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May 3, 2022

VIA ECF

Hon. Lewis A. Kaplan
United States District Judge
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
200 Worth Street
New York, New York 10007

Re: *de Gaudemar v Kosinski*, 22-cv-3534

Dear Judge Kaplan:

The New York State Board of Elections makes this submission in opposition to the relief requested by the plaintiffs herein.

Failure to Join Necessary Parties

The plaintiffs have named in this proceeding only the New York State Board of Elections which is the entity that administers elections. Plaintiffs have not joined in this proceeding the State of New York, indispensable in any action related to redistricting, nor the legislative entities that actually draw Congressional lines in due course, nor the Courts of the State now undertaking the redistricting process complained of herein.

New York Moved the Congressional Primary to Provide Sufficient Time

Fundamentally, the plaintiffs are seeking a remedy pursuant to 2 USC § 2a (c) (5) (*see e.g., Branch v Smith*, 538 U.S. 254 (2003)) on the premise that New York has run out of time to implement new districts for a Congressional primary and general election in 2022. This is simply not true. New York has made more time by moving its primary date, and this offends no provision of federal law.

Though far from ideal, New York is capable of having new lines in time for a primary election on August 23, 2022, the date of a remedial primary ordered by Steuben County Court in keeping

with the decision and order of New York's highest court in *Harkenrider v Hochul* (Plaintiff's Exhibit 4, ECF 8-4) which held "[w]e are 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 see 52 USC § 20302."

While all interstitial dates of a political calendar have not been approved by Steuben County Supreme Court on remittitur yet, that Court has ordered a Congressional primary date of August 23, 2022, and also ordered that military and overseas ballots be transmitted for that election no later than July 8, 2022, the deadline provided for in state law which is one day earlier than the federal deadline of July 9, 2022. *See Harkenrider v Hochul*, E2022-01116CV, Steuben County Supreme Court, Preliminary Order, NYSCEF Doc. # 301).

Plaintiffs rely heavily on *Branch v Smith*, 538 U.S. 254 (2003). In that case, the Mississippi courts were unable to adopt a Congressional districting plan before a federally imposed deadline triggering the imposition of alternative lines already carefully drawn by the federal court. Here, ironically, the plaintiffs are asking this Court to stop New York's effort to comply with its highest court's ruling to draw lines that comport with its state Constitution in time for implementation this year and instead invite this Court to summarily adopt lines that the state's highest court expressly found violate the State's Constitution.

This facially contravenes *Branch* which counseled federal courts that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court... [citations omitted]... We held that 'absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.'"

In this case the state is performing its duty to redistrict, and it has *made more time* by moving the date of the congressional primary. New York is not unique in moving its primary to make more time. Multiple states this year have moved their primary elections to provide additional time to complete redistricting.

The 2012 Northern District of New York Order

On January 27, 2012, in *United States v State of New York* (1:10-cv-1214 [NDNY] ECF # 59), Hon. Gary Sharpe ordered that after 2012, in each subsequent even-numbered year, "New York's non-presidential federal primary date shall be the fourth Tuesday of June, unless and until New York enacts legislation resetting the non-presidential federal primary election for a date that complies fully with all UOCAVA requirements, and is approved by this court." In 2014, 2016 and 2018, New York law continued to provide for a primary election to be held in September. This necessitated the State Board of Elections to seek remedial orders from Judge Sharpe altering several of New York's political calendar dates to meet the needs of a June federal Primary which was held in addition to state primaries in September.

However, in 2019, New York adopted Chapter 5 of Laws of 2019 enacting in state law, permanently, a single primary on the fourth Tuesday in June for all public offices filled at a general election. It was reasonable to conclude this satisfied the provisions of Judge Sharpe's order and no further federal court approval was required because the permanent primary date in New York law coincided with the date provided in Judge Sharpe's order. Accordingly, New York conducted primaries based *solely* on the new state law changes (Chapter 5 of 2019) in 2020 without seeking any court approval of the political calendar.

The situation presented under the current circumstances is simply beyond the contemplation or scope of Judge Sharpe's order. Judge Sharpe ordered the State to have a MOVE Act compliant calendar with a primary on the fourth Tuesday in June—but if the State is to have a primary on some other date, any “*legislation* resetting” the primary must be approved by the Court. The August 23 primary date at issue in this matter does not arise from legislation. The primary date change arises from a remedial state court order designed to facilitate New York deriving state constitutionally compliant district lines. In so doing, the New York judiciary has articulated its unequivocal commitment to a MOVE Act compliant calendar. *See Harkenrider v Hochul, infra.* In context, the Sharpe Order which struck the application of a state law mandating federal primaries in September should not be construed to prevent a state court remedial order establishing a one-time only primary weeks earlier in August.

All of this notwithstanding, NYSBOE is contemplating making an application to Judge Sharpe out of abundance of caution to seek a remedial order conforming to the state court order.

Move Act Compliance

New York can conduct a Move Act compliant election on August 23, 2022. At least one other state, Florida, also has a primary scheduled for that date. The federal law deadline to transmit ballots to military and overseas voters for the November election is September 24, 2022 (September 23, 2022, under state law). While the time from the August primary to the deadline to transmit ballots in late September is tighter than when the primary election is in June, it is achievable. The third Tuesday in August is three weeks earlier than the second Tuesday in September which was found to not be compliant with federal law in the 2012 matter before Judge Sharpe.

Respectfully, the temporary relief requested in this matter should be denied, so as not to impede New York from advancing Congressional elections in 2022 on lines that conform to the State's Constitution.

Very truly yours,

s/
Brian Quail

s/
Todd Valentine