If the Assembly candidates were to be removed from the ballot, effected boards of elections would not be able to timely test election machines for the remaining primaries (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. (R.871).

Presently, 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 election day poll sites for June 28, 2022. (R.872).

More than 50,000 poll workers have been hired and scheduled to work on the early voting days and/or primary day. (R.872).

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

Mail notifications have been sent to all of New York's active voters informing them of the primary date and location of the early voting sites (Election Law § 4-117). 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 notifications can only create massive voter confusion. (R.872).

Upon information and belief from New York's two main ballot printers and some counties that print their own ballots, there is a substantial and unprecedented supply chain problem related to ballot paper and envelopes.. If the June primary must be reconfigured, in addition to the waste of throwing away a vast inventory of ballots, the larger problem is the risk sufficient paper and envelopes will not be available in time to reprint for the remaining June primaries. Local boards report that ballot paper orders are on allocation, meaning full orders are not being met on time. (R.872).

Because there is a single ballot for all of a party's primaries for any given election district, removing Assembly offices from the primary ballot would cause significant confusion. New ballots would need to be prepared, proofed and printed, and procedures for how to count already submitted absentee ballots with statewide

candidates on them that also have live down ballot contests thereon would need to be implemented because the old ballots will not be readable by reprogrammed scanners. This would presumably require hand counting. (R.872).

D. Assembly Contests Cannot Be Added to August Congressional District/Senate District Primary

Moving some offices on the June primary ballot or all of the June 28 primary to August 23, 2022 is not possible given the time required to produce new district lines and the time needed to repeat ballot access petitioning. (R.875).

As of May 21, 2022, designating petitioning for the August primary has begun and is set to conclude on June 10, 2022. *See* <https://www.elections.ny.gov/NYSBOE/law/OrderReBallotAccessForAug232022primary.pdf>.

If the Assembly primary was cancelled and moved to August, in addition to the *impossible* task of parsing those contests from the June primary ballot described herein, it would be several weeks before ballot access for Assembly could even begin. Based on the experience in *Harkenrider*, it would take a special master approximately one month to draw new Assembly lines. There are 150 Assembly Districts, more than twice as many as the number of Senate Districts, making the work of redrawing Assembly District that much more. As the final order of Judge McAllister ordering the Senate and Congressional lines in

Harkenrider evidences, any redistricting analysis requires a period of time to elicit public input and due consideration of the redistricting factors as applied to each district. *Harkenrider*, (Steuben Sup. Ct., Doc. No. 670) (R.872).

It is not possible to fit an entire ballot access regime between the promulgation of new maps in early July (a month from now) and the deadline to send military and overseas ballots for the August 23, 2022 primary mere days later on or before July 8, 2022 (46 days before the August primary). Ballot access by designating petition typically begins four months before the election to which it relates. If new maps take a month from now to produce, there is literally no time for any ballot access process, even a truncated process. Even the abbreviated ballot access petitioning process in *Harkenrider* began on May 21 for an election to be held August 23 – a span of over three months. (R.868-81).

E. A September Primary Is Not Compatible With State or Federal Law

Pushing the August primary or a new Assembly primary even closer to November into September is not a viable option. Applying both federal law (52 USC § 20302, applicable to federal offices) and state law (Election Law §§ 10-108(1), 11-204(4), applicable to state and federal offices), the ballot for the general election must be transmitted to military and overseas voters on or before September 23, 2022. The Appellants' proposal to hold a primary on September

13, 2022 is inconsistent with this mandatory General Election ballot transmission deadline. (R.875).

Under New York law it is not possible to fully canvass the primary and resolve disputes and print ballots in the ten-day period between the proposed September primary and the deadline to send military and overseas ballots for the General Election. *See* Election Law § 9-100 et seq.

Under prior law, New York did hold its primaries in the second week of September. As of 2012, New York has been precluded by court order from holding any federal primary in September precisely because the timing is too tight and thus not compliant with the 45 days transmission requirement for general election ballots to military and overseas voters required by federal law. And now state law mirrors this federal requirement. Moreover, there is a standing Court Order from the Northern District of New York specifically placing the Congressional Primary in New York on August 23, 2022 as an exception to the current statutory deadline which is the fourth Tuesday in June and mandating “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*, 1:10-cv-01214, ECF No. 105 (US Dist Ct. NDNY May 10, 2022). (R.873 – 75).

A September primary held only for Assembly is also not reasonably plausible given the time it would take to create maps, secure available poll sites, schedule poll workers for potentially a *third* primary, on short notice. Attempting to turn around voting machines from use in an election held on August 23, 2022 for reuse at a third primary to be held on September 13, 2022 (early voting to being on September 3, 2022) while also preparing for the November general election would be a crushing burden on election administrators. (R. 873-75; 997-1000).

F. Judicial-Nominating Conventions and Party Committees

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. (R.874-76)

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.

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. Election 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. (R.874-76)

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. If the Assembly primary moved to September 13, 2022, the delay would be even greater. This would further prevent New York's election machinery to complete the party nominating processes in time to meet the requirement to transmit military and overseas ballots prior to 46 days before the general election on November 8, 2022. (R.874-76; 997-1000).

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 or October, 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. (R.997-1000)

Additionally, members of the Democratic Party's state committee, are elected from Assembly districts this year. Election Law §§ 2-102(1), 2-104(1). These elections would also have to be moved to August 23 (or September 13), 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 offices generate. (R.874-76).

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. (R.875)

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. (R.875).

G. Election Districts

If the Assembly map is replaced as petitioners propose, many more election districts will also have to change. (R.876-77).

Election districts are the foundational unit of New York's political geography. Local boards of elections must sort New York's approximately 13

million 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. (R.876-77).

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 often must change. (R.876-77).

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. (R.876-881).

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. (R.876-881).

ARGUMENT

I. THE COURT BELOW CORRECTLY CONCLUDED THERE IS NO TIME TO MOVE THE ASSEMBLY PRIMARIES FROM THE JUNE PRIMARY TO A DATE IN AUGUST OR SEPTEMBER AND THUS DISMISSAL WAS REQUIRED

Disruptions to the orderly administration of electoral processes can rise to the level where they are injurious to democracy. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (“[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief . . .”). The risk of a court disrupting an election increases when a plaintiff improperly delays in applying for injunctive relief. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (“Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”).

Absentee voting has now been underway for more than three weeks. Early voting at the June primary will commence in nine days from oral argument. The June 28 election is nineteen days out from then.

While the *Purcell* doctrine is one of comity and federalism, it has a commonsense foundation echoed in numerous New York cases. The importance of adhering to the orderly unfolding of electoral processes was observed in *Pataki v Hayduck*:

Time is the watchword. The candidate must have time to conduct a campaign. The electorate must have time to identify the candidates and make up its mind. The municipal body must have time to set up the ballot and prepare the voting machine. There is no room for procrastination or retraction by the board of elections. Having made a determination it is *functus officio*. It may not reconsider, redécide and jam up the delineated procedure. Once the period of court review expires the door is closed. The election must go on.

87 Misc. 2d 1095, 97-98 *affd* 55 A.D.2d 861 (2nd Dept 1976).

The Court of Appeals has held that when an election is fast approaching the impossibility of relief is a necessary basis for dismissal. *See Hunter v Orange County Board of Elections*, 2008 NY Slip Op 08073 (holding “[u]nder the circumstances of this case, it would be impossible, if this Court were to entertain the merits, to render meaningful relief in compliance with the Election Law” and directing the case be dismissed); *see also Pidot v Macedo*, 141 AD3d 680 (2nd Dept 2016) (holding “Supreme Court properly concluded, based, *inter alia*, on the concession of Pidot's counsel, that it would be impossible to grant Pidot the relief

he specifically requested in his petition, namely, to include his name on the June 28, 2016, primary ballot”).

Already three trial courts across the state – in Steuben County, Albany County and New York County – have rejected, in different procedural postures, applications to strip the Assembly contests out of the June 28 primary election because it is too late to do so. Justice McAllister held the ballot for the June 28th primary election was already certified, thus intervention to attack the Assembly maps “would create total confusion.” *Harkenrider v Hochul*, E20222-0116cv, Steuben County Sup Ct., Doc. No. 520, May 11, 2022. Justice Laurence Love in the case below observed on May 25, 2022: “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.” Justice Henry Zwack of Albany Supreme Court similarly held “tremendous prejudice and delay would result in a delay of the assembly primaries.” *See League of Women Voters v New York State Board of Elections*, 2022 WL 1816345 (Supt Ct. Albany County June 2, 2022).

A. The June Primary Cannot Be Cancelled

As of the return date in the matter below, more than 700,000 ballots had been printed. Now, more than 4.5 million have been printed. As of the return date below more than 200,000 absentee ballots had been printed. Now, the number stands at more than 250,000. Tens of thousands of absentees have been issued, and thousands of ballots have been returned. Pursuant to recent changes in Election Law, thousands of ballots have been adjudicated, their absentee envelopes opened and the ballots secured ready to be scanned as of the day before the beginning of early voting. *See* Election Law § 9-209 (6) (f).. Thousands of election day sites, hundreds of early voting sites and thousands of poll workers have been engaged. Candidates are entering into the home stretch of the primary campaigns.

The record below also establishes that invalidating Assembly lines at this late stage in the electoral calendar wreaks chaos with party positions based on Assembly district lines (R.874-76), requiring new petitioning for those positions, creates problems with election district creation which will delay the ability to utilize the new lines, *inter alia*. As Judge Love noted below:

(T)he 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... 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).

Significantly, under state law the deadline to challenge June 28 primary designations passed on April 21, 2022 as provided by Election Law 16-102 (2). 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.

B. An August 23, 2022 Primary Is Not Possible

New Senate and Congressional lines were promulgated on May 20, 2022. Ballot access was underway as of May 21, 2022 for the August primary for those offices, and petitioning is due to conclude on June 10, 2022. If relief were granted to the petitioners there would be no new Assembly maps for likely a month—early July at the earliest given the time drawing districts took in *Harkenrider*. Ballot access for Assembly could thus not even begin until early July. With the ballot transmission deadline for military and overseas voters being July 8, 2022 for the August primary, there is *literally* no time between the earliest new Assembly maps could be derived and July 8 when military and overseas ballots must be sent.

A remedy that cannot work cannot be granted. *See Hunter v Orange County Board of Elections*, 2008 NY Slip Op 08073

C. A September 13, 2022 Primary Is Not Possible

For the same reasons as the August 23, 2022 primary is not workable, a primary three weeks later in September is also not workable, given new lines could not be available until into July. If a September primary is in addition to the August primary, the further complication of turning around voting machines used in the prior election, testing them and redeploying them in such a tight window is problematic. As is securing thousands of poll sites and scheduling thousands of poll workers three weeks from the last primary while canvassing the prior election. (R.876-881).

But more fundamentally, a primary on September 13, 2022 is not compatible with transmitting military and overseas ballot by the deadline imposed by state and federal law prior to September 24, 2022. Because the delegates to the judicial nominating conventions are elected from Assembly districts, their ballot access would need to be repeated, meaning the judicial nominating conventions cannot be held as required by law between August 4th and 10th (dates prior to either remedial primary desired by appellants) and instead would need to be held later in September or early October, completely making impossible sending a unified primary ballot to military and overseas voters in compliance with existing law.

CONCLUSION

For the foregoing reasons, the decision and order of the court below should be affirmed.

Dated: June 6, 2022

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Dated: June 6, 2022

A handwritten signature in black ink, appearing to read "B. Quail", is written over a horizontal line.

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