

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,

Index No.
E2022-0116CV

Assigned Justice:
Hon. Patrick F.
McAllister, A.J.S.C.

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.

**MEMORANDUM OF LAW IN OPPOSITION TO
PETITIONERS' MOTION FOR SUPPLEMENTAL BRIEFING ON REMEDIES**

Respectfully submitted,

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Attorneys for Respondent Speaker of the Assembly Carl Heastie

Respondent Carl Heastie, Speaker of the New York State Assembly, respectfully opposes Petitioners' request for permission to submit supplemental briefing on remedies (Dkt. Nos. 199, 203).¹

PRELIMINARY STATEMENT

In February, Petitioners made an extraordinary request. They asked this Court to rewrite New York's election laws by extending the statutory deadlines for the 2022 Congressional and State Senate elections. Petitioners asserted their arguments in two memoranda of law and in a letter. On March 3, 2022, this Court rejected those arguments. It decided that, even if Petitioners somehow prevail on the merits of this special proceeding, the 2022 elections will proceed as scheduled. Unhappy with that decision, Petitioners now ask for supplemental briefing — effectively, a fourth bite at the apple.

This Court made the correct decision on March 3, and nothing has changed since then. If anything, Petitioners' proposed annulment of the election laws is even less appropriate today than it was weeks ago: aspiring candidates are collecting ballot signatures now, largely in reliance on this Court's March 3 pronouncement. In short, supplemental briefing would serve no purpose and should not be allowed.

STATEMENT OF FACTS

Petitioners initiated this special proceeding on February 3, 2022 (Dkt. No. 1). They seek to invalidate New York's recently enacted Congressional and State Senate district maps (*id.*). Respondents stipulated to an increased word limit for the memoranda of law on the merits (Dkt. No. 49). While 22 N.Y.C.R.R. § 202.8-b allows 7,000 words for memoranda of law in chief and 4,200 for reply memoranda, the parties agreed to limits of

¹ "Dkt. No." and any associated page citations refer to the document and page numbers assigned by the New York State Courts Electronic Filing ("NYSCEF") System in this special proceeding.

10,000 and 5,000 words, respectively (*id.*). Petitioners took full advantage: their opening memorandum contained 9,982 words, and their reply memorandum contained 4,986 (Dkt. No. 25 at 65; Dkt. No. 102 at 22). Both of Petitioners' memoranda argued that this Court should suspend 2022 election deadlines (Dkt. No. 25 at 62–63; Dkt. No. 102 at 16–17). Petitioners also submitted a letter to this Court, dated February 15, 2022, with further arguments in support of suspending the deadlines (Dkt. No. 52 at 3–4).

During oral argument on March 3, 2022, this Court rejected Petitioners' extraordinary request to override New York's election laws (Tr. 69:9–70:15):²

The Petitioners requested that I stay the election or the current petition-gathering process until this matter can be decided. . . . I do not intend at this time to suspend the election process for the following reasons:

[First,] Petitioners have an extremely high level of proof . . . That proof is beyond a reasonable doubt with the Respondents enjoying a presumption of constitutionality.

[Second,] 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; therefore, striking these maps would more likely than not leave New York State without any duly elected Congressional delegates.

I believe the more prudent course would appear to be to permit the current election process to proceed and then, if necessary, to require new elections next year [*i.e.*, in 2023] if the new maps need to be drawn.

Two days before that decision, aspiring candidates for Congress and for the State Senate began collecting signatures to qualify for primary elections. *See* N.Y. ELEC. LAW §§ 6-134(4), 6-158(1). The deadline for submitting petitions with the required

² “Tr.” refers to the transcript of oral argument held before this Court on March 3, 2022, attached as Exhibit A to the Affirmation of Steven B. Salcedo, Esq. dated March 15, 2022.

signatures is April 7, 2022, about three weeks from now. *Id.* § 6-158(1); *see also* Dkt. No. 6 (2022 election calendar).

ARGUMENT

For at least four reasons, this Court should deny Petitioners' request for supplemental briefing on remedies.

First, any discussion of remedies is premature. This Court has yet to rule on the district maps' constitutionality, and a ruling in Respondents' favor would naturally moot the remedy issue. Further, as this Court recognized at oral argument (Tr. 70:1–6), the need for a remedy is unlikely. New York State Courts have long deferred to the Legislature on redistricting matters. *Matter of Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79 (1992). “A strong presumption of constitutionality attaches to [a] redistricting plan,” and a court will strike down such plan only if unconstitutionality is demonstrated “beyond reasonable doubt.” *Id.* at 78 (quoting *Matter of Fay*, 291 N.Y. 198, 207 (1943)). Simply put, another round of briefing on remedies would be appropriate only if Petitioners overcome this demanding standard, which is unlikely.

Second, Petitioners already received ample opportunity to assert remedy-related arguments. They enjoyed increased word limits for their opening and reply memoranda of law on the merits, and they presented further arguments to this Court in a letter (Dkt. No. 52). Their apparent decision to hold back on certain arguments is no justification for a fourth bite at the apple.

Third, Petitioners cannot demonstrate changed circumstances that would justify supplemental briefing — which generally should be allowed only under “[u]nusual circumstances, such as a recent change in decisional law.” *Scherrer v. Time Equities*, 218

A.D.2d 116, 121 (1st Dep't 1995), *abrogated on other grounds by Matter of N.Y. County DES Litig.*, 89 N.Y.2d 506, 511 (1997). For example, in *People v. Fratta*, the Appellate Division denied the defendant's request for permission to file supplemental briefing on a potential *Batson* violation. 83 N.Y.2d 771, 772 (1994) (Mem). The Court of Appeals affirmed the denial because "[t]he *Batson* issue could have been discovered and included in defendant's original brief." *Id.* Here, the argument against supplemental briefing is even stronger. Not only *could* Petitioners have made their remedy arguments in prior briefing, but they *did* already make those arguments. Neither law nor facts have changed since then, so this Court should decline to entertain additional briefing.

Finally, this Court already rejected Petitioners' proposed remedy. Petitioners assert that this Court "[left] open the question of what [it] would do if it ultimately found the 2022 . . . maps unconstitutional" (Dkt. No. 199 at 2), but that's not true. In reality, this Court stated at oral argument on March 3, 2022, that "the more prudent course would appear to be to permit the current election process to proceed and then, if necessary, to require new elections next year [*i.e.*, in 2023] if the new maps need to be drawn" (Tr. 70:12–15). This Court correctly reasoned that "even if . . . 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" (*id.* at 70:6–9). Aspiring legislative candidates are collecting signatures now in reliance on this Court's decision, which was published by several media outlets.³

³ *E.g.*, Bill Mahoney, *Judge in redistricting case declines to halt New York's elections, but floats statewide specials in 2023*, POLITICO (Mar. 3, 2022, 8:48 PM EST), <https://www.politico.com/news/2022/03/03/redistricting-case-declines-halt-new-york-elections-00013801> (last visited Mar. 15, 2022).

Grasping at straws, Petitioners suggest that the State and Federal Constitutions do not allow elections in odd-numbered years, so this Court must reconsider its March 3 ruling (Dkt. No. 199 at 3). The suggestion is incorrect. Special elections in odd-numbered years (as well as even-numbered years) are permitted to fill vacant seats in the Federal and State legislatures. N.Y. PUB. OFF. LAW §§ 42(3)–(4). In fact, New York held special elections to fill vacancies in the State and Federal legislatures in 2009, 2011, and 2015.^{4, 5, 6} Thus, Petitioners' implicit constitutional argument is baseless and does not warrant additional briefing.

CONCLUSION

Petitioners' desire to revisit the remedies issue reflects wishful thinking. This Court has yet to rule on the district maps' constitutionality, and both the burden of proof and the evidence are on Respondents' side. Moreover, Petitioners already made their remedies arguments three times, and this Court correctly rejected them. Supplemental briefing on remedies would serve no purpose; Petitioners' motion should be denied.

⁴ New York State Board of Elections, *2009 Election Results*, <https://www.elections.ny.gov/2009ElectionResults.html> (last visited Mar. 15, 2022).

⁵ New York State Board of Elections, *2011 Election Results*, <https://www.elections.ny.gov/2011ElectionResults.html> (last visited Mar. 15, 2022).

⁶ New York State Board of Elections, *2015 Election Results*, <https://www.elections.ny.gov/2015ElectionResults.html> (last visited Mar. 15, 2022).

Dated: New York, New York
March 15, 2022

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CERTIFICATE OF COMPLIANCE WITH 22 N.Y.C.R.R. § 202.8-b

This memorandum of law complies with 22 N.Y.C.R.R. § 202.8-b because it contains 1,545 words, excluding the caption, table of contents, table of authorities, and signature block. The word count was generated by the word-processing system used to prepare this document.

Dated: Buffalo, New York
March 15, 2022

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