SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PAUL NICHOLS, GAVIN WAX, and GARY GREENBERG,

Petitioners,

-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, and THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents.

Index No. 154213/2022

GOVERNOR HOCHUL'S MEMORANDUM OF LAW IN SUPPORT OF HER ANSWER AND IN OPPOSITION TO THE PETITION AND PETITIONERS' MOTION BY ORDER TO SHOW CAUSE

LETITIA JAMES
Attorney General of the
State of New York
Attorney for Respondent Governor Hochul
28 Liberty Street
New York, New York 10005
(212) 416-8029

SETH FARBER
Special Litigation Counsel
Of Counsel

Table of Contents

PRELIMINARY STATEMENT

Respondent Governor Kathy Hochul ("Governor Hochul") respectfully submits this memorandum of law in support of her accompanying Answer and in opposition to the petition and motion by Petitioners Paul Nichols ("Nichols"), Gavin Wax ("Wax") and Gary Greenberg ("Greenberg") by Order to Show Cause ("OSC") signed by Justice Laurence Love on May 19, 2022 (the application (*see* NYSCEF No. 25). In the OSC, the Court struck the portion of the OSC presented (NYSCEF No. 2) that sought a temporary restraining order ("TRO") that would have enjoined respondents from using the 2022 State Assembly map in administering the 2022 primary and general elections, and immediately appointed a special master to begin proceedings to evaluate and draft a State Assembly map for the 2022 primary and general elections.

Petitioners Nichols, Wax and Greenberg allege that they are registered and eligible voters in the State of New York, and are, respectively, a Democratic primary candidate for governor until he was excluded from the ballot because his petition signatures were invalidated (Petition, NYSCEF No. 1 at para. 11), President of the New York Young Republican Club (*id.* at para. 12), and a former candidate for a State Senate seat in District 46, and "a potential candidate" for Congress, the State Senate and the State Assembly (*id.* at para. 13). None of the Petitioners allege that they are actually running for the State Assembly.

In the present OSC, Petitioners seek the following extraordinary relief at a time after the June primary election (that includes Statewide races, races for all 150 seats in the State Assembly and numerous other election contests) is already underway:

> "Judgment … pursuant to CPLR § 411 and CPLR § 3001: [1] Declaring pursuant to CPLR § 3001 that the 2022 State Assembly map, *see* 2021–2022 N.Y. Reg. Sess. Leg. Bills A.9040-A and A.9168, is void based upon the constitutional flaws in its adoption previously found by the Court of Appeals; [2] Appointing a special master to adopt a legally compliant State Assembly map; [3] Enjoining Respondents to adjourn the primary election date for state and local elections to August 23, 2022, or, alternatively, September 13, 2022; [4] Enjoining Respondents to open designating and independent nominating petition periods, *see* N.Y.

> Elec. Law §§ 6-134, 6-138, for Statewide, Congressional, State Assembly, State Senate, and local offices with deadlines sufficient for current candidates to obtain new designating petition signatures or run independently, and for potential candidates to newly qualify for primary elections or as an independent in the general election; [5] Suspending or enjoining the operation of any other state laws, or vacating any certifications or other official acts of the New York State Board of Elections or other governmental body, that would undermine this Court's ability to offer effective and complete relief for the November 2022 elections and related primaries; [6] Awarding Petitioners reasonable attorneys' fees and costs; and [7] Awarding such other and further relief as this Court may deem just and proper.

As Governor Hochul advised the Court in her Memorandum in Opposition to the TRO (NYSECF No. 26), similar challenges by two of the three Petitioners have already been rejected by the Steuben County Court that has been handling New York's redistricting litigation for several months, (*Harkenrider v. Hochul*, Steuben County Sup. Ct., Index No. E2022-0116CV, "*Harkenrider,"* NYSCEF No. 520). As Judge McAllister noted in denying Petitioners Motion for Intervention, to change the Assembly maps now would "create total confusion" as "a change in the Assembly Districts would impact several elected officials – and that was on May 11th, twelve days ago. This would include delegates to the State Supreme Court judicial nominating convention, representatives to county party committees and the New York State Democratic Committee." *Id.*, at 4.

Furthermore, the Statewide and Assembly primary election that Petitioners are again seeking to enjoin has been underway since May 13th. *See* Letter of Aaron Suggs on behalf of State Board of Elections opposing TRO, NYSCEF No. 14. Hence, if the relief sought in the OSC and the petition were granted, this would not only disrupt a primary election that is already in progress but would result in further chaos and disruption to an election cycle that has already confounded voters since redistricting challenges initially threw the election process into question three months ago.

For their part, Petitioners flippantly assert that "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." *See* Jim Walden and Aaron Foldenauer letter to the Court of May 18, 2022 (NYSECF No. 23). The Court should soundly reject Petitioners' cavalier suggestion to disenfranchise voters as a result of Petitioners' own late filing.

The impact of moving Assembly and other Statewide and local races and of reopening the designating and independent petition process will cause further disarray for candidates across New York. The certification deadline for the June primary has now passed, ballots are being printed, and candidates for judicial elections and party elections will be impacted because the Election Law ties the Assembly districts to election districts in a number of circumstances, and military ballots have already been sent out. Furthermore, the signature gathering period for independent candidates has been open for over a month and petitions are due to be submitted in a matter of days. Under these circumstances, Petitioners' untimely and improper application for the extraordinary relief of enjoining an election that is already under way should be denied in all respects.

ARGUMENT

A. The Present Application is barred by doctrine of laches.

Petitioners' challenge to the Assembly map (and the other attendant extraordinary relief they seek herein, discussed below including canceling the June 28, 2022 primary and reopening designating and independent nominating petition periods) is barred by the doctrine of laches. "Laches bars recovery where a plaintiff's inaction has prejudiced the defendant and rendered it inequitable to permit recovery*." Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 82 (4th Dept 1980).

Laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." *Reif v. Nagy*, 175 A.3d 107, 130 (1st Dep't 2019) (quoting *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y. 2d 801, 816 (2003)). To show prejudice, a defendant must show reliance and change of position from the delay. *Id.* Here, the prejudice that

would stem from Petitioners' belated challenge to the Assembly map is manifest. On May 4, 2022, the State Board of Elections certified the primary ballot for Assembly elections,[1] with local county boards of election throughout the State preparing for the election to go forward on June 28 (at significant effort and expense), with early voting and absentee balloting taking place before that date. As noted above, military ballots have already been sent out to military voters on or about May 13, 2022. If Petitioners' challenge were allowed, the Assembly map would have to be redrawn by a Special Master, and the Assembly primary could not go forward in June, and insofar as numerous other races are tied to Assembly districts, it is not clear what primaries, if any, could go forward in June (and of course, Petitioners seek to cancel and reschedule the entire June 28 primary in any event). Similarly, Petitioners gratuitously seek to open the independent nominating petition period after the period for collection of signatures has elapsed. They give no explanation for why they require that extraordinary relief, much less a reason why they sat on their "rights" while the election process was underway.

The proposed relief would cause yet more delay and add to the already formidable logistical challenges faced by the State and local boards of elections associated with having to accommodate entirely new Congressional and State Senate districts, let alone Assembly districts that have yet to be even drawn (and a new primary in August). This Court should decline to entertain this application.

B. <u>Changing assembly districts would cause chaos for candidates and voters and place additional, untenable burdens on boards of elections.</u>

Granting the relief demanded in the Petition of changing the Assembly districts at this late stage – something that could have been raised at least as far back as February – would cause an additional and unnecessary burden on the State's elections process. *See, e.g.*, *Purcell v. Gonzalez*, 549

[1] *See* https://www.elections.ny.gov/NYSBOE/Elections/2022/Primary/Jun282022PrimaryCertification.pdf.

U.S. 1 (2006) (per curiam) (U.S. Supreme Court has repeatedly cautioned federal courts against late changes to state election laws similar to those contemplated by Petitioners here). Not only does it risk further confusion to voters and candidates, but because the primaries for the State's one hundred and fifty Assembly districts are inexorably linked to a series of other elections, granting the application as requested would cause chaos statewide.

The Election Law requires judicial delegates to be elected from Assembly districts. Election Law § 6-124. Moving the Assembly primary will also necessitate moving the judicial nominating process, and, as indicated in Speaker Heastie's opposition memorandum (NYSCEF No. 15 at 8-10), a number of other offices including candidates for State Assembly, representatives to county party committees and the New York State Democratic Committee, party District Leaders in New York City, as well as delegates and alternate delegates to State Supreme Court judicial nominating conventions.

And, on top of already having to move Congressional and State Senate races as a result of other litigation, granting the relief requested by Petitioners here would upend the Assembly and numerous other races and would have a severe if not incalculable impact on election administration. A further dramatic change to New York's election cycle at this late point in time risks grave harm to candidates, voters, and elections officials.

C. Petitioners' Challenges to Designating Petitions are Time-Barred and Lack Any Legal Basis.

Petitioners are seeking to use this case to get a second bite at the apple to get on the ballot after failing to obtain ballot access during the now concluded petitioning process. They are also asking this court to set a stricter standard for statewide petitions than for the races for State Senate and for Congress – one that would demand the collection and submission of new designating petitions

well after the election has already begun. Specifically, in order to effectuate these requests, Petitioners are asking the court for extraordinary relief in the form of

> [3] Enjoining Respondents to adjourn the primary election date for state and local elections to August 23, 2022, or, alternatively, September 13, 2022; and [4] Enjoining Respondents to open designating and independent nominating petition periods, *see* N.Y. Elec. Law §§ 6-134, 6-138, for Statewide, Congressional, State Assembly[2], State Senate, and local offices with deadlines sufficient for current candidates to obtain new designating petition signatures or run independently, and for potential candidates to newly qualify for primary elections or as an independent in the general election

Functionally, Petitioners here[3] seek to leverage their already untimely challenge into an excuse to *cancel the June 28th primary for all primary races.* Specifically, Petitioners ask the Court to upend both the party designation process and the independent nominating petition process "for Statewide, Congressional, State Assembly, State Senate and local offices," *i.e.*. what appears to be every single federal, state and local office in New York.

First, Petitioners' last-ditch challenge to nominating petitions and designating petitions is clearly time-barred. The Election Law deadlines are strict, and with good reason, lest challenges like this result in the kind of chaos described in Point B, above. The period for obtaining signatures on independent nominating petitions has been open since April 19th and independent petitions must be submitted between May 24th and May 31st (*see* Election Law §§ 6-138(4) and 6-158(9); *see also* NYSCEF No. 5, State 2022 Political Calendar, Ex. 1 to Devlin Aff.).

[2] Petitioners Wax and Greenberg sought to intervene in the *Harkenrider* case, seeking *inter alia*, to invalidate signatures already gathered, change the dates for new petition signature gathering and submission for Assembly races. The Supreme Court, Steuben County, rejected their intervention motion, finding, *inter alia*, that it was untimely. *Harkenrider*, Steuben County Sup. Ct., Index No. E2022-0116CV, NYSCEF No. 520 at 3-4.

[3] Petitioner Nichols, acknowledges that he himself is a candidate for governor, a statewide office, and his designating petitions for the Democratic primary were rejected for an insufficient number of valid signatures, and he is collecting signatures to run as an independent candidate. *See* Nichols Affidavit dated May 16, 2022, ECF No. 9, at paras. 2-4.

Designating petitions have also already been filed and certified. Petitioners' challenge to the validity of designating petitions that have already been filed and certified is clearly time-barred by the statutory deadlines for filing objections.

Election Law 6-154(2) provides, in relevant part, that:

> "Written objections to any certificate of designation or nomination or to a designating petition or a petition for opportunity to ballot for public office or to a certificate of acceptance, a certificate of declination or a certificate of substitution relating thereto …. shall be filed with the officer or board with whom the original petition or certificate is filed within three days after the last day to file such a certificate to which objection is made, or within three days after the last day to file such a certificate, if no such certificate is filed except that if any person nominated by an independent nominating petition, is nominated as a party candidate for the same office by a party certificate filed, or a party nomination made after the filing of such petition, the written objection to such petition may be filed within three days after the filing of such party certificate or the making of such part nomination. When such an objection is filed, specifications of the grounds of the objections shall be filed within six days thereafter with the same officer or board and if specifications are not timely filed, the objection shall be null and void."

Election Law 16-102(2) provides in relevant part:

> "A proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition, or within three business days after the officer or board with whom or which such petition was filed, makes a determination of invalidity with respect to such petition, whichever is later."

In the present case, as designating petitions were received by April 7, 2022, objections were due to the State Board of Elections by April 11, 2022, and aggrieved parties had to commence legal action by April 21, 2022. *See Harkenrider v. Hochul*, CAE 22-506, NYSCEF No. 24 at 1 (4th Dep't, April 8, 2022).

Second, Petitioners have no legal basis to assert that the already submitted and certified nominating petitions are not legally sufficient. Providing the Petitioners relief here would result in a stricter standard for petitioning for statewide candidates than the requirements set forth in *Harkenrider* for Congressional and State Senate candidates. *(See Harkenrider*, Steuben County Sup. Ct., Index No. E2022-0116CV, NYSCEF No. 524 at 2.) In particular, candidates who already

qualified for the ballot succeeded in obtaining the required number of signatures in the broad swath of Congressional districts as required by law. For example, a number of candidates for statewide office, including three Democratic candidates and four Republican candidates for governor and three Democratic candidates for lieutenant governor, successfully accumulated enough designating petitions from across the state to appear on the certified ballot for the June 28th primary, and a new Congressional map does not change that candidates who have been certified on the ballot demonstrated the required breadth of support from across the state by obtaining the required signatures. To set a different standard here for statewide candidates would be inconsistent and incongruous with that decision and detrimental to both voters and candidates.[4]

Ultimately, Petitioners have timed their application for this relief in as highly prejudicial a manner as their other requests: the independent nominating process began over a month ago, and we are now just days before the period when petitions are due to be submitted. Further, although the Petition itself is replete with references to the Court of Appeals decision in *Harkenrider v. Hochul*, 2022 WL 1236822 (N.Y. Apr. 27, 2022), Petitioners fail to offer any explanation for why they waited until three weeks after that decision to bring the present application despite the clear prejudice that would result to election officials, candidates and voters throughout the State. Indeed, Petitioners' own tardiness should absolutely preclude Petitioners from voiding the petition signatures already obtained by candidates, including those who successfully qualified for the June 28th primary election ballot.

Under these circumstances, the extraordinary if not unprecedented relief sought by Petitioners of canceling an entire primary and reopening designating and independent nominating petition

[4] Even assuming Petitioners were correct, the appropriate remedy would be to mirror what the *Harkenrider* court decided for petitioning in the Congressional races. Instead of creating a new, more restrictive rule for statewide races in the form of a new petitioning period, or restarting the prior petitioning period, candidates would simply rely on the existing petitions that collected to submit the statutory requirements. *Harkenrider*, Steuben County Sup. Ct., Index No. E2022-0116CV, NYSCEF No. 524 at 2.

periods (and thereby dramatically altering the State's entire election landscape) here at this late point in New York's election cycle risks extraordinarily grave harm to candidates, voters, and elections officials, and should be denied by this Court in all respects.

CONCLUSION

For the reasons set forth above, Governor Hochul respectfully submits that Petitioners' motion by OSC should be denied in its entirety and the Petition denied, together with such further relief as the Court may order.

Dated: New York, New York
May 23, 2022

LETITIA JAMES
Attorney General
State of New York
Attorney for Respondent Governor Hochul

s/ Seth Farber
SETH FARBER
Special Litigation Counsel
28 Liberty Street
New York, NY 10005
(212) 416-8029
Seth.Farber@ag.ny.gov

CERTIFICATION

In accordance with Rule 202.8-b of the Uniform Rules of Supreme and County Courts, the undersigned certifies that the word count in this memorandum of law (excluding the caption, table of contents, table of authorities, signature block, and this certification), as established using the word count on the word-processing system used to prepare it, is 2,746 words.

Dated: New York, New York
May 23, 2022

/s/ ***Seth Farber***
By: Seth Farber
Special Litigation Counsel