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May 10, 2022

**By ECF**

The Honorable Gary L. Sharpe  
United States District Judge  
James T. Foley U.S. Courthouse  
445 Broadway, Room 411  
Albany, NY 12207

Re: *United States of America v. New York State Board of Elections, et al.*  
10-CV-1214 (GLS)

Dear Judge Sharpe:

On behalf of Proposed Plaintiff-Intervenors Belinda de Gaudemar and Susan Schoenfeld, we write to bring to the Court's attention two affidavits filed yesterday in *Harkenrider v. Hochul*, Case No. E2022-0116CV, the redistricting litigation taking place in New York's Steuben County Supreme Court. In the affidavits, which are attached as Exhibits A and B, the Co-Executive Directors of the New York State Board of Elections ("SBOE") make clear that even though New York has not received this Court's approval to hold a later federal primary election, it is not preparing to hold the federal primary on June 28, 2022; it is only planning to hold an election for state and local offices on that date. *See* Affidavit of Todd D. Valentine, Exhibit A, ¶ 8 ("the Board, and local boards of elections, are . . . preparing for the August congressional and State Senate primaries ordered by [the Steuben County Supreme] Court.").

In other words, the SBOE continues to flout the clear terms of this Court's 2012 order. New York is bound by this Court's 2012 order, unless and until this Court grants approval to change the date or otherwise modifies the order. Under that Order, the state must hold its non-presidential federal primaries on the fourth Tuesday in June unless 1) "New York enacts legislation resetting the non-presidential federal primary election for a date that complies fully with all UOCAVA requirements," and 2) that date "is approved by this court." 2012 Order at 8 (Jan. 27, 2012), ECF No. 59; *see also EEOC v. Local 638*, 889 F. Supp. 642, 649 (S.D.N.Y. 1995) ("Parties are bound by a court order until the court modifies the order or releases them from it, and defendants who act without first asking the court to clarify the order act[] at their own peril." (quotation marks omitted)), *rev'd in part on other grounds, EEOC v. Local 638*, 81 F.3d 1162 (2d Cir. 1996).

The SBOE does not contest that it is required to seek this Court's approval in order to modify the federal primary election date. *See* ECF 98-7 (Proposed Intervenors' Ex. 7), at 19:19–20 ("THE COURT: Why haven't you gone back to Judge Sharpe? MR. QUAIL: We should

EMERY CELLI BRINCKERHOFF ABADY WARD & MAAZEL LLP

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have.”). And yet, the SBOE continues to prepare for a federal primary election in August without approval, in direct contravention of the clear language of this Court’s 2012 order.

The 2012 order issued as a direct result of New York’s history of noncompliance with federal law governing the transmission of military and overseas ballots. For the reasons set forth in their letter brief (ECF 98), Proposed Plaintiff-Intervenors oppose the SBOE’s request for a supplemental order allowing for an August primary in 2022, because they are concerned that New York—given all of the administrative steps that must occur to certify the results of a primary election and the risk of a recount or litigation—will fail to mail overseas voters absentee ballots in time for them to vote those ballots, return them, and have them counted in the general election.

Counsel for Proposed Plaintiff-Intervenors are available at the Court’s convenience to address this emergent matter.

Dated: May 10, 2022

Respectfully Submitted,

ELIAS LAW GROUP LLP

EMERY CELLI BRINCKERHOFF  
ABADY WARD & MAAZEL LLP

By: /s/ Aria C. Branch

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*\*Pro hac vice applications to be submitted.*

Enclosures

# **EXHIBIT A**

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF STEUBEN

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 VOLANTE,

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.

**AFFIDAVIT OF  
TODD D. VALENTINE**

Index No.  
E2022-0116CV

Hon. Patrick F. McAllister

STATE OF NEW YORK     )  
  ) SS:  
COUNTY OF ALBANY     )

TODD D. VALENTINE, being duly sworn, deposes and says:

1. I serve as Co-Executive Director for the New York State Board of  
Elections (“Board”). I have held this position since 2008. From 1997 to 2008 I was Special  
Counsel to the Board. Accordingly, I am familiar with county board of elections practices and  
capabilities. I make this affidavit based on my personal knowledge.

2. I respectfully submit this affidavit in opposition to Gavin Wax's and Gary Greenberg's motions to intervene. The positions expressed in this affidavit represent a consensus opinion of the New York State Board of Elections.

### **Background**

3. On February 3, 2022, the Legislature enacted two laws that, collectively, established New York's legislative-district maps for Congress, the State Senate, and the State Assembly.

4. On April 27, 2022, the Court of Appeals invalidated the congressional and State Senate maps. It left the Assembly map in place as it not challenged by anyone in any court as of that date.

5. Two days later, this Court ordered that (1) Special Master Dr. Jonathan Cervas will release his proposed remedial congressional and State Senate maps by May 16, 2022; (2) after considering any comments submitted in opposition to his proposed maps, Special Master Cervas will finalize the maps by May 24, 2022; (3) congressional and State Senate primary elections, which had been scheduled by law for June 28, 2022, will occur on August 23, 2022; and (4) the deadline for local boards of elections to mail military and overseas ballots for the August 23 primaries is July 8, 2022 (Doc. Nos. 296, 301).

6. Initially, this Court had set a deadline of May 24, 2022 to finalize the congressional map (Doc. No. 258). The Board then asked this Court to "consider expediting the approval process . . . in any manner possible" (Doc. No. 290). Later that day, this Court moved the deadline from May 24 to May 20 (Doc. No. 291).

7. Non-parties Gavin Wax and Gary Greenberg moved to intervene in this lawsuit on May 1 and 3, respectively (Doc. Nos. 316, 346). They ask this Court to strike down the Assembly map, which Petitioners did not challenge, and to enjoin use of that map for the 2022 primary and general elections. If this Court grants their request, the Assembly primaries would likely be moved from June 28 to August 23.

8. The motions should be denied. The Board, and local boards of elections, are already under unprecedented strain preparing for the August congressional and State Senate primaries ordered by this Court. They have been aware of this change for some time now and have been preparing for those offices to be contested at an August primary. Moving a third election—i.e., the Assembly primary—would place additional, potentially unbearable burdens on the State's election system. In particular because the June 28 primary has already been certified by state and local boards of elections, ballots have been or are being prepared across the state based on that certification and ballots are to be sent for the June primary, including those primaries being held within the 150 Assembly Districts across the state before Friday, May 13, 2022 as that is the deadline under state law to send military and overseas ballots for the June 28 election as provided for by Election Law 10-108.

### **Danger to the June Primaries**

9. Replacing the Assembly map at this even later date would endanger all other elections scheduled for June 28 primaries.

10. On May 4, 2022, the Board certified Assembly candidates for the June 28 primaries. In response, local boards of elections finalized their primary ballots. The primary ballot for each party is a unified ballot that would include candidates for any Assembly primary,

Governor, Lieutenant Governor, and other elected offices (except for Congress and State Senate, which this Court moved to August 23).

11. The statutory deadline to mail these primary ballots to military and overseas voters is Friday, May 13, 2022. Elec. Law §§ 10-108(1), 11-204(4). To prepare for mailing, local boards of elections are printing ballots now. Local boards are also programming their voting systems and extensively testing those ballots for compatibility with vote-counting machinery.

12. If the Assembly primaries are moved from June to August, then these ballots would have to be thrown away. New primary ballots (without Assembly candidates) would need to be created, printed, tested, addressed, and mailed by the May 13 deadline. That would almost certainly be impossible, and I do not make that averment lightly. Further, boards of elections have reported unprecedented supply-chain issues resulting in paper and envelope shortages, so the printing of replacement ballots would prove challenging.

### **Judicial-Nominating Conventions and Party Committees**

13. Far more so than congressional and State Senate districts, Assembly districts affect several other aspects of New York's election infrastructure. Accordingly, replacing the Assembly map would create even more burdens than replacing the congressional and State Senate maps.

14. For example, Supreme Court elections depend on Assembly districts.

15. Parties' candidates for the Supreme Court are not chosen through primary elections. Instead, delegates choose them at party conventions. Those judicial delegates, in turn,

are elected by voters in the primaries—and much like candidates for other offices, they must collect designating-petition signatures to appear on primary ballots.

16. The judicial delegates who win the primaries attend a nominating convention of their party, which by law must occur between August 4 and 10, 2022. Elec. Law § 6-158(5). At the conventions, delegates decide who will appear for their party on the general-election ballot as candidates for the Supreme Court.

17. Critically, judicial delegates are elected from Assembly districts. Elec. Law § 6-124. So, if the Assembly map is replaced, judicial-delegate elections (like Assembly primaries) would have to be moved to August 23, and judicial-nominating conventions could not occur between August 4 and 10 as presently required by law. Instead, judicial-nominating conventions probably could not be held until September, after the results of judicial-delegate elections are certified. This would imperil the ability of New York's election machinery to complete the party nominating processes in time to meet the critical and unalterable requirement to transmit military and overseas ballots prior to 46 days before the general election on November 8, 2022.

18. Specifically, general-election ballots must be mailed to military and overseas voters by September 23, 2022. Elec. Law §§ 10-108(1), 11-204(4). If Supreme Court candidates are chosen at conventions in September, it would be extremely difficult to finalize, print, program voting machines, test, address, and mail general-election ballots (which include Supreme Court candidates) by the September 23 deadline.

19. Additionally, members of the Democratic Party's state committee, are elected from Assembly districts this year. Elec. Law §§ 2-102(1), 2-104(1). Therefore, if the Assembly map is replaced, elections for these positions cannot occur on June 28 as scheduled.

These elections would also have to be moved to August 23, creating an additional burden in the already-challenging process of preparing for the unexpected August primaries. Similarly, current law permits that a member of a county committee need not reside in the election district he or she represents, but rather the member of county committee may represent any election district in the Assembly District in which the member of county committee resides. If the Assembly districts are changed at this late date it would likely be necessary to redo petitioning for members of county committees as well given this residency requirement.

### **Election Districts**

20. Finally, if the Assembly map is replaced as Mr. Wax and Mr. Greenberg propose, many more election districts will also have to change.

21. Election districts are the foundational unit of New York's political geography. Local boards of elections must sort New York's approximately 13 million active voters into 15,587 election districts before a primary or general election can occur. This sorting is necessary because voters' election districts determine what ballot they receive and where they vote.

22. Every voter in a given election district receives the same ballot, with the same candidates for the same races. As a result, election districts cannot be bisected by Assembly districts, State Senate districts, congressional districts, county boundaries, or municipal boundaries. Stated differently, everyone in a given election district must reside in the same Assembly district, State Senate district, congressional district, county, and municipality. If any of those boundaries change, election districts must change.

23. This year, after the redistricting that occurred on February 3, local boards of elections spent virtually all their time for about one month, working with their voter registration vendors, to sort voters into their correct election districts.

24. If the Assembly map is replaced, election districts will have to be re-drawn, and voters will have to be re-sorted. This process could take weeks, given that boards of elections would have to simultaneously complete the other steps necessary to prepare for primaries in June and August.

### **Statewide Primaries on June 28**

26. Presently, all statewide primaries are proceeding at the June 28, 2022 primary. This should not be disturbed, as this Court's prior order on April 29, 2022 articulated. All necessary steps for ballot access for statewide primaries have been completed, and nothing in the current litigation touches on the validity of those processes. Significantly, under state law the deadline to challenge primary designations passed on April 21, 2022 as provided by Election Law 16-102. And the courts have uniformly held that this deadline applies even to challenges of a Constitutional dimension. *See Scaringe v Ackerman*, 119 AD 2d 327 (3<sup>rd</sup> Dept 1986) (holding petitioners' claims that candidate was barred by the constitutional residency requirement from seeking office was subject to limitations period of the Election Law: "[i]rrespective of the label given to the proceeding or the words used to describe the issue, the late relief sought by petitioners seeks judicial intervention in the election process to remove a candidate from the ballot...they cannot avoid the time requirement of the statute by initiating a new and different proceeding...". Accordingly, it is simply too late for new claims related to the invalidity of the Assembly and statewide elections to be entertained.

**Conclusion**

27. Replacing the Assembly map and moving the statewide primaries would create logistical hurdles for the Board and for local boards of elections for which we have no reasonably actionable solutions. For this reason, the motions to intervene should be denied.

Dated: Albany, New York  
May 9, 2022

  
TODD D. VALENTINE

Sworn to before me this  
9 day of May, 2022

  
Notary Public

BRIAN L QUAIL  
Notary Public, State of New York  
Reg. No. 02QU6395806  
Qualified in Schenectady County  
Commission Expires 08/05/2023

# **EXHIBIT B**

STATE OF NEW YORK  
SUPREME COURT : COUNTY OF STEUBEN

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 VOLANTE,

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.

**AFFIDAVIT OF  
KRISTEN ZEBROWSKI  
STAVISKY**

Index No.  
E2022-0116CV

Hon. Patrick F. McAllister

STATE OF NEW YORK     )  
  ) SS:  
COUNTY OF ALBANY     )

KRISTEN ZEBROWSKI STAVISKY, being duly sworn, deposes and says:

1. I serve as Co-Executive Director for the New York State Board of Elections (“Board”). I have held this position since 2021. I previously served as Commissioner of Elections at the Rockland County Board of Elections. I am familiar with the practices and capabilities of boards of elections and make this affidavit based on my personal knowledge.

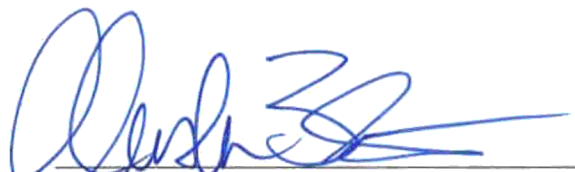
2. I respectfully submit this affidavit in opposition to Gavin Wax’s and Gary Greenberg’s motions to intervene.

3. I have read the affidavit of Todd D. Valentine in this matter dated May 9, 2022, and I agree with its contents. The positions expressed in that affidavit represent a bipartisan consensus opinion of the New York State Board of Elections.

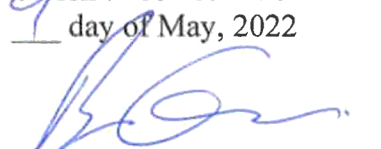
**Conclusion**

4. Replacing the Assembly map and moving the Assembly and statewide primaries to August would create logistical hurdles for the Board and for local boards of elections for which we have no reasonably actionable solutions. For this reason, the motions to intervene should be denied.

Dated: Albany, New York  
May 9, 2022

  
KRISTEN ZEBROWSKI STAVISKY

Sworn to before me this  
9 day of May, 2022



Notary Public

BRIAN L QUAIL  
Notary Public, State of New York  
Reg. No. 02QU6395806  
Qualified in Schenectady County  
Commission Expires 08/05/2023