

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF NEW YORK - CIVIL TERM - PART 63

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4 PAUL NICHOLS, GAVIN WAX, and GARY GREENBERG,

5

Petitioners,

6

-against-

Index No. 154213/22

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

14

Respondents.

15 -----X

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60 Centre Street  
New York, New York  
May 23, 2022

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B E F O R E: HONORABLE LAURENCE LOVE  
Supreme Court Justice

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(Continued)

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Diane Kavanaugh, RMR, CRR, CRC  
Senior Court Reporter

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## Proceedings

1 THE COURT: Good morning to all sides.

2 We're here in the action Paul Nichols, Gavin Wax,  
3 and Gary Greenberg against Governor Kathy Hochul, et al.,  
4 Index No. 154213 of 2022.

5 First, if I could have appearances from all  
6 counsel, starting with the Petitioner.

7 MR. WALDEN: Yes, sir. My name is Jim Walden. I'm  
8 here with my colleague, Peter Devlin, on behalf of  
9 Petitioners.

10 MR. FOLDENAUER: Good morning, Your Honor. Aaron  
11 Foldenauer, on behalf of Gavin Wax.

12 THE COURT: Anyone else for Petitioner?  
13 For Respondents.

14 MR. BUCKI: Good morning, Your Honor. Craig Bucki,  
15 B-U-C-K-I, from the law firm of Phillips Lytle, in Buffalo,  
16 New York, on behalf of New York State Assembly Speaker Carl  
17 Heastie, H-E-A-S-T-I-E. And with me in court today is my  
18 co-counsel, C. Daniel Chill, from the law firm of Graubard  
19 Miller, in New York City.

20 THE COURT: Thank you.

21 MR. FARBER: Good morning, Your Honor. Seth  
22 Farber, special litigation counsel, from the office of  
23 Attorney General Letitia James, New York, New York,  
24 appearing on behalf of Governor Hochul.

25 MR. HECKER: Good morning, Your Honor. My name is

dk

## Proceedings

1 Eric Hecker, Cuti Hecker Wang, on behalf of the Senate  
2 Majority Leader.

3 THE COURT: Good morning, all.

4 Just as a brief procedural matter, I did receive a  
5 request on Friday from the press seeking to have cameras in  
6 the courtroom, which is a request that is being denied at  
7 this time. Obviously the courtroom is certainly open to the  
8 public. Anyone from the press or anyone else can be here.

9 I'm just waiting on the technical piece, in terms  
10 of some of the Respondents that have already answered, we  
11 have some representatives here from the New York City Board  
12 of Elections who are joining us virtually. I believe they  
13 have had some issues they were dealing with.

14 Who is here on behalf of the State Board of  
15 Elections?

16 MR. QUAIL: Good morning. Brian Quail, from the  
17 New York State Board of Elections. I am also joined by my  
18 colleague, Kevin Murphy.

19 THE COURT: Good morning.

20 You are the only ones who are participating in the  
21 process obviously. We will obviously keep track on the  
22 technical end the best we can on our side. If we run into  
23 some issues on your side, please let us know as soon as  
24 possible.

25 With that said, good morning. I'm Judge Love. I

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## Proceedings

1 know you are obviously here with an order to show cause that  
2 came before me the middle of last week.

3 I'm certainly aware, as everyone else who is here  
4 is aware as well, I wasn't the first judge that the case got  
5 assigned to.

6 I know the initial order to show cause was uploaded  
7 on Sunday and went through whatever the technical stuff was  
8 through the court system. Even though we obviously move a  
9 lot quicker now that many things go through electronically,  
10 it still takes a couple of days to be properly processed and  
11 to go to two of my other colleagues before the case came  
12 before me.

13 As you also know, obviously I signed off on the  
14 order to show cause with a return date this morning. I'm  
15 certainly very cognizant of the time constraints that we're  
16 all dealing with in real time in this entire situation.

17 Although I know Petitioner was seeking an initial  
18 TRO in this matter as well, I did strike that provision  
19 pending hearing from everyone in detail today. Frankly,  
20 recognizing that even at the time that this proposed order  
21 to show cause was submitted, military ballots and things had  
22 already been processed, and certainly cognizant from  
23 documents that had already been uploaded on NYSCEF in this  
24 matter that the Board of Elections was already actively in  
25 the process of things. And I did not want to add an

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## Proceedings

1 additional potential delay that could have some significant  
2 ramifications over the course of the weekend.

3 I will also say, and then I will hear from counsel  
4 on both sides momentarily, this obviously is not occurring  
5 in a vacuum. This process here today is not occurring in a  
6 vacuum.

7 Everyone here is certainly aware of the process  
8 that occurred with one of my colleagues upstate, with the  
9 initial lawsuit that was filed back on February 2nd after  
10 the lines were initially put out by the Legislature and  
11 signed by the Governor, and all of the process that's gone  
12 on through the Fourth Department's review and the  
13 Court of Appeals decision culminating with the new  
14 Congressional and State Senate lines that were released over  
15 the course of this weekend.

16 So with that said, I guess I'll first turn to  
17 Petitioners' counsel and give you an opportunity to be heard  
18 in this matter.

19 MR. WALDEN: Thank you, Your Honor.

20 I am going to argue for all three Petitioners,  
21 although if I miss anything, I think Mr. Foldenauer would  
22 like to reserve a little bit of time.

23 THE COURT: That's fine.

24 MR. WALDEN: My remarks, Your Honor, won't delay  
25 the Court long because I'm going to get right to the point.

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## Proceedings

1           The constitutional amendment that's at issue in  
2           this case passed overwhelmingly by the voters. They passed  
3           it by a margin of 58 percent to 41 percent. The mandate in  
4           that constitutional amendment was clear and resounding. And  
5           the purpose behind it was clear as well.

6           As Senator Nozzolio said on the Floor, when  
7           advocating for passage, to ignore the constitutional process  
8           we are envisioning today in any way I believe certainly  
9           would be contrary to the public interest.

10          Well, the New York State Legislature did just that.  
11          They ignored the Constitution and went ahead with their own  
12          maps.

13          It doesn't matter what I think because the  
14          Court of Appeals has already spoken clearly. The Assembly  
15          map is unconstitutional. That much nobody can possibly  
16          dispute.

17          But it begs an important question, Your Honor.

18          And if you don't mind, I'm just going to move my  
19          chair back for a second.

20          It begs an important question, which is, why are  
21          the leaders of the Democratic and Republican parties and  
22          their BOE appointees aligned here together advocating for an  
23          unconstitutional map, defending it based on a conflict with  
24          the oath of office they took to uphold the Constitution, in  
25          defiance of the Court of Appeals, and at two great costs?

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## Proceedings

1           One cost, to the confidence in our electoral system  
2           with voters already feeling deeply cynical and voter turnout  
3           at an epic low.

4           And a second one is a financial cost because it has  
5           cost a queen's ransom to hire lawyers to defend these  
6           litigations, defending an unconstitutional map all across  
7           the state, and the litigation continues.

8           And basically in the papers, Your Honor, the  
9           Respondents give you three answers.

10           Answer number one, the Assembly map is bipartisan.

11           Now, constitutionally that's irrelevant, obviously,  
12           because the constitutional amendment was not only  
13           bipartisan, it was overwhelming, even in the Legislature.

14           The Assembly, I think, passed it 23 to -- I can't remember  
15           what the numbers were, Your Honor, but it was overwhelming.

16           But only in an environment that is as cynical and  
17           craven, as we are in America today, could someone say the  
18           Assembly map was bipartisan with a straight face.

19           Two-thirds of the Republicans and the Assembly  
20           voted against it, and every single member of the Senate on  
21           the Republican side voted against the Assembly map.

22           THE COURT: Okay.

23           Counsel, one-third of the Assembly Minority voted  
24           in favor of the map.

25           MR. WALDEN: Fourteen members. You're right,

dk



## Proceedings

1 Your Honor. And that has become, as we've seen even in  
2 Congress, the touchstone for saying something's bipartisan,  
3 which is when you get a couple of people to sign on from the  
4 other side.

5 That is not a bipartisan in the context of American  
6 democracy. And it's certainly not an argument that matters  
7 or should constrain the Court when we're talking about a  
8 violation of constitutional proportions.

9 But because they can't sell the bipartisan  
10 argument, in part because it is legally irrelevant, they  
11 then move to the chaos argument. And they say that voiding  
12 the Assembly map will throw the election into chaos.

13 Now, three things, Your Honor, important to note.

14 The Courts rejected that argument already. And  
15 we're not that far down the road from April 27th, which is  
16 when the Court of Appeals came out with its decision.

17 THE COURT: Counsel, I might take issue with  
18 exactly the way you word that. I mean, the Court of Appeals  
19 issued the decision that they did in terms of their findings  
20 on the Congressional maps and the State Senate maps.

21 As to the Assembly maps, they certainly referenced  
22 that they had some constitutional infirmities related to  
23 that map, but for the reasons that we're all aware of, they  
24 issued a ruling that essentially they weren't in a position  
25 to make the determination on the Assembly maps at that time

dk

## Proceedings

1 and left it open-ended for how anyone wanted to proceed.

2 MR. WALDEN: So, Your Honor, I did you a  
3 disservice. I apologize. I think that I didn't phrase my  
4 argument carefully enough. So you thought I was saying one  
5 thing. I was trying to say something else.

6 THE COURT: That's fine. I'll give you a chance to  
7 clarify.

8 MR. WALDEN: I can do both.

9 First of all, Your Honor, you're absolutely right  
10 that the Court of Appeals did something that nobody really  
11 could have predicted, right. No one knew what the  
12 Court of Appeals was going to do.

13 What we know is that Judge McAllister declared the  
14 maps sua sponte unconstitutional for the same reason that  
15 the Congressional and Senate maps were declared  
16 unconstitutional.

17 THE COURT: Even that, counsel, I'll just correct  
18 you. There was a finding between him, and then when it went  
19 to the Fourth Department, that the Congressional maps were  
20 certainly clearly unconstitutional with the gerrymandering  
21 issues and all of that.

22 But as to the Senate maps, he found that they were  
23 unconstitutional. He did not, on the technical issues  
24 because of what happened with the 2014 Commission and the  
25 two maps, and what was and wasn't filed, but I don't believe

dk

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1 even he made reference that those maps were unconstitutional  
2 in terms of gerrymandering or other issues. And, as you  
3 said, he sua sponte added the Assembly maps into the mix as  
4 well.

5 MR. WALDEN: So, Your Honor, let me just very  
6 precisely say to you, so that if there's any lack of clarity  
7 in what I'm arguing here, our petition is all about the  
8 procedural constitutional violation. And we call it  
9 procedural. Respondents minimize the significance of it.

10 And when I tried to explain the constitutional  
11 consequences and why it was important to American democracy,  
12 I was accused of giving a civics lecture. So I won't give  
13 one to the Court. I'm more than happy to go into that.

14 THE COURT: I think I've had enough civics lessons  
15 through the years. My mother was a history teacher. Plus I  
16 occasionally paid attention in school.

17 You can go ahead from there.

18 MR. WALDEN: But, Your Honor, we're not talking  
19 about the fact that all three maps were declared  
20 unconstitutional. You're correct that the Congressional one  
21 was also gerrymandered, but they were all declared  
22 unconstitutional for the same procedural reason that is  
23 imbedded in the Constitution, which is, they were all done,  
24 they were all drawn in violation of the Constitution.

25 So when I say that the Court of Appeals rejected

dk

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1 the argument that it was impossible that it would cause  
2 chaos, what I meant was on April 27th, very, very shortly  
3 ago, the Court of Appeals said, with respect to the Senate  
4 and the Congressional maps, I trust you are going to be able  
5 to work it out.

6 In point of fact, we can work it out, Your Honor.

7 This chaos argument is ridiculous because, although  
8 this is not before the Court right now, we have a very  
9 simple solution, and we put that solution forward.

10 And what you've got are generalized, exaggerated  
11 adjectives as to why it's overly burdensome. When all we're  
12 saying is let's move all the State races back to September,  
13 which is the historic date for party primaries. Until 2014,  
14 all party primaries were on September 14th. Leave the  
15 Congressional race where it is. That eliminates any Federal  
16 issues whatsoever. And move the primaries to September.  
17 That gives the Board of Elections even more time to get it  
18 right, which is what matters.

19 And so this notion of chaos is illusory. But, more  
20 importantly, who caused the chaos? They go to great lengths  
21 in their papers to blame us for delay. Seriously,  
22 Your Honor?

23 On March 31st, Judge McAllister declared the  
24 Assembly map void and unusable. His words could not have  
25 been more clear.

dk

## Proceedings

1           The Respondents had no idea what was going to  
2           happen. I assume they had no idea. I certainly hope they  
3           had no idea what was going to happen in the  
4           Fourth Department and Court of Appeals. For all they knew  
5           that judgment would be sustained.

6           THE COURT: But, counsel, that's not where the  
7           timeline starts. The timeline starts February 2nd.

8           MR. WALDEN: Yes.

9           THE COURT: February 2nd was the date that the  
10          proposed lines from the Legislature were completed on the  
11          2nd and signed off on by the Governor on March 2nd. And the  
12          lawsuit that was before Judge McAllister was literally filed  
13          on that same day.

14          And once that was filed on the March 2nd date, and  
15          I think the initial petition was amended on March 8th to  
16          include the State Senate lines, and very clear, when it was  
17          filed at that time, the parties made clear they were not  
18          seeking to take any action related to the Assembly lines.  
19          That's when the clock started.

20          So I agree with you, nobody would have had any way  
21          of knowing what Judge McAllister's decision would have been,  
22          what the Fourth Department was going to do, or what the  
23          Court of Appeals was going to do between February and the  
24          April 27th decision from the Court of Appeals.

25          But the opportunity for your clients or anyone else

dk

## Proceedings

1 to add the issue, the potential issue, of the Assembly maps,  
2 the clock on that started to run on that same February 2nd  
3 date.

4 MR. WALDEN: Well, Your Honor, I was not addressing  
5 that point. But I take Your Honor's -- I take what you are  
6 saying, Your Honor, but I respectfully disagree. This is  
7 why.

8 There are two reasons, Your Honor. There's a legal  
9 reason and there's a factual reason.

10 The legal reason is clear. The Respondents made  
11 this argument in the context of our intervention motions.  
12 Fair enough. The intervention statute has a timeliness  
13 requirement.

14 The last time I looked, Your Honor, the  
15 apportionment provision of article 3 section 5 does not have  
16 a time provision. It says that the Court shall hear a case.  
17 That it shall be decided promptly. And that any citizen in  
18 the State can file one.

19 And they cite not a single case where a judge in  
20 this state applied a judicially created timeliness  
21 requirement to apportionment litigation.

22 So, Your Honor, just from a legal perspective,  
23 we're not in intervention land here. And they have to show  
24 you -- this is not my burden. They have to show you that  
25 there is authority for creating one in an apportionment case

dk

## Proceedings

1 where the consequences for our democracy are epic.

2 And they argue all of these equitable doctrines.

3 And that's what I was trying to get to, Your Honor, which is  
4 this timeliness.

5 It wouldn't be fair, Judge, for you to count  
6 timeliness for us, and I can walk through why we were timely  
7 for sure, but it wouldn't be fair for you to count that  
8 against us and not recognize the fact that they  
9 intentionally stood on their -- sat on their hands.

10 They did it on purpose, Your Honor, because the  
11 whole point here is to run out the clock. That's why we  
12 were trying to get in front of the Court so quickly because  
13 they're saying every day that passes, it's more pandemonium.  
14 And every single time, even with today, today they filed a  
15 motion to dismiss. When you asked for papers in response to  
16 our TRO, they didn't even have a return date on their  
17 papers. The Court bounced them. And then two minutes later  
18 they re-filed them with a return date that violated the  
19 Court's order because you said give eight days and they  
20 noticed it for today.

21 Judge, going back to the chaos argument, which is  
22 really important, they were on notice as of March 31st.

23 Talk about us sitting on our hands? The Board of  
24 Elections has a responsibility to the voters of New York to  
25 make sure that they're prepared for an election. And this

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## Proceedings

1 whole problem was a problem of the people that appointed  
2 them to their positions. And I hope that they're going to  
3 act independently and not just simply at the whim of the  
4 people that appointed them.

5 And they did nothing. They could have developed a  
6 contingency plan on March 31st to today. What if somebody  
7 knocks down the Assembly maps, what are we going to do?  
8 They haven't. They put their heads down and rushed forward.

9 Ask them, Your Honor, did you prepare a contingency  
10 plan for the election if some Court shut down the Assembly  
11 on March 31st, can you tell me that you were preparing for a  
12 different scenario on March 31st?

13 They did nothing, because that's what they wanted  
14 all along, Your Honor.

15 So it's like the kid who said, I would have done my  
16 homework if only, fill in the blank. That's exactly what  
17 happened here. And their delay was of constitutional  
18 significance. Ours was an equitable consideration, I guess,  
19 which doesn't matter in this context when the enabling  
20 constitutional provision and the statute do not require  
21 timeliness.

22 But when the bipartisan argument fails, and when  
23 the chaos argument fails, and, Judge, here is where the  
24 rubber meets the road, they actually make the argument that  
25 the maps that they drew unconstitutionally are fair.

dk



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1 I mean, I obviously couldn't believe that I saw  
2 that in the papers, Your Honor, because I really hope that  
3 whatever questions you have for me, you are equally direct  
4 with them.

5 How they can --

6 THE COURT: I am definitely equal opportunity.

7 MR. WALDEN: Thank you, Judge.

8 THE COURT: And whoever is standing in front of me,  
9 there will be some questions, I assure you.

10 MR. WALDEN: Thank you.

11 They said the same thing about the Senate map. And  
12 the Court of Appeals struck it down. And the Special Master  
13 redrew.

14 And, lo and behold, what happened, it did the one  
15 thing, the one thing that's critical to the protection of  
16 our democracy, which is it did not protect incumbent  
17 Independents.

18 The Special Master redrew the Congressional map.  
19 Also deemed fair. All throughout this litigation, it's  
20 fair, it's fair, you should uphold it. New lines were  
21 drawn.

22 Guess what, Your Honor? The same quality to the  
23 maps. It didn't protect the incumbents. The Assembly map  
24 was drawn specifically to protect Democratic incumbent  
25 candidates. It is antidemocratic at its core. And this is

dk

## Proceedings

1 not speculation or guesswork, Your Honor. When I say that  
2 it was rigged, I can give you examples.

3 There was an Assembly man -- an Assembly challenger  
4 in the 37th district in Queens. His name is Huge Ma,  
5 H-U-G-E, M-A.

6 And among other things that he's done, Your Honor,  
7 he actually created a website to allow people to find COVID  
8 vaccine sites. Obviously that's someone that deserves a run  
9 at the polls.

10 And guess what happened to Mr. Ma in these fair  
11 lines that the Legislature crammed through in an  
12 unconstitutional way? Exactly what the voters of New York  
13 were trying to get them not to do from the beginning. They  
14 played with the maps and they rigged the game against  
15 Mr. Ma.

16 Suddenly Mr. Ma wakes up one day and realized that  
17 he can no longer run in the 37th district because his house  
18 has been drawn outside the line.

19 And, Judge, this is all about winners and losers.  
20 Please, we all understand that. Who won in that  
21 circumstance? An incumbent Democrat named Catherine Nolan,  
22 high-ranking person in the Democratic Party, served for  
23 almost 40 years. She won. Who lost?

24 THE COURT: But, I'm sorry, just for that specific  
25 example, isn't she retiring?

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## Proceedings

1 MR. WALDEN: I was just going to get there. Thank  
2 you.

3 THE COURT: Not a problem.

4 MR. WALDEN: Mr. Ma can now no longer run in the  
5 37th district. She's retiring for medical reasons. It was  
6 announced after the maps came out. And Mr. Ma now can't run  
7 in the 37th district, even though he would be a leading  
8 candidate there. That was done to protect the Democrats.

9 So who lost? The voters lost.

10 And another candidate -- they talk so much about  
11 candidate protection. Every time they say it, Your Honor, I  
12 hope that what burns in your ears is not candidate  
13 protection. They don't care at all about challengers. They  
14 care about incumbents. That's what they're here for.

15 That did not protect the candidate, who was a  
16 quality candidate from the 37th district. But he wasn't  
17 alone. Go up to Albany. Sam Fein was trying to run in the  
18 108th district. Somehow the map magically moved his house  
19 out of the 108th into another district. And he had to take  
20 himself off the ballot.

21 THE COURT: But, counsel, the concept of when lines  
22 are drawn, whoever draws them, whether they are from a  
23 special commission, by the Legislature in the past, by a  
24 Special Master, whoever draws the line at a certain point,  
25 the line is drawn within a community, on a county line, or

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## Proceedings

1 meandering up and down in certain sections, where the  
2 criteria that went into how those lines are drawn take in  
3 numerous items in terms of population and trying to, you  
4 know, preserve fairness in terms of racial, you know,  
5 coherence, to keep things -- not coherent, but to keep  
6 things cohesive in terms of certain communities that  
7 hopefully still have a voice.

8 But the bottom line is, even on the current maps  
9 that the Special Master has put out for both the State  
10 Senate and the Congressional, we all know there have been  
11 numerous decisions that were made in that where individual  
12 candidates, whether they are incumbents or just candidates  
13 for the first time planning to run, have found their homes  
14 to be just outside of a certain district, or that they have  
15 now been lumped together with a neighboring district where  
16 the political decisions on whether someone's running in one  
17 place or another have changed.

18 So I guess I'm just questioning the argument to say  
19 that because the Assembly and Legislature, if the  
20 Legislature drew up lines where you're coming up with -- you  
21 can come up with examples where it benefited certain  
22 candidates and hurt other candidates, I guess I'm trying to  
23 say the same exact argument could be put in place for every  
24 single map that the Special Master has put into place for  
25 the Senate and Congressional maps at this time.

dk

## Proceedings

1           There are still -- you know, there are still  
2 candidates out there for some of those offices who are  
3 claiming that there are issues with those maps. And I'm  
4 certainly not looking to dive into that. I'm enjoying  
5 myself just dealing with what's in front of me.

6           But I just think it's a little bit of an unfair  
7 argument to say that the maps were drawn specifically to  
8 keep one person out of one specific district.

9           With that said, you may proceed.

10          MR. WALDEN: Thank you, Your Honor. I appreciate  
11 your perspective.

12          And if your perspective was actually the way the  
13 Respondents were acting, I would be happy with democracy and  
14 I would be moving on to some other pro bono case, right.  
15 That would be great.

16          But, Your Honor, there are two things that are  
17 important. First of all, I have used this adage before, but  
18 I find it useful in these circumstances, if it walks like a  
19 duck, and it talks like a duck, it's a duck.

20          And when you have candidates, and I guess I won't  
21 go through all the list of them, Your Honor, where in race  
22 after race after race and district after district after  
23 district where it just happens to be that the incumbent is  
24 staying in the district and a strong challenger is moved  
25 outside, I think that it does not take a cynical mind to see

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## Proceedings

1 that there's a bad purpose.

2 So their argument that it's fair will require me to  
3 go into lots of examples that will challenge your notion,  
4 Your Honor, but, as a legal matter, again, getting back to  
5 the law, even if that is your presumption, even if you give  
6 Respondents more credit than I did based on the  
7 circumstances, generally, you can't possibly do that here,  
8 Your Honor. You can't cut them slack here. You can't  
9 presume that they operated from good motives because they  
10 intentionally violated the Constitution and then spent  
11 millions of dollars from the public trough to defend an  
12 unconstitutional map, even when there was time to say to the  
13 Fourth Department, no, you know what, you're right, this was  
14 wrong, we did it the wrong way, we've got an obligation to  
15 uphold the Constitution, we're going to go back and do it  
16 right.

17 Instead, what's happening in these courts across  
18 the state is a game. It's blood sport. They're trying to  
19 run out the clock until they create so much delay that the  
20 Court of Appeals even throws up their hands and says, okay,  
21 there's not enough time.

22 I don't think the Court of Appeals is going to do  
23 that, Your Honor. This case is going to go to the  
24 Court of Appeals. And I think the Court of Appeals is going  
25 to hold the Democrats and the Republicans accountable for

dk

## Proceedings

1 their rhetoric because they stand up and they decry voter  
2 suppression in the south and decry rigging in the south, and  
3 they decry ID laws that suppress the vote, particularly  
4 among poor and minority communities in the south, and then  
5 they rig the maps here.

6 And, Your Honor, the manipulations in the map are  
7 not just candidates. And if the Respondents are deluding  
8 themselves into thinking that the intrepid young prosecutors  
9 at the Public Corruption Unit at the US Attorney's Office in  
10 this city are not paying attention to what's going on here,  
11 they're crazy.

12 Your Honor, look at district 61. That was a tried  
13 and true, there's no demographic changes there, right. It's  
14 the same district demographically than it was before. And  
15 they decided to change the map.

16 And what did they do?

17 They snaked along, out of Staten Island, along the  
18 Brooklyn Waterfront, and then went into Manhattan. And,  
19 Judge, do you know how many voters they picked up in  
20 Brooklyn by snaking along the Waterfront? Four. Four  
21 voters. And do you know where they live? On a houseboat.  
22 They picked up four voters on a houseboat.

23 Do you know what they got for that, Your Honor?  
24 Two new Legislative leaders.

25 And do you know who is going to elect those two

dk

## Proceedings

1 Legislative leaders? The four people on the houseboat.

2 Your Honor, this is something of a Banana Republic.

3 This is not the America or the New York that I know.

4 And so this is going to be examined, not just by  
5 this Court, but for all of the deals that resulted in all of  
6 these things that all seem to line up to what every  
7 editorial board in this state knows to be true, which is  
8 this is another Albany game.

9 We've seen it again and again and again. And this  
10 is just the latest incarnation of we're not accountable.  
11 The ends justify the means.

12 So, Your Honor, what I had been saying is that they  
13 have three primary arguments; bipartisan, chaos, fair.

14 None of them are true. None of them are accurate.  
15 And it still begs the question, why are we here, why are  
16 they defending an unconstitutional map?

17 We all know the answer, Your Honor. The editorial  
18 boards have published this again and again and again, and  
19 every corner of the state, Conservative, Democratic,  
20 Liberal, Progressive, whatever you want to say, they're all  
21 lying. They know that this is the incumbent protection  
22 game.

23 The Assembly map was the key prize all along. That  
24 is why it was not challenged in Steuben County.

25 Whatever else happened in the courts, the parties

dk



## Proceedings

1 agreed they did not want anyone reviewing the Assembly map  
2 because the Democrats, for whatever reason, wanted it to be  
3 inviolate.

4 THE COURT: Counsel, which begs the question, and  
5 I'm sure I'll come to this on the other side as well, but  
6 why do you believe they had a different view on the Assembly  
7 maps than the other maps?

8 MR. WALDEN: Well, Your Honor, I don't want to take  
9 too much of your time, but I'll give you the easiest answer.

10 Of all the people who voted against, and, Judge,  
11 again, I'm not giving a civics lesson, so if I go over my  
12 skis, just do this, and I'll shut up. I'm very respectful  
13 in that way.

14 Obviously this amendment grew from, right, it  
15 wasn't some elected official that woke up one day and was,  
16 like, you know what, what we do with these maps is really  
17 unfair, right.

18 There's a long, long history to the amount of  
19 cynicism and anger at the game playing around these lines.

20 It culminated in 2012. But it was 20 years before  
21 that, Judge. And I can go through the history.

22 THE COURT: It's fair to say every time we've gone  
23 through a census and redistricting --

24 MR. WALDEN: I won't.

25 THE COURT: There's a long history in New York and

dk

## Proceedings

1 around the country on that.

2 MR. WALDEN: Yes.

3 THE COURT: We don't need to go through all of  
4 that.

5 MR. WALDEN: But, Judge, yes. I'll leave that  
6 alone.

7 But what is true is New York has positioned itself  
8 as a leader on the anti-voter suppression effort. And in  
9 2012, New York made good on that promise, right, made good  
10 on it by initiating the very long process of two separate  
11 votes in the Legislature, by the voters, enabling statutes  
12 and changes to numerous state laws to make this all happen  
13 and line up. And then they threw it away over the Assembly  
14 maps.

15 And your question is why. And I only have one  
16 answer.

17 You would think that every lover of democracy would  
18 vote for something like that. Who is the one person on the  
19 Democratic, or one of the people on the Democratic side who  
20 cast a vote against this is the current Speaker, Carl  
21 Heastie. He voted against it.

22 So, Your Honor, we all know the history of three  
23 men in a room and all of these manipulations. I can't tell  
24 you, because I'm not in the Assembly, why that line was  
25 drawn, but what I do know is that line is very consistent

dk

## Proceedings

1 with Mr. Heastie's vote in 2013.

2 THE COURT: Okay. I'll just take a step back.

3 The Commission that was created, and passed by the  
4 voters of New York, that created a Commission of ten  
5 members, five Democrats and five Republicans, to do a  
6 certain job that they -- I don't think anyone is arguing  
7 they didn't do the job they were supposed to do, correct?

8 MR. WALDEN: No, Your Honor. They weren't given  
9 the chance to do the job. The job required a very clear  
10 process that was laid out, an alternative. The job was,  
11 submit one map. It gets up or down voted. It got down  
12 voted. Okay. Do another map.

13 THE COURT: Right.

14 MR. WALDEN: And if, and if, and this is the escape  
15 valve that they wrote in to the Constitution, if that  
16 doesn't pass, then there can be an action brought to make  
17 the IRC take a series of actions.

18 Now, I didn't write that, Your Honor. They did.

19 THE COURT: Right.

20 MR. WALDEN: They're just trying to sidestep it.

21 So the idea that I don't think we can blame the  
22 Commission for not doing its job when their job was taken  
23 away from them midstream. We don't know what would have  
24 happened with that second map. We don't know if they would  
25 have hired a Special Master, like Cervas, to say, listen, we

dk

## Proceedings

1 need you to cut through all this political nonsense and put  
2 the voters of the State of New York first and stop our  
3 jockeying for the Incumbent Protection Act.

4 But they decided to do something different. They  
5 snatched it.

6 THE COURT: All right.

7 Counsel, I am going to hear from Respondents  
8 momentarily. I don't want to cut you off. I will let you  
9 finish up if you have any additional argument you want to  
10 make.

11 MR. WALDEN: I do.

12 THE COURT: Go ahead. I'll come back.

13 MR. WALDEN: Let me go to their defenses,  
14 Your Honor. They have a number of defenses; not just one,  
15 but several.  
16 They've essentially used every technicality in the  
17 book. Putting aside this is an issue of the constitutional  
18 amendments on which the Court of Appeals has spoken and  
19 rejected many of the arguments they put forward, let's put  
20 that aside, they have so many technicalities I'm really  
21 surprised that they didn't find a way to challenge or use  
22 semicolons, right. Some of these defenses, Your Honor, are  
23 just ridiculous.

24 Honestly, me, as a private lawyer, if I did it in  
25 court papers and I cited an authority that had nothing to do

dk

## Proceedings

1 with the issues, I think the judges would be very, very  
2 critical and cynical, and maybe even yell at me for doing  
3 it.

4 But I've been surprised, this has nothing to do  
5 with you, that they did this in Steuben County and basically  
6 no repercussions at all.

7 So this -- but one they didn't try in Steuben  
8 County, which is kind of interesting in and of itself, is  
9 the statutory bar issue. They didn't raise that one in  
10 Steuben County. That was an innovation for this one, the  
11 delay tactic.

12 They cite CPLR 5313 for the notion that a Court is  
13 prohibited from restraining a public officer's duties.  
14 Okay. Simple enough.

15 Does that seriously mean that a Court can't direct  
16 a public officer or agency to act within the law, to act  
17 according to the Constitution? Of course not, right.

18 Now, the funny thing about this, Your Honor, it  
19 would be funny, I guess, if the stakes weren't so high, when  
20 they cited this, of course, you know, Mr. Devlin and I were,  
21 like, wait a minute, they didn't cite any case authority.  
22 This is a new argument. We're vaguely aware of this  
23 provision, but we went and looked it up. Oh, there's a lot  
24 of case law. They didn't cite any of it.

25 Let's look at it.

dk

## Proceedings

1 Case after case after case after case says Courts  
2 have the power to direct agencies to act lawfully and  
3 constitutionally despite CPLR 6313.

4 So we said in our reply papers, they didn't cite  
5 any law. But here's the law. Here's the law dating back  
6 even before the CPLR, because this is imbedded in New York  
7 jurisprudence since the 19th century. We actually cited two  
8 cases from the late 1900s.

9 So what do they do? They submit a reply paper.

10 In the reply paper they cite one case, one case  
11 only, DiFare versus Shek. D-I-F-A-R-E, S-H-E-K. It's a  
12 Second Department case from 1974.

13 I'm guessing, Your Honor, in relying on this so  
14 prominently in defense of this they didn't really read the  
15 case. I have a copy of it if you would like.

16 DiFare actually stands for the opposite  
17 proposition. In that case a Yonkers police officer decried  
18 his lowly position on a list for the position of sergeant.  
19 And so he filed an injunction to prevent the appointing  
20 commission in Yonkers from appointing any sergeants from the  
21 people on this list. Okay.

22 There was a problem. The problem is that there  
23 were already two appointments made at the time he filed his  
24 petition. So the lower court dismissed the petition  
25 outright.

dk

## Proceedings

1           The Second Department reinstated the petition. And  
2 then commented in dicta on something that was in the order  
3 to show cause that the Petitioner had filed. And it cited  
4 6313. And it said, you can't request an injunction this  
5 way. It makes reference to an ex parte. But they quote the  
6 language accurately. The problem is it's dicta because the  
7 Court wasn't actually reviewing a decision from the lower  
8 court.

9           But you have to read on, Your Honor.

10           The very next paragraph in the opinion, and I am  
11 going to quote it because it's so clear, the  
12 Second Department did order an injunction against any  
13 further appointments on the list other than the other two,  
14 and the words that they used are, quote, we think it  
15 necessary to restrain further appointments from the  
16 challenged list of eligibles until Petitioner's challenge  
17 thereto has been rebutted.

18           So whatever the force and effect of this seminal  
19 case that is the only one that they cite for their  
20 interpretation of 6313, the case says the exact opposite.

21           But, Your Honor, let's go through the other  
22 defenses. I'll try to do it more quickly. As you can tell,  
23 Your Honor, I love citing cases. I love going through  
24 cases. But I know that your time is important. So I will  
25 answer any -- I've read every single one of their cases.

dk

## Proceedings

1 Any one ask me about and I can discuss it.

2 But they go to this failure to join necessary  
3 parties. This is actually another innovation. They didn't  
4 use this in Steuben County. They only use it here. Here is  
5 their argument.

6 Their argument is that we're effectively trying to  
7 invalidate petitions for specific candidates. Hmmm. Okay.  
8 Where? Where do we say that?

9 The language that they quote is a partial and  
10 misleading quote from something that we said in Steuben  
11 County.

12 Here, we asked for no such relief, Your Honor. You  
13 can look at the order to show cause, paragraph 4. You can  
14 look at the fourth request for relief that's on, I think  
15 it's also on page 4 of our petition. I could be wrong about  
16 that.

17 We don't ask for any petitions to be decertified.

18 What we ask is, and this is completely consistent  
19 with what Judge McAllister did in Steuben County with  
20 respect to the Senate and the Congressional maps, when the  
21 lines are going to be redrawn, candidates are going to be in  
22 very different positions.

23 There are some candidates that may have completely  
24 valid signatures because all of the people that signed  
25 happened to be in the district. There may be other people

dk



## Proceedings

1 that are also okay because they got so many signatures in  
2 addition to the statutory requirements that if they lose  
3 2 percent or 5 percent, it won't make a difference, they  
4 still have a valid petition. Then there will be other  
5 candidates who lose some signatures.

6 And all we were trying to do is give those  
7 candidates a short petitioning period to get additional  
8 signatures to replace the ones that they lost because,  
9 honestly, Your Honor, that's going to happen mostly to  
10 challengers as opposed to incumbents, because the incumbents  
11 get five times the number of signatures and little known  
12 challengers have a little bit more trouble with the  
13 petitioning process.

14 THE COURT: Right. I mean, I think everyone would  
15 say it's fair to say the group that would be most  
16 detrimentally impacted by having to go through petitioning  
17 again will be grass roots or local people, potentially  
18 making a first run or doing it on a limited budget. It's  
19 not a trade secret that incumbents usually have a lot more  
20 support and experience on doing what they need to for the  
21 petitioning process and all of that.

22 So I agree with you, doing this will hurt, for lack  
23 of a better term, it has a potential to hurt the little guy  
24 more than incumbents.

25 MR. WALDEN: What will hurt the little guy more,

dk

## Proceedings

1 Your Honor?

2 THE COURT: Throwing this out and going through the  
3 whole process again and having everyone do new petitions.

4 MR. WALDEN: No, no, Your Honor. No matter what --  
5 first of all, the little guy that you're talking about.

6 THE COURT: Right.

7 MR. WALDEN: They're already harmed by these maps.  
8 Please don't misunderstand. We're talking about a  
9 completely different set of candidates.

10 There are a set of candidates. This is the one I  
11 was going to go through, the laundry list. There are a set  
12 of candidates that were taken off the ballot because the  
13 lines were redrawn. Those are the people that were harmed,  
14 in addition to the voters, by this manipulation with the  
15 Assembly map. All we were trying to --

16 THE COURT: But, also, when you are dealing  
17 specifically with the Assembly maps and the petitioning for  
18 the Assembly maps, it's very rare that you are dealing with  
19 just an Assembly candidate.

20 You're dealing with other candidates for local  
21 positions and to be judicial delegates. There's a host, and  
22 I think that's part of the argument that you're kind of  
23 going through now in terms of Respondents' arguments on lack  
24 of joinder on some parties. I mean, there are literally  
25 thousands of positions across the state that are directly

dk

## Proceedings

1 tied to the Assembly map and the petitioning and everything  
2 that we need to go through.

3 MR. WALDEN: Totally agree, Your Honor. I'm not --  
4 I apologize if I'm losing the thread here a little bit,  
5 Your Honor.

6 Let me say a couple of things.

7 First of all, this issue about joining, you're  
8 right, if they're correct, then the next time that someone  
9 wants to challenge the maps, they put up a completely  
10 artificial barrier that the Court of Appeals is never going  
11 to agree with. And that is that you have to join candidates  
12 that might be, might be adversely affected.

13 We have no idea who could be adversely affected yet  
14 because we haven't seen the maps, right. We haven't seen  
15 the redrawn maps.

16 If you look at the Senate and the Congressional  
17 maps, there were plenty of district lines where there was no  
18 need to change anything at all.

19 What are we supposed to do? What is a Petitioner  
20 supposed to do when carrying out the constitutional mandate  
21 of holding them to the process that the voters agreed on?  
22 Like, literally just everyone.

23 First of all, Your Honor, understand, again, I hope  
24 that you -- I trust that you see through this. They didn't  
25 raise this in Steuben County. There are a lot of candidates

dk

## Proceedings

1 there that would have had to have been joined.

2 So whether they waived it or not, it's clear that  
3 they are raising new arguments that for some strange reason  
4 they didn't raise in the one proceeding where they all  
5 colluded on keeping the Assembly sacrosanct.

6 Also, the solution doesn't fit the problem. The  
7 problem is not the petitions. And no matter what they say,  
8 they cannot point you to language in anything that we've  
9 filed in this proceeding that says invalidate a single  
10 petition. We didn't. Their argument is, well, you may  
11 impact candidates. And that is not the standard,  
12 Your Honor.

13 If you look at their cases, and I can go through  
14 them in great detail, the standard for joining a necessary  
15 party is very clear across the cases.

16 The Court requires that there is -- someone has an  
17 identified arm that is inextricably interwoven with the  
18 litigation. And if there is a candidate that doesn't know  
19 whether he or she will be impacted because they haven't seen  
20 the lines, they have not suffered any sort of injury that is  
21 inextricably interwoven such that reapportionment litigation  
22 will essentially turn into a free-for-all where every single  
23 one that wants to hold up the Constitution has to name  
24 thousands and thousands of candidates as necessary parties.

25 Can you imagine what that's going to do to the

dk

## Proceedings

1 Court? Can you imagine what that's going to do to the  
2 resource of these candidates that now don't even know if  
3 they're impacted, but they've got to use campaign finance  
4 funds to come into court to appear because now they've been  
5 named? That would be completely unworkable. And there's  
6 not a single case to support it, not one.

7 So, Your Honor, these defenses that they talk  
8 about, the laches case, this is, like, the idea that they're  
9 citing Schultz for laches -- again, Judge, I'm really  
10 getting close to the end.

11 THE COURT: Go ahead.

12 MR. WALDEN: I'm really getting close to the end.

13 The laches argument is kind of a funny one. Again,  
14 they have to prove prejudice for laches to apply. And they  
15 have no prejudice.

16 They talk about burden. But burden is not  
17 prejudice within the meaning of the law. Prejudice is their  
18 rights were adversely affected, not it's going be harder.

19 Somebody is not prejudiced when the Court orders  
20 them to pay a \$10,000 fine that the judge thinks is  
21 appropriate. They're burdened, but they're not prejudiced.  
22 They have to spend money and they have to do a lot of things  
23 over again. That's burden. That's not prejudice in the  
24 legal sense of the word.

25 So laches is off the table for that reason and that

dk

## Proceedings

1 reason alone.

2 But they cite Schultz, like Schultz, the only case  
3 for laches. And I'm sure Your Honor read it. I read it as  
4 well. A case where there was a law that allowed public  
5 financing for many agencies across the state. The law went  
6 into effect. The government amassed this incredible  
7 infrastructure, spent millions of dollars to issue these  
8 bonds. And the bonds were issued. Hundreds of millions of  
9 dollars, including bonds that went to some of the most  
10 sophisticated financial institutions in America.

11 Money came into the State of New York, hundreds of  
12 millions of dollars, from these bonds. Petitioner sat on  
13 their hands. Petitioner sat on their hands and waited until  
14 all of the bonds were issued and only then brought a  
15 constitutional challenge that ultimately the Court found  
16 they had not shown. They had not preserved, right.

17 So the constitutional issue wasn't addressed in the  
18 merits in the decision they cited. But there is a  
19 corresponding opinion where the Court says, and, by the way,  
20 now we want to say something about this. They didn't even  
21 preserve this constitutional challenge all along.

22 In those circumstances, the Court applied the  
23 laches doctrine and said, listen, there's been -- there will  
24 be so much financial and reputational damage to the State of  
25 New York for your delay, right, because it was their delay.

dk

## Proceedings

1 They waited until all this was done. That's where they  
2 apply laches.

3 The damage, financial and otherwise, that is being  
4 done to the State of New York now was done by the  
5 Respondents because they acted unconstitutionally and in the  
6 manner that was intended to benefit incumbents.

7 They raise some other defenses. If you have any  
8 questions about any of them, I'm more than happy to address  
9 them.

10 I would, Your Honor, because you've been very  
11 patient with me, I would like to conclude.

12 THE COURT: I am going to ask one other brief  
13 topic. Then I will turn to Respondents and may come back to  
14 you.

15 You wave your magic wand and I grant everything  
16 that you're looking for, okay. And it goes up --

17 MR. WALDEN: Judge, my legal pen, not my magic  
18 wand.

19 THE COURT: It goes up to the Appellate Division,  
20 and in all likelihood the Court of Appeals, and you get  
21 everything that you are looking for. And so the  
22 Special Master now has to be appointed, go through all of  
23 this in detail again, and come up with appropriate maps, go  
24 through some level, even if it is an expedited process, some  
25 level of an expedited review with some public comment, and

dk

## Proceedings

1 puts out that, congratulations, these are the new maps for  
2 the State Assembly and everything now needs to get started.

3 As you know, at this point, military ballots were  
4 issued on the 13th.

5 MR. WALDEN: Not relevant here. That's  
6 Congressional.

7 THE COURT: Correct.

8 Election processes have already begun. I think  
9 even you would have difficulty standing here today and  
10 arguing that if you got everything that you were hoping to  
11 get, that it would be realistic to do the primary on the  
12 August date that is currently out there for the  
13 Congressional and the State Senate.

14 So you are probably talking about, even in a best  
15 case scenario, of something being done in September. Is  
16 that fair to say?

17 MR. WALDEN: Well, you said a lot there,  
18 Your Honor. You said something like I would have trouble  
19 arguing something. The answer to that question is no, I  
20 won't have trouble arguing at all.

21 Again, Your Honor, you have a lot of discretion.  
22 And they want to make it seem like, oh, my God, this is  
23 going to be a train wreck. Of course they want you to buy  
24 that argument, because that goes along with dragging this  
25 out, putting the burden and expense on us to go up the

dk



## Proceedings

1 chain, when we all know what the Court of Appeals is going  
2 to say because they've said it already.

3 THE COURT: Counsel, it was essentially a  
4 three-month plus process from when the initial lawsuit was  
5 filed in February in this matter until there was a decision  
6 by the Court of Appeals on April 27th, that then resulted in  
7 a fairly quick process with the Special Master releasing  
8 Congressional and Senate maps over the course of this  
9 weekend. It's today, May 23rd, the first working day since  
10 that has occurred. So all of March, all of April, all the  
11 way through May. So it's three plus months to get that done  
12 with an August date being set as a primary.

13 MR. WALDEN: Your Honor, we can get to maps. And  
14 if you order a TRO today -- first of all, Your Honor, please  
15 don't count the week since we filed against us.

16 And, honestly, the intervention was on our rights.  
17 So a lot happened in that period of time. And you know full  
18 well that some measure of those things they did in order to  
19 be able to make this argument. So I hope you hold them to  
20 account for that.

21 THE COURT: I understand. And I've also read  
22 Judge McAllister's decision in detail when he turned down  
23 the intervention request because, in short, I am not going  
24 to quote through all of it now, but in short a lot of what  
25 he had to say was allowing this issue to be dealt with at

dk

## Proceedings

1 the same time by a Special Master, who was already up to  
2 speed and dealing with a Congressional and State Senate map,  
3 he said there simply would not be enough time and that doing  
4 all of that would further delay the process. And, as he  
5 pointed out, it all still goes back to that March 2nd date  
6 when the first actions began.

7 MR. WALDEN: Your Honor, I don't think that's what  
8 Judge McAllister said respectfully, Your Honor. What he  
9 said was, it would cause too much confusion in light of this  
10 case. Nothing stops you from filing, nothing, he said it  
11 twice, stops you from filing your plenary action.

12 THE COURT: I agree. I one hundred percent agree  
13 Judge McAllister clearly said you couldn't intervene in this  
14 case, but you could start a separate standalone case, which  
15 is why we're here today, which is fine. I'm not disputing  
16 your right to have brought it.

17 But I can't get away from a lot of the language he  
18 used when he denied the intervention. And, here, he was a  
19 judge who was most familiar with everything that was going  
20 on on the redistricting, already had an established  
21 relationship with a Special Master, who he was comfortable  
22 using for this process. And that Special Master was  
23 obviously already doing a lot of the work. So he had a  
24 tremendous head start on something that was already in a  
25 short window.

dk

## Proceedings

1           But, nonetheless, even with those circumstances,  
2           let's remember, Judge McAllister, at the outset, sua sponte  
3           had thought the Assembly lines should be part of the mix,  
4           you know, in the first place. And it went through the  
5           Appellate Division. And the Court of Appeals issued the  
6           decision that they did.

7           There was nothing that was stopping  
8           Judge McAllister at that stage from saying, okay, I already  
9           had this finding, I'm going to stick with it, and now let's  
10          add the Assembly into the pile.

11          So that opportunity was there a couple of weeks ago  
12          for that to have occurred. And a good part of the reason  
13          that he rejected the intervention, while at the same time  
14          saying you could file a new case, but a great part of the  
15          reason he rejected it was because going through that process  
16          would necessitate probably a further delay on the  
17          Congressional and the State Senate part.

18          MR. WALDEN: Well, Your Honor, you said quite a bit  
19          there, Your Honor, so I'm not sure what you want me to focus  
20          on, but even if, for no other reason, if you just let me  
21          make the record on a couple of things.

22          THE COURT: That's fine. I will let you do that.

23          MR. WALDEN: I have a very brief concluding  
24          statement.

25          THE COURT: That's fine.

dk

## Proceedings

1 MR. WALDEN: Thank you. I appreciate that.

2 So, first of all, I said this, this argument of  
3 burden on the election, it's not before the Court because  
4 there is no timeliness requirement under the Constitution.  
5 The Constitution doesn't say you have to do these things  
6 unless it's really hard. It says you have to do them.

7 So, Your Honor, I think on that basis alone, if the  
8 Court were to deny the TRO based on burden, especially when  
9 there's no prejudice, they're going to get up here and say  
10 burden, burden, burden. They're going to say prejudice, but  
11 it's not. They created the burden. That's the unclean  
12 hands doctrine. They can't complain about the burden that  
13 they self created.

14 So legally, Your Honor, I don't think you can  
15 consider this. Factually, Your Honor, I don't think that  
16 you should. And, most importantly, it's illusory.

17 You could simply move back, even if it was just the  
18 Assembly, it would be confusing to have three primaries, but  
19 at least it would be constitutional, you could move back the  
20 Assembly race alone, which has other, as you've said,  
21 fairly -- has other collateral races that are tied to the  
22 Assembly, that would give the Board of Elections plenty of  
23 time, right. Ask them for specifics on why that's not  
24 possible.

25 THE COURT: I intend to.

dk

## Proceedings

1 MR. WALDEN: Thank you.

2 THE COURT: That will be part of what we're doing  
3 today.

4 MR. WALDEN: Your Honor, what they have said in all  
5 these affidavits and what they said to Judge Steuben was all  
6 these generalities, oh, there's so much burden, there's so  
7 much burden, and it's extreme. They blame us for it. But  
8 they never say, okay, if we really -- because think about  
9 the timing, Your Honor, they have from May 20th to  
10 August 23rd to do these, three months. If we get the maps  
11 in two weeks, they will have three months to do the Assembly  
12 race in September. If they can do one race, and this is  
13 where the Court of Appeals' decision is so important,  
14 Your Honor, the time period is virtually identical.

15 So this whole issue -- aside from the reasons I  
16 have given you, this whole argument is made up. They're  
17 trying to be as general as possible, hoping against hope  
18 that some judge is, like, I don't need to dig into the  
19 details.

20 And the details here are important if they're going  
21 to to meet -- satisfy their burden for a legal standard,  
22 laches, which doesn't apply here.

23 I'm going to wrap up, Your Honor. I'm going to get  
24 to the TRO standards. This will be two minutes or less.

25 The issue before the Court is really only this

dk

## Proceedings

1 issue, is there a likelihood of success on the merits, is  
2 there irreparable harm, and what is the balance of equities.

3 On likelihood of success on the merits, we all know  
4 what the Court, of course, is going to do. They have  
5 already spoken. We are going to win on the merits. They  
6 don't seriously contend otherwise.

7 On irreparable harm, the Court of Appeals has been  
8 extremely clear that if you allow an election to go over --  
9 go forward on unconstitutional maps, that is a  
10 constitutional injury to voters. So that satisfies  
11 irreparable harm.

12 And now we're just down to the balance of equities.  
13 They say to us, you've delayed, right. We say to them, you  
14 intentionally broke the law, you're violating your oaths by  
15 even defending this litigation, and you certified, which is  
16 now going to be before a judge in Albany, an  
17 unconstitutional map, even though the Court of Appeals could  
18 not award relief because of the procedural gamesmanship.  
19 The Board of Elections can't just simply willy-nilly ignore  
20 the Court of Appeals, right.

21 They should have said, sorry, game over, we're  
22 going to do our jobs. They didn't.

23 So, Your Honor, I'm begging you, please, on behalf  
24 of the voters of New York and every candidate that was  
25 rigged off the bid by these shenanigans, for the Court to

dk

## Proceedings

1 say, not on my watch. Their tactics are more informed by  
2 Darwin than Mill, right.

3 The voters here are what count. The excluded  
4 candidates are what count.

5 I beg Your Honor to keep them at the forefront of  
6 your mind when you are listening to the Respondents'  
7 arguments.

8 Thank you. Thank you for all the time, Your Honor.

9 THE COURT: Thank you, counsel.

10 Counsel, I am just going to -- I want to take a  
11 short break so that everyone can stretch their legs,  
12 including the court reporter.

13 We are going to take a five minute or so recess.  
14 Then we will resume with Respondents' argument.

15 (Whereupon, a recess was taken.)

16 COURT CLERK: Come to order.

17 THE COURT: You may all be seated.

18 We'll turn now to counsel for Respondents.

19 Whatever order you wish to proceed. I know the  
20 Governor was first named. We can proceed from there.

21 MR. FARBER: Thank you, again, Your Honor. Seth  
22 Farber, with the Office of the Attorney General, for  
23 Governor Hochul.

24 Your Honor's questions indicate that you have a  
25 thorough understanding of what is going on here.

dk

## Proceedings

1 Counsel for the Petitioners asked the question of  
2 who caused the chaos. And not to answer a question with a  
3 question, except I will, who brought this case on May 15th?  
4 Who didn't bring this case on May 2nd or May 3rd --  
5 February 2nd or February 3rd, when the Steuben County  
6 litigation got started, or in the month of February, in the  
7 month of March, or even in the month of April, after the  
8 Fourth Department and the Court of Appeals had decided this  
9 case?

10 Instead, they waited to intervene until the  
11 beginning of May, when the Supreme Court Justice in Steuben  
12 County, who has lived with the redistricting issues since  
13 February, concluded that, notwithstanding his own view on  
14 the Assembly maps, the attempts at intervention at that  
15 point were too late.

16 So, instead, they come to this Court and put this  
17 all on you, at this late hour, after military ballots have  
18 gone out, numerous other preparations for the election,  
19 including the printing of approximately 700,000 ballots that  
20 would have to be destroyed, unknown numbers of military  
21 ballots would have to be discarded, and military voters  
22 disenfranchised. Why? Because Petitioners have waited  
23 until now to bring this case.

24 Another matter not discussed in argument is that  
25 the relief sought is a lot more than simply invalidating the

dk



## Proceedings

1 Assembly maps. And even invalidating petitions or redoing  
2 petitions for other offices that are tied with Assembly  
3 maps, relief is also sought to literally cancel and  
4 reschedule the June primary altogether for all offices, not  
5 just the Assembly, but including statewide offices,  
6 including Governor, for which, well, one of the Petitioners  
7 advises that they were an unsuccessful candidate for. It's  
8 not addressed in argument, but, nonetheless, what is before  
9 the Court.

10 All of these issues could have been addressed for  
11 months, but are brought now, literally at the twelfth,  
12 thirteenth or fourteenth hour, because the election is  
13 underway now.

14 I have no doubt that my colleagues for the State  
15 Board of Elections, for Speaker Beastie, for the Senate  
16 Majority Leader Cousins, can go into more detail on these  
17 points.

18 But under the circumstances, Your Honor, at this  
19 late hour, even as Justice McAllister noted, chaos would be  
20 caused as a result of interfering with the election process  
21 at this hour.

22 If Your Honor has no further questions, I'll defer  
23 to my colleagues.

24 THE COURT: All right. Thank you, counsel. I will  
25 hear from your colleagues as well.

dk

## Proceedings

1 MR. FARBER: Thank you, Your Honor.

2 THE COURT: Counsel on behalf of the Assembly  
3 Speaker.

4 MR. BUCKI: First off, would Your Honor prefer I  
5 stand here or at the podium?

6 THE COURT: I think between all the Plexiglas and  
7 stuff, it would be perfectly fine if you stand there, it is  
8 a little closer, as we continue to navigate the joys of our  
9 current COVID universe.

10 MR. BUCKI: Certainly, Your Honor.

11 Where I would like to begin is a point that is  
12 similar to where I began my presentation at Steuben County  
13 Supreme Court on the intervention motion.

14 I have to call out Mr. Walden again for the  
15 numerous irresponsible accusations that he makes as an  
16 officer of this court. I can get past all of his sarcasm  
17 because I've dealt with many sarcastic lawyers in the past.  
18 What I can't get past is when he accuses people who take a  
19 constitutional oath of office in the New York State Assembly  
20 of things like voter suppression, without any evidence, when  
21 he says that there are going to be Federal investigations,  
22 that the FBI and public integrity units are going to become  
23 involved, and he doesn't offer any kind of evidence, when he  
24 says that Legislators are violating their Congressional  
25 oaths of office, and he doesn't offer any evidence.

dk

## Proceedings

1                   Where we should be focused on this special  
2 proceeding is on the law, rather than making wild  
3 accusations and delving into the kind of conspiracy theories  
4 that the Courts are supposed to stay away from.

5                   And so with that in mind, I would like to begin by  
6 saying that contrary to what Mr. Walden says, I would submit  
7 to this Court that this case has nothing to do with the  
8 Constitution for these Petitioners. This case has nothing  
9 to do with democracy for these Petitioners.

10                   Rather, this case needs to be viewed through the  
11 prism of the fact that all three of these Petitioners have  
12 grievances with either the New York State Board of Elections  
13 or the New York State Assembly.

14                   And that's the reason why this proceeding was not  
15 brought until May 15th. That's why we didn't have  
16 litigation in February or March or April, because now they  
17 have beefs with either the Board of Elections or the  
18 Assembly, and so this is their way to get back at them. And  
19 they have the money to do it. They have the money to hire  
20 Mr. Walden and Mr. Foldenauer. So that's what this case is  
21 really all about.

22                   And I would boil down the interests of the  
23 Petitioners to three words, correction, attention, and  
24 coercion.

25                   Now, with respect to Mr. Nichols, this proceeding

dk

## Proceedings

1 is all about correcting his mistakes that he made in his  
2 race for Governor because he needed to get a certain number  
3 of signatures to get onto the primary ballot. And he simply  
4 didn't get enough valid signatures. So the State Board of  
5 Elections ruled him off the ballot.

6 And then Mr. Nichols brought a lawsuit in Albany  
7 County Supreme New York, which he discloses nowhere in the  
8 petition, nowhere in the supporting papers, and he brings  
9 this case in Albany, but his problem was, he botched the  
10 service of the petition. And because he botched the  
11 service, therefore, the case was dismissed on May 12th.

12 And so he had the opportunity to take an appeal  
13 from that decision on May 12th in an effort to try to get  
14 the Third Department to restore his candidacy, but for  
15 whatever reason, he decided he wasn't going to take that  
16 appeal. And therefore was going to try to bring this  
17 proceeding as kind of a collateral attack on the fact that  
18 the Board of Elections threw him off the ballot. And he  
19 couldn't even get the service right for his lawsuit.

20 So that's the motivation of Mr. Nichols.

21 With respect to Mr. Wax, his motivation is  
22 attention.

23 Why else would we have tweets from Mr. Wax going  
24 back to February calling Republican Assembly members weak  
25 and pathetic and saying all these guys, referring to members

dk

## Proceedings

1 of the State Assembly, care about is keeping their pension.

2 You know, he's a conservative commentator. He's a  
3 conservative activist. He can't get on Fox News, so he goes  
4 on One America News, which is to the right of Fox News, to  
5 offer his opinions. And in this day and age, the more  
6 outlandish the opinion, the more attention that you get.

7 And so I would submit that for him, this lawsuit is  
8 all about getting attention and sticking it to the  
9 Republicans in the Assembly with whom he has grievances, as  
10 he has set forth in Twitter.

11 In the case of Mr. Greenberg, this lawsuit is all  
12 about coercion, because time and again, particularly in the  
13 last few weeks, he has been attacking the Assembly on  
14 Twitter, he has been tagging the Speaker on Twitter, because  
15 he is very passionate about a piece of legislation called  
16 the Adult Survivors Act with respect to adult victims of  
17 sexual abuse, and he has policy differences personally as  
18 opposed to what has been proposed in the state legislature.

19 And so time and again he is saying we need to have  
20 a taxpayer supported fund for different kinds of adult  
21 survivor claims.

22 And there is, I think, at least I perceive,  
23 disagreement between what Mr. Greenberg thinks ought to be  
24 done and what the Legislature is hoping to do during what  
25 remains of this session.

dk

## Proceedings

1           And so rather than hire a lobbyist, which maybe  
2           he's done, I'm not sure about that, but rather than go  
3           through the legitimate channels of persuasion to try to  
4           achieve the result legislatively that he's hoping to  
5           achieve, he brings this lawsuit to coerce the Assembly and  
6           to hold the political process hostage so he can get what he  
7           wants on this bill that is very important to him.

8           So I would submit that all of this explains why  
9           this proceeding wasn't brought in February or March or  
10          April. These are newfound grievances that all three of  
11          these Petitioners have.

12          And so the question this Court needs to ask itself  
13          is, will they allow these grievances to grind the electoral  
14          system in the State of New York to a halt.

15          And I would submit that the answer is no.

16          Mr. Walden called the arguments that are made by  
17          the State Assembly in support of its motion to dismiss  
18          cynical and craven.

19          My response is that what I think is truly cynical  
20          is that Mr. Walden made the same arguments before  
21          Justice McAllister in support of his intervention motion,  
22          and Justice McAllister, whom this Court rightly notes, back  
23          on March 31st did sua sponte invalidate the Assembly  
24          district lines, there were appeals that followed, and on  
25          those appeals the Fourth Department said, we're leaving the

dk

## Proceedings

1 Assembly lines alone. The Court of Appeals said, we're  
2 leaving the Assembly lines alone.

3 And so Mr. Walden went to Steuben County back on  
4 May 10th and tried to argue in support of intervention, and  
5 intervention was denied because, as Justice McAllister noted  
6 in his decision, to allow intervention on May 10th, and, by  
7 the way, we're already at May 23rd, but back on May 10th,  
8 Judge McAllister said allowing intervention would create  
9 total confusion.

10 And I would submit, Your Honor, nothing has changed  
11 since May 10th, except that now we're not at May 10th  
12 anymore. We're at May 23rd. And so whatever confusion  
13 there would have been by allowing intervention on May 10th  
14 is only compounded with every passing day that goes by.

15 THE COURT: But I will, counsel, just briefly,  
16 although I agree Judge McAllister did have those findings,  
17 and there was a large part of it rationale for denying their  
18 intervention at that time, he did, as Petitioners pointed  
19 out, he did go on to say that the parties were free to file  
20 a new suit, specifically on the Assembly issue, which is  
21 what brings us here today. He did not just issue a blanket  
22 ruling of saying too little, too late at that time.

23 So the fact that he still believed at that point,  
24 he obviously didn't issue a ruling on the substance of it,  
25 but that he essentially opened the door and invited

dk

## Proceedings

1 Petitioners to consider further legal action, what is your  
2 response to that?

3 MR. BUCKI: I wouldn't say that Judge McAllister  
4 made any kind of invitation of anything.

5 What Judge McAllister said was, these proposed  
6 intervenors, which at the time were Mr. Wax and  
7 Mr. Greenberg, they can bring a separate lawsuit and they  
8 didn't need Justice McAllister's permission to bring a  
9 separate lawsuit.

10 And when I counsel clients about, you know, is it  
11 possible that I'm going to get sued, what I like to say is,  
12 anybody can sue anybody else over anything at any time.  
13 There's no doctrine or decree that says you cannot sue  
14 somebody.

15 But when you decide to bring a separate action and  
16 commence a separate lawsuit, you need to be prepared to  
17 address any of the defenses that might be raised to that  
18 lawsuit; equitable defenses, defenses concerning necessary  
19 parties, defenses concerning standing, defenses concerning  
20 timeliness.

21 And the fact is, if the Assembly map was going to  
22 be challenged, notwithstanding whatever the Court of Appeals  
23 may have said in a footnote, the challenge needed to be made  
24 in the right way in order for it to have any effect.

25 And a good example, which I also raised in the

dk



## Proceedings

1 argument before Judge McAllister, is what happens in cases  
2 involving suits seeking to address illegal or  
3 unconstitutional government action such as, say, a land use  
4 dispute, an issue that arises under the State Environmental  
5 Quality Review Act.

6 You have a very narrow statute of limitations in  
7 which to make your challenge. Sometimes it's four months.  
8 Sometimes it's maybe 60 days. Sometimes it can even be as  
9 little as 30 days. Or, under the Election Law, as little as  
10 14 days.

11 And we're going to get to that statute of  
12 limitations in a minute.

13 So all the time it happens that matters that are  
14 substantively illegal or substantively unconstitutional are  
15 allowed to stand because they're not challenged timely,  
16 because they're not challenged using the proper procedure.  
17 And so when Mr. Walden says at the beginning of his more  
18 than an hour long presentation how can the Assembly defend  
19 these lines, I can tell Your Honor how we can defend it.

20 Number one, because the Court of Appeals had an  
21 opportunity to invalidate the Assembly map and it declined  
22 to do so.

23 And, furthermore, that there are a whole host of  
24 issues relating to timeliness and necessary parties and  
25 standing, et cetera, and we're going to go through every

dk

## Proceedings

1 single one, that make this challenge not a challenge that  
2 can be countenanced at this point in time.

3 And so we offer a variety of defenses. And I would  
4 say that any one of them independently has sufficient merit  
5 to justify dismissing this lawsuit.

6 And the first one is laches.

7 I can hardly believe my ears to hear Mr. Walden  
8 claim that somehow there is no limit, either as a matter of  
9 equity or as a matter of statute, with respect to timeliness  
10 of bringing a claim such as the one that's brought in this  
11 petition.

12 If that were true, then there would be no reason  
13 for any kind of statute of limitations at all.

14 And under the law of equity, it is a well-known  
15 principle that those who seek equity must do equity.

16 And the last people on earth in this case who did  
17 any kind of equity at all were Mr. Nichols and Mr. Wax and  
18 Mr. Greenberg because while all of the proceedings were  
19 going on in Steuben County Supreme Court, with the  
20 Petitioners and counsel for the Legislative leaders and  
21 counsel for the Governor, having a trial, having expert  
22 testimony concerning a variety of very complex technical  
23 issues relating to the redistricting process, what were  
24 Mr. Wax and Mr. Greenberg doing? They were tweeting, rather  
25 prolifically. They were hiding behind their computers in

dk

## Proceedings

1 their basement offering all kinds of commentaries on the  
2 lawsuit.

3 THE COURT: I would just ask you, the bench trial  
4 that was held before Judge McAllister, approximately how  
5 long did that bench trial last?

6 MR. BUCKI: So the first day of argument on motions  
7 in the trial took place on March 3rd.

8 And, in fact, we have copies of Mr. Greenberg's  
9 tweets where he was actually live tweeting and copying  
10 commentaries made by others who were tweeting about the  
11 proceedings because they were live streamed, so anyone who  
12 wanted to watch the proceedings. So Mr. Greenberg was well  
13 aware of what was going on, not to mention the fact that he  
14 was posting copies of the pleadings on Twitter.

15 THE COURT: No, no. That I'm aware of in terms of  
16 the timeline. I saw that in the various papers filed.

17 MR. BUCKI: Certainly.

18 So March 3rd was the first day of argument on  
19 motions. And then March 14th, I believe it was, was a  
20 Monday. And so we had testimony on the 14th, the 15th, and  
21 the 16th, with the possibility of the 17th, but we didn't  
22 have to go over to the 17th.

23 And then there still needed to be closing  
24 arguments. And the closing arguments took place in person  
25 in Steuben County on March 31st. And there was a decision

dk

## Proceedings

1 later that day. So effectively, when you add up the  
2 different court appearances, it amounted to five days.

3 THE COURT: Right.

4 MR. BUCKI: And then the appellate process followed  
5 from that.

6 So there was ample opportunity for Mr. Wax and  
7 Mr. Greenberg to commence a proceeding or to intervene at  
8 that earlier point in time when all of these issues could  
9 have been hashed out concerning not only the Congressional  
10 map and the Senate map, but also the Assembly map too.

11 And why that's important also is that back in  
12 February and in March, there had been no designating  
13 petitions filed anywhere in the State of New York. Those  
14 filings didn't happen until April 4th through 7th.

15 So Mr. Walden says why is it that these arguments  
16 concerning necessary parties were not raised in the original  
17 Harkenrider proceeding in Steuben County that was begun in  
18 February, because there had been no petitions filed, and so,  
19 therefore, there were none of these candidate necessary  
20 parties who could have been named because you don't know who  
21 your candidates are going to be whose rights might be  
22 inequitably affected until these individuals' petitions  
23 would have been filed.

24 So for Mr. Walden to say that we're somehow  
25 imposing that draconian burden upon the Petitioners to make

dk

## Proceedings

1           them sue all kinds of candidates, that's a burden they  
2           themselves created. Because if they had brought this  
3           lawsuit in February, there would have been no need to name  
4           any of these other candidates because no petitions would  
5           have been filed yet at that time.

6                     And so, really, it was the delay on the part of the  
7           Petitioners that leads us to this point.

8                     And, of course, laches, an equitable doctrine,  
9           equals delay, plus prejudice. We certainly have the delay.

10                    And in terms of the prejudice, here's the prejudice  
11           that we have. First of all, prejudice to candidates. And  
12           we're not just talking about candidates for State Assembly.  
13           We're talking about candidates for district leader in  
14           New York City, for State Democratic Committee, for county  
15           party committee, because you have to run in the Assembly  
16           district where you live. And then, finally, and perhaps  
17           most critically with respect to time frame, candidates for  
18           delegates and alternate delegates to the various judicial  
19           nominating conventions.

20                    And Mr. Walden claims that we're not looking to  
21           invalidate any kind of candidacies. And so, therefore,  
22           there's no need for any of these candidates to be worried,  
23           for any of these thousands of different positions throughout  
24           the State of New York.

25                    Well, let's look at the relief that is sought by

dk

## Proceedings

1 Mr. Walden in his petition. The words speak for themselves.

2 He says in the petition that the Petitioners are  
3 looking to enjoin Respondents, quote, to open designating an  
4 independent nominating petition periods for statewide  
5 Congressional, State Assembly, State Senate and local  
6 offices with deadlines sufficient to obtain new designating  
7 petition signatures.

8 So, in fact, even if candidates aren't necessarily  
9 going to be disqualified, Mr. Walden is asking for the  
10 petitioning period to be reopened for candidates for all  
11 kinds of offices to have to get new signatures.

12 And I would submit that that is a way in which  
13 these candidates are going to be prejudiced and inequitably  
14 affected because, as of right now, candidates for all of  
15 these various offices that I mentioned, they know what  
16 districts they're running in, they know they filed their  
17 petitions from April 4th through 7th, they know, if they  
18 haven't been thrown off the ballot, that they've satisfied  
19 the signature requirements, they know if they have a  
20 primary, they know who their primary opponent is going to  
21 be, or if they don't have an opponent, they know that they  
22 don't have a primary opponent.

23 So by granting the relief that Mr. Walden asks for  
24 at this late date, all of these assumptions that are baked  
25 into the decisions that have been made by the Boards of

dk

## Proceedings

1 Elections are going to go up in smoke.

2 And so now candidates may go from having no race,  
3 to perhaps having a race, from thinking they've gotten  
4 enough signatures to now needing to get more.

5 These are all the reasons in which candidates, for  
6 a variety of these positions, not just State Assembly, are  
7 going to be inequitably affected because Assembly districts  
8 are the building blocks pursuant to which other offices are  
9 elected.

10 That's why the New York State Democratic Committee,  
11 elected from Assembly districts. Judicial delegate and  
12 alternate, elected from Assembly districts. Where you can  
13 run for county committee, determined by your Assembly  
14 district.

15 So this isn't just about getting rid of Assembly  
16 districts. By getting rid of Assembly districts, and having  
17 a brand-new map, you affect all of these races and all of  
18 these thousands of candidates where a whole variety of  
19 offices are going to be prejudiced.

20 And Mr. Walden simply discounts that. And we would  
21 submit that that's wrong.

22 That's the first way candidates are prejudiced.  
23 And that applies whether you're an incumbent or a  
24 challenger.

25 THE COURT: Counsel, I will let you continue in a

dk

## Proceedings

1 moment.

2 MR. BUCKI: Sure.

3 THE COURT: But just hypothetically, if what  
4 Petitioner was seeking was granted and officially a new  
5 primary date was being set for sometime in September  
6 because, as I mentioned, I cannot fathom how we could get  
7 through that, even that potential hypothetical, following  
8 the same August dates that are in place for the Senate and  
9 Congressional races, do you believe, and I will hear  
10 obviously from the Board of Elections as well, but do you  
11 believe in your opinion that it would be possible to get all  
12 of that together for a September primary?

13 MR. BUCKI: Absolutely not. And here's an example  
14 as to why.

15 Under UOCAVA, Uniformed and Overseas Citizens  
16 Absentee Voting Act, the absentee ballots need to be sent to  
17 our overseas citizens and our men and women serving our  
18 country in uniform 45 days before the general election.

19 And the general election this year is scheduled for  
20 November 8, 2022. There is no changing that date.

21 And 45 days before November 8th is September 23rd.  
22 So the ballots need to be sent to all of these people  
23 overseas September 23rd.

24 And yet Mr. Walden proposes a September 13th  
25 primary date. And, as Your Honor knows, sometimes elections

dk



## Proceedings

1 are close. You may think that you will get a result on  
2 election night. But, as recent history has shown, sometimes  
3 you can have elections that take weeks to be decided, like  
4 the race for district attorney in Queens back in 2019.

5 And so a ten-day window from a September 13th  
6 primary to a September 23rd date for sending out all of  
7 these absentee ballots is simply unworkable because of the  
8 prospects of having close races.

9 In addition, what cannot be forgotten is the need  
10 to finalize the ballot for New York State Supreme Court. So  
11 if you have primary races on September 13th to choose  
12 delegates to judicial nominating conventions, those  
13 primaries, inasmuch as they take place, the winners need to  
14 be certified. And then you actually need to have the  
15 judicial nominating conventions. And you don't know who the  
16 candidates for State Supreme Court are going to be until the  
17 nominating conventions are actually held.

18 So only once those conventions are held can ballots  
19 be actually printed listing the names of the candidates for  
20 State Supreme Court. There simply is not enough time. Not  
21 to mention that it's already enshrined in statute that the  
22 judicial nominating conventions are supposed to take place  
23 during the early part of August.

24 So those are two examples that demonstrate why the  
25 September 13th primary date that they propose is simply

dk

## Proceedings

1 unworkable.

2 And what the Petitioners forget is that UOCAVA, the  
3 Federal statute, is a relatively recent creation.

4 The reason why we were able to have primaries in  
5 the State of New York in September for so long is that for  
6 many years there was no UOCAVA statute. And, in fact,  
7 absentee ballots were routinely sent to people no matter  
8 where in the world they were located in the month of  
9 October.

10 But the Federal Government stepped in and said, we  
11 want to have a statute that standardizes nationwide when  
12 people in the military are supposed to get their absentee  
13 ballots. And so that's why we have that statute now.

14 And that statute places a firm limit on the ability  
15 of the State Board of Elections to send absentee ballots --  
16 I should say to finalize absentee ballots any later than the  
17 date that is set by the UOCAVA statute.

18 And that is why the calendar that the Petitioners  
19 propose is simply unworkable.

20 THE COURT: Counsel, to pick up on that, because as  
21 you just mentioned, within New York State it was fairly  
22 common that primaries used to take place in September for a  
23 long period of time.

24 MR. BUCKI: Very true.

25 THE COURT: And I understand the rationale you just

dk

## Proceedings

1 gave in terms of the Federal statute with the 45-day window,  
2 but are there other additional reasons why you believe  
3 potentially having a primary in September would create any  
4 other difficulties?

5 MR. BUCKI: Well --

6 THE COURT: Beyond what -- I know you referenced  
7 some.

8 MR. BUCKI: Simply the difficulty of actually  
9 getting ballots printed in a timely fashion. As the Board  
10 of Elections has stated in various affidavits, because of  
11 supply chain issues, we've even had problems getting the  
12 necessary supplies that are required simply to print out the  
13 ballots that are needed for the entire State of New York,  
14 not to mention the fact that the more compressed of a time  
15 frame that you have, the more the cost increases.

16 And I expect the State Board of Elections will talk  
17 in great detail about the problems they have been having  
18 simply to satisfy the requirements already that have been  
19 imposed by Justice McAllister. And September 13th is simply  
20 unworkable.

21 Not to mention the fact that the Petitioners, even  
22 though Justice McAllister has exercised jurisdiction over  
23 the Congressional and Senate lines, the Petitioners, for  
24 whatever reason, in their petition want to circumvent  
25 Justice McAllister's authority in Steuben County

dk

## Proceedings

1 Supreme Court and have this Court somehow reopen or change  
2 the limitation period for candidates' signatures and the  
3 signature requirements with respect to Congressional and  
4 State Senate offices, when that's really the domain of  
5 Justice McAllister.

6 And, in fact, the August 23rd primary date that he  
7 set had to be approved by a Federal Judge, Judge Sharpe, in  
8 the United States District Court for the Northern District  
9 of New York.

10 So should this Court accept the invitation of the  
11 Petitioners to have yet another change, it would be  
12 necessary to go back to Judge Sharpe.

13 And Judge Sharpe has already ruled that the fourth  
14 week of August is about as far as one can go in terms of  
15 having a primary in order to satisfy Federal law as it  
16 exists at the present time. That didn't used to be the  
17 case, but it is the case now. And that's an important  
18 consideration that this Court should keep in mind.

19 So because of the delay that was promulgated by  
20 these Petitioners, sitting on the sidelines and tweeting,  
21 while everybody else was litigating over the Congressional  
22 and State Senate lines that causes prejudice to candidates,  
23 be they incumbents or challengers, it causes prejudice to  
24 our men and women in uniform, in the military, who are  
25 required to get their absentee ballots, have them sent out

dk

## Proceedings

1 by a particular date, and the prejudice in terms of the time  
2 frame because it took a month, approximately, for  
3 Justice McAllister to put together, with the aid of a  
4 Special Master, 89 districts combined, for Congress and  
5 State Senate.

6 And this Court would have to put together 150  
7 districts for State Assembly, not to mention that all of  
8 those State Assembly districts are going to impact races for  
9 a variety of other offices that I already mentioned.

10 So even to think that a month would be sufficient  
11 to put together a new map, we would submit that that's an  
12 unrealistic expectation.

13 So that's the issue of laches.

14 And I would combine in with the issue of laches the  
15 issue of the statute of limitations. Because of the  
16 inequitable effect that will be had upon various candidates  
17 if these lines go down, to invalidate candidacies for  
18 particular offices, in a particular district, Election Law  
19 16-102 is clear, there was a 14-day statute of limitations  
20 from the last day for filing designating petitions.

21 And it's not enough for the Petitioners to claim  
22 that they're not looking to invalidate candidacies because,  
23 yeah, they are. They're looking to invalidate candidacies  
24 that are dependent upon the districts that exist now and  
25 they're looking to require candidates who have already filed

dk

## Proceedings

1 their petitions to now go get new petitions or, at a  
2 minimum, run in districts other than the districts where  
3 they had planned and intended to run all along.

4 And so Election Law 16-102 is clear, they had  
5 14 days to bring this proceeding from the last day for  
6 filing petitions. And that was April 21st. And this  
7 proceeding was brought on May 15th. It is simply untimely.

8 And Mr. Greenberg knows well about the statute of  
9 limitations. He was very much an advocate for the Child  
10 Victims Act. And all of those Child Victims Act lawsuits  
11 only became possible by changing the statute of limitations.

12 And so too here, the Petitioners have to live with  
13 the statute of limitations that exists under the  
14 Election Law right now. If they want to change the law and  
15 go to Albany and try to advocate for that, then that's  
16 something they can certainly do. But the law right now  
17 imposes a 14-day statute of limitations, separate and apart  
18 from, and in addition to, the application of the equitable  
19 doctrine of laches. And this is why this proceeding is  
20 simply untimely.

21 THE COURT: Counsel, just on the statute of  
22 limitations argument, I mean, I understand the argument that  
23 you're making, but here, they're not challenging one  
24 specific group that was designated by the petitions. This  
25 is obviously on a much larger scale. So do you still

dk

## Proceedings

1 believe that the 14-day statute of limitation would be in  
2 place where we're not talking about the specific petitions  
3 but the overall constitutional status of them?

4 MR. BUCKI: They are challenging specific  
5 petitions. They are challenging the candidacies and the  
6 designations of every single person statewide who was  
7 designated for State Assembly, for district leader, for  
8 delegate judicial convention, for all judicial convention,  
9 for county party committee and for State Democratic  
10 Committee, because all of those designations depend upon the  
11 Assembly districts being as they were enacted back on  
12 February 3rd in Chapter 14 of the laws of 2022. And so that  
13 is why that statute of limitations applies.

14 And even if this Court should determine that that  
15 statute of limitations doesn't apply, the equitable doctrine  
16 of laches applies regardless. And so either way, this is an  
17 untimely proceeding.

18 And then the next issue that I really think cannot  
19 go unnoticed is the issue of the absence of the necessary  
20 parties.

21 And Mr. Walden pokes fun at the argument, but I'll  
22 tell you, the First Department last year did not poke fun at  
23 the argument in Matter of Clinton versus Board of Elections  
24 of the City of New York, which is binding precedent on this  
25 Court.

dk

## Proceedings

1           And that was a case concerning a certificate for  
2           filling vacancies with respect to a judicial nominating  
3           convention. And there was a challenge to the certificate,  
4           but only certain individuals who were named on the  
5           certificate were actually named as parties to the lawsuit.

6           And they said this case should be dismissed because  
7           everyone who was named on the certificate needs to be  
8           treated as a necessary party because if the certificate goes  
9           down, not only do our filling the vacancies goes down, but  
10          the vacancies filled by everybody else on the certificate  
11          goes down. And the First Department agreed. And the  
12          New York Court of Appeals denied leave to appeal.

13          And so here, Mr. Walden made a statement in his  
14          presentation saying, well, you know, this is an argument  
15          that depends upon what might happen in terms of whether a  
16          person will have to run in a different district or whether a  
17          person will be happy with their new district, unhappy with  
18          their new district.

19          Well, that's the standard because CPLR 1001(a) says  
20          that persons who might be inequitably affected by a judgment  
21          in the action shall be made plaintiffs or defendants. The  
22          standard isn't whether they will be inequitably affected.  
23          The fact is they might be inequitably affected.

24          And all of these candidates, for all of these  
25          different offices, that are based upon the Assembly district

dk



## Proceedings

1 lines, these are all individuals who might be inequitably  
2 affected by a judgment in that, as Mr. Walden requests in  
3 his petition, they might need to get new signatures. They  
4 might need to run in different districts. They might end up  
5 facing a primary opponent who they presently do not have.  
6 They might end up having a tougher race than they had  
7 bargained for in a district that looks different from what  
8 they're currently planning on.

9 All of those are ways in which the candidates who  
10 are on the ballot right now might be inequitably affected by  
11 a judgment in this case. All of them are necessary parties.  
12 And yet none of them are here.

13 And with respect to that issue, what also cannot be  
14 ignored is the fact that we have Boards of Elections  
15 throughout the State of New York that also are necessary  
16 parties. And the cases on this issue are Flynn v. Orsini  
17 from the Fourth Department and Gagliardo, G-A-G-L-I-A-R-D-O,  
18 versus Colascione, C-O-L-A-S-C-I-O-N-E, because in the  
19 petition, Mr. Walden and the Petitioners ask this Court to  
20 suspend or enjoin the operation of any other state laws or  
21 vacating any certifications or other official acts of the  
22 New York State Board of Elections or other governmental  
23 body.

24 And what's important to keep in mind is that it's  
25 not only the New York State Board of Elections that

dk

## Proceedings

1 certifies candidacies and certifies the primary ballot.  
2 When a particular office to be elected crosses county lines,  
3 the petitions for that office are indeed filed with the  
4 New York State Board of Elections. But in the City of  
5 New York, if the office to be elected does not cross between  
6 lines within the city versus outside the city, those  
7 petitions are filed with the New York City Board of  
8 Elections. And in Long Island, upstate, if the race to be  
9 elected is only to be elected from within a particular  
10 county, likewise, the petitions are filed at that particular  
11 county's Board of Elections.

12 So Mr. Walden, in his petition, is asking for all  
13 kinds of certifications of the ballot and certifications of  
14 candidacies to be suspended and enjoined and vacated. And  
15 yet the Boards that issued these certifications are not here  
16 to be represented. We don't have the New York City Board of  
17 Elections here. We don't have the 57 other county Boards of  
18 Elections throughout the State of New York, outside New York  
19 City, represented here. And we would submit that they too  
20 are necessary parties, even if the individual candidates are  
21 not.

22 And so, either way, there are necessary parties  
23 that needed to be named, that might be inequitably affected,  
24 and yet are not represented here.

25 And for Mr. Walden to go talking about how much

dk

## Proceedings

1 he's interested in people's rights, what about the rights of  
2 these candidates, what about the rights of the Boards of  
3 Elections?

4 Apparently the Petitioners don't care about their  
5 rights, because if they really cared about their rights,  
6 then those individuals, those Boards, would have been named  
7 as Respondents to this proceeding.

8 And this is why the proceeding fails as well.

9 I'll touch briefly on standing.

10 We would submit Election Law 16-102 standing  
11 requirements apply. You need to be a party chair or  
12 objector or an aggrieved candidate.

13 The Petitioners are none of these. Mr. Nichols  
14 cannot possibly claim that he's aggrieved by how the  
15 Assembly map looks. He's only aggrieved inasmuch as he  
16 didn't get enough signatures for Governor in the first  
17 place. And then he tried to bring a lawsuit. And he  
18 couldn't follow the instructions right for getting the  
19 lawsuit served. And instead of bringing an appeal to the  
20 Appellate Division Third Department, he decided, well, I'm  
21 going to do a Hail Mary pass three days later and try to  
22 bring this case and latch on with Mr. Wax and Mr. Greenberg.

23 And we would submit that that's -- that that does  
24 not satisfy the test of aggrievement.

25 And then further, with respect to Mr. Wax and

dk

## Proceedings

1 Mr. Greenberg, they too had an opportunity to appeal from  
2 the denial of intervention to the Appellate Division  
3 Fourth Department.

4 Funny thing, they decided not to do that because  
5 maybe they could tell they weren't likely to succeed. And  
6 so now they want to come to this Court to try to get a  
7 second bite at the apple to see if they can try again with  
8 another judge when Justice McAllister, who was so keenly  
9 familiar with the issues, simply would not give them  
10 countenance for the challenge that they're trying to pursue.

11 THE COURT: But, counsel, do you believe that  
12 Mr. Wax and Mr. Greenberg also lack standing or you are just  
13 making that argument with Mr. Nichols?

14 MR. BUCKI: Yes, with respect to all the  
15 Petitioners, yes, they absolutely lack standing.

16 THE COURT: And you are making that statement  
17 despite what was within the Court of Appeals decision in  
18 terms of standing on these types of matters?

19 MR. BUCKI: Yes. The Court of Appeals talked about  
20 the constitutional language saying that any citizen could  
21 bring a challenge to Assembly maps.

22 We would submit that this case is about a lot more  
23 than challenging Assembly maps. It's about challenging  
24 candidate certifications. It's about requiring candidates  
25 to go get new signatures, requiring candidates to run in

dk

## Proceedings

1 districts other than the districts for which their  
2 candidacies have been certified. And so that crosses from  
3 the realm of simply challenging maps to the realm of trying  
4 to have an inequitable effect upon candidacies that already  
5 were finalized back on April 21st when they were not  
6 challenged. And that is why the Petitioners don't have  
7 standing.

8 And where I would like to close is, let's say, for  
9 the sake of argument, that the Court agrees with Mr. Walden  
10 that notwithstanding all of these defenses that the petition  
11 can be granted, I would submit to this Court that the  
12 solution is not the convoluted solution that Mr. Walden  
13 proposes to try to create havoc in this year's elections.  
14 Rather, I apply the rule of Occam's razor whereby the  
15 simplest solution is usually the correct one.

16 And so too here, all that's been alleged in papers,  
17 putting aside bluster, putting aside conspiracy theories,  
18 putting aside wild accusations from Mr. Walden, all that's  
19 been actually alleged in litigation papers in this lawsuit  
20 is procedural unconstitutionality of the Assembly map, that  
21 the Assembly map was enacted, notwithstanding the fact that  
22 the Independent Redistricting Commission had not had an  
23 opportunity to, at least in the view of the  
24 Court of Appeals, had not had sufficient opportunity to  
25 issue a second set of maps for the Legislature's

dk

## Proceedings

1 consideration.

2 Nowhere is it alleged that there is any substantive  
3 unconstitutionality in the map for the Assembly districts.

4 Nowhere in the petition do they say anything about  
5 the fact that the map is somehow gerrymandered.

6 Nowhere do they say, aside from bluster today,  
7 nowhere do they say, backed up by any evidence, that somehow  
8 the match was unfair.

9 Nowhere do they say that the map for Assembly is  
10 not compact.

11 Nowhere do they say that it ignores communities of  
12 interest.

13 Nowhere do they say that doesn't -- that it fails  
14 to satisfy any of the other substantive Congressional  
15 criteria that are said in Article III of the State  
16 Constitution.

17 All that's alleged is this purported procedural  
18 infirmity. And so the solution to the procedural infirmity,  
19 should the Court find one, and should the Court determine  
20 that this is somehow a timely proceeding, and somehow that  
21 there isn't a necessary parties problem, and that somehow  
22 there isn't a laches problem, the solution is simply to take  
23 the map that was enacted by the representatives of the  
24 people of the State of New York, not imposed by a judge  
25 elected by a small portion of the state population, but

dk

## Proceedings

1           rather by the representatives who are elected by all  
2           20 million of us, take that map and impose it, and say, this  
3           will be the map for the next ten years, and adopt it and  
4           ratify it.

5                       I think an important contrast needs to be drawn  
6           between this proceeding and the one that was brought by the  
7           Petitioners in Steuben County.

8                       The Steuben County Petitioners, in challenging the  
9           Congressional map and the State Senate map as a substantive  
10          matter, they brought evidence, they put forth expert  
11          affidavits. We had a trial based upon very complex issues  
12          of statistics, Monte Carlo simulation, issues that would  
13          take a long time to explain, and that I think would go  
14          beyond the proper boundaries of my argument today, and  
15          likewise, the Respondents offered a variety of experts too.  
16          So there needed to be a trial to hash out all of the  
17          different expert opinions that were based upon simulations  
18          and evaluations of statistical data.

19                      Here, by contrast, the Petitioners offer nothing of  
20          the sort. To use a baseball analogy, they want to take the  
21          fact that the Petitioners hit a home run on the issue of  
22          procedural unconstitutionality before the Court of Appeals,  
23          and they are the ones who want to run the bases, even though  
24          they had nothing to do with that outcome. We would submit  
25          that that's not proper.

dk

## Proceedings

1 THE COURT: Counsel, my only question on that is,  
2 when everything -- I understand what you're saying,  
3 essentially to, for lack of a better term, rubber stamp the  
4 existing Assembly and wave my magic wand and say that they  
5 are now constitutional, but the State Senate maps were also  
6 solely found to be procedurally unconstitutional.

7 There was no claim in terms of gerrymandering or  
8 any of the other issues with that, yet it still resulted in  
9 the process that was just completed upstate where those set  
10 of lines were, in fact, redrawn.

11 MR. BUCKI: Well, actually, the Petitioners did  
12 allege in great detail and offer simulation evidence stating  
13 that the Senate now was substantively unconstitutional and  
14 did not -- setting aside the procedural argument, did not as  
15 a matter of substance satisfy the criteria for  
16 redistricting.

17 THE COURT: I understand your argument was made,  
18 but the Court of Appeals in their decision related to the  
19 State Senate map found that it was just -- their finding was  
20 it was only procedurally unconstitutional. They weren't  
21 getting into -- did not agree that there was any sort of  
22 gerrymandering or other items that had occurred.

23 But that said, I do understand the argument that  
24 you are putting forth.

25 MR. BUCKI: Your Honor is absolutely right that the

dk



## Proceedings

1 Special Master in Steuben County, Dr. Cervas, C-E-R-V-A-S,  
2 he would have been well within his rights simply to say,  
3 we're going to adopt the Senate map that was enacted. In  
4 fact, that was what I argued before the Special Master back  
5 on May 6th.

6 In large part, Dr. Cervas did leave the Senate map  
7 unchanged. He did make a few revisions, particularly in  
8 Erie County, and also in New York City, and on Long Island,  
9 because he decided that those were decisions he wanted to  
10 make.

11 THE COURT: Which I understand. And just  
12 hypothetically, if I followed your, and I know it's not your  
13 main argument, but if it came down to it, and I followed  
14 what you are suggesting as an alternate resolution and  
15 simply said that the existing Assembly maps are -- that  
16 there's nothing wrong with them and that they should remain  
17 in place, wouldn't we still have to go through a lot of the  
18 same process?

19 MR. BUCKI: Absolutely not, because there's no need  
20 for a Special Master unless there is a need for changes to  
21 the map.

22 And what differentiates this case from the case  
23 that concerned the Senate is, with respect to the Senate  
24 maps, there was strong clash among the parties as to whether  
25 those maps were a substantive gerrymander. And we had a

dk

## Proceedings

1 significant amount of testimony and evidence concerning that  
2 issue.

3 Here, by contrasting the Assembly map, we have  
4 nothing in the way of expert affidavits. We have nothing in  
5 the way of simulations. We have nothing that could support  
6 even an allegation that there is any kind of substantive  
7 unconstitutionality, aside from the new matter that  
8 Mr. Walden raises today based upon anecdotes about people  
9 who purportedly wanted to run for Assembly.

10 And my response to that is, the State Constitution  
11 is clear, that in a redistricting year, you can move into  
12 the district where you want to run. No one is prohibited  
13 from doing that.

14 THE COURT: No, I understand, as long as you are a  
15 resident.

16 MR. BUCKI: As long as you've been a resident of  
17 the county for a certain period of time, you are welcome to  
18 move into any other Assembly district, Senate district in  
19 that county that you choose.

20 And so to say that this is some -- that the way  
21 certain lines were drawn based upon anecdotes and  
22 accusations therefore is somehow a gerrymander is really  
23 irresponsible because the solution is if you want to run in  
24 a different district, move to that different district.  
25 Nothing is stopping you as a candidate from moving to that

dk

## Proceedings

1 district.

2 THE COURT: All right.

3 MR. BUCKI: We would submit, as I said, that this  
4 proceeding should be dismissed or, in the alternative,  
5 regardless of dismissal, we would submit that the map that  
6 was enacted for State Assembly by the New York State  
7 Legislature in February be ratified so that the elections  
8 for State Assembly and all of these other races that depends  
9 on the Assembly map can continue in an orderly fashion as  
10 they have been to this point.

11 THE COURT: Thank you.

12 Just before I turn back to hear from the Board of  
13 Elections, I just want to follow up on that last point with  
14 Mr. Walden.

15 To be clear, I think you had said it as part of  
16 your argument, is your only claim to strike the Assembly  
17 maps and to do the other items based upon the perceived  
18 procedural unconstitutionality or are you seeking a claim  
19 that there are issues in terms of potential gerrymandering  
20 and other things that have gone on which would, in all  
21 likelihood, require the Court to hear, essentially go  
22 through a similar bench trial to what may have occurred  
23 before Judge McAllister?

24 MR. WALDEN: Your Honor, to be crystal clear,  
25 again, I'm sorry if I wasn't crystal clear before, the issue

dk

## Proceedings

1 here is what everybody here is referring to as procedural  
2 unconstitutionality. Also I was responding to the fact that  
3 they keep saying it's fair. But if you want me to wait  
4 until after the BOE.

5 THE COURT: I wanted that quick point. I'll come  
6 back.

7 With that said, counsel, I am now going to turn to  
8 the representative from the State Board of Elections.  
9 Whoever is going to speak on behalf of the Board, I will  
10 give you an opportunity to be heard as well.

11 MR. QUAIL: Thank you, Your Honor.

12 Brian Quail for the New York State Board of  
13 Elections.

14 I appreciate that a lot has been said before the  
15 Court today. Nonetheless, I would like to take a very brief  
16 segue back to 1976.

17 In 1976, in a case that bears little relation to  
18 the circumstances in this one, because, frankly, no case  
19 does, the Court, in Pataki v. Hayduk, 87 Misc.2d 1095,  
20 articulated rather brilliantly the considerations, though,  
21 that need to be considered by the Court in an Election Law  
22 case like this.

23 And what the Court there said is that once the  
24 Board of Elections takes the first step and gears are set in  
25 motion, and the next step then must be taken by the person

dk

## Proceedings

1 aggrrieved, whether candidate or nominee, the Supreme Court  
2 then may act and adequate machinery is set up for the  
3 immediate review by the highest court, if necessary.

4 And then the Court continued, time is the  
5 watchword. The candidate must have time to conduct a  
6 campaign. The electorate must have time to identify  
7 candidates to make up its mind. The municipal body must  
8 have time to set up the ballot and prepare the voting  
9 machine. There is no room for procrastination or  
10 retraction. And the Court concluded, only confusion and  
11 chaos can result from delay.

12 In this case, the possibility that Petitioners here  
13 could have brought their grievance into the courthouse, as  
14 has been well established, is the truth of the matter as of  
15 February of this year. Here we are in May.

16 But instead of looking back, I think it is more  
17 instructive to look forward.

18 We are 36 days away from a primary election on  
19 June 28th that was scheduled as a matter of law. And we are  
20 26 days away from the beginning of early voting.

21 And while there were some averments in this  
22 courtroom that the Board of Elections has only offered up  
23 vague articulations of what the problems are, I would point  
24 to the 15-page affidavit of Mr. Valentine that was submitted  
25 in this matter, which was quite specific. But I am more

dk

## Proceedings

1 than happy to get even more specific than that.

2 The issue with the election time frame boils down  
3 to reverse planning. So in this instance we know we're  
4 having a general election on November 8th. And that date --  
5 so we have to first begin to plan back from there.

6 The way New York's election calendar works, the  
7 goal is to have the ballot certified 54 days out from the  
8 election. That 54 days out from the general election puts  
9 us on or about September 13th.

10 From September 13th then, the Board needs to,  
11 collectively all the boards in New York, need to make sure  
12 that military ballots are able to flow by 9-24, which is not  
13 so many days later, 9-23/9-24. The state law deadline is  
14 actually 46 days before the election and the Federal  
15 deadline is 45.

16 So when looking at the scenario that was presented  
17 on April 27th, when the Court of Appeals in Harkenrider  
18 determined that there was going to have to be a remedial  
19 primary, and remanded this matter to Steuben County Supreme  
20 Court to determine the calendar for that primary, the  
21 question was, looking forward from April 27th, and knowing  
22 where we need to be by 9-13, which is a certified ballot for  
23 the general election, how do we squeeze in yet another  
24 primary.

25 So we have one on June 28th. And there's no basis

dk

## Proceedings

1 to move anything other than Congress or State Senate because  
2 they were not impacted by the judge's order. If those  
3 primaries were to move, that determination would need to be  
4 made, and I believe Judge McAllister noted this on more than  
5 one occasion, that determination would need to be made by  
6 the Legislature, which is due deference, because it is not  
7 necessary to move any other primaries other than the State  
8 Senate and Congressional one to effectuate the  
9 Court of Appeals ruling and the prior ruling of  
10 Judge McAllister that started all of this back at the end of  
11 March.

12 So the Board looked at where we were at on  
13 April 27th, and looked at where we needed to be, and  
14 determined that the latest date that a primary would be  
15 feasible would be August 23rd.

16 Moving forward from August 23rd, the ballot for the  
17 general election would need to be certified by 9-13,  
18 facilitating the flow of military ballots just eight  
19 some-odd days after that.

20 And the Board then endeavored to create a calendar  
21 moving it back from that date, the August 23rd date, that  
22 would permit that primary to occur.

23 The certification date for the August primary,  
24 54 days before that date, would be June 29th, which would  
25 allow time between June 29th and July 8th to transmit

dk

## Proceedings

1 military ballots timely for that primary.

2 And then what has to happen in between, what has to  
3 happen between where we were on April 27th and getting to  
4 the point where we have a ballot on 6-29, military ballots  
5 flowing on 7-8, we have to fit in all the ballot access. We  
6 have to fit in a challenge period. We have to fit in all of  
7 the steps that would normally happen in a much longer period  
8 of time in that window, which was already comprised.

9 As a result, the Board recommended a calendar that  
10 shrank the designating petitioning period from 37 days to  
11 21. And a number of other interstitial steps with respect  
12 to other filings that are related to post election ballot  
13 sorting and challenges that would shrink the amount of time  
14 that it would take to complete them. And in so doing, and  
15 as you will note, we began the designating petitions process  
16 at the absolute first available date, literally the day  
17 after the maps were promulgated. And that date was  
18 originally scheduled for the 24th. But in order to grab  
19 additional time to make the process work reasonably, the  
20 Board asked the Court if it could do something to move off  
21 of its original calendar promulgation date of May 24th, and  
22 the Court graciously did, promulgating the calendar --  
23 excuse me, promulgating the districts on the 20th, or in the  
24 wee morning hours of the 21st, which the case may be.

25 So that's how we managed to fit in this new

dk



## Proceedings

1 primary.

2 Now, also of consideration in all of this is that  
3 the June primary has to coexist with the August primary.  
4 The same machines are going to be needed at both events.  
5 And one of the considerations then, obviously, also had to  
6 be can there be a turnaround from primary number one and  
7 primary number two, from July 28th to August 23rd. And,  
8 very tightly, the answer to that is yes, but it is very  
9 tight.

10 Remember, an election event --

11 THE COURT: I'm sorry, counsel, you froze up there  
12 for a second. Repeat the last line.

13 MR. QUAIL: An election event is not an  
14 insignificant undertaking. There are 15,000-plus election  
15 districts, 5,000 poll sites, more than 300 early voting  
16 sites, and over 50,000 people who are deployed, in order to  
17 make all of those mechanics function.

18 So in looking at the scenario that was presented,  
19 we did manage to squeeze in the August primary in a way that  
20 would comport with getting military and overseas and all  
21 other ballots out timely for November and be far enough from  
22 the June primary to make the June primary also work.

23 So now we hear that the Petitioners are interested  
24 in having a primary in September. Their papers would have  
25 suggested that all primaries were going to move. But during

dk

## Proceedings

1 oral argument now, Petitioners have posited perhaps just  
2 some of the primaries could move to 9-13. The remainder, or  
3 just the Congressional primary, perhaps, would continue to  
4 be held on August 23rd.

5 The distance between August 23rd and 9-13 in a two  
6 primary scenario is absolutely, positively undoable. There  
7 is not enough election machinery to turn the machines around  
8 between those two events.

9 There would be tremendous overlap of various  
10 processes, like absentee ballots out for both elections at  
11 the same time, and any number of other logistical hurdles  
12 and problems that there is absolutely no surmountable  
13 scenario to get around. It's just, it's a nonstarter  
14 positively.

15 Then we turn to, sort of, the argument that we  
16 should have done something more to get ready.

17 The Board of Elections doesn't draw the lines. The  
18 Board of Elections administers elections on dates that are  
19 provided by law. And our duty is to have fidelity to the  
20 law and to implement elections as they are provided for by  
21 court order, obviously, or by statute.

22 That is what the Board did in this case.

23 The idea that we could have begun planning for a  
24 remedial election on an as yet undetermined date with maps  
25 that would not be determined until some unknown point in the

dk

## Proceedings

1 future, that there was some burden or duty on the part of  
2 the Board to do that is just remarkable that it was even  
3 asserted.

4 What the Board of Elections has done in a  
5 yeoman-like manner, particularly county Boards of Elections,  
6 is continuing along the process and planning for two  
7 election events relatively close in time, one of which was  
8 not planned for, with substantial supply chain problems  
9 presented, the need to schedule poll sites for a second  
10 event that normally would have been occurring earlier, much  
11 earlier in the year. And they have set about this work as  
12 the diligent public officials that they are.

13 And I come back to where I began. There is no room  
14 for procrastination or retraction. Only confusion and chaos  
15 can result from delay.

16 Words of wisdom from 1976, absolutely true in 2022.

17 I respectfully ask Your Honor to deny the  
18 application that's been made by the Petitioners because  
19 democracy requires orderliness to unfold so that people's  
20 voices can be heard. That's what a denial in this case  
21 means.

22 It is not somehow or another bending to the  
23 political class that's trying to manipulate anything. It's  
24 about making sure that the people's voices in this day, the  
25 millions of voters who participate in these election

dk

## Proceedings

1 contests, can be heard.

2 Thank you, Your Honor.

3 THE COURT: Mr. Quail, let me just ask you, sir, to  
4 be clear, I think you mentioned it, the physical turnaround  
5 time between the machines that would be used on the  
6 August 23rd primary for Congressional and Senate races, is  
7 it your testimony here today that it would be impossible to  
8 have those machines ready to go again for another primary  
9 21 days later?

10 MR. QUAIL: It is literally unthinkable that it  
11 would be possible to have the election on that date, get the  
12 election results certified and reprogram and have reprinted  
13 ballots in time to go for an election on 9-13.

14 THE COURT: Okay.

15 Realistically, how much time would you need to  
16 complete that undertaking?

17 MR. QUAIL: Generally speaking, the time from the  
18 certification to when the election itself actually occurs,  
19 we are typically looking at 54 days is what we would  
20 normally look at.

21 By the way, I would point out that for a 9-13  
22 election, we would be looking at early voting that would be  
23 starting ten days before that date, right. So we would be  
24 looking at 9 -- you know, the 2nd of September early voting  
25 would be starting for -- on at least some set of machines

dk

## Proceedings

1 during an election that was conducted, that would need to be  
2 completed and ready and made available for an election held  
3 on 8-23. The mechanisms by which that would happen are  
4 just, I can't fathom that.

5 THE COURT: Okay.

6 MR. QUAIL: And, Your Honor, I'm not able to  
7 testify here because I'm only an attorney, but I --

8 THE COURT: I apologize. To be clear, I know I  
9 said your testimony. I mischaracterized that. I meant to  
10 say your position and your part of the arguments. I know  
11 obviously the affidavits that were filed as part of these  
12 proceedings.

13 MR. QUAIL: What dictates this, Your Honor, is the  
14 size of the election event. So if you have a situation  
15 where some very small subset of a county is having an  
16 election event within a window of, say, 20 days and there's  
17 sufficient voting machines available in their county, then  
18 there are scenarios where it can occur.

19 But when you're talking about a large election  
20 event, one of which at least is going to be a statewide  
21 election event, which means all election districts, poll  
22 sites are going to be engaged in that election event, a mere  
23 20 some-odd days between the two things, and the need to  
24 prepare for that is just unthinkable.

25 THE COURT: Thank you.

dk

## Proceedings

1 I am just going to turn back to Petitioners'  
2 counsel. I will give you an opportunity.

3 MR. WALDEN: Your Honor, you heard the three  
4 attorneys. They had a break. I would like to consult with  
5 my client, who is in the courtroom.

6 MR. QUAIL: Your Honor, we can't hear.

7 THE COURT: I'm sorry. Counsel was just asking for  
8 a brief recess before I gave him an opportunity for a  
9 rebuttal.

10 Counsel, I have no problem doing that. I'm just  
11 cautioning, because I'm looking at the clock, we sort of  
12 have to break for lunch by 1:00. So depending on how long  
13 you need you think with your rebuttal, I would like to get  
14 this done before the lunch break rather than having to come  
15 back in the afternoon.

16 So with that said, I am okay taking a quick  
17 five-minute recess, but it will be a real five-minute  
18 recess, not a traditional court five-minute recess.  
19 All right.

20 With that, I will see everyone back in five  
21 minutes.

22 (Whereupon, a recess was taken.)

23 THE COURT: Everyone may be seated.

24 Counsel for Petitioners, I want to give you an  
25 opportunity for some rebuttal. You may proceed.

dk

## Proceedings

1 MR. WALDEN: Thank you, Your Honor.

2 That's going to be, given how much was said here, a  
3 little more than ten minutes. I'll do my best.

4 You asked Mr. Bucki -- and, by the way, I have  
5 great respect for him. I'm not going to engage in insults  
6 to counsel, which I don't think have a place in the  
7 courtroom, but I respect him.

8 You asked him a pointblank question. Mr. Bucki, is  
9 it impossible to do a September 13th primary. And his  
10 answer was, well, Judge, there's this statute, and I can't  
11 even pronounce the acronym, but I think Your Honor  
12 understands this, it's the same statute that the Board of  
13 Elections was talking about when they're talking about this  
14 reverse clock, everybody keeps talking about military and  
15 overseas ballots. Does that apply to State races? No, it  
16 doesn't. It's a Federal statute that applies to Federal  
17 races. It is irrelevant to their reverse clock for the  
18 purposes of this petition.

19 THE COURT: Well, counsel, if there are New York  
20 State residents who are outside of the state, they still  
21 have the opportunity to vote.

22 MR. WALDEN: Yes, Your Honor, but that statute  
23 applies only to Congressional races. It's a Federal  
24 statute.

25 There is a corresponding State Court statute, but

dk

## Proceedings

1 the whole point of the Court of Appeals is that in light of  
2 the Congressional infirmity, including the procedural one  
3 with respect to the Senate, you have the power to change all  
4 State Court deadlines.

5 That's what Judge McAllister did. He changed the  
6 number of signatures on the petition. He changed the time  
7 frame for petitions to be submitted. He changed when things  
8 were supposed to get certified and when people got notice.

9 It's imperfect, Your Honor, but they can't use the  
10 reverse clock with respect to the military and overseas  
11 ballots on the Federal election side. You can't change  
12 that.

13 They're right, that's what Judge Sharpe is for. We  
14 would have to go to Judge Sharpe if we were changing the  
15 Congressional race, which is why we did not ask to change  
16 the Congressional race.

17 THE COURT: No, I understand. And I certainly  
18 understand what you're saying. But, counsel, in terms of  
19 the issue of the practicalities of election machines, going  
20 out to, as they said, 5,000 polling sites around the state  
21 for an August 23rd primary date, just the physical logistics  
22 of getting those machines back in, doing what they need to  
23 to certify the results, and then to get the machines back  
24 out for a September primary 21 days later, and, as they  
25 pointed out, it's not just 21 days later because we now have

dk



## Proceedings

1 early voting, so it would be probably about ten to  
2 twelve days later, that they are characterizing as  
3 essentially being an impossible task.

4 MR. WALDEN: I heard them, Your Honor.

5 THE COURT: Do you agree with that?

6 MR. WALDEN: No. Your Honor, that's why I think  
7 it's great that Mr. Quail made that caveat at the end. You  
8 remember, you asked him the question pointblank, Mr. Quail,  
9 are you telling me, put aside the testimony, but are you  
10 telling me you can't turn them around. And he totally  
11 hedged.

12 The reason he hedged is his expert affidavit  
13 doesn't said anything about time. And it's a red herring  
14 anyway, Your Honor, because we have two forms of relief when  
15 it comes to the date.

16 If they're saying they can't turn around a second  
17 primary, fine, let's have one primary on August 23rd. Then  
18 you only use the election machines once. We can clarify  
19 everything.

20 We were trying to give them an option to have more  
21 time, at least with respect to the Assembly, so that --

22 THE COURT: But then, counsel, we're back to the  
23 initial problem, to try to get everything done that would  
24 need to be done, to invalidate the current Assembly maps,  
25 consult with a Special Master, go through the process of

dk

## Proceedings

1 coming through with new maps, and getting all of that done  
2 timely enough that they would be in place for the same  
3 August 23rd primary date currently in place for the Senate  
4 and Congressional maps. I mean, that was a good part of the  
5 reason that your application to intervene in the action  
6 before Judge McAllister was denied.

7 MR. WALDEN: Judge, again, because of the potential  
8 time --

9 THE COURT: I understand.

10 MR. WALDEN: I disagree there, Your Honor. But  
11 here's the issue that I didn't get to earlier, which is, we  
12 asked for the Special Master there to be appointed here  
13 because even though the BOE decided, maybe because of their  
14 political master does not have a contingency plan, and that  
15 was pretty shocking, they said the BOE didn't have any  
16 responsibility to that, I'm sure the Special Master did  
17 because he was living in a world where he thought the  
18 Assembly maps were going to be gone for about a month and  
19 half.

20 And Mr. Bucki made an incredibly important  
21 concession, Your Honor. And I hope that you take this into  
22 account. What he said was that the Senate maps were changed  
23 very little. They mostly stayed the same. They mostly  
24 stayed the same.

25 That detail is important, Your Honor, because what

dk

## Proceedings

1 the Special Master did was to fix the obvious problems.

2 And you know what he invited you to do? He invited  
3 you to own those problems, even though you have no idea why  
4 they excluded Candidate Ma, why they excluded  
5 Candidate Fein, why they --

6 THE COURT: Counsel, I agree, if there is a  
7 Special Master, if it came to it, and I was in a position to  
8 appoint a Special Master to deal with the Assembly maps, as  
9 a starting point, don't make the assumption I'm using --  
10 would use the same Special Master who was already utilized  
11 for other matters. There are --

12 MR. WALDEN: He's done.

13 THE COURT: He's done his job and had his  
14 qualifications for it, but, as we all know, there are other  
15 individuals who could be serving in that role.

16 MR. WALDEN: Judge, their whole point is that we  
17 acted so irresponsibly in not filing a plenary action there  
18 because there's so much expertise there. But I think it  
19 would be a missed opportunity, Your Honor, to not use the  
20 same guy. When the BOE was sitting on its hands, he was  
21 probably looking at the Assembly maps, and has a lot of  
22 experience there, Your Honor.

23 My only point to you, Mr. Bucki invited you to just  
24 recertify the maps. And I don't think it's wise for the  
25 Court.

dk

## Proceedings

1 THE COURT: I understand.

2 MR. WALDEN: On maps that clearly have significant  
3 problems, which goes to the substantive fairness issue.

4 THE COURT: Counsel, I'll say at the outset, I  
5 agree with you, I think that's a dangerous way to go. I  
6 think, you know, literally having one person, even if it's  
7 myself, or especially if it's myself, depending who you ask,  
8 but having me make the determination of what the maps are  
9 for all of the Assembly districts without having an expert  
10 to rely on, who goes through a much more detailed process  
11 and goes through things, I would be very hesitant to do  
12 something like that. I would want to have an opportunity to  
13 hear full arguments on the rationale for all of this. And,  
14 frankly, that's part of my concern.

15 And I know Judge McAllister I'm sure had that as, I  
16 don't want to get into his head, and I'm not going to  
17 predetermine for him, but he had a short window of time, but  
18 there was a window nonetheless, a window of time where he  
19 was able to go through this whole process and get a Master  
20 in and go through some really significant things that needed  
21 to be done, which obviously has an impact on everyone in the  
22 state for the next ten years.

23 MR. WALDEN: The argument Mr. Bucki suggested is  
24 that the voters are going to be living with an  
25 unconstitutional map for ten years, Your Honor. So I can

dk

## Proceedings

1 say a couple of things. Again, I ask that you give me a  
2 little bit more time.

3 THE COURT: Briefly. I am here all day. I would  
4 rather not have to have everyone come back after two.  
5 Go ahead.

6 MR. WALDEN: I'm not asking for an hour. I'm  
7 asking for a couple of minutes.

8 THE COURT: I will give you a few minutes.  
9 Go ahead.

10 MR. WALDEN: Your Honor, I know this is a difficult  
11 burden for you, but you've got broad shoulders.

12 Judge McAllister's decision, whatever you think of  
13 it, is not relevant here, Your Honor. This can be done. It  
14 can be done.

15 And what -- the two things that you have to  
16 understand when you're going to go on burden or delay, which  
17 are all part of the laches structure, which is, they don't  
18 deny that the Constitution and the Court of Appeals said  
19 what they said. And it's mandatory and it's  
20 nondiscretionary.

21 But think about it, Your Honor, take their argument  
22 to its logical extreme, what if we had filed in February,  
23 what really would be different now?

24 Judge McAllister still would have thrown out the  
25 Assembly maps. He would have just done it on a motion as

dk

## Proceedings

1           opposed to sua sponte. The Fourth Department still would  
2           have reversed. And the Court of Appeals -- this is the only  
3           difference. The Court of Appeals would have had a  
4           Petitioner there. And so on April 27th, which is really not  
5           that long ago, the maps would have been invalid.

6                   THE COURT: Well, I will say this, on April 27th,  
7           the Court of Appeals may have issued a different decision  
8           related to the Assembly maps, but if they did, that would  
9           have then been part of what was being done by  
10          Judge McAllister.

11                   MR. WALDEN: I'm not sure, I apologize, maybe I'm  
12          tired, but I don't understand what you're saying.

13                   THE COURT: If the Assembly maps, if the Court of  
14          Appeals hypothetically had said that the Assembly maps were  
15          unconstitutional for procedural reasons and need to be  
16          redrawn as well, that would have been part, on April 27th,  
17          that would have gone back before Judge McAllister at the  
18          same time.

19                   MR. WALDEN: I totally agree, Your Honor. I'm  
20          being candid about this. It's not February that matters.  
21          What matters is what happened right after the  
22          Court of Appeals. And right after the Court of Appeals, we  
23          moved to intervene within days, within days. And we were  
24          denied. They opposed. We were denied. Right.

25                   Honestly, Judge, that is not a great look for

dk

## Proceedings

1 anyone when we act that quickly and we're denied on these  
2 grounds.

3 And, again, Your Honor, this is really important.  
4 Mr. Bucki's whole claim here is that you have the discretion  
5 to knock us out on timeliness grounds, which don't apply  
6 under the statute. But remember his words, he said, those  
7 who seek equity must do equity. Very broad pronouncement.

8 What he doesn't understand, but I know that he's a  
9 smart guy, so I'm sure that was tactical on his part, we're  
10 not seeking equity here. We're not. We're trying to  
11 enforce the Constitution, regardless of what he thinks my  
12 clients' motives are. And when he questions those motives,  
13 he's punching above his weight class.

14 They're trying to get equity. They're trying to  
15 use all of these doctrines which you know don't apply.  
16 They're seeking laches. They have to do equity in order to  
17 get equity. They have the burden, not us. They violated  
18 the Constitution. They are violating their constitutional  
19 oaths.

20 My clients are simply trying to defend the  
21 Constitution, not just for this election, but for the next  
22 ten years.

23 Thank you, Your Honor.

24 THE COURT: Thank you, counsel.

25 My appreciation to counsel on all sides. I know

dk

## Proceedings

1 everything was done under a relatively tight time frame to  
2 be in here today, even under normal circumstances. I  
3 recognize everyone's dealing with one version or another of  
4 COVID circumstances as well.

5 I will endeavor to issue a decision on this matter  
6 fairly quickly. It will certainly be out this week. I'm  
7 certainly going to endeavor to get it done hopefully over  
8 the next day or two so that everyone has that out there and  
9 can proceed accordingly from there.

10 With that said, I am going to conclude this matter.

11 I will ask if both sides can order a transcript of  
12 today's proceedings.

13 And with that, I wish everyone the best of luck.

14 MR. WALDEN: Thank you, Judge.

15 MR. BUCKI: Thank you, Your Honor.

16 MR. FARBER: Thank you, Your Honor.

17 MR. QUAIL: Thank you, Your Honor.

18

19 \* \* \* \*

20 Certified to be a true and accurate transcript of  
21 the stenographic minutes taken within.

22

23 Diane Kavanaugh  
24 Diane Kavanaugh, RMR, CRR, CRC  
25 Senior Court Reporter

24

25

dk