STATE OF NEW YORK
SUPREME COURT : COUNTY OF NEW YORK

PAUL NICHOLS, GAVIN WAX, and GARY GREENBERG,

Petitioners,

Index No. 154213/2022

v.

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

Respondents.

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR A TEMPORARY RESTRAINING ORDER

Respectfully submitted,

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Respondent Carl Heastie, Speaker of the New York State Assembly (the "Speaker"), respectfully opposes Petitioners' motion for a temporary restraining order ("TRO") (Dkt. No. 2).[1]

PRELIMINARY STATEMENT

On February 3, 2022, the Legislature enacted the Assembly district map to govern New York for the next 10 years. L.2022, c. 14, § 1. Yet only now, over three months later, do Petitioners bring this proceeding to invalidate that map. Boards of Elections have prepared for the June 28 primary for months; primary ballots have been finalized, printed, and mailed to military members; and candidates have already collected petition signatures, spent money, and built campaigns. All the while, Petitioners remained on the sidelines as others challenged only the Congressional and State Senate maps.

Petitioners' pending motion for a TRO should be denied out of hand. Under CPLR 6313(a), this Court cannot grant a TRO "against a public officer [or] board … to restrain the performance of statutory duties." Yet that is exactly what Petitioners ask this Court to do — they seek to enjoin the New York State Board of Elections and this State's 58 local Boards of Elections (none of which is a party to this proceeding) from conducting the June primaries, which they must do under the Election Law.

Even absent this statutory bar, however, Petitioners' egregious delay should not be rewarded — especially not at the expense of secure, orderly 2022 elections. The motion for a TRO should be denied.

[1] "Dkt. No." and any associated page citations refer to document and page numbers assigned by NYSCEF in this proceeding. The Speaker's counsel offers this memorandum of law for the limited purpose of opposing Petitioners' TRO application, and the Speaker does not waive the CPLR's requirement of service upon him of the Petition, any accompanying documents, and any Order to Show Cause this Court may enter.

STATEMENT OF FACTS

A. The *Harkenrider* Lawsuit begins in February 2022, and the Court of Appeals renders its decision in April

On February 3, 2022, the New York State Legislature enacted redistricting maps for the State Assembly, the State Senate, and Congress. L.2022, c. 13 & 14. Later that day, Tim Harkenrider and others commenced *Matter of Harkenrider v. Hochul* (Index No. E2022-0116CV), a special proceeding in Steuben County Supreme Court (the "*Harkenrider* Petitioners" and the "*Harkenrider* Lawsuit"). Their petition challenged only the Congressional map (Steuben Dkt. No. 1).[2] Then, on February 8, the *Harkenrider* Petitioners filed an amended petition adding a challenge to the State Senate map (Steuben Dkt. No. 18). The amended petition affirmatively disavowed any challenge to the Assembly map (*id.* at No. 5 nn. 6-7).

Petitioners challenged the Congressional and State Senate maps on two grounds. Substantively, they argued the two maps violated the State Constitution's ban on partisan gerrymandering (Steuben Dkt. No. 25, at pp. 17-56). Procedurally, they argued that because the State's Independent Redistricting Commission had deadlocked and failed to submit a second set of proposed maps to the Legislature, the Legislature lacked authority to enact maps of its own (*id.* at pp. 9-14).

Proceedings continued in Steuben County Supreme Court for nearly two months. On March 31, 2022, the Court invalidated the State Senate map on procedural grounds only, and the Congressional map on both procedural and substantive grounds

[2] "Steuben Dkt. No." and any associated page citations refer to the document and page numbers assigned by the NYSCEF system in the Supreme Court proceedings of *Matter of Harkenrider v. Hochul*, Steuben County Index No. E2022-0116CV.

(Steuben Dkt. No. 243). *Sua sponte*, it also invalidated the Assembly map on procedural grounds only (*id.* at p. 17).

About three weeks later, the Fourth Department affirmed in part and reversed in part. *Matter of Harkenrider v. Hochul*, 2022 WL 1193180 (4th Dep't Apr. 21, 2022). Beforehand, various Congressional members, candidates for office, and voters moved before the Fourth Department to intervene. In opposition, the *Harkenrider* Petitioners argued the motion was "patently untimely" (Steuben Dkt. No. 462, at ¶ 6). The Fourth Department denied the motion (Fourth Dep't Dkt. No. 41).[3]

The Court of Appeals rendered its decision on April 27, about one week after the Fourth Department's decision on the merits. *Matter of Harkenrider v. Hochul*, __ N.Y.3d __, 2022 WL 1236822 (April 27, 2022). Like Supreme Court, the Court of Appeals invalidated the State Senate map on procedural grounds only, and it invalidated the Congressional map on both procedural and substantive grounds. *Id.* at *1. The Court declined, however, to invalidate the Assembly map, which no one had challenged. *Id.* at *11 n.15. It ordered Supreme Court, with the assistance of Special Master Jonathan Cervas, to draw remedial State Senate and Congressional maps for the 2022 elections. Supreme Court set a deadline of May 20 to finalize those maps (Steuben Dkt. No. 291).

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

After the Court of Appeals issued its decision, Petitioner Gavin Wax moved on May 1 to intervene in the *Harkenrider* Lawsuit (Steuben Dkt. No. 317). Petitioner Gary Greenberg did the same two days later (Steuben Dkt. No. 347). Both sought to invalidate

[3] "Fourth Dep't Dkt. No." refers to the document number assigned by the NYSCEF system on the Appellate Division docket for *Matter of Harkenrider v. Hochul*, Fourth Department Index No. CAE 22-00506.

the Assembly map and to enjoin use of the map for the 2022 elections (Steuben Dkt. No. 317, at p. 3; Steuben Dkt. No. 347, at p. 4).

Steuben County Supreme Court denied the motions as untimely. Among other things, Supreme Court noted that: (1) "[i]t was clear from the Petition and Amended Petition that the Assembly Districts were not being challenged"; (2) "both Greenberg and Wax were aware of this pending action shortly after it was commenced in February"; and (3) because the 2022 election cycle was well underway, "[t]o permit intervention [at] this time would create total confusion" (Steuben Dkt. No. 520, at pp. 2-4). Neither Mr. Wax nor Mr. Greenberg has appealed.

C. Ballots for the June primaries are finalized and mailed by May 13, 2022, and Petitioners later commence this special proceeding seeking to "adjourn" those primaries

While the *Harkenrider* Lawsuit proceeded, preparations for the 2022 elections continued. The general elections for Congress, the State Senate, the State Assembly, and other elected positions are November 8, 2022 (Steuben Dkt. No. 6). Under Federal and State law, general-election ballots must be mailed to military voters by September 23, 2022 (*id.*). Before general-election ballots can be finalized and mailed, primary elections need to take place. Those were all scheduled by law for June 28 (*id.*). But due to the Court of Appeals' decision, Supreme Court moved the Congressional and State Senate primaries from June 28 to August 23, 2022 (Steuben Dkt. No. 301). All other primaries, including the Assembly primaries, remain scheduled for June 28.

In accordance with Federal and State law, ballots for the June 28 primaries were finalized and mailed to military voters by May 13, 2022 (Dkt. No. 14; Steuben Dkt. No. 6). Petitioners commenced this special proceeding on May 15 (Dkt. No. 1).

The Petition requests a declaration that the Assembly map is procedurally unconstitutional (Dkt. No. 1, at p. 29), but makes no allegation that the map is somehow substantively unfair or a partisan gerrymander.. It also seeks to "adjourn" next month's primaries for all "state and local elections" to late August or mid-September (*id.* at p. 30). Further, the Petition seeks to invalidate the candidacies of everyone who has qualified for primary elections for "Statewide, Congressional, State Assembly, State Senate, and local offices" (*id.*). If Petitioners prevail, those thousands of candidates would need to "obtain new designating petition signatures or run independently" (*id.*).

ARGUMENT

POINT I

THE MOTION MUST BE DENIED UNDER CPLR 6313(a)

"No temporary restraining order may be granted … against a public officer, board, or municipal corporation of the state to restrain the performance of statutory duties." CPLR 6313(a). Yet that is what Petitioners seek — a TRO that would "suspend[ ] or enjoin[ ] the operation of any … state laws, or vacat[e] any certifications or other official acts … of the New York State Board of Elections or other governmental body" (Dkt. No. 1, at p. 30), and thereby prohibit boards of elections from undertaking their statutory duties associated with administering the June 28 primary elections. *See*, *e.g.*, N.Y. ELEC. LAW §§ 7-207 (requiring Boards of Elections to prepare voting machines in advance of the primary election), 8-406 (requiring Boards of Elections to deliver ballots to qualified absentee voters), 10-108 (same with respect to military voters), 11-204 (same with respect to overseas voters). For that reason alone, the motion must be denied.

Further, if this Court grants Petitioners a preliminary injunction (which it should not), Petitioners must "give an undertaking" sufficient to cover "all damages and costs which may be sustained by reason of the injunction." CPLR 6312(b). Such undertaking here would likely total in the millions of dollars — if the June 28 primaries are enjoined, the New York State Board of Elections and the State's 58 local Boards of Elections (one for New York City, and one for each county outside New York City) would need to pay employee compensation and procure additional supplies in a frantic effort to prepare for a new date for conducting primary races that the Boards have already certified, and for which they have already finalized and sent ballots to voters.

POINT II

THE TRO FACTORS WEIGH AGAINST GRANTING THE MOTION

Even if a TRO is theoretically available here (it is not), Petitioners are not entitled to one. A TRO is appropriate only if Petitioners demonstrate a likelihood of success on the merits, that they would suffer irreparable and imminent injury absent a TRO, and that the equities balance in their favor. *Mabry v. Neighborhood Defender Serv., Inc.*, 88 A.D.3d 505, 505 (1st Dep't 2011). Here, Petitioners fail on all three fronts.

A. Petitioners are unlikely to succeed on the merits

Petitioners assert the April 27 Court of Appeals decision guarantees them a victory on the merits (Dkt. No. 3, at p. 7). Not so. The Court of Appeals never suggested that, no matter the circumstances, any challenge to the Assembly map would succeed. And here, Petitioners seek to do much more than what the *Harkenrider* Petitioners did — these Petitioners seek belatedly to invalidate the candidacies of thousands of candidates who have already qualified for the primary ballot, weeks after the time for challenging those

candidacies has expired. Under these circumstances, additional requirements must be met, and Petitioners have not met them.

1. The doctrine of laches bars Petitioners' claim

Laches is an equitable doctrine. It bars a claim if two elements are satisfied: delay in bringing the claim, and prejudice caused by the delay. *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003). "[D]elays of even under a year have been held sufficient to establish laches." *Matter of Schulz v. State of New York*, 81 N.Y.2d 336, 348 (1993) (delay of 11 months); *accord*, *Matter of Cantrell v. Hayduk*, 45 N.Y.2d 925, 927 (1978) (*per curiam*) (delay of two months).

In *Schulz*, for example, citizens challenged the constitutionality of a public-finance law. 81 N.Y.2d at 342. They initiated the lawsuit within a year after the law's enactment. *Id.* at 347. But in the interim, the State sold bonds, sold property, and completed other transactions under the law. *Id.* at 348. The Court of Appeals determined that invalidating the law would require nullifying those transactions, which would be akin to "putting genies back in their bottles." *Id.* The plaintiffs' failure to bring their claim sooner, combined with the resulting prejudice to "society in general," required dismissal of the claim under the laches doctrine. *Id.* at 348, 350.

Similarly here, Petitioners' egregious delay in bringing this proceeding threatens to cause unprecedented prejudice. Candidates for the Assembly and many other elected positions have already collected ballot-access signatures and have qualified for the June primaries. Ballots for those primaries are finalized; "every Board of Elections has issued ballots to military voters" (Dkt. No. 14, p. 1). And Steuben County Supreme Court determined that, to proceed with even somewhat orderly primaries on August 23, remedial

Congressional and State Senate maps must be finalized by May 20. That deadline is now impossible to meet with respect to the Assembly map.

2. Petitioners failed to name necessary parties

Under CPLR 1001(a), "[p]ersons … who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." Necessary parties must be joined through proper service, and "[n]onjoinder of a [necessary] party … is a ground for dismissal of an action." CPLR 1003; *accord*, *Am. Transit Ins. Co. v. Carillo*, 307 A.D.2d 220, 220 (1st Dep't 2003).

This requirement especially applies in election cases. When a petitioner seeks to remove a candidate from a primary ballot, the candidate "might be inequitably affected by a judgment," is a necessary party, and must be served. On point is *Clinton v. Board of Elections of City of New York*, 2021 WL 3891600 (Sup. Ct. N.Y. County Aug. 26, 2021), *aff'd*, 197 A.D.3d 1025 (1st Dep't 2021). There, a voter sued to invalidate a certificate that filled certain delegate vacancies at the Republican judicial-nominating convention. *Id.* at *1. But he failed to join all the judicial delegates named in the certificate. *Id.* at *3. Supreme Court held that those delegates were necessary parties and, because of the non-joinder, dismissed the lawsuit. *Id.* The First Department affirmed. 197 A.D.3d 1025. Other Courts throughout the State have reached analogous conclusions. *See*, *e.g.*, *Matter of Masich v. Ward*, 65 A.D.3d 817, 817 (4th Dep't 2009); *Matter of Castracan v. Colavita*, 173 A.D.2d 924, 925 (3d Dep't 1991) (*per curiam*); *Matter of Minew v. Levine*, 2021 WL 1775369, at *3 (Sup. Ct. Onondaga County Apr. 30, 2021).

Replacing the Assembly map, as Petitioners seek to do, would create even more upheaval than replacing the Congressional and State Senate maps. The reason is that

Assembly districts, unlike Congressional and State Senate districts, are the foundation of a variety of public offices and party positions in New York's political infrastructure, for which designations were made and primary elections are scheduled to take place this year. In March and April, designating petitions were collected and filed with Boards of Elections throughout New York State on behalf of candidates for:

- each political party's precinct-level county committee representatives, who need not live in the precinct they hope to represent, but "must reside in the assembly district containing the election district in which the member is elected" (*Matter of Gordon v. Monahan*, 89 A.D.2d 1030, 1031 (3d Dep't 1982) (citing N.Y. ELEC. LAW § 2-104(1));
- representatives to the New York State Democratic Committee, for which Assembly districts are the "[u]nit of representation,"[4] such that aspiring members of the State Committee must reside in "the county in which the [Assembly district] … is contained" (N.Y. ELEC. LAW §§ 2-102(1), (3));
- each political party's New York City district leaders, who seek office by Assembly district in each county that comprises the City (*id.* § 2-110(2)); and
- delegates and alternate delegates to State Supreme Court judicial-nominating conventions, who also are elected "from each Assembly district" (*id.* § 6-124; *accord, Johnson v. Lomenzo*, 20 N.Y.2d 783, 783 (1967)).

Hence, by applying to annul the Assembly district lines enacted in February 2022, Petitioners look to invalidate the otherwise valid and/or certified designations of

[4] *See* New York State Democratic Party Rules, p. 3 (Steuben County Dkt. No. 465).

thousands of candidates throughout New York State who seek public office or party positions for which their eligibility depends upon running and obtaining a sufficient number of signatures within a particular Assembly district. These include candidates for State Assembly, representatives to county party committees and the New York State Democratic Committee, party District Leaders in New York City, and delegates and alternate delegates to State Supreme Court judicial nominating conventions. All these candidates are necessary parties to this proceeding, because a judgment invalidating the Assembly district lines under which they qualified for the ballot would also invalidate their designations, or at least require them to obtain a new round of signatures on designating petitions, and thereby leave those candidates "inequitably affected[.]" CPLR 1001(a). The New York State Board of Elections and the 58 local Boards of Elections are also necessary parties, because they are the administrative agencies that accepted those candidates' designating petitions for filing and would be responsible for invalidating them upon any annulment of the Assembly district lines enacted in February 2022. *Matter of Flynn v. Orsini*, 286 A.D.2d 568, 568 (4th Dep't 2001); *Gagliardo v. Colascione*, 153 A.D.2d 710, 710 (2d Dep't 1989). Absent those necessary parties, Petitioners' claim fails as a matter of law.

3. Petitioners lack standing

The Election Law delineates three categories of people who may challenge the "designation of any candidate for any public office": a citizen who previously filed an objection with a board of elections; an aggrieved, rival candidate; or the chairperson of a party committee. N.Y. ELEC. LAW § 16-102(1). Petitioners are not rival candidates[5] or the

[5] Mr. Nichols allegedly intends to run for Governor, but that does not make him an aggrieved, rival candidate for purposes of the Assembly map. *See Matter of Cocco v. Moreira-Brown*, 230 A.D.2d 952 (3d Dep't 1996) (holding that petitioner was not an "aggrieved candidate" for standing purposes because she was not "a candidate for the office in question").

chairpersons of a party committee. And they do not claim to have filed objections to any designating petitions, so they cannot bring their challenge as citizen-objectors. *See Matter of Korman v. N.Y. State Bd. of Elections*, 137 A.D.3d 1474, 1475-76 (3d Dep't 2016) (holding that petitioners lacked standing as citizen-objectors due to their noncompliance with objection requirements). Therefore, Petitioners lack standing and cannot succeed on the merits.

4. The statute of limitations has expired

The Election Law also provides that a "proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition." N.Y. ELEC. LAW § 16-102(2). The last day to file designating petitions for the primaries for State Assembly, county party committee, New York State Democratic Committee, party District Leader in New York City, and delegate and alternate delegate to State Supreme Court judicial nominating conventions was April 7, 2022 (Steuben Dkt. No. 6) — well over 14 days before Petitioners commenced this special proceeding on May 15. Consequently, the Petition is time-barred.

Because determining the limitations period "for a particular declaratory judgment action" requires "examin[ing] the substance of that action to identify the relationship out of which the claim arises and the relief sought," it is irrelevant that Petitioners have not framed this special proceeding as a challenge to the candidates' designating petitions. *Solnick v. Whalen*, 49 N.Y.2d 224, 229 (1980); *see also Matter of Ciotti v. Westchester County Bd. of Elections*, 109 A.D.3d 988, 989 (2d Dep't 2013) ("[n]otwithstanding the characterization of this proceeding as one pursuant to CPLR Article 78 … this proceeding is governed by the statute of limitations set forth in Election Law § 16-102(2)"); *Olma v. Dale*, 306 A.D.2d 905, 905-06 (4th Dep't 2003) (holding that plaintiff could not

evade the 14-day statute of limitations by framing his claim as a declaratory-judgment action seeking to remove a candidate's name from the ballot); *Scaringe v. Ackerman*, 119 A.D.2d 327, 329-330 (3d Dep't 1986) (granting a motion to dismiss when petitioners failed to properly bring a claim under § 16-102 within the statutory time limit). Election Law § 16-102 limits the time in which proceedings regarding petitions can be brought, and that Petitioners bring constitutional claims is not enough, alone, to keep those claims alive—"[a] constitutional claim can become time-barred just as any other claim can." *Block v. North Dakota* ex rel. *Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 292 (1983); *see also County of Chemung v. Shah*, 28 N.Y.3d 244, 262-63 (2016).

While couched as a challenge to the Assembly district lines enacted in February 2022, a judgment for Petitioners would invalidate or inequitably effect thousands of candidate designations throughout New York State. Hence, the requirements of New York Election Law § 16-102 apply (*accord Matter of N.Y. State Cmte. of Independence Party v. N.Y. State Bd. of Elections*, 87 A.D.3d 806, 809-10 (3d Dep't 2011)), and this special proceeding is time-barred because it began more than 14 days after the last day for filing designating petitions that were to be collected in Assembly districts in New York State. N.Y. ELEC. LAW § 16-102(2).

B. Petitioners fail to articulate concrete harm they will suffer if their motion is denied

Petitioners do not challenge the substantive fairness of the Assembly map, which was enacted with bipartisan support. Aside from their meaningless bluster about "Faustian bargains" (Dkt. No. 3, at p. 8), they fail to identify concrete harm they would suffer if the 2022 elections proceed under a fair map. Indeed, even if they get their wish — an Assembly map drawn by a special master — it is unclear why or whether that map would

differ from the map enacted by the Legislature. Petitioners have not demonstrated harm, yet alone irreparable harm.

C. The balance of the equities weighs heavily against granting the motion

As explained above, Petitioners' delay in bringing this action is egregious. The *Harkenrider* Lawsuit received heavy media coverage starting the day it was filed on February 3. To confirm that the *Harkenrider* Petitioners did not challenge the Assembly map, all anyone had to do was access the NYSCEF docket, at no cost, and skim their pleadings.

Petitioners, in particular, cannot claim ignorance. Mr. Greenberg is a "former New York state political candidate, who may in the future run again for State office" (Steuben Dkt. No. 348, ¶ 1). Mr. Wax is "a New York-based conservative political activist, commentator, and columnist," president of the New York Young Republican Club, and a contributor to One America News and other media outlets.[6] And Mr. Nichols alleges he is running for Governor (Dkt. No. 1, ¶ 102). All of them were surely aware in February of the *Harkenrider* Lawsuit, the 2022 redistricting, or both.

In fact, although they didn't bother bringing a special proceeding until now, Mr. Greenberg and Mr. Wax did find time to tweet prodigiously about New York's redistricting and this special proceeding during the past several months. On February 3, for instance, Mr. Greenberg retweeted an image of the Petition in the *Harkenrider* Lawsuit (Steuben Dkt. No. 461, at p. 2). He tweeted or retweeted about redistricting, the *Harkenrider* Lawsuit, or both at least four additional times that day, eight additional times that month, and eight times in March — including a play-by-play of oral arguments that took place in

[6] Gavin Wax, https://www.gavinwax.com/ (last accessed May 17, 2022).

Steuben County Supreme Court on March 3, 2022 (*id.* at pp. 15-16). Mr. Wax was paying attention as well. In a February 3 Twitter post, he asked why "Republicans [are] so weak in New York" because "apparently 15 GOP members of the Assembly voted in favor of the Democrats [sic] gerrymandering proposal" (Steuben Dkt. No. 460, at p. 2). He tweeted a picture of the Steuben County Supreme Court's March 31 Order (which originally invalidated the enacted Congressional and State Senate district maps) the day it was issued (*id.* at p. 4). He even asked his Twitter followers to "Please clap!" for his proposed "fair and just map"—which was solid red except for a blue handgun shooting bullets into a blue Albany (*id.* at p. 6).

Simply put, Petitioners have no excuse for failing to commence this special proceeding in February or March. "It is an ancient maxim that he who comes to equity must come with clean hands." *Amarant v. D'Antonio*, 197 A.D.2d 432, 434 (1st Dep't 1993). Hence, when "a litigant has himself been guilty of inequitable conduct with reference to the subject matter" of the litigation, "a court of equity will refuse him affirmative aid." *Levy v. Braverman*, 24 A.D.2d 430, 430 (1st Dep't 1965). *Accord*, *Sync Realty Grp. v. Rotterdam Ventures, Inc.*, 63 A.D.3d 1429, 1431 (3d Dep't 2009) (finding the balance of equities does not favor a party that knowingly contributes to its own harm); *De Candido v. Young Stars, Inc.*, 10 A.D.2d 922 (1st Dep't 1960) (denying temporary restraining order on account of plaintiff's laches and unclean hands). Here, Petitioners sat on their rights for months while the *Harkenrider* Lawsuit was litigated. Their egregious delay tips the equities against issuing a TRO.

On the other side of the scale, denying the motion would not create the dystopia Petitioners portray. For instance, they deride the Assembly map as "partisan-

infected" (Dkt. No. 3, at p. 8) without acknowledging a critical fact: the enacted Assembly map is a fair map that received bipartisan support. It passed the Assembly by an overwhelming vote of 118 to 29, including 14 Republican votes in favor. All those 14 Republicans, approximating one third of the Assembly Republican conference, have made affidavits in which they assert the Assembly map is fair (Steuben Dkt. Nos. 444-59). No wonder, then, that the *Harkenrider* Petitioners did not challenge the Assembly map.

Petitioners assert the Court of Appeals "already balanced the competing equities at stake here" (Dkt. No. 3, at p. 10), but that is not true. The Court ordered remedial Congressional and State Senate district maps for the 2022 elections, rather than waiting for the 2024 elections, because the *Harkenrider* Petitioners "commenced [that] proceeding on the same day" the maps were enacted. *Harkenrider*, 2022 WL 1236822, at *12 n.18. In contrast, Petitioners here slept on their rights for three months before bringing this special proceeding. And since the Court's April 27 decision, June primary ballots have been finalized and mailed, making an immediate Assembly redistricting impossible.

In short, this time-barred proceeding, brought by Petitioners who lack standing and fail to name thousands of necessary parties, is not likely to succeed on the merits. Petitioners fail to articulate any harm that could surpass the harm their proposed invalidation of ballot certifications and suspension of the entire primary election only six weeks away would cause candidates, the State, and the voting public. And the balance of the equities favors Respondents. This Court should not issue a TRO.

CONCLUSION

Petitioners' motion for a temporary restraining order should be denied.

Dated: New York, New York
May 17, 2022

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CERTIFICATE OF COMPLIANCE WITH 22 N.Y.C.R.R. § 202.8-b

This memorandum of law complies with 22 N.Y.C.R.R. § 202.8-b because it contains 4,401 words, excluding the caption, table of contents, table of authorities, and signature block. The word count was generated by the word-processing system used to prepare this document.

Dated: Buffalo, New York
May 17, 2022

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