STATE OF NEW YORK
SUPREME COURT : COUNTY OF NEW YORK

PAUL NICHOLS, GAVIN WAX, and GARY GREENBERG,

Petitioners,

v.

GOVERNOR KATHY HOCHUL, 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. 154213/2022

Assigned Justice:
Hon. Laurence L. Love

MEMORANDUM OF LAW IN SUPPORT OF SPEAKER HEASTIE'S MOTION TO DISMISS

Respectfully submitted,

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Respondent Carl Heastie, Speaker of the New York State Assembly (the "Speaker"), respectfully submits this memorandum of law in support of his motion to dismiss the Petition (Dkt. No. 1).[1]

PRELIMINARY STATEMENT

This is Petitioners' second attempt to invalidate the Assembly district map enacted by the Legislature in February 2022. The first time, a few weeks ago, they tried to intervene in the nearly concluded lawsuit that challenged the Congressional and State Senate maps. Steuben County Supreme Court denied that motion as untimely, correctly recognizing two undeniable facts: Petitioners should have brought their challenge in February, not May; and to grant the relief Petitioners seek would throw the 2022 elections into "total confusion."

Rather than appeal that decision, Petitioners decided to try again in a different venue. They ask this Court to do what Steuben County Supreme Court refused to do: sustain an egregiously late challenge to the Assembly map; invalidate thousands of candidacies (or, at a minimum, require candidates to run in districts other than those where they originally planned to run, and to face new primary challenges); erase candidates' and Boards of Elections' months of preparation for the June primaries; push those primaries to August (or even September); and force the State's election infrastructure to start from scratch on an impossibly compressed timeline. This Court should decline the invitation.

Petitioners insist election integrity compels a ruling in their favor. But if they truly cared about election integrity, rather than personal gain and media attention, they

[1] "Dkt. No." and any associated page citations refer to the document and page numbers assigned by NYSCEF in this proceeding.

would have challenged the Assembly map shortly after its enactment. Instead, while the election cycle continued as required by law, Petitioners watched and waited. Now, at the eleventh hour, they bring a purely procedural challenge to a map that no one has accused of substantive unfairness, and that the Legislature enacted with bipartisan support. In fact, 23 Assembly Republicans — including eight who voted *against* the Assembly map for procedural reasons — have submitted affidavits attesting that the map is fair.

Election integrity compels a ruling for Respondents, not Petitioners. The only way to ensure orderly, secure elections for 2022 is to leave the Assembly map in place, to leave the election calendar undisturbed, and to dismiss this proceeding.

STATEMENT OF FACTS

A. The *Harkenrider* Lawsuit begins on February 3, 2022, the Court of Appeals renders its decision in April, and Special Master Cervas draws remedial maps for Congress and the State Senate

On February 3, 2022, the New York State Legislature enacted redistricting maps for the State Assembly, the State Senate, and Congress. L.2022, c. 13 & 14. Later that day, Tim Harkenrider and others commenced *Matter of Harkenrider v. Hochul* (Index No. E2022-0116CV), a special proceeding in Steuben County Supreme Court (the "*Harkenrider* Petitioners" and the "*Harkenrider* Lawsuit"), with Hon. Patrick F. McAllister presiding. Their original petition challenged only the Congressional map (Salcedo Aff. Ex. B).[2] Then, on February 8, the *Harkenrider* Petitioners filed an amended petition adding a challenge to the State Senate map (Salcedo Aff. Ex. D). The amended petition affirmatively disavowed any challenge to the Assembly map (*id.* ¶ 10 nn. 6-7).

[2] "Salcedo Aff." refers to the affirmation of Steven B. Salcedo, Esq., dated May 22, 2022.

The *Harkenrider* Petitioners challenged the Congressional and State Senate maps on two grounds. Substantively, they argued the maps violated the State Constitution's ban on partisan gerrymandering (Salcedo Aff. Ex. D ¶¶ 121-212). Procedurally, they argued that because the State's Independent Redistricting Commission had deadlocked and failed to submit a second set of proposed maps to the Legislature, the Legislature lacked authority to enact maps of its own (*id.* ¶¶ 234-245).

Proceedings continued before Justice McAllister in Steuben County for nearly two months. On March 31, 2022, Justice McAllister invalidated the State Senate map on procedural grounds only, and the Congressional map on both procedural and substantive grounds (Salcedo Aff. Ex. E at 18). *Sua sponte*, he also invalidated the Assembly map on procedural grounds only (*id.*).

About three weeks later, the Fourth Department affirmed in part and reversed in part. *Matter of Harkenrider v. Hochul*, Index. No. CAE 22-00506, 2022 WL 1193180 (4th Dep't Apr. 21, 2022). Beforehand, various Congressional members, candidates for office, and voters moved before the Fourth Department to intervene. In opposition, the *Harkenrider* Petitioners argued the motion was "patently untimely" (Salcedo Aff. Ex. F ¶ 6). The Fourth Department denied the motion (Salcedo Aff. Ex. G).

The Court of Appeals rendered its decision on April 27, about one week after the Fourth Department's decision on the merits. *Matter of Harkenrider v. Hochul*, __ N.Y.3d __, 2022 WL 1236822 (April 27, 2022). Like Justice McAllister, the Court of Appeals invalidated the State Senate map on procedural grounds only, and it invalidated the Congressional map on both procedural and substantive grounds. *Id.* at *1. The Court expressly declined, however, to invalidate the Assembly map, which no one had challenged.

Id. at *11 n.15. It ordered Justice McAllister, with the assistance of Special Master Jonathan Cervas, to draw remedial Congressional and State Senate maps for the 2022 elections, and to "swiftly develop a schedule to facilitate an August primary election" for Congress and the State Senate. *Id.* at *12.

Justice McAllister originally set a deadline of May 24 for this remedial map-drawing process (Salcedo Aff. Ex. H at 3). The State Board of Elections then urged him to "consider expediting the approval process for both Congressional and State Senate lines in any manner possible" (Salcedo Aff. Ex. I). The Board, emphasizing the logistical difficulties of holding an election under the circumstances, also asked that the deadline for finalized maps "not extend past … May 24, 2022" (*id.*). In response, Justice McAllister accelerated the deadline from May 24 to May 20 (Salcedo Aff. Ex. J at 3).

Justice McAllister authorized parties and the public to submit comments and proposed remedial maps for Special Master Cervas' consideration (Salcedo Aff. Ex. H at 3). Between April 22 and May 20, well over 100 such documents were filed on the Steuben County Supreme Court docket. Parties and members of the public also offered comments during a hearing in Steuben County on May 6. Special Master Cervas released proposed Congressional and State Senate maps on May 16 and 17; after receiving additional comments, he released the finalized maps shortly after midnight on May 21 (Salcedo Aff. Ex. K). Justice McAllister ordered the New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR") to do the following two things: (1) "LATFOR be and hereby is directed to review the maps for the purpose of determining compliance with the block-on-border and town-on-border rules and then to certify to the New York State Board of Elections the precincts, districts, etc. for each Congressional and

New York State Senate district"; and (2) "in the event LATFOR determines there to be some technical violation of one of these rules that LATFOR immediately notify the court of the violation so that appropriate corrective action can be taken by the court" (*id.* at 6).

B. Gavin Wax's and Gary Greenberg's motions to intervene in the *Harkenrider* Lawsuit — filed on May 1 and 3, 2022 — are denied as untimely

After the Court of Appeals issued its April 27 decision, and as the remedial map-drawing process was ongoing, Petitioner Gavin Wax moved on May 1 to intervene in the *Harkenrider* Lawsuit (Salcedo Aff. Ex. L). Mr. Wax is "a New York-based conservative political activist, commentator, and columnist," president of the New York Young Republican Club, and a contributor to One America News and other media outlets.[3] From February 3 to March 31 — while proceedings were ongoing in Steuben County — Mr. Wax posted over a dozen messages on Twitter about the *Harkenrider* Lawsuit, New York's redistricting, or both (Salcedo Aff. Ex. M). For example, 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.* at 3). He tweeted a picture of Justice McAllister's March 31 Order (which originally invalidated the enacted district maps) the day it was issued (*id.* at 6). He also 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.* at 8). The May 1 motion to intervene was his first effort to challenge the Assembly map.

[3] *See* Gavin Wax, https://www.gavinwax.com/ (last accessed May 21, 2022). Mr. Wax's self-description as an "activist" first appeared on his website shortly after he moved to intervene (*see* Salcedo Aff. Ex. Y).

On May 3, 2022 — two days after Mr. Wax's motion — Petitioner Gary Greenberg also moved to intervene (Salcedo Aff. Ex. N). Mr. Greenberg is "a former New York state political candidate, who may in the future run again for office" (Dkt. No. 11 ¶ 1). Specifically, he attempted to run for State Senate in 2020 but failed to obtain sufficient signatures to qualify for the Democratic primary ballot (Salcedo Aff. Ex. O). He advocates for a public fund to benefit survivors of sexual abuse and, since late April 2022, has criticized the Assembly on Twitter for its expected enactment of the Adult Survivors Act, which Mr. Greenberg considers to be a "flawed … hotch-potch" [sic] (Salcedo Aff. Ex. P at 2). Like Mr. Wax, Mr. Greenberg posted numerous Twitter messages about the *Harkenrider* Lawsuit and New York's redistricting. On February 3, for instance, he retweeted an image of the petition in that lawsuit, which challenged only the Congressional map (Salcedo Aff. Ex. Q at 2). He tweeted or retweeted about redistricting, the *Harkenrider* 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 in Steuben County on March 3, 2022 (*id.* at 15-16). The May 3 motion to intervene was his first effort to challenge the Assembly map.

The motions filed by Mr. Wax and Mr. Greenberg requested essentially the same relief. They asked Justice McAllister to invalidate the Assembly map — which neither the *Harkenrider* Petitioners nor anyone else had challenged — and to enjoin use of the map for the 2022 primary and general elections (Salcedo Aff. Ex. L at 5-6; Salcedo Aff. Ex. N at 18-19). They also sought, in Justice McAllister's words, to "invalidate all the [ballot-access] signatures previously gathered [by Assembly candidates], create new time periods

for gathering signatures after new maps are enacted, [and] change the signature requirements for both primary and independent petitions" (Salcedo Aff. Ex. R at 4).

Justice McAllister denied both motions as untimely. Among other things, he noted that: (1) "[i]t was clear from the Petition and Amended Petition [filed in early February] that the Assembly Districts were not being challenged"; (2) "both Greenberg and Wax were aware of this pending action shortly after it was commenced in February … yet they chose to do nothing at that time"; and (3) because the 2022 election cycle was well underway, "[t]o permit intervention [at] this time would create total confusion" (*id.* at 3-5). Neither Mr. Wax nor Mr. Greenberg has appealed.

C. Ballots for the June primaries are finalized and mailed by May 13, 2022

While the *Harkenrider* Lawsuit was ongoing in February, March, April, and May, preparations for the 2022 elections continued. Beginning on February 3, 2022 — the day the congressional, State Senate, and State Assembly maps were enacted — New York's county boards of elections began entering the new district boundaries into voter-registration systems "so that New York's 12,982,819 registered voters would be assigned to their correct districts. This is necessary to create poll books for elections, allow voters to receive the correct absentee ballots and to provide data for candidates …." (Salcedo Aff. Ex. S ¶ 16).

March 1, 2022 was the first day for aspiring candidates to collect ballot-access signatures (Salcedo Aff. Ex. C). Candidates must collect hundreds or thousands of these signatures, then submit them to the relevant board of elections, to qualify for a place on primary ballots (*id.*). Petitions were due for filing from April 4 through 7, 2022, and signatures are valid only if the signatory resides in the district where the candidate will run (*id.*). Signatures are subject to challenge, *see* N.Y. ELEC. LAW § 6-154, which typically

requires about a month to adjudicate (Salcedo Aff. Ex. S ¶ 9). The State Board of Elections was required to certify primary-ballot candidates by May 4 (Salcedo Aff. Ex. C).

The primary elections are scheduled by law for June 28, 2022, with early voting from June 18 through 26 (*id.*). The general election, in turn, is scheduled for November 8, with early voting from October 29 through November 6 (*id.*). Forty-five days before the June 28 and November 8 elections, federal law requires States to finalize and mail ballots to military and overseas voters. 52 U.S.C. § 20302(a)(8)(A). So primary ballots were required to be mailed by May 13, and general-election ballots must be mailed by September 23 (Salcedo Aff. Ex. C).

Since about 1974, New York State held primaries in September instead of June. As a result of the late primary, however, the State violated Federal law by failing to mail military and overseas ballots by the September 23 deadline. *See United States v. State of New York*, 2012 WL 254263, at *1 (N.D.N.Y. Jan. 27, 2012). The Federal government sued the State, and the U.S. District Court for the Northern District of New York ordered the congressional primary moved to June, after rejecting a request to move the primary to August instead. *Id.* at *2.

Because of the Court of Appeals' April 27 decision, which invalidated the congressional and State Senate maps, Justice McAllister moved those two primaries from June 28 to August 23, 2022 (Salcedo Aff. Ex. T). The U.S. District Court for the Northern District of New York approved the change for the congressional election. *United States v. State of New York*, 2022 WL 1473259, at *3 (N.D.N.Y. May 10, 2022).

Deadlines and election dates for the remaining elections — including for the Assembly — remain unchanged. Accordingly, on the May 4 statutory deadline, the State

Board of Elections certified candidates for the Assembly primaries and for other primaries (Salcedo Aff. Ex. U). Ballots for the June 28 primaries were finalized, printed, and machine-tested, and they were mailed to military and overseas voters by the May 13 statutory deadline (Dkt. No. 14). Early voting for these primaries begins on June 18, less than one month from now (Salcedo Aff. Ex. C).

D. Petitioners commence this special proceeding on May 15, 2022

Petitioners — Mr. Wax, Mr. Greenberg, and Paul Nichols — commenced this special proceeding on May 15, a few days after Justice McAllister denied the untimely motions to intervene (Dkt. No. 1).

Mr. Nichols, who did not seek to intervene in the *Harkenrider* Lawsuit, claims to be "a candidate for Governor of the State of New York" (Dkt. No. 9 ¶ 2). He attempted to qualify for the Democratic gubernatorial primary, but "the Board of Elections removed [him] from the ballot after determining that [his] designating petition contained invalid signatures" (*id.*). Mr. Nichols challenged the Board's determination, *pro se*, in Albany County Supreme Court (Salcedo Aff. Ex. V). The challenge failed, however, because Mr. Nichols did not properly serve the respondents in that proceeding (*id.*). The order dismissing Mr. Nichols's challenge was entered on May 12, 2022 (*id.*) — three days before he and the other Petitioners commenced this special proceeding.

The Petition, which is not verified, requests a declaration that the Assembly map is procedurally unconstitutional (Dkt. No. 1 at 29), although it makes no allegation that the map is somehow substantively unfair or a partisan gerrymander. It also seeks to "adjourn" next month's primaries for all "state and local elections" — not just the Assembly elections — to late August or mid-September (*id.* at 30). Further, the Petition seeks to

invalidate the candidacies of everyone who qualified for primary elections for "Statewide, Congressional, State Assembly, State Senate, and local offices" (*id.*). If Petitioners prevail, those thousands of candidates would need to "obtain new designating petition signatures or run independently" (*id.*). Additionally, potential candidates who did not originally qualify for primaries would receive another chance to gather sufficient signatures and "newly qualify" for the primary ballot (*id.*).

ARGUMENT

This Court should dismiss the Petition under CPLR 404(a). Just like the unsuccessful motions to intervene in Steuben County, this special proceeding is patently untimely. In fact, tacitly acknowledging that the timeliness issue was already decided against them, Petitioners do not address it in their papers (Dkt. Nos. 1, 3, 23). Because of Petitioners' untimeliness, along with the unprecedented prejudice that would result if they prevail, this proceeding is barred by the doctrine of laches. The Petition should also be dismissed because Petitioners failed to join necessary parties, they lack standing, the statute of limitations has expired, and the Petition is unverified.

POINT I

THE DOCTRINE OF LACHES BARS THIS PROCEEDING

Laches is an equitable doctrine. It bars a claim if two elements are satisfied: delay in bringing the claim, and prejudice caused by the delay. *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003); *see also Matter of Schulz v. State of New York*,

81 N.Y.2d 336, 348 (1993) (delay of 11 months sufficient to establish laches); *accord*, *Matter of Cantrell v. Hayduk*, 45 N.Y.2d 925, 927 (1978) (*per curiam*) (delay of two months).[4]

In *Schulz*, for example, citizens challenged the constitutionality of a public-finance law. 81 N.Y.2d at 342. They initiated the lawsuit within a year after the law's enactment. *Id.* at 347. But in the interim, the State sold bonds, sold property, and completed other transactions under the law. *Id.* at 348. The Court of Appeals determined that invalidating the law would require nullifying those transactions, which would be akin to "putting genies back in their bottles." *Id.* The plaintiffs' failure to bring their claim sooner, combined with the resulting prejudice to "society in general," required dismissal of the claim under the laches doctrine — even though they challenged the constitutionality of a statute. *Id.* at 348, 350.

Similarly here, Petitioners' egregious delay threatens unprecedented prejudice to New York's elections, candidates, and voters, so the Petition should be dismissed.

A. The Assembly map was enacted over three months ago, yet Petitioners waited until now to commence this proceeding

Petitioners are unquestionably guilty of egregious delay. The Assembly map was enacted on February 3, 2022. The *Harkenrider* Lawsuit began that same day — and, as Justice McAllister correctly found, "[i]t was clear from the Petition and the Amended Petition that the Assembly Districts were not being challenged" (Salcedo Aff. Ex. R at 3). Indeed, the *Harkenrider* Lawsuit was well-publicized from Day One — in part by Mr. Wax and Mr. Greenberg themselves.

[4] According to some courts, another element of laches is "lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief." *Kverel v. Silverman*, 172 A.D.3d 1345, 1348 (2d Dep't 2019). That element is satisfied here. Before the motions to intervene in Steuben County, Petitioners did not notify Respondents that they would challenge the Assembly map.

These Petitioners, in particular, cannot claim ignorance. As explained above, Mr. Wax is a "conservative political activist," Mr. Greenberg recently ran for public office, and Mr. Nichols claims to be running for Governor. Mr. Wax and Mr. Greenberg even tweeted — prodigiously — about the *Harkenrider* Lawsuit and redistricting in February and March. None of these three individuals has offered a valid excuse for waiting more than three months to bring this special proceeding.

Further, their personal histories suggest they are acting not out of a sincere concern for how the Assembly map was enacted, but rather out of self-interest: Mr. Wax wants 15 minutes of fame; Mr. Greenberg wants to raise his political profile and coerce the Assembly into enacting the legislation he wants; and Mr. Nichols wants to resurrect his failed primary bid. If they truly cared so deeply about the Assembly map, they would have challenged the map months ago. Instead, they tweeted from the sidelines while Respondents and the *Harkenrider* Petitioners litigated in Steuben County, at the Fourth Department, and at the Court of Appeals.

B. Because of Petitioners' egregious delay, granting the relief they seek is virtually impossible and would jeopardize this State's elections

The other element of laches — prejudice — is satisfied here, as well. Because of Petitioners' three-month delay, the State's elections, candidates, and voters will all suffer unprecedented harm if the Petition is granted.

If the Assembly map is re-drawn and the 2022 election calendar is upended again, it is unclear how this State could conduct orderly, secure elections. Boards of Elections have already certified candidates; finalized, printed, and mailed ballots; and performed numerous other administrative tasks to prepare for the June primaries. In fact, on May 9, Board of Elections Co-Executive Director Todd Valentine affirmed that "[i]t is

simply too late for new claims related to the invalidity of the Assembly and statewide elections …. 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" (Salcedo Aff. Ex. W ¶¶ 26-27). And that was two weeks ago. The Board's other Co-Executive Director, Kristen Zebrowski Stavisky, concurred with Mr. Valentine. She affirmed that the "positions expressed in [his] affidavit represent a bipartisan consensus opinion of the New York State Board of Elections" (*id.* ¶ 3). Justice McAllister, moreover, moved the deadline to finalize remedial maps from May 24 to May 20 — implicitly recognizing that a later deadline would leave Boards of Elections in an impossible position.

Additionally, because of Petitioners' egregious delay, granting the relief they request would cause severe prejudice to candidates and voters. Candidates have built campaigns, raised and spent money, gathered signatures, qualified for primary ballots, courted voters, and invested countless hours running for office. If Petitioners prevail, these candidates will have to qualify again for the primaries. Their districts will change. Some of them may find themselves running against a powerful incumbent rather than for an empty or vulnerable seat. Many voters, furthermore, will suddenly live in a re-drawn district with different candidates seeking their support.

One subset of voters will suffer particular harm if Petitioners prevail: the men and women who defend our freedoms as members of the military. Under the federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20302(a)(8), New York must mail ballots to military and overseas voters at least 45 days before the primary and general elections. This timeframe ensures that those voters, some of

whom live on the other side of the world, will receive ballots in time to cast their vote and for those votes to be counted.

Recognizing UOCAVA's importance, the U.S. District Court for the Northern District of New York wrote, correctly, that "[i]t is unconscionable to send men and women overseas to preserve our democracy while simultaneously disenfranchising them while they are gone." *United States v. State of New York*, 2012 WL 254263, at *1. But in their quest for personal gain, Petitioners carelessly endanger this critical voting right. They casually ask this Court to move every single primary to September 13 (Dkt. No. 3 at 6; Dkt. No. 23 at 4), which is only ten days before the deadline under UOCAVA to mail general-election ballots. To be clear, when New York held September primaries, it was unable to comply with UOCAVA, was sued by the Federal government, and was ordered to move its primaries to June. *United States v. State of New York*, 2012 WL 254263, at *1-3. And under this year's circumstances — with three Court-ordered redistrictings, if Petitioners get their wish — military disenfranchisement would be a near certainty. That result would be "unconscionable." *Id.* at *1.

In any event, this Court likely has no authority to move the Congressional and State Senate primaries to September. Such an order would conflict with Justice McAllister's order setting those primaries for August 23, and with the Northern District of New York's Court Order approving that date. It would also conflict with the Court of Appeals' instructions to hold August primaries for those two offices.

Petitioners also ask for all primaries to be moved to August, if this Court declines to move them to September (as it should) (Dkt. No. 1 at 30). Their request is a non-starter. To hold August primaries for Congress and the State Senate, Justice McAllister

determined that remedial maps needed to be in place by May 20, and that even May 24 would be too late. Developing those two maps — which contain 89 districts combined, compared to the Assembly's 150 districts — took about one month. In fact, the process was not even complete by the May 20 deadline. Final maps were released early on May 21, and Justice McAllister then ordered LATFOR to review those maps for "technical violation[s]" and to certify "precincts, districts, etc." for the Board of Elections (Salcedo Aff. Ex. K at 6). It is obviously impossible, then, to responsibly develop a new Assembly map by May 20 or 24, or even by early to mid-June. And if an Assembly map is not in place until June, there is no way to complete the ballot-access process, finalize primary ballots, and mail them to military and overseas voters by the July 8 deadline (Salcedo Aff. Ex. T at 3). Moving the June primaries to August is simply out of the question.

In short, because of Petitioners' egregious delay, the relief they request is virtually impossible. Even if granting such relief were technically possible, doing so would cause unprecedented harm to the elections, to candidates, and to voters, including military voters. Consequently, the Petition should be dismissed under the laches doctrine.

POINT II

PETITIONERS FAIL TO SATISFY VARIOUS OTHER REQUIREMENTS TO MAINTAIN THIS PROCEEDING

A. Petitioners did not join 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 with particular force 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 *Clinton v. Board of Elections of City of New York*, 2021 WL 3891600 (Sup. Ct. N.Y. County Aug. 26, 2021), *aff'd*, 197 A.D.3d 1025 (1st Dep't), *lv. denied*, 37 N.Y.3d 910 (2021). In that case, a voter sued to invalidate a certificate that filled certain delegate vacancies at the Republican judicial-nominating convention. *Id.* at *1. But he failed to join all the judicial delegates named in the certificate. *Id.* at *3. Supreme Court held that those delegates were necessary parties and, because of the non-joinder, dismissed the lawsuit. *Id.* The First Department affirmed, 197 A.D.3d 1025, and the Court of Appeals denied leave, 37 N.Y.3d 910. Other Courts throughout the State have reached analogous conclusions. *E.g.*, *Matter of Masich v. Ward*, 65 A.D.3d 817, 817 (4th Dep't 2009); *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).

Replacing the Assembly map, as Petitioners seek to do, 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," such that aspiring members of the State Committee must reside in "the county in which the [Assembly district] … is contained" (N.Y. ELEC. LAW §§ 2-102(1), (3); Salcedo Aff. Ex. X at Art. II § 1(b));
- 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)).

Hence, by applying to annul the Assembly district lines enacted in February 2022, Petitioners 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 are 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 or run in new districts, and thereby leave those candidates "inequitably affected[.]" CPLR 1001(a). The New York State Board of Elections and the 58 local Boards of Elections are also necessary parties, because they are the administrative agencies that accepted those candidates' designating petitions for filing and would be responsible for invalidating the current primary ballot certifications upon any annulment of the Assembly district lines enacted in February 2022. *Matter of Flynn v. Orsini*, 286 A.D.2d 568, 568 (4th Dep't 2001); *Gagliardo v. Colascione*, 153 A.D.2d 710, 710 (2d Dep't 1989). Absent those necessary parties, Petitioners' claim fails as a matter of law.

B. Petitioners lack standing

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). Petitioners are not rival candidates or the chairpersons of a party committee.[5] And they do not claim to have filed objections to any designating petitions, 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, Petitioners lack standing and this proceeding must be dismissed.

C. The statute of limitations has expired

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.

[5] Mr. Nichols supposedly is running for Governor, but that does not make him an aggrieved, rival candidate for purposes of the Assembly map. *See Matter of Cocco v. Moreira-Brown*, 230 A.D.2d 952 (3d Dep't 1996) (holding that petitioner was not an "aggrieved candidate" for standing purposes because she was not "a candidate for the office in question").

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 (Salcedo Aff. Ex. C) — well over 14 days before Petitioners commenced this special proceeding on May 15. Consequently, the Petition is time-barred.

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." *Solnick v. Whalen*, 49 N.Y.2d 224, 229 (1980). It is therefore irrelevant that Petitioners have not framed this special proceeding as a challenge to the candidates' designating petitions. *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); *Scaringe v. Ackerman*, 119 A.D.2d 327, 329-330 (3d Dep't 1986) (granting a motion to dismiss when petitioners failed to properly bring a claim under § 16-102 within the statutory time limit).

Election Law § 16-102 limits the time in which proceedings regarding petitions can be brought, and that Petitioners bring constitutional claims is not enough, alone, to keep those claims alive—"[a] constitutional claim can become time-barred just as any other claim can." *Block v. North Dakota* ex rel. *Bd. of Univ. & Sch. Lands*, 461 U.S. 273,

292 (1983); *see also County of Chemung v. Shah*, 28 N.Y.3d 244, 262-63 (2016). For example, in *Matter of ISCA Enterprises v. City of New York*, the petitioners challenged the constitutionality of the notice procedure in tax foreclosure proceedings. 77 N.Y.2d 688, 696 (1991). The foreclosure proceedings were subject to a two-year limitation period. *Id.* The petitioners were aware of the foreclosure proceedings with more than a year left to bring their claims, but they waited four years to sue. *Id.* The Court of Appeals disapproved of their delay, stating that "[h]aving itself delayed commencement of its action for nearly four years from notice, [petitioners] cannot be heard to complain of a constitutional infirmity." *Id.* at 697. The Court did not even reach the question of the constitutionality of the foreclosure procedure, so important is the question of notice and adherence to the time limitations period. *Id.*

While couched as a challenge to the Assembly district lines enacted in February 2022, a judgment for Petitioners 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 this special proceeding is time-barred because it began more than 14 days after the last day for filing designating petitions that were to be collected in Assembly districts in New York State.

D. The Petition is not verified

A special proceeding to invalidate ballot-access petitions "shall be heard upon a verified petition." N.Y. ELEC. LAW § 16-116. "The Election Law requirement of a verified petition is a jurisdictional condition precedent to commencing a proceeding." *Matter of Callahan v. Russo*, 123 A.D.2d 518, 518 (4th Dep't 1986). *Matter of Goodman v.*

Hayduk, in which aspiring candidates brought a special proceeding to validate their ballot-access petition, is on point. 64 A.D.2d 937, 937 (2d Dep't 1978). The petition that commenced the special proceeding was not verified, but Supreme Court allowed the aspiring candidates to correct the error by filing an amended (verified) petition. *Id.* The Second Department reversed and dismissed the proceeding, holding that the verification requirement "is jurisdictional in nature, and cannot be cured by amendment." *Id.* at 938. The Court of Appeals affirmed, determining that "[t]o find an unverified petition … acceptable to institute the special proceeding would not serve practical purposes or advance the policy behind [Election Law § 16-116]." 45 N.Y.2d 804, 806 (1978).

Here, Petitioners seek to invalidate the ballot-access petitions — indeed, to invalidate the certified candidacies — for every single elected office in this State (Dkt. No. 1 at 30). Yet they did not verify their Petition. This lack of verification is a jurisdictional defect, and the Petition therefore must be dismissed.

POINT III

THE ASSEMBLY MAP IS FAIR AND SHOULD NOT BE RE-DRAWN

Behind Petitioners' supposed newfound interest in election integrity, they neglect to mention a critical fact: 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, one of which was cast by the Assembly Minority Leader. All those 14 Republicans, approximating one third of the Assembly Republican conference,

have submitted affidavits affirming they believe the Assembly map is fair.[6] In fact, eight Republican members of the Assembly who voted *against* the Assembly map have also submitted affidavits affirming they believe the map is fair,[7] meaning that at least about half of the *minority* party's Assemblymembers believe the map is fair. No wonder, then, that the *Harkenrider* Petitioners did not challenge the enacted Assembly map. And the Petitioners' complaints here about the map are procedural only; they do not claim the map is substantively flawed. Neither Petitioners here, nor anyone else, has ever alleged that the Assembly map enacted by the Legislature in February 2022 has been unconstitutional as a matter of substance.

It would make no sense to further upend this year's elections by granting an untimely, flawed Petition and striking down a fair Assembly map. Whether or not this Court grants any aspect of the Petition (which it should not), it should decline to appoint any special master, and fix any procedural flaw by simply re-adopting the enacted Assembly map immediately and leaving the election calendar unchanged.

[6] *See* accompanying affidavits of Assemblymembers William A. Barclay, Philip A. Palmesano, Joseph M. Giglio, Michael J. Norris, Michael J. Fitzpatrick, Angelo J. Morinello, Karl Brabenec, Stephen Hawley, Christopher Tague, Brian D. Miller, Joseph Angelino, John Lemondes, and Joshua Jensen, each of which were sworn to between May 19 and 22, 2022. Assemblymember Andrew Goodell submitted a similar affidavit in opposition to Mr. Wax's and Mr. Greenberg's motions to intervene in the *Harkenrider* Proceeding (Salcedo Aff. Ex. Z). Recently elected Republican Assemblymember Eric "Ari" Brown also offers his affidavit sworn to on May 19, 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.

[7] *See* accompanying affidavits of Assemblymembers Edward Ra, Doug Smith, Jarett Gandolfo, Robert Smullen, John K. Mikulin, Kevin M. Burne, Brian Manktelow, and Mary Beth Walsh, each of which were sworn to on May 20, 2022.

CONCLUSION

This Court should decline Petitioners' selfish, last-minute invitation to upend the 2022 elections. The Petition should be dismissed, and this Court should ratify and adopt the Assembly district map enacted on February 3, 2022 (L.2022, c. 14, § 1).

Dated: New York, New York
May 22, 2022

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

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Dated: Buffalo, New York
May 22, 2022

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