

To Be Argued By:
Aaron S. Foldenauer
Time Requested: 15 Minutes

New York County Clerk's Index No. 154213/2022

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT



PAUL NICHOLS, GAVIN WAX, GARY GREENBERG,

Case No.
2022-04649

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.

REPLY BRIEF FOR PETITIONER-APPELLANT GAVIN WAX

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Cases

Matter of Harkenrider v. Hochul,
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Rules

22 NYCRR § 1250.2(c)2

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Petitioner-Appellant Gavin Wax (“Mr. Wax”), by and through his undersigned counsel, respectfully submits this reply memorandum in connection with his appeal in the above-captioned action.

ARGUMENT

Petitioner-Appellant Gavin Wax respectfully submits this separate reply brief given that, for the reasons stated herein, he believes that he now views this appeal differently from the other two petitioners, Paul Nichols and Gary Greenberg (and with whom Mr. Wax initially submitted a joint opening brief in partnership with their separate counsel). *See* NYSCEF No. 9 (Nov. 7, 2022) (the “Opening Brief”).

This action is unique inasmuch as Mr. Wax did not commence this lawsuit—along with the other two petitioners—to seek a specific monetary award against an adversary, but rather, to ensure that fair, constitutional State Assembly district lines were crafted for the betterment of all New Yorkers. One significant step toward that goal was this Court’s decision of June 10, 2022 which declared—following an appeal by Mr. Wax and the two other petitioners—the prior State Assembly map to be invalid. R. 1031-1033. On remand, Justice Love entered an order, which is now the subject of this appeal, setting forth a process to redraw the State Assembly district lines, which in Justice Love’s view, would satisfy the redistricting process set forth in Article III of the New York State Constitution. R. 6-24.

Although Mr. Wax respectfully submits that the law still militates in favor of the relief requested in the Opening Brief, additional factors now before this Court merit specific mention and, if the Court deems appropriate, consideration by this Court as it determines how to rule with respect to this appeal so as to ensure fairness to all sides and, ultimately, the people of the State of New York. *Cf.* 22 NYCRR § 1250.2(c) (containing provisions for parties to an appeal to provide “[n]otice of [a] change of circumstances,” such as when “a matter or any issue therein has been rendered moot.”)

One significant development—which was mentioned in the brief submitted by Counsel to the Speaker of the Assembly, Carl Heastie—is that, during the pendency of this appeal, the Republican and Democratic members of the Independent Redistricting Commission (the “IRC”) *reached an agreement* and agreed upon a single proposed Assembly map. *See* NYSCEF No. 14 at 29. This promising development puts this matter on very different footing from the prior appeal, which centered around the *failure* of the IRC to reach an agreement on proposed lines. *See, e.g., Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494, 504-05 (2022). As demonstrated by a letter that was filed with this Court on December 7, 2022 by counsel to certain members of the IRC, the Commission will be holding public hearings throughout the State as it seeks to come to a final agreement on the Assembly Map pursuant to Justice Love’s order. NYSCEF No. 16 at 1-2. It

should be acknowledged that this process could well be on track to being successful and result in an Assembly Map that comports with constitutional requirements.

In deciding how to adjudicate this appeal, this Court has a number of options available to it, including by potentially considering the fact that the IRC is now working with draft maps upon which there is, in fact, a bipartisan agreement, and considering whether circumstances may ultimately deem any issues presented as moot. Unlike most appeals—which ultimately entail winning or losing when up against an adversary—Mr. Wax submits that this appeal concerns whether constitutional state assembly lines are ultimately afforded to all New Yorkers.

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CONCLUSION

Petitioner-Appellant Gavin Wax respectfully requests that the Court consider this reply memorandum in connection with his appeal in the above-captioned action.

Dated: New York, NY
December 16, 2022

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Aaron S. Foldenauer', written over a horizontal line. The signature is fluid and cursive.

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 1250.8(j) the foregoing brief was prepared on a computer.

Type: A proportionally spaced typeface was used as follows:

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