SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Plaintiffs,

-against-

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.

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Index No. 611872/2023

Hon. Felice Muraca

(Mot. Seq. 003)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS NASSAU COUNTY AND THE NASSAU COUNTY LEGISLATURE'S MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

This Court should reject Plaintiffs' untimely, extraordinary request for back-to-back redistricting and elections in consecutive years, which would inject utter chaos and confusion into the electoral processes in Nassau County. On February 27, 2023, the Nassau County Legislature ("Legislature") adopted a redistricting plan for the County's nineteen legislative districts, which became law the next day upon the County Executive's signature. Despite contemporaneous threats of immediate litigation challenging the map—including from Plaintiffs' own counsel—Plaintiffs waited nearly five months to sue, belatedly seeking to force a mid-decade redistricting, including potentially a special election in 2024. As Nassau County ("County") and Legislature explained in their Motion To Dismiss, the unreasonableness of Plaintiffs' delay in filing this time-sensitive lawsuit and the resulting prejudice to the County and the public warrants dismissal under the doctrine of laches.

Plaintiffs now oppose dismissal, but their arguments fall flat. Plaintiffs purport to rely upon the continuing-wrong doctrine, but their Complaint alleges only a single claimed wrong: the Legislature's adoption of the challenged map. Various Democratic members of the Legislature, members of the public, and Plaintiffs' counsel in this very suit threatened immediate litigation challenging the map at that time, but Plaintiffs waited many months to bring this challenge. Plaintiffs also argue that these litigation threats put the Legislature on notice of this lawsuit, but such threats to challenge the map *immediately* upon its adoption in no way constituted sufficient notice of a five-month-delayed action. And Plaintiffs' claim that this case is likely to turn on expert testimony does not help their cause because all of the allegations in their Complaint pre-date the Legislature's adoption of the map. Indeed, Plaintiffs do not even allege that their experts needed

more than a couple of days to conduct the same social science analysis that their political allies conducted quickly as to multiple iterations of proposed maps during the legislative process.

Accordingly, this Court should dismiss the Complaint under the doctrine of laches.

ARGUMENT

I. The Doctrine Of Laches Bars Plaintiffs' Complaint

A. As the County and Legislature explained, the doctrine of laches bars this lawsuit in light of Plaintiffs' near-five-month delay in bringing this equitable action challenging, and seeking to replace, the county-level redistricting plan. Allowing this action to move forward would prejudice both the public and the County by potentially forcing the County to conduct mid-decade redistricting in back-to-back election cycles and causing significant confusion to voters, candidates, and election officials alike. *See* NYSCEF No.31 ("Mot."). Plaintiffs' challenge to the Legislature's map became ripe when the County Executive signed the Legislature's plan into law on February 28, 2023. Mot.11. Nevertheless, Plaintiffs chose to wait until July 26, 2023, to challenge that map—after an election under the new plan had already begun. Mot.11.

The Complaint provides no reasonable excuse for Plaintiffs' delay, containing no factual allegations that occurred after the map was enacted, mentioning no newly gathered or developed evidence that could explain the delay. Mot.11. Plainly, "nothing prevented the plaintiff[s] from filing this action" when the County enacted the map on February 28, 2023. *MacDonald v. Cnty. of Monroe*, 191 N.Y.S.3d 578, 593 (N.Y. Sup. Ct. Monroe Cnty. 2023). Because of Plaintiffs' inexplicable delay, granting the extraordinary relief they seek—ordering the County to conduct a new round of redistricting and potentially hold a special election—would harm the County and the public by "creating instability and dislocation in the electoral system," *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990), resulting in "voter confusion," *Quinn v. Cuomo*, 126 N.Y.S.3d 636, 641 (N.Y. Sup. Ct. Queens Cnty. 2020), prejudice to candidates, *id.*, and the needless "imposi[tion of]

great financial and logistical burdens" on the County, *White*, 909 F.2d at 102; *see also Chestnut v. Merrill*, 377 F. Supp. 3d 1308, 1317 (N.D. Ala. 2019); *Sanders v. Dooly Cnty., GA*, 245 F.3d 1289, 1290–91 (11th Cir. 2001); Mot.12–14. Laches applies in the redistricting context, Mot.9–10 (collecting cases), and Plaintiffs' unexplained, prejudicial delay clearly warrants dismissal under laches.

B. Plaintiffs' arguments against the application of laches all fail to overcome this fundamental deficiency in their lawsuit.

First, Plaintiffs' suggestion that laches "doesn't apply" to "gerrymandering claims" as a categorical matter because such claims allege a "continuing wrong" is legally incorrect. *See* NYSCEF No.43 at 2–3 ("Opp."). In New York, laches applies to *all* "equitable actions and declaratory judgment actions where the defendant shows prejudicial delay." 75A N.Y. Jur. 2d Limitations and Laches § 353; *see Saratoga Cnty. Chamber of Com., Inc. v. Pataki*, 100 N.Y.2d 801, 816 (2003). And although laches "has no application when plaintiffs allege a continuing wrong," *Capruso v. Vill. of Kings Point*, 23 N.Y.3d 631, 642 (2014), the continuing-wrong doctrine "may only be predicated on *continuing unlawful acts* and not on the continuing effects of earlier unlawful conduct," *Salomon v. Town of Wallkill*, 174 A.D.3d 720, 721 (2d Dep't 2019) (citations omitted); *see also Henry v. Bank of Am.*, 147 A.D.3d 599, 601 (1st Dep't 2017). In this regard, the important "distinction is between a single wrong that has continuing effects and a series of independent, distinct wrongs." *Salomon*, 174 A.D.3d at 721 (quoting *Henry*, 147 A.D.3d at 601). That a plaintiff may "continue[ ] to suffer damages from the date of the [defendant's] wrongful acts . . . does not support the application of the doctrine since it may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct." *Selkirk v. State*, 249 A.D.2d 818, 819 (3d Dep't 1998) (citation omitted). Accordingly, the continuing wrong

doctrine is inapplicable where a plaintiff's alleged "harm" can be "exclusively traced to the day when" a defendant allegedly committed "the original objectionable act." *Webster Golf Club, Inc. v. Monroe Cnty. Water Auth.*, 219 A.D.3d 1136, 1136 (4th Dep't 2023). And for the continuing-wrong doctrine to preclude laches against a plaintiff's alleged future harms, the plaintiff must also show that the defendant has a "continuing duty" to prevent those harms. *See Garron v. Bristol House, Inc.*, 162 A.D.3d 857, 859 (2d Dep't 2018) (citation omitted).

Here, the continuing-wrong doctrine is inapplicable because Plaintiffs' Complaint alleges only a singular alleged wrong, which occurred on either February 27 or 28, 2023. Plaintiffs' Complaint alleges "that the 2023 map was drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." *See* NYSCEF No.24 ("Moskowitz Aff."), Ex.1 ¶ 2 (citation omitted). And Plaintiffs justified making the Legislature a party to this action solely because of one previous act: "[i]t passed the challenged map." Moskowitz Aff., Ex.1 ¶ 29. For that reason, the purported "continuing" harms that Plaintiffs complain of in their opposition—"debas[ing]" voters' future votes in each recurring election held under the allegedly gerrymandered map, Opp.4—merely constitute the allegedly harmful future *effects* of the Legislature's allegedly unlawful past conduct, namely "pass[ing] the challenged map," Moskowitz Aff., Ex.1 ¶ 29. Plaintiffs' allegation that they will "continue[ ] to suffer damages from the date of the [Legislature's allegedly] wrongful act[ ]," that is, adopting the redistricting plan, "does not support the application of the doctrine since it may only be predicated on continuing unlawful acts and not on the continuing effects of earlier unlawful conduct." *Selkirk*, 249 A.D.2d at 819. These future elections do not constitute "a series of independent, distinct wrongs," because any alleged "harm" that Plaintiffs might sustain in those elections could be "exclusively traced to the day when" the Legislature allegedly committed "the original

objectionable act," *i.e.*, passing the challenged map. *Webster Golf Club, Inc.*, 219 A.D.3d at 1136. Moreover, the Legislature's involvement in the redistricting process is complete under State and County law. Mot.2–3, 13; *see* Nassau Cnty. Charter §§ 113–14.[1] Thus, the continuing-wrong doctrine cannot excuse Plaintiffs' delay.

None of the out-of-state cases that Plaintiffs cite in arguing that laches does not apply in redistricting cases counsel a different result under New York law. Opp.4. Plaintiffs rely on *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), as a case in which a court "recognize[d] that gerrymandering claims . . . generally allege continuing violations," Opp.4, but the majority there simply asserted that because the plaintiffs' injury from the racial gerrymandering had "been getting progressively worse," that rendered that gerrymandering an "ongoing . . . violation" to which laches did not apply, *Garza*, 918 F.2d at 772. This unsupported analysis conflates the violation and the resulting injury, contrary to New York law. *See, e.g.*, *Salomon*, 174 A.D.3d at 721. Moreover, *Garza* is distinguishable on this point. Judge Kozinski's concurring opinion explained that the "ongoing nature of the violation" that the Ninth Circuit was concerned with in *Garza* was that county's "continuing practice of splitting the Hispanic core into two or more districts to prevent the emergence of a strong Hispanic challenger" in each of the county's "reapportionments going back at least as far as 1959," *Garza*, 918 F.2d at 778 (Kozinski, J., concurring in part), whereas, here, Plaintiffs only challenge the Legislature's and County's current redistricting plan. *League of Women Voters of Michigan v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019), *vacated*, 140 S. Ct. 429 (2019), is also contrary to binding New York precedent, as it holds—as a categorical matter—that "laches does not apply to Plaintiffs' claims for declaratory

[1] Available at https://www.nassaucountyny.gov/DocumentCenter/View/37579/Charter-1122?bidId= (all websites last visited Oct. 2, 2023).

and injunctive relief." *Benson*, 373 F. Supp. 3d at 909 (citations omitted). Under New York law, laches applies to "equitable actions and declaratory judgment actions." 75 N.Y. Jur. 2d Limitations and Laches § 353; *Pataki*, 100 N.Y.2d at 816. Finally, Plaintiffs' reliance on *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), is misplaced. *Jeffers* cited a prior decision, *Smith v. Clinton*, 687 F. Supp. 1310 (E.D. Ark. 1988), for the proposition that harm is "suffered anew each time" an election is held under an "illegal [redistricting] structure," *id.* at 1313; *see Jeffers*, 730 F. Supp. at 202. But *Smith* concluded that laches did not apply because of "significant developments" in the law relating to racial gerrymandering between the map's enactment and the plaintiffs' filing suit, such as pertinent amendments to the Voting Rights Act and the U.S. Supreme Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986). *See Smith*, 687 F. Supp. at 1313. No such "significant developments," *id.*, could explain the delay here.[2]

Second, contrary to Plaintiffs' suggestion, Democratic legislators' comments and public testimony at prior meetings "warn[ing] about litigation over the map" supports, rather than "torpedoes[,] [the County's and Legislature's] laches defense," Opp.7.

As an initial matter, while lack of notice may be a relevant consideration in some laches cases, it is not an essential element of a laches defense, contrary to Plaintiffs' arguments. *See* Opp.6–7. Laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." *MacDonald*, 191 N.Y.S.3d at 591 (quoting *Pataki*,

[2] While *Shapiro v. Maryland*, 336 F. Supp. 1205 (D. Md. 1972), *see* Opp.4, concluded that it was "not prepared to find, as a matter of law, that the four and one-half month delay is an absolute bar to the maintenance of th[e] suit" under the facts of that case, it nevertheless dismissed the plaintiff's request for injunctive relief because of delay, noting that "at this eleventh hour it would unduly disrupt the elective process and would seriously prejudice citizens, candidates, and government officials alike." *Shapiro*, 336 F. Supp. at 1210, 1211 (citations omitted). Thus, although *Shapiro* fifty years ago incorrectly ruled that laches was inapplicable in the redistricting context to bar the entire lawsuit, that court nevertheless acknowledged that a plaintiff's delay in this context could frustrate their ability to receive relief.

100 N.Y.2d at 816). Accordingly, the only essential elements of the defense are (1) unexplained delay by the plaintiff and (2) resulting prejudice to the defendant. *See Capruso*, 23 N.Y.3d at 641; *Williams v. Plaxall Realty Sub, LLC*, 176 N.Y.S.3d 414, 419–20 (N.Y. Sup. Ct. Bronx Cnty. 2022) (same); *Mundel v. Harris*, 199 A.D.3d 814, 815 (2d Dep't 2021) (same); *Medinol Ltd. v. Cordis Corp*., 15 F. Supp. 3d 389, 400 (S.D.N.Y. 2014) (same); *see also* 89 N.Y. Jur. 2d Real Property—Possessory Actions § 110 ("the two essential elements of laches are unexplained delay and prejudice"). While certain decisions have articulated laches as containing a lack-of-notice element, *see Kverel v. Silverman*, 172 A.D.3d 1345, 1348 (2d Dep't 2019), Plaintiffs do not cite any New York case rejecting a laches defense solely on notice grounds. That is because laches is an equitable doctrine that "is addressed to the sound discretion of the court" and requires a "balancing of all the considerations before" the court, *Goodfarb v. Freedman*, 76 A.D.2d 565, 572–73 (2d Dep't 1980) (citations omitted), as well as a "balancing of interests between the parties," *Turin Hous. Dev. Fund Corp. v. Kennedy*, No.51341/2020, 2023 WL 5965825, at *4 (N.Y. Civ. Ct. N.Y. Cnty. Sept. 14, 2023). Moreover, courts usually do not consider a plaintiff's mere prior "oppos[ition] to the defendant's [action]," *Kverel*, 172 A.D.3d at 1349, mere "statements of discontent," *Avant v. Ahern Rentals, Inc.*, No.3:20-CV-01884-JMC, 2022 WL 585947, at *4 (D.S.C. Feb. 24, 2022), or "vague" or "no[n] credible threat[s] of litigation," 4 N.Y. Prac., Com. Litig. in N.Y. State Courts § 30:31 (5th ed.), to be sufficient notice of a delayed future lawsuit. Rather, plaintiffs are required to demonstrate that they specifically put the defendant "on notice" that they would "seek the contested relief" in the future action. *Kobre v. Camp Mogen Avraham*, 293 A.D.2d 893, 895 (3d Dep't 2002).

Regardless of whether notice is an essential element (as Plaintiffs wrongly claim), or just a relevant consideration (as New York law provides), it would not bar Plaintiffs' suit here.

Plaintiffs argue the Legislature had sufficient notice of this lawsuit because several Democratic legislators threatened a lawsuit during the February 27 meeting of the Legislature, where the body adopted the redistricting plan. Opp.6–7. But these Democratic legislators threatened to a file a lawsuit *immediately* after the map's adoption. Mot.6–7. These statements thus put the Legislature on notice of *immediate* litigation, which notice dissipated once days and months lapsed without any suit being filed. Mot.7. Thus, these legislators demonstrated only that they "were opposed to the defendant's [plan]," but did not seek relief "until they commenced this action," *Kverel*, 172 A.D.3d at 1349, and their "statements of discontent alone, especially when litigation d[id] not actually begin for a long time, [did] not put [the Legislature] on notice," *Avant*, 2022 WL 585947, at *4 (citation omitted). At that point, the County and Legislature could "reasonably conclude that [ ] no credible threat of litigation" remained because Plaintiffs made those "threats without initiating litigation." 4 N.Y. Prac., *supra*, § 30:31. Given the time-sensitive nature of redistricting, *MacDonald*, 191 N.Y.S.3d at 593, it was eminently reasonable for the County and Legislature to assume that County Democrats had reconsidered their prior objections after examining the final map and the pertinent legal authorities. Plaintiffs cannot seriously suggest that the County and Legislature were indefinitely on notice that a lawsuit would come at some unknown future date.

Third, Plaintiffs are wrong to claim that when a lawsuit "is likely to turn on expert testimony," that justifies a party waiting several months to file a redistricting challenge, Opp.7–8, and *Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022), only refutes this argument. While *Harkenrider* turned on extensive expert evidence, *Harkenrider*, 38 N.Y.3d at 506, 519, the petitioners there filed their challenge to New York's entire congressional map *the same day* the Governor signed it into law, *id.* at 505. Thus, Plaintiffs' argument that waiting nearly five months to initiate their suit challenging the Legislature's redistricting plan was reasonable because "this case is likely to turn

on expert testimony," while citing *Harkenrider*, Opp.7, makes no sense. Plaintiffs provide nothing tying their delay to this purported need for developing expert evidence, and their Complaint and even their brief provide no evidence that they spent the five months interim developing expert analyses or otherwise "gather[ing] sufficient evidence." *People v. Miller*, 83 A.D.3d 1097, 1098 (2d Dep't 2011) (considering reasonableness of delay in bringing prosecution) (citations omitted). In any event, Plaintiffs easily could have completed all necessary expert review of the enacted map within a few days of its enactment, meaning that the claimed need for expert testimony does not account for Plaintiffs' many months of delay. During the Legislature's redistricting process, Plaintiffs were doing exactly that: having their experts analyze the Legislature's proposed maps within days of their release. *See* Moskowitz Aff., Ex.1 ¶¶ 55, 65. Thus, even if Plaintiffs had wanted to conduct their own expert analyses, they could have done so within a couple of days after the final map was released, including because the Legislature simultaneously released the underlying data files, allowing for such analysis.[3]

Finally, Plaintiffs' claim that allowing this lawsuit to move forward after their unreasonable delay would not prejudice the County and the public, Opp.8–9, is incorrect. Regarding harms to voters and candidates, of course "there is no evidence in the record" of such harms already taking place, Opp.9, because these harms would result from a court granting Plaintiffs' request for relief, which has not occurred (and should not occur), *see* Mot.12–13. As courts have regularly held, voters "would [be] confuse[d]" and disenfranchised by a mid-decade redistricting in back-to-back

[3] *See* https://www.nassaucountyny.gov/5515/Adopted-Maps (showing publicly available links to all data underlying the final adopted version of the challenged map). Plaintiffs' further attempt to justify their delay by claiming that they needed the Legislature's redistricting expert's underlying data and analysis—which the Legislature contends is protected on multiple privilege grounds—backfires. Plaintiffs concede that "there is likely to be a lengthy discovery dispute over" this data, Opp.8, meaning expeditious filing of this suit was even more important, so that Plaintiffs could obtain any relevant and nonprivileged materials.

election cycles, *Sanders*, 245 F.3d at 1290, especially when dealing with the "localized county redistricting" that would be affected here, *Chestnut*, 377 F. Supp. 3d at 1317; *see* Mot.12–13. It is surely not "absurd," Opp.9, to conclude candidates have acted in reliance on the current maps because the Nassau County Charter provides that they must stay in place until the next scheduled redistricting. *See* Mot.13. Plaintiffs' argument that the County "would have had to incur" the "significant expenses" necessary to redistrict twice in one decade regardless of when Plaintiffs filed, Opp.9, simply assumes that the map is deficient—which it is not. And even if Plaintiffs' suit were meritorious—which, again, it is not—the County would not "have had to incur" the necessary expenses to hold a special election if Plaintiffs had not delayed in bringing this suit. Mot.12–13. Forcing the County to incur these "great financial and logistical burdens" in back-to-back cycles after such a delay would significantly prejudice it and the public. *White*, 909 F.2d at 104.

CONCLUSION & RELIEF REQUESTED

This Court should not entertain Plaintiffs' extraordinary request for back-to-back redistricting, with back-to-back elections on different maps, because Plaintiffs' unexplained delay warrants dismissal under the equitable doctrine of laches.

Respectfully submitted,

Dated: New York, New York
October 3, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Memorandum of Law in Support of Defendants Nassau County and the Nassau County Legislature's Motion to Dismiss the Complaint complies with the word count limitations set forth in Uniform Rule 202.8-b for the Supreme Court. This Memorandum uses Times New Roman 12-point typeface and contains 3,201 words, excluding parts of the document exempted by Rule 202.8-b. As permitted, the undersigned has relied on the word count feature of this word-processing program.

By: _____
BENNET J. MOSKOWITZ