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.

Index No.
E2022-0116CV

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

MEMORANDUM OF LAW IN OPPOSITION TO GAVIN WAX'S AND GARY GREENBERG'S MOTIONS TO INTERVENE

Respectfully submitted,

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Respondent Carl Heastie, Speaker of the New York State Assembly (the "Speaker"), respectfully opposes the motions to intervene filed in this proceeding by Gavin Wax (Dkt. Nos. 316-19) and Gary Greenberg (Dkt. Nos. 346-49) (collectively, the "Putative Intervenors").[1] Respondent Senator Andrea Stewart-Cousins, Majority Leader of the New York State Senate, joins in the Speaker's papers opposing the intervention motions.

PRELIMINARY STATEMENT

Like many other New Yorkers, Putative Intervenors Gavin Wax and Gary Greenberg knew about this lawsuit the day it began. Yet they stayed on the sidelines for 87 days, preferring instead to criticize the Legislature on Twitter. Only now — months after the Petition was filed, weeks after Assembly candidates completed their ballot-access petitioning, and mere days before the deadline to finalize remedial maps — do Mr. Wax and Mr. Greenberg put down their phones, request permission to intervene, and ask this Court to strike down the Assembly map. That map, moreover, received bipartisan support and is fair, as has been affirmed in the sworn affidavits of 14 Republican Assembly members, including Minority Leader William Barclay and Assemblyman Philip Palmesano, who is one of two Republican members of the New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR").

This Court should not authorize an egregiously late and otherwise flawed intervention; it should not strike down a fair Assembly map that received bipartisan support; and it should not inject further, needless chaos into this year's elections. The motions to intervene should be denied.

[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.

ARGUMENT

POINT I

THE MOTIONS SHOULD BE DENIED AS UNTIMELY

The Putative Intervenors seek to intervene as of right under CPLR 1012(a) or, alternatively, at this Court's discretion under CPLR 1013 (Dkt. No. 317, p. 9; Dkt. No. 347, p. 5). Both provisions allow intervention only "[u]pon timely motion." Neither motion is timely, and they should be denied for that reason alone.[2]

A. The Putative Intervenors failed to intervene three months ago, when Petitioners disavowed any challenge to the Assembly map

Petitioners commenced this lawsuit on February 3, 2022 (Dkt. No. 1). The original Petition, filed that day, did not challenge the Assembly map (*id.*). Five days later, Petitioners filed a proposed Amended Petition, adding a challenge to the State Senate map, but not the Assembly map (Dkt. No. 18). In fact, the February 8 Amended Petition affirmatively disavowed any challenge to the Assembly map (*id.* at p. 5 nn.6-7). Proceedings in this Court continued for nearly 60 days, to March 31, 2022, with no request by anyone to intervene. The Appellate Division, Fourth Department, issued its Decision and Order on the subsequent appeal on April 21, 2022, and the Court of Appeals issued its Opinion and Order on cross-appeals from the Fourth Department Decision and Order six days later. *See Matter of Harkenrider v. Hochul*, ___ A.D.3d ___, 2022 WL 1193180 (4th Dep't Apr. 21, 2022), *aff'd as mod.*, ___ N.Y.3d ___, 2022 WL 1236822 (Apr. 27, 2022).

This lawsuit has been no secret. Quite the contrary — it received heavy media coverage from Day One. To confirm that Petitioners did not challenge the Assembly

[2] The intervention motion made on behalf of Benjamin Carlisle, Emin Eddie Egriu, Michael Rakebrandt, Jonathan Howe, and Howard Rabin (Dkt. Nos. 326-27, 331) is also untimely and should be denied, for the same reasons set forth in Point I of this Memorandum of Law.

map, all anyone had to do was access the NYSCEF docket, at no cost, and skim Petitioners' pleadings.

The Putative Intervenors, in particular, cannot claim ignorance. Mr. Greenberg is a "former New York state political candidate, who may in the future run again for State office" (Dkt. No. 348 ¶ 1). Mr. Wax is "a New York-based conservative political commentator and columnist," president of the New York Young Republican Club, and a contributor to One America News and other media outlets.[3] Neither Putative Intervenor was living under the proverbial rock for the past three months.

Although they didn't bother seeking intervention until now, they did find time to tweet prodigiously about New York's redistricting and this special proceeding during the past several months. On February 3, for instance, Mr. Greenberg retweeted an image of the Petition (Bucki Aff. Ex. B).[4] He tweeted or retweeted about redistricting, this lawsuit, or both at least four additional times that day, eight additional times that month, and eight times in March — including a play-by-play of oral arguments that took place on March 3, 2022 (*id.*). Mr. Wax was paying attention, as well. In a February 3 Twitter post, he asked why "Republicans [are] so weak in New York" because "apparently 15 GOP members of the Assembly voted in favor of the Democrats [sic] gerrymandering proposal" (*id.* Ex. A). He tweeted a picture of this Court's March 31 Order the day it was issued (*id.*). He even asked his Twitter followers to "Please clap!" for his proposed "fair and just map"—which was solid red except for a blue handgun shooting bullets into a blue Albany (*id.*).

[3] Gavin Wax, https://www.gavinwax.com/ (last accessed May 5, 2022).

[4] "Bucki Aff." refers to the affirmation of Craig R. Bucki, Esq. dated May 9, 2022.

Simply put, the Putative Intervenors have no excuse for failing to intervene in February or March. "[T]he party seeking equity must do equity, i.e., he must come into court with clean hands[.]" *Pecorella v. Greater Buffalo Press, Inc.*, 107 A.D.2d 1064, 1065 (4th Dep't 1985). Here, the Putative Intervenors knowingly chose to focus on their Twitter pages, and sit on their rights while the parties from the inception of this proceeding litigated the validity of the enacted Congressional and State Senate district lines in February, March, and April 2022. The Putative Intervenors' egregious delay past the issuance of the Court of Appeals Opinion and Order, without more, is ample basis to deny their motions.

Matter of Fink v. Salerno, in which the petitioners challenged a Board of Elections determination that certain candidates could not appear on the ballot, is on point. 105 A.D.2d 489, 489 (3d Dep't 1984). The proceeding began on October 3, with a return date of October 9; rival candidates moved to intervene on October 8. *Id.* at 490. Supreme Court denied the motion as untimely. *Id.* The Appellate Division affirmed, stressing "the expediency with which election cases must be handled," which is particularly true here. *Id.*; *see also Castle Peak 2012-1 Loan Trust v. Sattar*, 140 A.D.3d 1107, 1108 (2d Dep't 2016) (denying motion to intervene filed four months after movant learned of the relevant events). Thus, the putative intervenor in *Fink* waited five days after the proceeding began, until "the 'eve of trial,'" *viz.*, one day before the return date. 105 A.D.2d at 490. Here, the Putative Intervenors waited much longer: about three months after this proceeding began, about one month after this Court's March 31 Decision and Order (Dkt. No. 243), and several days after the exhaustion of appeals on the merits and the entry of the final Court of Appeals Order that granted the Amended Petition and invalidated the enacted Congressional and State Senate district lines enacted by the State Legislature in February 2022.

Also instructive is *Matter of Rutherford Chemicals, LLC v. Assessor of Town of Woodbury*, in which someone sought to intervene "three weeks after the parties had reached a settlement." 115 A.D.3d 960, 961 (2d Dep't 2014). Supreme Court denied the motion as untimely, and the Appellate Division affirmed. *Id.*; *see also Carnrike v. Youngs*, 70 A.D.3d 1146, 1147 (3d Dep't 2010) (denying motion to intervene filed after the plaintiff won a default judgment). Here the circumstances are similar: the Court of Appeals already ruled on the merits, and only now do the Putative Intervenors ask to join the party and inject a new claim.[5]

B. The public interest disfavors intervention at this late stage

The public has a strong interest in orderly, secure elections for 2022. That interest is endangered by the Putative Intervenors' last-minute attempt to challenge the bipartisanly supported Assembly map.

In consultation with Special Master Jonathan Cervas, this Court originally set a deadline of May 24, 2022, to finalize a remedial congressional map (Dkt. No. 258, at p. 2). The New York State Board of Elections then urged this Court to "consider expediting the approval process for both Congressional and State Senate lines in any manner possible" (Dkt. No. 290). The Board, emphasizing the difficulty of conducting a redistricting in the middle of an election cycle, also asked that the deadline for finalized maps "not extend past ... May 24, 2022" (*id.*). In response, this Court accelerated the deadline from May 24 to May 20 (Dkt. No. 291, p. 2). Parties and the public have submitted comments and

[5] Notably, on April 15, 2022, the Appellate Division, Fourth Department, denied a motion to intervene filed by other non-parties (Fourth Department Dkt. No. 41). In opposition, Petitioners had argued the motion was "patently untimely" (Bucki Aff. Ex. C). The Putative Intervenors' motions here are even less timely.

proposed maps since April 22 (*e.g.*, Dkt. Nos. 263, 266, 269), about a month before the maps will be finalized.

A remedial Assembly map cannot be responsibly drawn by May 20, which is only ten days after the motions' May 10 return date. Ten days are insufficient to finalize a remedial Assembly map with meaningful public input—especially considering that the Assembly contains 150 districts, compared to only 63 Senate districts and only 26 Congressional districts. Developing an Assembly map should take more than twice as long, not less than half as long, as developing the congressional and State Senate maps.

Additionally, replacing the Assembly map would create even more upheaval than replacing the Congressional and State Senate maps. The reason is that Assembly districts, unlike Congressional and State Senate districts, are the foundation of a variety of public offices and party positions in New York's political infrastructure, for which designations were made and primary elections are scheduled to take place this year. In March and April, designating petitions were collected and filed with Boards of Elections throughout New York State on behalf of candidates for:

- each political party's precinct-level county committee representatives, who need not live in the precinct they hope to represent, but "must reside in the assembly district containing the election district in which the member is elected" (*Matter of Gordon v. Monahan*, 89 A.D.2d 1030, 1031 (3d Dep't 1982) (citing N.Y. ELEC. LAW § 2-104(1));
- representatives to the New York State Democratic Committee, for which Assembly districts are the "[u]nit of representation,"[6] such that aspiring members of the State

[6] *See* New York State Democratic Party Rules, p. 3 (Bucki Aff. Ex. F).

Committee must reside in "the county in which the [Assembly district] ... is contained" (N.Y. ELEC. LAW §§ 2-102(1), (3));

- each political party's New York City district leaders, who seek office by Assembly district in each county that comprises the City (*id.* § 2-110(2)); and
- delegates and alternate delegates to State Supreme Court judicial-nominating conventions, who also are elected "from each Assembly district" (*id.* § 6-124; *accord, Johnson v. Lomenzo*, 20 N.Y.2d 783, 783 (1967)).

For these reasons, upsetting the Assembly map at this late stage would send shockwaves far beyond the Assembly elections, by invalidating thousands of designations throughout New York State: not only of prospective Assembly candidates, but also candidates for county party committee positions, New York State Democratic Committee representatives, New York City party district leaders, and delegates to State Supreme Court judicial nominating conventions.

Finally, and critically, the enacted Assembly map is a fair map that received bipartisan support. It passed the Assembly by an overwhelming vote of 118 to 29, including 14 Republican votes in favor. All those 14 Republicans, approximating one third of the Assembly Republican conference, have submitted affidavits affirming their belief that the Assembly map is fair.[7] No wonder, then, that Petitioners did not challenge the Assembly district map that the State Legislature enacted in February 2022. And the Putative

[7] *See* Affidavits of Assemblymen William A. Barclay, Philip A. Palmesano, Joseph M. Giglio, Andrew Goodell, Michael J. Norris, Michael J. Fitzpatrick, Angelo J. Morinello, Karl Brabenec, Stephen Hawley, Christopher Tague, Brian D. Miller, John Lemondes, Joseph Angelino, and Joshua Jensen, each of which were sworn to on May 5, 2022. Recently elected Republican Assemblyman Eric "Ari" Brown also offers his affidavit sworn to on May 5, 2022, in which he states he would have supported the Assembly district lines enacted in February 2022, had he been a member of the State Assembly at that time.

Intervenors do not claim the map is substantively flawed, either; their complaints are merely procedural. It would make no sense to further upend this year's elections by authorizing an untimely intervention and striking down a fair, bipartisan map. Indeed, should this Court allow intervention and find the Assembly map procedurally unconstitutional, it should simply re-adopt the enacted Assembly map immediately. There is no point in ordering Special Master Cervas to fix what isn't broken.

POINT II

EVEN IF THEIR MOTIONS WERE TIMELY, THE PUTATIVE INTERVENORS DO NOT QUALIFY FOR INTERVENTION UNDER CPLR 1012 OR 1013

The Putative Intervenors assert a right to intervene under CPLR 1012(a)(2) (Dkt. No. 317 at p. 9; Dkt. No. 347 at p. 5). That provision authorizes intervention as of right if, among other things, the putative intervenor "is or may be bound by the judgment." The Putative Intervenors here do not meet this requirement. "[W]hether [a] movant will be bound by the judgment within the meaning of [CPLR 1012(a)(2)] is determined by its *res judicata* effect." *Vantage Petroleum, Bay Isle Oil Co. v. Bd. of Assessment Review of Town of Babylon*, 61 N.Y.2d 695, 698 (1984); *accord, Lyman Rice, Inc. v. Albion Mobile Homes, Inc.*, 89 A.D.3d 1488, 1489 (4th Dep't 2011). And judgment in this case can have no res judicata effect on Mr. Wax or Mr. Greenberg. Res judicata binds only parties and those in privity with parties. *Green v. Santa Fe Indus., Inc.*, 70 N.Y.2d 244, 252 (1987). The Putative Intervenors are obviously not parties, nor do they allege privity with a party. They therefore cannot be "bound by the judgment," so they have no right to intervene under CPLR 1012(a)(2). *See Matter of Citizens Organized to Protect the Env't v. Planning Bd. of Town of Irondequoit*, 50 A.D.3d 1460, 1461 (4th Dep't 2008); *Matter of Tyrone G. v. Fifi N.*, 189 A.D.2d 8, 17 (1st Dep't 1993).

Mr. Greenberg, but not Mr. Wax, also asserts entitlement to intervene under CPLR 1012(a)(1) (Dkt. No. 347 at 5). That provision authorizes intervention as of right "when a statute of the state confers an absolute right to intervene." A non-party has an "absolute right to intervene" if a statute says so expressly, or if a statute expressly makes the non-party a necessary party in the action. *See Rossrock 2005 Fund LLC v. Estate of Shui King Wong*, 2008 WL 835253, at *7 (Sup. Ct. Kings County Mar. 17, 2008); *Matter of Orans (Rockefeller)*, 47 Misc. 2d 493, 496 (Sup. Ct. N.Y. County 1965); *cf.* N.Y. SOC. SERVS. LAW § 383(3) (expressly granting certain foster parents the right to intervene in child-custody proceedings). That is not the case here. Mr. Greenberg merely argues that because Unconsolidated Laws § 4221 would have allowed him to bring a special proceeding, it therefore gives him an "absolute right to intervene" (Dkt. No. 347 at 5). But the statute says nothing about intervention, and it does not make Mr. Greenberg (or Mr. Wax) a necessary party. It does not confer a right to intervene.

The Putative Intervenors also seek to intervene pursuant to this Court's discretion under CPLR 1013 (Dkt. No. 317, at p. 9; Dkt. No. 347, at p. 6). To intervene under that provision, they must demonstrate that intervention will not "unduly delay the determination of the action." As described above, granting the motions would do just that, when the Court of Appeals already granted the Amended Petition and annulled the only district lines that Petitioners sought to invalidate. In any event, the motions are untimely and should be denied on that basis alone.

POINT III

THE MOTIONS RUN AFOUL OF SEVERAL PROCEDURAL AND ELECTION LAW REQUIREMENTS

When Petitioners began this special proceeding on February 3, 2022, no candidates had yet qualified for the 2022 primary elections — the petitioning period did not begin until March 1. The Assembly district map challenge proposed by the Putative Intervenors is different. The petitioning period is over, and the New York State Board of Elections alone has already certified for this year's primary election more than 100 Assembly candidates, more than 300 candidates for delegate to State Supreme Court judicial nominating conventions, and more than 280 candidates for alternate delegate to those same conventions (Bucki Aff. Ex. D).

As per New York Election Law § 6-144, petitions designating candidates for public office or party positions: (1) to be voted for solely within a particular county outside New York City are filed at the Board of Elections for that county; (2) to be voted for solely within New York City are filed at the New York City Board of Elections; and (3) "to be voted for in a district greater than one county, or portions of two or more counties, in the office of the state board of elections." By seeking to annul the enacted Assembly map, therefore, the Putative Intervenors look to invalidate the designations of each of those nearly 700 candidates for State Assembly and delegates and alternate delegates to State Supreme Court judicial nominating conventions, whose petitions were filed at the New York State Board of Elections. The Putative Intervenors also look to invalidate the designations of thousands of other State Assembly, county party committee, New York City party district leader, and State Supreme Court judicial nominating convention delegate and alternate delegate candidates whose petitions were filed at the New York City Board of Elections or

the other 57 county Boards of Elections through the State.[8] *See, e.g.*, Dkt. No. 360, at p. 3 (in which Putative Intervenor Gary Greenberg asks this Court, among other things, to require previously designated State Assembly candidates to obtain new petition signatures, and to "vacat[e] any certifications" of Assembly candidacies "or other official acts of the acts [sic] of the New York State Board of Elections or other governmental body"). The Putative Intervenors' motions trigger procedural and substantive requirements under the Election Law that the Putative Intervenors have not met.

A. The Putative Intervenors have not served their intervention motions pursuant to the instructions set by this Court in its Orders to Show Cause

First, the intervention motions made by Mr. Greenberg and Mr. Wax should be denied, because they were not served in compliance with this Court's Orders to Show Cause (Dkt. No. 360 for the Greenberg Motion, and Dkt. No. 325 for the Wax Motion).

"'The method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with[.]'" *Codrington v. Citimortgage, Inc.*, 118 A.D.3d 843, 844 (2d Dep't 2014) (quoting *Matter of El Greco Soc'y of Visual Arts, Inc. v. Diamantidis*, 47 A.D.3d 929, 929 (2d Dep't 2008)). *Accord, Page v. Niagara Falls Mem'l Med. Ctr.*, 167 A.D.3d 1428, 1432 (4th Dep't 2018). Such is especially true of the Putative Intervenors' proposed causes of action that implicate election law and seek to annul candidate designations that would otherwise be valid. *See, e.g., Matter of Jean-Louis v. Laurent*, 172 A.D.3d 1454, 1455-56 (2d Dep't 2019); *Matter of Rodwin v. Townsend*, 286 A.D.2d 569, 569 (4th Dep't 2001); *Matter of Flynn v. Orsini*, 286 A.D.2d 568, 568 (4th Dep't 2001); *Matter of Sahler v. Callahan*, 92 A.D.2d 976, 977 (3d Dep't 1983).

[8] Mr. Greenberg makes this request explicit in his proposed Petition in Intervention (Dkt. No. 349 at 18). And his counsel made clear that Mr. Greenberg "seeks to invalidate petitions submitted by existing candidates for any office, including for the New York State Assembly" (Bucki Aff. Ex. E).

Torres v. Sedgwick Avenue Dignity Developers LLC, 74 Misc. 3d 839 (N.Y. City Civ. Ct. Bronx County 2022), is illustrative. That case concerned a civil contempt motion made by order to show cause, by which the petitioner "was required to serve respondents' counsel by 'filing' on NYSCEF." *Id.* at 841. The Court signed, uploaded, and entered the order to show cause on NYSCEF, but the petitioner "never filed a *complete* order to show cause with supporting papers on NYSCEF after the [C]ourt signed [the order], even assuming that this type of motion [was] deemed served upon the *[C]ourt's* upload." *Id.* (emphasis in original). For this reason, the Court concluded the petitioner himself had never served the order to show cause upon the respondents, and "the motion for contempt [was] denied for improper service." *Id.* at 842.

So Mr. Greenberg's and Mr. Wax's intervention motions also should be denied, for reason of defective service alone. This Court's Order to Show Cause on the Greenberg Motion (Dkt. No. 360):

> **ORDERED** that service of a copy of this Order and accompanying papers be served on counsel to all parties via NYSCEF, on or before May 5, 2022[.]

Id., at p. 3 (emphasis added). Yet the NYSCEF docket in this proceeding reflects neither Mr. Greenberg nor his counsel served the completed, entered, and signed Order to Show Cause on the Greenberg Motion at any time, let alone by May 5, 2022.

This Court's Order to Show Cause on the Wax Motion (Dkt. No. 325):

> **ORDERED** that service of a copy of this Order *and accompanying documents* be served on counsel to all parties via NYSCEF, on or before the 3rd day of May, 2022[.]

Id., at p. 2 (emphasis added). Mr. Wax's counsel did serve a copy of that Order to Show Cause by electronically filing the same on NYSCEF (*see* Dkt. No. 345), but his filing did not

include the "accompanying documents" that Mr. Wax claims to support his intervention motion. This contravened both this Court's Order to Show Cause on the Wax Motion, and the requirements of CPLR 2214 and 22 N.Y.C.R.R. § 202.8(c), by which "a movant must serve ... the order to show cause[ ] *together with the supporting papers.*" *Torres*, 74 Misc. 3d at 841 (emphasis added).

Simply put, this Court gave Mr. Greenberg and Mr. Wax unambiguous instructions (that Mr. Greenberg's and Mr. Wax's counsel themselves proposed to this Court, *see* Dkt Nos. 316 & 346) for serving their intervention motions upon the Speaker, and Mr. Greenberg and Mr. Wax failed to comply. "Having thus failed to effect service in accordance with the provisions of the order[s] to show cause," therefore, Mr. Greenberg and Mr. Wax "failed to gain jurisdiction over respondents," and their intervention motions should be denied for this reason alone. *Matter of Washington v. Mahoney*, 71 A.D.2d 1047, 1048 (4th Dep't 1979).

B. The Putative Intervenors have not joined necessary parties

Under CPLR 1001(a), "[p]ersons ... who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." Necessary parties must be joined through proper service, and "[n]onjoinder of a [necessary] party ... is a ground for dismissal of an action." CPLR 1003; *accord*, *Am. Transit Ins. Co. v. Carillo*, 307 A.D.2d 220, 220 (1st Dep't 2003).

This requirement applies in election cases. When a petitioner seeks to remove a candidate from a primary ballot, the candidate "might be inequitably affected by a judgment," is a necessary party, and must be served. On point is *Matter of Masich v. Ward*, in which the petitioners challenged a certificate that authorized over 100 candidates to appear

on primary ballots. 65 A.D.3d 817, 817 (4th Dep't 2009). Supreme Court dismissed the lawsuit for failure to join each of those candidates. *Id.* The Fourth Department affirmed, finding that the non-joined candidates "would have been inequitably affected had the court granted the relief sought in the petition," *i.e.*, invalidation of their candidacies. *Id.* (citing CPLR 1001(1) and 1003). Other courts have reached analogous conclusions. *E.g.*, *Matter of Castracan v. Colavita*, 173 A.D.2d 924, 925 (3d Dep't 1991) (*per curiam*); *Matter of Minew v. Levine*, 2021 WL 1775369, at *3 (Sup. Ct. Onondaga County Apr. 30, 2021).

Here, by applying to annul the Assembly district lines enacted in February 2022, the Putative Intervenors look to invalidate the otherwise valid and/or certified designations of thousands of candidates throughout New York State who seek public office or party positions for which their eligibility depends upon running and obtaining a sufficient number of signatures within a particular Assembly district. These include candidates for State Assembly, representatives to county party committees and the New York State Democratic Committee, party District Leaders in New York City, and delegates and alternate delegates to State Supreme Court judicial nominating conventions. All these candidates would be necessary parties to this proceeding, because a judgment invalidating the Assembly district lines under which they qualified for the ballot would also invalidate their designations, or at least require them to obtain a new round of signatures on designating petitions, and thereby leave those candidates "inequitably affected[.]" CPLR 1001(a). The New York State Board of Elections and the 58 local Boards of Elections (one for New York City, and one for each county outside New York City) would also be necessary parties, because they are the administrative agencies that accepted those candidates' designating petitions for filing and would be responsible for invalidating them

upon any annulment of the Assembly district lines enacted in February 2022. *Flynn*, 286 A.D.2d at 568. Absent those necessary parties, the pending intervention motions and the Putative Intervenors' proposed causes of action fail as a matter of law.

C. The Putative Intervenors lack standing, and the applicable statute of limitations expired

The Election Law delineates three categories of people who may challenge the "designation of any candidate for any public office": a citizen who previously filed an objection with a board of elections; an aggrieved, rival candidate; or the chairperson of a party committee. N.Y. ELEC. LAW § 16-102(1). The Putative Intervenors are not rival candidates or the chairpersons of a party committee. And they do not claim to have filed objections to the designating petitions of any candidate for State Assembly, county party committee, New York State Democratic Committee, party District Leader in New York City, or delegate or alternate delegate to any State Supreme Court judicial nominating convention, so they cannot bring their challenge as citizen-objectors. *See Matter of Korman v. N.Y. State Bd. of Elections*, 137 A.D.3d 1474, 1475-76 (3d Dep't 2016) (holding that petitioners lacked standing as citizen-objectors due to their noncompliance with objection requirements). Therefore, the Putative Intervenors lack standing to bring their proposed cause of action.

The Election Law also provides that a "proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition." N.Y. ELEC. LAW § 16-102(2). The last day to file designating petitions for the primaries for State Assembly, county party committee, New York State Democratic Committee, party District Leader in New York City, and delegate and alternate delegate to State Supreme Court judicial nominating conventions was April 7, 2022 (Dkt. No. 6) — well over 14 days before

the Putative Intervenors moved to intervene on May 1 and May 3, 2022. Consequently, the motions are time-barred. Because determining the limitations period "for a particular declaratory judgment action" requires "examin[ing] the substance of that action to identify the relationship out of which the claim arises and the relief sought," it is irrelevant that the Putative Intervenors have not styled their motion or their proposed causes of action as a challenge to the candidates' designating petitions. *Solnick v. Whalen*, 49 N.Y.2d 224, 229 (1980). *See Matter of Ciotti v. Westchester County Bd. of Elections*, 109 A.D.3d 988, 989 (2d Dep't 2013) ("[n]otwithstanding the characterization of this proceeding as one pursuant to CPLR Article 78 … this proceeding is governed by the statute of limitations set forth in Election Law § 16-102(2)"); *Olma v. Dale*, 306 A.D.2d 905, 905-06 (4th Dep't 2003) (holding that plaintiff could not evade the 14-day statute of limitations by framing his claim as a declaratory-judgment action seeking to remove a candidate's name from the ballot). While couched as challenges to the Assembly district lines enacted in February 2022, a judgment in favor of the Putative Intervenors on their proposed causes of action would invalidate or inequitably effect thousands of candidate designations throughout New York State. Hence, the requirements of New York Election Law § 16-102 apply (*accord*, *Matter of N.Y. State Cmte. of Independence Party v. N.Y. State Bd. of Elections*, 87 A.D.3d 806, 809-10 (3d Dep't 2011)), and Mr. Greenberg's and Mr. Wax's proposed intervention motions are untimely, because they were made more than 14 days after the last day for filing designating petitions that were to be collected in Assembly districts in New York State. N.Y. ELEC. LAW § 16-102(2).

CONCLUSION

This Court should deny both motions to intervene. Alternatively, if this Court grants the motions and finds the Assembly map unconstitutional, this Court should immediately adopt the enacted Assembly map, which received bipartisan support and whose substance no party or Putative Intervenor has criticized.

Dated: New York, New York
May 9, 2022

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

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