SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Hazel Coads; **Stephanie M. Chase**; **Marvin Amazan**; **Susan E. Cools**; **Suzanne A. Freier**; **Carl R. Gerrato**; **Esther Hernandez-Kramer; John Hewlett Jarvis**; **Sanjeev Kumar Jindal**; **Hermione Mimi Pierre Johnson**; **Neeraj Kumar**; **Karen M. Montalbano**; **Eileen M. Napolitano; Olena Nicks**; **Deborah M. Pasternak**; **Carmen J. Pineyro**; **Danny S. Qiao**; **Laurie Scott; Raja Kanwar Singh**; **Amil Virani**; **Mary G. Volosevich**; and the **Nassau Democratic County Committee**,

Plaintiffs,

vs.

Nassau County; the **Nassau County Legislature**; the **Nassau County Board of Elections**; **Joseph J. Kearny,** in his official capacity as a commissioner of the Nassau County Board of Elections; and **James P. Scheuerman**, in his official capacity as a commissioner of the Nassau County Board of Elections,

Defendants.

Index No. 611872/2023

Hon. Felice Muraca

Plaintiffs' Response in Opposition to the Defendants' Motion to Dismiss

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This is an action challenging the 2023 redistricting map for the Nassau County legislators. The plaintiffs are Democratic voters and the Nassau County Democratic Committee, and they allege that the 2023 map is a partisan gerrymander in violation of New York's Municipal Home Rule Law. The plaintiffs seek declaratory and injunctive relief prohibiting the county from using the 2023 map in future elections.

The defendants are the county, the county legislature, the board of elections, and two county election officials. The county and the legislature have moved to dismiss the complaint under the doctrine of laches, thus allowing them to use the 2023 map in perpetuity even if it violates New York law. (NYSCEF 23.) The Court should deny the defendants' motion because the doctrine of laches doesn't apply to continuing violations like unlawful redistricting maps and because the defendants couldn't establish the elements of laches even if it did.

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Legal Standard

The equitable doctrine of laches bars recovery when a plaintiff's delay in bringing suit has prejudiced the defendant and has thereby made recovery unfair. 75A N.Y. Juris. 2d, Limitations and Laches § 350. The doctrine "has no application," however, "when plaintiffs allege a continuing wrong."

Capruso v. Village of Kings Point, 16 N.E.3d 527, 533 (2014); *accord Seaview at Amagansett Ltd. v. Trustees of Freeholders and Commonalty of Town of E. Hampton*, 38 N.Y.S.3d 212, 214 (2d Dep't 2016).

"To establish laches, a party must show: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant." *Kverel v. Silverman*, 102 N.Y.S.3d 641, 644 (2d Dep't 2019) (cleaned up). Whether the doctrine applies depends on the facts of each case, and the party invoking laches bears the burden of establishing all four elements of the defense. *Meding v. Receptopharm*, 923 N.Y.S.2d 165 (2d Dep't 2011).

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Argument

I. The laches doctrine doesn't apply to continuing violations.

A law that creates an ongoing violation of constitutional or statutory rights doesn't become immunized from challenge forever by the mere passage of time. While laches can bar recovery for past violations, each recurring violation creates a new harm and thereby resets the clock. That's why New

York courts recognize that the laches doctrine doesn't apply when a plaintiff alleges a continuing violation. *See, e.g., Capruso,* 16 N.E.3d at 533; *Seaview,* 38 N.Y.S.3d at 214; *see also, e.g., Transp. Workers Union of Am. v. New York City Transit Auth.*, 341 F. Supp. 2d 432, 453 (S.D.N.Y. 2004).

Courts also recognize that gerrymandering claims, like the claim here, generally allege continuing violations. *See, e.g., Garza v. City of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990) (racial gerrymandering); *League of Women Voters of Mich. v. Benson,* 373 F. Supp. 3d 867, 908-10 (E.D. Mich. 2019), *vacated,* 140 S. Ct. 429 (2019) (partisan gerrymandering); *Jeffers v. Clinton*, 730 F. Supp. 196, 202 (E.D. Ark. 1989) (three-judge district court) (racial gerrymandering); *Shapiro v. Maryland*, 336 F. Supp. 1205, 1210 (D. Md. 1972) (racial gerrymandering). That's because each recurring election held under a gerrymandered map harms the voters anew. A gerrymander debases their votes again and again and again.

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Of course, there are some exceptions. In *White*, for example, the Fourth Circuit applied the laches doctrine to bar a racial gerrymandering claim when the plaintiffs filed their complaint several months after the last election under the challenged plan had taken place. *White v. Daniel*, 909 F.2d 99, 102-03 (4th Cir. 1990). There would be no further elections under the challenged plan because the defendant county was required by existing law to redraw

district lines before the next election. *See id*. But that's obviously not the case here. A decade's worth of elections remain under Nassau County's new plan.

The cases on which the defendants rely are not to the contrary. (NYSCEF 31 at 14.) In *Badillo,* for example, the court didn't apply laches at all. *Badillo v. Katz,* 343 N.Y.S.2d 451, 459-61 (N.Y. Sup. Ct. Bronx Cnty. 1973). Instead, the court granted a declaratory judgment that New York City's redistricting plan violated a state statute and merely delayed injunctive relief until the following election cycle. *Id.* at 461. In *McDonald,* the court denied the plaintiff's motion for a *preliminary* injunction to stop an imminent election but noted that "[t]he denial of the preliminary injunction does not deprive the plaintiff of his opportunity to proceed with his litigation seeking to invalidate the local law." *McDonald v. County of Monroe,* 191 N.Y.S.3d 578, 591-92 (N.Y. Sup. Ct. Monroe Cnty. 2023). The same was true in *In re Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep't 2022). The court granted a declaratory judgment that the challenged redistricting plan was unlawful and merely declined injunctive relief to stop an imminent election. *Id.* None of these cases support the proposition that Nassau County's unlawful redistricting plan is entitled to a decade-long free pass.

The difference between the defendants' cases and this one is that the plaintiffs here aren't seeking to stop an imminent election. They haven't sought a preliminary injunction, and they don't seek relief before the 2023

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general election. With the imminent election off the table, the laches doctrine doesn't bar them from seeking declaratory and injunctive relief from the continuing injuries that Nassau County's redistricting plan will cause in future elections.

II. The defendants can't establish the elements of laches.

Even if the laches doctrine did apply to continuing violations that flow from gerrymandered redistricting plans, the defendants here have failed to establish the essential elements of the defense. In fact, they don't even mention all of those elements.

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Critically, the defendants ignore the third essential element of the laches defense, which requires them to show a "lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief." *Kverel*, 102 N.Y.S.3d at 644. A defendant can't complain of unfair prejudice or surprise from a delay in bringing litigation if the defendant knew about the litigation all along.

And here, the defendants knew about the litigation. In fact, they crow repeatedly about that knowledge in their brief:

- "While Legislators from both sides of the political aisle praised the map for incorporating multiple of their proposed changes, some Legislators and lawyers promised an immediate lawsuit because they believed that the Legislature had not accommodated their concerns sufficiently, with one Legislator remarking at a public hearing of the Legislature: 'Tomorrow morning, students in Nassau County are going to wake up

to a snow day. This body is going to wake up to a lawsuit.'" (NYSCEF 31 at 6.)

- "Counsel for Plaintiffs in this case also testified at this hearing against the proposed map, threatening that 'we are going to be in litigation and you're guaranteeing that . . . and you will be paying millions of dollars to somebody, because the map, the map that you presented, is completely illegal.'" (NYSCEF 31 at 10.)

- "At the February 27 meeting, the Minority Leader called the map 'an illegal document' that would end up in court if not changed and 'forewarned' the Legislature that the "County will be sued.'" (NYSCEF 31 at 11.)

- "Legislator Joshua A. Lafazan promised that such a lawsuit would occur immediately." (NYSCEF 31 at 11.)

The defendants were warned about litigation over the map so many times that it would be ridiculous for them to assert otherwise. That alone torpedoes their laches defense.

The defendants also can't establish that the timing of the plaintiffs' suit was unreasonable under the circumstances. This case is likely to turn on expert testimony. *See, e.g., Harkenrider v. Hochul*, 197 N.E.3d 437, 453-54 (N.Y. 2022). The presiding officer of the Nassau County Legislature hired an expert to help him justify his proposed map. (Verified Compl., NYSCEF 1 at 20.) His attorney summarized the expert's analysis but refused to disclose it. (*Id.*) In fact, a separate lawsuit seeking disclosure of the expert's analysis remains pending before this Court. *See League of Women Voters v. Nassau Cnty. Legis.*, Index No. 613287/2023, (N.Y. Sup. Ct. Nassau Cnty. Aug. 17,

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2023). And there is likely to be a lengthy discovery dispute over the same analysis in this case. It is thus the defendants' own refusal to disclose the analysis that has delayed the filing of this suit as much as anything. Of course, the defendants also acknowledge that the legislature changed the map less than a week before the final vote. (NYSCEF 31 at 11.) That meant that opponents of the map had to re-do all of their own expert analysis. It was not unreasonable for the plaintiffs to seek the legislature's expert analysis before suing or to ensure that their own analysis reflected the plan as passed. Given those circumstances, and the fact that gerrymandering cases can take years, *see, e.g., Goosby v. Town Bd. of the Town of Hempstead, N.Y.*, 180 F.3d 476, 481 (2d Cir. 1999) (racial gerrymandering case that lasted for more than 11 years), a delay of a few months is not unreasonable.

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Finally, the defendants can't establish prejudice due to any delay. They can't claim, for example, that key witnesses have died or become unavailable. Memories haven't faded. No evidence has gone missing. Instead, the defendants claim that redistricting more than once in a decade would inevitably cause voter confusion and disenfranchisement. (NYSCEF 31 at 17.) Not so. There is no evidence of voter confusion or disenfranchisement in the record, and it is not a matter for judicial notice. Voter confusion also isn't enough to defeat a voting-rights lawsuit. If it were, no voting-rights lawsuit could ever succeed.

The County also claims that the delay has harmed candidates who have already expended money seeking election under the current map "with the expectation that such map would remain in place for the decade." (NYSCEF 31 at 18.) Here again, there is no evidence in the record that *any* candidate for election in 2023 has spent money on an election with the expectation that the same lines would be in place until at least 2031. It would be absurd for any such candidate to do so. Given that the plaintiffs here aren't seeking relief before the 2023 election, any harm to candidates in future elections is unsubstantiated and purely speculative.

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Finally, the defendants claim that redistricting more than once in a decade would cause the county to incur "significant expenses." (NYSCEF 31 at 18.) But those expenses wouldn't result from any delay by the plaintiffs. The county would have had to incur those expenses even if the plaintiffs had filed on the day the new map became effective. The expenses result from the defendants' own unlawful conduct, and that isn't prejudice for purposes of the laches doctrine.

Conclusion

The Court should deny the defendants' motion to dismiss.

Respectfully submitted this 20th day of September, 2023.

MEJIAS MILGRIM ALVARADO & LINDO, P.C.

By: David L. Mejias, Esq.
1 Dosoris Lane
Glen Cove, New York 11542
516-333-7777
dave@mejiaslaw.com

Bryan L. Sells*
Georgia Bar No. 635562
The Law Office of Bryan L. Sells, LLC
Post Office Box 5493
Atlanta, Georgia 31107-0493
(404) 480-4212 (voice/fax)
bryan@bryansellslaw.com

* Application for admission *pro hac vice* pending.

Attorneys for the Plaintiffs

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HAZEL COADS; STEPHANIE M. CHASE; MARVIN AMAZAN; SUSAN E. COOLS; SUZANNE A. FREIER; CARL R. GERRATO; ESTHER HERNANDEZ-KRAMER; JOHN HEWLETT JARVIS; SANJEEV KUMAR JINDAL; HERMIONE MIMI PIERRE JOHNSON; NEERAJ KUMAR; KAREN M. MONTALBANO; EILEEN M. NAPOLITANO; OLENA NICKS; DEBORAH M. PASTERNAK; CARMEN J. PINEYRO; DANNY S. QIAO; LAURIE SCOTT; RAJA KANWAR SINGH; AMIL VIRANI; MARY G. VOLOSEVICH; and the NASSAU DEMOCRATIC COUNTY COMMITTEE,

Plaintiffs,

NASSAU COUNTY; the NASSAU COUNTY LEGISLATURE; the NASSAU COUNTY BOARD OF ELECTIONS; JOSEPH J. KEARNY, in his official capacity as a commissioner of the Nassau County Board of Elections; and JAMES P. SCHEUERMAN, in his official capacity as a commissioner of the Nassau County Board of Elections,

Defendants,

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Law offices of **Mejias, Milgrim, Alvarado & Lindo, P.C.**
Attorneys for Plaintiffs
1 Dosoris Lane
Glen Cove, New York 11542
(516) 333-7777 Facsimile: (516) 333-7878

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TO

Signature (Rule 130-1.1-a)

____

DAVID L. MEJIAS, ESQ.

Service of a copy of the within is hereby admitted
Dated: ____________________
Attorneys for Defendants

NOTICE OF ENTRY
That the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on

NOTICE OF SETTLEMENT
That an of which is a true copy will be presented for settlement to the HON. one of the judges of the Within named Court, at on

Dated: September 20, 2023 **Mejias, Milgrim, Alvarado & Lindo, P.C.**