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VIA E-Filing and E-Mail (Drudolf@nycourts.gov)
The Honorable Laurence L. Love
Justice of the Supreme Court, New York County
80 Centre Street, Room 122
New York, NY 10013

Re: *Nichols v. Hochul*, Index No. 154213/2022

Dear Justice Love:

We represent Petitioners in this Special Proceeding, which aims to remedy a grave constitutional injury to New York voters and candidates. Indeed, if the Court does not act, as Respondent's counsel conceded before Judge McAllister, New York voters would have to exercise the franchise with an unconstitutional Assembly map for a decade. (NYSCEF Doc. No. 6 at 65:19-23). Thus, in a real way, Respondents urge this Court to place its imprimatur on generational unconstitutionality.

Further, as Todd Valentine, Co-Executive of the New York State Board of Elections ("BOE") has conceded, Assembly districts have a unique impact on "New York's election infrastructure" and follow-through to several other elected offices, including judicial ones. (*Harkenrider v. Hochul*, Index No. E2022-0116cv, Doc. No. 430 ¶¶ 13-17). Thus, the constitutional harm, if this Court declines to remedy it, will cast a pall of suspicion over thousands of elected officials for years to come.

Petitioners seek only two forms of immediate provisional relief: (1) declaring that the BOE cannot use the current Assembly map, which the Court of Appeal has already held to be unconstitutional (the "TRO"); and (2) appointing a Special Master to re-draw the Assembly map on an expedited basis.

Cases such as these benefit from a constitutional priority over the Court's docket. Article III, Section 5 provides as follows (emphasis added):

> "An 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; and **any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings**, and if said court be not in session it shall convene promptly for the disposition of the same. **The court shall render its decision within sixty days after a petition is filed.** In any judicial proceeding relating to

> redistricting of congressional or state legislative districts, **any law establishing congressional or state legislative districts found to violate the provisions of this article shall be invalid in whole or in part**. In the event that a court finds such a violation, the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities."

Alas, it took some time for a judge to be assigned, and the first two judges recused themselves. Before he recused himself, Judge Frank scheduled argument on the TRO for tomorrow, May 19th, at 1:15 p.m. We respectfully request that this Court allow that hearing to proceed as scheduled.

To assist the Court, we respond to three issues raised in Respondent's opposition, and we will address the balance of their arguments during the hearing. We also raise one housekeeping matter.

Challenging Petitions and Disqualifying Candidates

In various ways (e.g., failure to join necessary parties, statute of limitations, etc.), Respondents raise various technical and procedural issues and suggest that Petitioners are seeking to challenge petitions and seek to disqualify candidates. The fundamental basis of these arguments is incorrect.

The requested TRO is about the unconstitutional Assembly map—and only the unconstitutional Assembly map. Respondents do not defend the unconstitutionality of the Assembly map. They could not if they wanted to. The Court of Appeals has already spoken. *Harkenrider v. Hochul*, 2022 WL 1236822, at *12 n. 15 (N.Y. Apr. 27, 2022) (noting that the State Assembly map suffers from the same "procedural infirmity" which renders the congressional and State Senate maps void ab initio under the New York Constitution). And the Court's duty is clear: the legislative apportionment is "subject to review by the supreme court, at the suit of any citizen" (N.Y. Constitution Article III, § 5, *cited in Harkenrider*, 2022 WL 1236822, at *4). Likewise, the remedy for "procedurally unconstitutional" enactment of the Assembly map is for the "Supreme Court … with the assistance of [a] special master and any other relevant submissions … [to] adopt constitutional maps with all due haste." *Harkenrider*, 2022 WL 1236822, at *13.

Thus, when the Assembly map is redrawn, some candidates may invariably find themselves in districts that differ from the unconstitutional districts that were drawn by the legislature. The relief we seek is *not* to disqualify the candidates on this basis. Rather, as Justice McAllister did in Steuben County, Petitioners only seek for the Court, once a new Assembly map is created, to allow existing candidates an opportunity to correct their petitions and give anyone who wishes to run, regardless as to whether they had previously circulated petitions or not, time to circulate petitions to get on the ballot pursuant to the new map. Justice McAllister has taken similar steps with respect to the Senate and congressional maps. *See Harkenrider v. Hochul*, Index No. E2022-0116cv, Doc. No. 524, which is the Steuben County court's plan for ballot access.

Because this relief is not even before the Court yet (Petitioners sought no TRO on these issues), Respondents' arguments are, at best, premature.

Finally, with regard to Respondents' concerns about the mailing of ballots, we do not believe Respondents' statements are entirely accurate. While *military and overseas ballots* have

presumably been mailed (despite BOE's awareness of an imminent and/or pending Assembly map challenge), any such returned ballots can be discarded or not counted. And, regardless, new ballots will need to be sent out because of the pending congressional and State Senate redistricting. In addition, the New York City Board of Elections has scheduled a public inspection of sample ballots to occur on May 20, 2022, the very purpose of which is to invite public review and comment to correct any errors or issues that exist *before* all of the remaining ballots are printed.

Alleged Statutory Bar

Respondents argue that CPLR 6313(a) bars any TRO against a public officer in restraint of their duties. Respondents cite no case holding that this provision bars the Court from directing such officers to perform their duties in compliance with the Constitution.

This omission was strategic. In fact, many courts have recognized the Court's power to do just that. *See Komyathy v. Board of Ed. of Wappinger Central School Dist. No. 1*, 75 Misc. 2d 859, 862 (Sup. Ct. Dutchess Cty. 1973) (holding that notwithstanding CPLR 6313(a), "it is clear that the court has inherent power to stay such bodies on a temporary basis where it appears that they will act illegally, i.e., not within the performance of statutory duties"); *Metro. Transp. Auth. v. Vill. of Tuckahoe*, 67 Misc. 2d 895, 902 (Sup. Ct. Westchester Cty 1971) (rejecting CPLR 6313 argument; holding that "the court must balance the statutory obligation of the municipality and its appointive officials to enforce its building regulations against the statutorily recognized needs of the general public"), *aff'd*, 38 A.D.2d 570, 328 N.Y.S.2d 615 (2d Dep't 1972); *110 Manno Realty Corp. v. Town of Huntington*, 61 Misc. 2d 702, 704 (Sup. Ct. Suffolk Cty. 1970) (rejecting CPLR 6313 argument and granting temporary injunction; finding that the "proposed reclassification, it appears, is part and parcel of a contrived plan on the part of defendant, not to perform but to *prevent* the performance of a statutory duty") (emphasis in original); *United Talmudical Acad. Torah V'Yirah, Inc. v. Town of Bethel,* 24 Misc. 3d 1240(A (Table), 2009 WL 2613293, at * 6 (Sup. Ct. Sullivan Cty. Aug. 24, 2009) ("Whenever the government takes action to prevent citizens from exercising [a recognized constitutional right] there is irreparable harm which sets a high standard for the government action. CPLR § 6313(a) cannot … be used by … the government to strike down religious freedom."). This has been the law since the nineteenth century. *Davis v. Am. Soc. for Prevention of Cruelty to Animals*, 75 N.Y. 362, 366 (1878) ("That public bodies and public officers may be restrained by injunction from proceeding in violation of law, to the prejudice of the public or to the injury of individual rights, cannot be questioned.") (citing and quoting *People v. Canal Bd. of New York*, 55 N.Y. 390, 393 (1874)).

Thus, no statutory bar precludes relief necessitated by Respondents' unconstitutional actions.

Burden of changing primary dates

Respondents' cynical position is that the Court should not correct a constitutional infirmity of their own making. In their papers, using a "throw spaghetti at the wall" approach, these raise a bevy of specious arguments, including *laches*,[1] which have no merit at all.

[1] The only case Respondents cite is *Schulz v. New York*, 81 N.Y.2d 336 (1993), which is readily distinguishable. There, petitioners challenged an 11-month old law that permitted the state to issue bonds. By the time of the challenge, the state had issued hundreds of millions of dollars of bonds,

Using classic sleight of hand, they blame Petitioners for their alleged "delay" in bringing this proceeding now, when (a) they willfully violated the Constitution, (b) were on notice that the Assembly map was unconstitutional since Justice McAllister's decision on March 31, and (c) developed no contingency plan.

In fact, the relief Petitioners seek creates less burden, not more, and affords more time, not less. In Steuben County, all interested parties will have final Senate and congressional maps on May 20 for an August 23 primary—giving the BOE roughly three months. If the Court grants all the relief Petitioners seek and opts to order elections to be held on the historically used primary date of the second Tuesday in September, the BOE will have an additional three weeks. And, if Assembly maps are re-drawn and ordered by June 15, which is eminently achievable, and the Court approves a unified primary date of September 13, the BOE will have three months to complete the process.

Disliking the message, and unable to defend the unconstitutional Assembly map, Respondents will continue to spill much ink and use heated exhortations to attack the messengers, who are only trying to restore a semblance of integrity and public trust after the mess Respondents themselves created. Petitioners hope the Court will see through this tactic.

Court Reporter

We believe it likely that—whichever parties lose with respect to the TRO—those parties are likely to seek expedited appeal. We therefore request that tomorrow's hearing be held on the record, and that the Court have present a court reporter who is able to prepare an expedited transcript promptly upon completion of the proceedings.

Respectfully submitted,

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Attorneys for Petitioners Paul Nichols and Gary Greenberg

/s/*Aaron Foldenauer*
Aaron Foldenauer
Attorneys for Petitioner Gavin Wax

cc: All Counsel (via e-filing and email)

all of which would require cancellation and refund at even greater cost to the state. No such harm is true here, and the bond program did not raise any serious constitutional issues. Here, the Court must adhere to the Court of Appeals ruling that the Assembly maps are unconstitutional.