SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN
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TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, AND MARIANNE VIOLANTE,

Petitioners,

-against-

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, AND THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents.

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Steuben County Index No. E2022-0116CV

Motion Sequence No. 9

AFFIRMATION OF ERIC HECKER, ESQ. IN OPPOSITION TO PETITIONERS' "SUPPLEMENTAL BRIEF ADDRESSING REMEDIES"

ERIC HECKER, ESQ., hereby affirms under penalty of perjury that the following is true and correct:

1. I am an attorney duly licensed to practice law in New York State, and a member of Cuti Hecker Wang LLP, counsel for Respondents Senate Majority Leader and President *Pro Tempore* of the Senate Andrea Stewart-Cousins and the New York State Senate Majority's appointees to the New York State Legislative Task Force on Demographic Research and

Reapportionment (collectively, the "Senate Respondents"). I submit this Affirmation in opposition to Petitioners' "Supplemental Brief Addressing Remedies" dated March 18, 2022. (Dkt. No. 232).

2. Petitioners invite this Court to upset New York's statutory 2022 election calendar with a stroke of the judicial pen, even though the 2022 election process is already underway. But in pressing for this extraordinary relief, Petitioners fail to acknowledge three critical facts: (1) that any order by this Court finding any infirmities in the congressional and/or Senate plans will be stayed pending appellate review; (2) that if and when an appellate court were to finally decide that there were any infirmities in the congressional and/or Senate plans, the next step would be for the Legislature to be afforded the opportunity to address and correct any such infirmities; and (3) that any order by this Court directing the Board of Elections to stay or delay statutory election dates would itself be stayed pending appellate review. As discussed below, especially taking these three critical facts into account, it is clear that this Court must reject Petitioners' invitation to upset the 2022 election calendar.[1]

3. With respect to the first critical fact that Petitioners fail to mention, there is no doubt that any order by this Court finding any infirmities in the congressional and/or Senate plans would be stayed pending appellate review. Every single New York redistricting challenge

[1] Petitioners' submission also addresses whether it would be constitutional for the Court to order a special election in 2023. No party has proposed such a remedy at any point in this proceeding.

since 1892 has ultimately been decided by the Court of Appeals,[2] and there is no basis to doubt that the appellate courts in this case would afford similarly thorough review to any order by this Court finding any aspect of either plan unconstitutional beyond reasonable doubt. Once Respondents file a notice of appeal from any potential order directing the Legislature to redraw any part of any redistricting plan, any such order would be automatically stayed pursuant to CPLR § 5519(a)(1). We do not know whether the ensuing appellate review of any such order (most likely in both the Fourth Department and then in the Court of Appeals) will take days, weeks, or months, but months would appear to be more likely than days or even weeks.

4. With respect to the second critical fact that Petitioners never mention, they ignore that article III, § 5 of the New York Constitution expressly requires that "[i]n the event that a court finds . . . a violation," the Legislature "shall have a full and reasonable opportunity to correct the law's legal infirmities." We do not know when any such process might begin, assuming it ever does – it would begin only after any order finding any infirmity were to become final after all appeals have been exhausted – but courts typically give legislatures thirty days to correct infirmities in a redistricting plan. Whenever one supposes the Fourth Department and the Court of Appeals may complete review of whatever judgment this Court may issue on the merits of this case, the Legislature will then be afforded a reasonable amount of time to make any corrections to the congressional and/or Senate plans that may be deemed necessary.

[2] *See Carter v. Rice*, 135 N.Y. 473 (1892); *In re Sherill*, 188 N.Y. 185 (1907); *In re Reynolds*, 202 N.Y. 430 (1911); *Burns v. Flynn*, 268 N.Y. 601 (1935); *In re Fay*, 291 N.Y. 198 (1943); *Matter of Orans*, 17A N.Y.2d 7 (1966); *Schneider v. Rockefeller*, 31 N.Y.2d 420 (1972); *Bay Ridge Cmty. Council, Inc. v. Carey*, 103 A.D.2d 280 (2d Dep't 1984), *aff'd,* 66 N.Y.2d 657 (1985); *Wolpoff v. Cuomo*, 80 N.Y.2d 70 (1992); *Cohen v. Cuomo*, 19 N.Y.3d 196 (2012).

5. After accounting for these two critical facts, the question presented, properly framed, is as follows: given the practical reality that it is going to be at least weeks and likely months before any order striking down any part of either plan becomes final after ensuing appeals, and given that the next step after that would be for the Legislature to enact a replacement plan or plans responding to any such final appellate order, would it be appropriate for this Court to issue an order at this juncture upsetting the statutory 2022 election calendar?

6. The answer to that question is plainly no. The statutory designating petitioning period started three weeks ago. Candidates have been collecting designating petition signatures for weeks in the districts drawn by the enacted plans. Were an appellate court to order in the future that the process start over under new lines, candidates who already have expended scarce campaign resources collecting signatures would have to revisit that process to their detriment.

7. Moreover, Petitioners' casual suggestion that this Court set a new primary date in August ignores a host of practical considerations and the fact that such a change would conflict with a controlling federal court order. The federal Uniformed Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA") requires that ballots be transmitted to overseas military personnel no later than 45 days before a federal election. 52 U.S.C. § 20302(a) (formerly 42 U.S.C. §§ 1973ff(1)-(7), as amended by Pub. L. No. 111-84, subtitle H, 575-589, 123 Stat. 2190, 2318-2335 (2009)). To comply with this requirement in advance of the current June primary election, ballots must be finalized and transmitted to overseas military personnel on or before May 14, 2022. In 2012, United States District Judge Sharpe of the Northern District of New York entered a permanent injunction setting New York's federal primary to occur on the fourth Tuesday in June to permit compliance with the 45-day UOCAVA requirement. *United States v.*

State of New York, No. 10 Civ. 1214 (GLS)(RFT), 2012 WL 254263, at *2 (N.D.N.Y. Jan. 27, 2012). Any attempt to alter the June primary date would risk violating federal law and, at a minimum, would require approval by Judge Sharpe in the Northern District of New York before the change could take effect. U.S. Const., art. VI, cl. 2.

8. This Court has made clear that it understands the realities of the political calendar. During the hearing on March 3, 2022, the Court stated that it "d[id] not intend . . . to suspend the election process" in 2022, explaining that "even if I find the maps violated the Constitution and must be redrawn, it is highly unlikely that a new viable map could be drawn and be in place within a few weeks or even a couple of months." Tr. at 69-70. "[S]triking these maps," the Court continued, "would more likely than not leave New York State without any duly elected Congressional delegates." *Id*. at 70. The Court therefore concluded that "I believe the more prudent course would appear to be to permit the current election process to proceed." *Id*.[3]

9. The Court's eminently reasonable decision is consistent with – and indeed compelled by – legions of state court cases that have held, time and again, that it would be improper for a court to sow confusion and otherwise impermissibly threaten orderly election

[3] CPLR 2221(d)-(e) provide that a motion for leave to renew or reargue must be identified specifically as such and must, in the case of a motion to reargue, "be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion," or in the case of a motion to renew, "be based upon new facts not offered on the prior motion that would change the prior determination" or "demonstrate that there has been a change in the law that would change the prior determination." *See Quinn-Jacobs v. Moquin*, 201 A.D.3d 1330, 1331 (4th Dep't 2022); *Ives Hill Country Club, Inc. v. City of Watertown*, 185 A.D.3d 1494, 1497 (4th Dep't 2020); *Boreanaz v. Facer-Kreidler*, 2 A.D.3d 1481, 1482 (4th Dep't 2003). Petitioners have improperly failed to identify their brief as a motion to renew or reargue, and they further fail to identify any new facts or changes in the law that would justify asking this Court to revisit its March 3, 2022 on-the-record decision declining to enjoin the 2022 election calendar.

processes, including by interfering with a statutory election calendar, after the election process already has begun. *See In re Khanoyan*, 65 Tex. Sup. Ct. J. 207, 2022 WL 58537 (Jan. 6, 2022) (denying challenge to redistricting for 2022 election because of the timing of the election and nature of the relief sought); *Alliance for Retired Americans v. Secretary of State*, 240 A.3d 45, 54 (Me. 2020) (denying injunctive relief and holding that court should not alter rules on eve of election); *Singh v. Murphy*, Doc. No. A-0323-20T4, 2020 WL 6154223, at *14-15 (N.J. App. Div. 2020) (same); *League of United Latin American Citizens of Iowa v. Pate*, 950 N.W.2d 204, 216 (Iowa 2020) (same); *In re Hotze*, 627 S.W.3d 642, 645-46 (Tex. 2020) (same); *Ohio Democratic Party v. LaRose*, 159 N.E.3d 852, 879 (Ohio 2020) (reversing lower court's grant of injunction shortly before the election and stating that altering the rules close to the election would "fuel distrust in the integrity of the election process"); *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 387 (Fl. 2015) (noting that after lower court found redistricting plan unconstitutional and approved the Legislature's remedial plan, it nevertheless ordered the upcoming 2014 election "to proceed under the unconstitutional 2012 plan due to time constraints"); *Dean v. Jepsen*, 51 Conn. L. Rptr. 111, 2010 WL 4723433, at *7 (Conn. Super. Ct. Nov. 3, 2010) (denying injunctive relief and noting that "by filing her action so close to the election, the plaintiff risks injecting impermissible confusion and disruption in the electoral process"); *Chicago Bar Ass'n v. White*, 386 Ill. App. 3d 955, 961 (2008) ("[W]e agree[] that there are too many obstacles at this late date to alter the method of voting," noting that late changes would "result in voter confusion," and "[a]s an election draws closer, that risk will increase") (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006)); *Quinn v. Cuomo*, 69 Misc. 3d 171, 177-78 (N.Y. Sup. Ct. Queens Cnty. 2020) (refusing to grant injunction where election date

was five weeks away, noting that late-stage reinstatement of special election could lead to "great expense" and "voter confusion" which "in itself, is violative of the very intent and purpose of the Election Law").

10. New York courts have likewise made clear in the reapportionment context that even when a plan is unconstitutional, a fast-approaching election should nevertheless proceed under the plan, and a new, constitutionally compliant plan should be enacted for future elections. *See Honig v. Bd. of Sup'rs of Rensselaer Cnty.*, 31 A.D.2d 989, 989 (3d Dep't 1969), *aff'd*, 24 N.Y.2d 861 (1969) (ordering election to proceed under unconstitutional plan given "the imminence of the spring primary election, the first day for signing designating petitions being but three weeks away," and finding that "if employed as a temporary measure, the plan before us, having been adopted by the representative body, is preferable" to any alternative options at that late stage); *Duquette v. Bd. of Sup'rs of Franklin Cnty.*, 32 A.D.2d 706 (3d Dep't 1969) (applying same principle); *Pokorny v. Bd. of Sup'rs. of Chenango Cnty.*, 59 Misc. 2d 929, 934 (Sup. Ct. Chenango Cnty. 1969) (same); *see also Abate v. Mundt*, 33 A.D.2d 660, 663 (2d Dep't), *aff'd*, 25 N.Y.2d 309 (1969), *aff'd*, 403 U.S. 182 (1971) (though reapportionment plan was held constitutional, even the dissenting judges in the Second Department and Court of Appeals held that the election should proceed under what they found to be an unconstitutional plan given time exigencies).

11. Courts have repeatedly refused to implement the extreme remedy of enjoining election deadlines. *See Burns v. Flynn,* 155 Misc. 742, 744 (N.Y. Sup. Ct. Albany Cnty. 1935), *aff'd*, 245 A.D. 79 (3d Dep't 1935), *aff'd*, 268 N.Y. 601 (1935) (refusing to enjoin election even though legislators had entirely failed to reapportion, to avoid violating the rights of voters);

Khanoyan, 65 Tex. Sup. Ct. J. 207, 2022 WL 58537, at *5 (noting that delaying the election would be "an extremely disruptive and fraught judicial imposition"); *see also Honig*, 31 A.D.2d at 989 (election proceeded despite unconstitutional reapportionment plan; remedy was ordered for future elections); *Duquette*, 32 A.D.2d at 706 (same); *Pokorny*, 59 Misc. 2d at 934 (same).[4]

12. Especially in light of this overwhelming authority, there is no basis for this Court to revisit its prior on-the-record conclusion that it would be inappropriate for the Court to enjoin and judicially tinker with the complex set of past and future statutory dates that candidates are relying on as we speak. Indeed, the case for declining Petitioners' invitation to do so grows stronger with each passing day.

13. This brings us to the third critical fact that Petitioners omit: that any order by this Court directing the Board of Elections to stay or delay statutory election dates would itself be stayed pursuant to CPLR § 5519(a)(1) pending appellate review. The Court has not even ruled on the merits of this case yet, and Petitioners have not come close to meeting their burden of proving that either plan is unconstitutional beyond reasonable doubt. But if the Court disagrees and strikes down any aspect of either plan, and if the Court then goes even further and reverses its March 3, 2022 decision and orders the Board of Elections to alter the statutory election

[4] Petitioners' citations to other states' cases do not support the remedy they ask this Court to order. Indeed, they do not cite a single case in which a trial court, as opposed to a state's highest court, has moved the date of a primary election. The only authority Petitioners provide in which a state trial court moved *any* deadline is *Legislative Research Commission v. Fischer*, No. 2012-SC-000091 (Ky. Apr. 26, 2012), and there the trial judge only extended the filing deadline for candidates by ten days. For the reasons stated, by the time any appeals will be concluded and, if necessary, the Legislature is given the opportunity to address any infirmities, a far more dramatic extension would be required here.

calendar, then Respondents' ensuing notices of appeal would stay any such order pending appellate review. It is therefore difficult to understand the point of the current debate.

14. There is no doubt that this Court is playing a critical role in this process, including by making a wide range of preliminary rulings in this special proceeding and including especially by determining in the first instance which side has prevailed on the merits. Once the Court makes that decision, the next step will be for the Fourth Department and then most likely the Court of Appeals to determine if this Court got it right. Once that process has concluded, there may or may not be the need to address infirmities in one or both plans, and if there is, only the Legislature may do that in the first instance. Once the Legislature has corrected any infirmities, if any, that may need to be addressed, then this Court may be tasked with evaluating the sufficiency of any such remedial steps taken by the Legislature, and whatever this Court may decide at that juncture may also be appealed. There is no doubt that if this Court rules for Petitioners, the road ahead will take months to complete. There is no basis to think it will be practicable to draw new congressional or Senate lines in time to prepare for and hold the 2022 primary, and there certainly is no basis for the Court to purport to upset the 2022 election calendar right now.

15. I affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

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Dated: March 21, 2022
New York, New York

/s/ Eric Hecker

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