

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

---

BELINDA DE GAUDEMAR, ANTHONY  
HOFFMANN, SUSAN SCHOENFELD,  
NANCY PASCAL, and MICHAEL CORBETT,

*Plaintiffs,*

v.

PETER S. KOSINSKI, in his official capacity as  
Co-Chair of the State Board of Elections;  
DOUGLAS A. KELLNER, in his official  
capacity as Co-Chair of the State Board of  
Elections; ANDREW J. SPANO, in his official  
capacity as Commissioner of the State Board of  
Elections; ANTHONY J. CASALE, in his  
official capacity as Commissioner of the State  
Board of Elections; TODD D. VALENTINE, in  
his official capacity as Co-Executive Director of  
the State Board of Elections; and KRISTEN  
ZEBROWSKI-STAVISKY, in her official  
capacity as Co-Executive Director of the State  
Board of Elections,

*Defendants,*

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

*Applicants in Intervention.*

Case No. 22-cv-03534-LAK

**NOTICE OF MOTION TO  
INTERVENE BY 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**

PLEASE TAKE NOTICE that upon the accompanying Memorandum of Law, 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, will move this Court before the Hon. Lewis A. Kaplan, United States District Judge, at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, Rm. 21B, New York, NY 10007, at a time to be scheduled by this Court, for an order pursuant to Federal Rule of Civil Procedure 24 granting their Motion to Intervene. As set forth in the accompanying Memorandum of Law, Proposed Intervenors seek intervention as of right, or, in the alternative, permissive intervention pursuant to Federal Rules of Civil Procedure 24(a) and 24(b), respectively.

Proposed Intervenors further file with this Notice of Motion as exhibits their proposed Answer to Plaintiffs' Complaint (Exhibit 1), as well as their proposed Opposition To Plaintiffs' Application For A Temporary Restraining Order And Motion For Preliminary Injunction (Exhibit 2).

Dated: New York, New York.  
May 3, 2022

Respectfully submitted,

By: /s/Bennet J. Moskowitz

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*Attorneys for Proposed Intervenors*

*\*pro hac vice pending*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of May, 2022, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

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PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS,  
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GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS,  
AND MARIANNE VOLANTE'S PROPOSED ANSWER TO  
PLAINTIFFS' COMPLAINT**

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**INTRODUCTION**

Per Federal Rule of Civil Procedure 24(c)'s requirement that the intervention motion of Proposed Intervenor-Defendants 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 (hereinafter, collectively, “the Proposed Intervenor[s]”), be accompanied by a “pleading that sets out the . . . defense[s] for which intervention is sought,” the Proposed Intervenor[s] hereby submit this proposed Answer. Fed. R. Civ. P. 24(c). The Proposed Intervenor[s] do not waive any of their defenses, privileges, or immunities in this meritless suit, nor do they waive their right to amend this proposed Answer. *See* Fed. R. Civ. P. 12(a)(4)(A); *see also* Fed. R. Civ.P. 15(a).

### **NATURE OF THE ACTION**

1. Paragraph 1 references statutes and a federal court order. These sources speak for themselves. Proposed Intervenor[s] deny the rest of Paragraph 1 to the extent it is not consistent with those statutes and federal court order.

2. The Proposed Intervenor[s] admit that New York must redistrict before it may conduct the 2022 congressional election because the 2012 map—which the state courts already invalidated—is now unconstitutional. To the extent Paragraph 2 sets forth legal conclusions, no response is required, but if a response is required, the Proposed Intervenor[s] deny those conclusions.

3. The Proposed Intervenor[s] deny that New York is in no position to meet its obligation to redraw its congressional boundaries in time to conduct its congressional primary on June 28. Further, Paragraph 3 sets forth legal conclusions for which no response is required, but if a response is required, the Proposed Intervenor[s] deny those conclusions.

4. The Proposed Intervenors deny that the obligation to implement new congressional redistricting plans for the State is now on this Court. Further, to the extent that Paragraph 4 sets forth legal conclusions for which no response is required; the Proposed Intervenors deny all allegations in Paragraph 4.

5. Paragraph 5 asserts legal conclusions for which no response is required; however, if a response is required, the Proposed Intervenors deny all legal conclusions in Paragraph 5. Additionally, Paragraph 5 references statutes and a court decision, which speak for themselves. To the extent the allegations in Paragraph 5 differ from those sources, the Proposed Intervenors deny the allegations.

6. The Proposed Intervenors deny that this Court has authority to adopt a congressional redistricting plan for New York. To the extent that Paragraph 6 asserts legal conclusions, no response is required; however, if a response is required, the Proposed Intervenors deny the allegations.

7. The Proposed Intervenors deny all allegations in Paragraph 7.

8. The Proposed Intervenors deny the allegations in Paragraph 8, including the allegation that New York Courts are not fulfilling their redistricting duties in a timely manner. To the extent Paragraph 8 asserts legal conclusions, no response is required; however, if a response is required, the Proposed Intervenors deny the allegations.

#### **JURISDICTION AND VENUE**

9. The Proposed Intervenors deny that this Court has subject-matter jurisdiction over this action. Paragraph 9 also cites to federal statutes and a federal

rule, which speak for themselves. The Proposed Intervenor deny the allegations in Paragraph 9 to the extent they are inconsistent with those federal statutes and federal rule. Finally, the allegations in Paragraph 9 set forth legal conclusions for which no response is required; however, if a response is required, the Proposed Intervenor deny the allegations in Paragraph 9.

10. The Proposed Intervenor lack knowledge or information to form a belief about the allegations in Paragraph 10 with respect to where Defendants reside. The remaining allegations in Paragraph 10 set forth legal conclusions for which no response is required; however, if a response is required, the Proposed Intervenor deny the allegations in Paragraph 10.

11. Paragraph 11 cites federal statutes, which speak for themselves. The Proposed Intervenor deny the allegations contained in Paragraph 11 to the extent they are inconsistent with those federal statutes. The Proposed Intervenor lack knowledge or information to form a belief about where the events that gave rise to Plaintiffs' claims occurred.

12. The Proposed Intervenor deny that this Court has subject-matter jurisdiction over this action. The Proposed Intervenor deny the allegations contained in Paragraph 12 to the extent they are inconsistent with that federal statute, which speaks for itself.

#### **PARTIES**

13. The Proposed Intervenor lack knowledge or information to form a belief about the allegations contained in Paragraph 13.

14. The Proposed Intervenors lack knowledge or information to form a belief about the allegations in Paragraph 14. The allegations in Paragraph 14 also set forth legal conclusions for which no response is required; however, if a response is required, the Proposed Intervenors deny the allegations in Paragraph 14.

### **FACTUAL ALLEGATIONS**

15. Paragraph 15 cites case law, which speaks for itself. Proposed Intervenors deny the allegations in Paragraph 15 to the extent they are inconsistent with that case law.

16. Paragraph 16 cites case law, which speaks for itself. Proposed Intervenors deny the allegations in Paragraph 16 to the extent they are inconsistent with that case law.

17. Paragraph 17 cites census data, which data speaks for itself. Proposed Intervenors deny the allegations in Paragraph 17 to the extent they are inconsistent with that census data.

18. Proposed Intervenors admit that New York is entitled to 26 Congressmembers, which is one fewer congressional seat than under the previous 2010 census. Paragraph 18 cites a United States statute, which speaks for itself. Proposed Intervenors deny the remaining allegations in Paragraph 18.

19. Paragraph 19 cites census data, which speaks for itself. Proposed Intervenors deny the allegations in Paragraph 19 to the extent that they are inconsistent with that data.

20. Proposed Intervenors admit that the previous 2010 Congressional Map is unconstitutionally malapportioned, but deny any allegation that this map is still in force in New York or causes any injury to Plaintiffs, given the courts' decision in *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022). Paragraph 20 cites case law, the U.S. Constitution, and a federal statute, which speak for themselves. To the extent the allegations in Paragraph 20 are inconsistent with the U.S. Constitution and that federal statute, Proposed Intervenors deny the allegations.

21. Paragraph 21 sets forth legal conclusions for which no response is required; however, if a response is required, Proposed Intervenors deny all allegations in Paragraph 21. Further, Paragraph 21 cites federal statutes, which speak for themselves. To the extent the allegations in Paragraph 21 are inconsistent with the federal statutes, Proposed Intervenors deny the allegations.

22. Paragraph 22 sets forth legal conclusions for which no response is required; however, if a response is required, Proposed Intervenors deny all allegations in Paragraph 22. Further, Paragraph 22 cites federal statutes, which speak for themselves. To the extent the allegations in Paragraph 22 are inconsistent with the federal statutes, Proposed Intervenors deny the allegations.

23. Paragraph 23 sets forth legal conclusions for which no response is required; however, if a response is required, Proposed Intervenors deny all allegations in Paragraph 23. Further, Paragraph 23 cites federal statutes, which speak for themselves. To the extent the allegations in Paragraph 23 are inconsistent

with the federal statutes, Proposed Intervenors deny the allegations. Finally, to the extent there are factual allegations in Paragraph 23, Proposed Intervenors deny those allegations.

24. Paragraph 24 cites case law, which speaks for itself. Proposed Intervenors deny the allegations in Paragraph 24 to the extent they are inconsistent with that case law.

25. Paragraph 25 cites case law, which speaks for itself. Proposed Intervenors deny the allegations in Paragraph 25 to the extent they are inconsistent with that case law.

26. Paragraph 26 cites case law, which speaks for itself. Proposed Intervenors deny the allegations in Paragraph 26 to the extent they are inconsistent with that case law. To the extent there are factual assertions, Proposed Intervenors lack knowledge sufficient to form a belief about the assertions, and therefore deny the remaining assertions in Paragraph 26.

27. Paragraph 27 cites statutes, which speak for themselves. Proposed Intervenors deny the allegations in Paragraph 27 to the extent they are inconsistent with those statutes. Further, Paragraph 27 sets forth legal conclusions for which no response is required; however, if a response is required, Proposed Intervenors deny all allegations in Paragraph 27. To the extent there are factual allegations, Proposed Intervenors deny the factual allegations in Paragraph 27.

28. The assertions in Paragraph 28 set forth legal conclusions for which no response is required; however, if a response is required, Proposed Intervenor deny the allegations.

29. Proposed Intervenor deny all allegations in Paragraph 29, including any allegation that the New York Courts are not fulfilling their redistricting duties in a timely manner.

30. Proposed Intervenor lack knowledge or information sufficient to form a belief about the allegations in Paragraph 30, and therefore deny the allegations in Paragraph 30.

31. The Proposed Intervenor lack knowledge or information sufficient to form a belief about the allegations in Paragraph 31, and therefore deny the allegations in Paragraph 31. Further, Paragraph 31 references legislation, which speaks for itself. Proposed Intervenor deny the allegations in Paragraph 31 to the extent they are inconsistent with that legislation.

32. The Proposed Intervenor lack knowledge or information sufficient to form a belief about the allegations in Paragraph 32, and therefore deny the allegations in Paragraph 32. Further, Paragraph 32 cites a court-hearing transcript, which speaks for itself. To the extent Paragraph 32 contains allegations that are inconsistent with that court transcript, Proposed Intervenor deny the allegations.

33. Paragraph 33 cites court decisions, which speak for themselves. To the extent Paragraph 33 contains allegations that are inconsistent with those court

decisions, Proposed Intervenors deny the allegations. To the extent there are factual allegations, the Proposed Intervenors deny the factual allegations in Paragraph 33.

34. Paragraph 34 cites a New York statute, which speaks for itself. To the extent Paragraph 34 contains allegations that are inconsistent with that statute, Proposed Intervenors deny the allegations. To the extent there are factual allegations, the Proposed Intervenors lack knowledge or information sufficient to form a belief about the allegations in Paragraph 34, and therefore deny the allegations in Paragraph 34.

35. Paragraph 35 cites court decisions, which speak for themselves. To the extent Paragraph 35 contains allegations that are inconsistent with those court decisions, Proposed Intervenors deny the allegations. To the extent there are factual allegations, the Proposed Intervenors deny the factual allegations in Paragraph 35.

36. Paragraph 36 cites a court decision, which speaks for itself. To the extent Paragraph 36 contains allegations that are inconsistent with that court decision, Proposed Intervenors deny the allegations.

37. Paragraph 37 sets forth legal conclusions for which no response is required; however, if a response is required, Proposed Intervenors deny all allegations in Paragraph 37. To the extent there are factual allegations, Proposed Intervenors deny the factual allegations in Paragraph 37.

38. Paragraph 38 sets forth legal conclusions for which no response is required; however, if a response is required, Proposed Intervenors deny all

allegations in Paragraph 38. To the extent there are factual allegations, Proposed Intervenor deny the factual allegations in Paragraph 38.

39. Paragraph 39 sets forth legal conclusions for which no response is required; however, if a response is required, Proposed Intervenor deny all allegations in Paragraph 39. To the extent there are factual allegations, Proposed Intervenor deny the factual allegations in Paragraph 39.

40. The Proposed Intervenor deny the allegations contained in Paragraph 40, including any allegation that New York Courts are not fulfilling their redistricting duties in a timely manner.

41. Paragraph 41 references a court decision that speaks for itself. To the extent that the allegations contained in Paragraph 41 are inconsistent with that court decision, Proposed Intervenor deny those allegations. To the extent Paragraph 41 asserts legal conclusions, no response is required; however, to the extent a response is required, the Proposed Intervenor deny the allegations.

42. Paragraph 42 asserts legal conclusions for which no response is required; however, to the extent a response is required, the Proposed Intervenor deny the allegations. Additionally, Paragraph 42 references statutes and a court decision, which speak for themselves. To the extent that the allegations contained in Paragraph 42 are inconsistent with the statutes and court decision, Proposed Intervenor deny those allegations. Finally, to the extent the allegations in Paragraph 42 assert facts, Proposed Intervenor deny the allegations.

43. Paragraph 43 references a court decision, which speaks for itself. To the extent the allegations contained in Paragraph 43 are inconsistent with that court decision, Proposed Intervenors deny those allegations. Further, to the extent Paragraph 43 asserts legal conclusions, no response is required; however, to the extent a response is required, Proposed Intervenors deny the allegations.

44. Paragraph 44 references a court decision, which speaks for itself. To the extent the allegations contained in Paragraph 44 are inconsistent with that court decision, Proposed Intervenors deny those allegations. Further, to the extent Paragraph 44 asserts legal conclusions, no response is required; however, to the extent a response is required, Proposed Intervenors deny the allegations.

45. Proposed Intervenors deny the allegations in Paragraph 45, including any allegation that the New York Courts are not fulfilling their redistricting duties in a timely manner.

46. Proposed Intervenors deny the allegations in Paragraph 46, including any allegation that the New York Courts are not fulfilling their redistricting duties in a timely manner.

47. Proposed Intervenors deny the allegations in Paragraph 47, including any allegation that the New York Courts are not fulfilling their redistricting duties in a timely manner.

## CLAIMS FOR RELIEF

### COUNT I

48. Proposed Intervenors reallege and reincorporate their responses to all prior paragraphs of the Complaint and the paragraphs in the count below as though fully set forth herein.

49. Paragraph 49 references constitutional provisions and case law, which speak for themselves. To the extent that the allegations in Paragraph 49 differ from the constitutional provisions and case law, Proposed Intervenors deny the allegations.

50. Paragraph 50 references constitutional provisions and case law, which speak for themselves. To the extent that the allegations in Paragraph 50 differ from the constitutional provisions and case law, Proposed Intervenors deny the allegations.

51. Proposed Intervenors admit that the previous 2010 Congressional Map is unconstitutionally malapportioned, but deny any allegation that this map is still in force in any way in New York or causes any injury to Plaintiffs, given the state court's decision in *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022). To the extent that Paragraph 51 contains legal conclusions, no response is required; however, if a response is required, Proposed Intervenors deny the conclusions. Finally, Proposed Intervenors also deny any allegations that Plaintiffs suffer any harm.

## COUNT II

52. Proposed Intervenors reallege and reincorporate their responses to all prior paragraphs of the Complaint and the paragraphs in the count below as though fully set forth herein.

53. Paragraph 53 references a statute, which speaks for itself. To the extent that the allegations in Paragraph 53 differ from the statute, Proposed Intervenors deny the allegations. Proposed Intervenors admit that the previous 2010 Congressional Map is unconstitutionally malapportioned, but deny any allegation that this map is still in force in any way in New York or causes any injury to Plaintiffs, given the state court's decision in *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022). To the extent that Paragraph 53 contains legal conclusions, no response is required; however, if a response is required, Proposed Intervenors deny the conclusions. Finally, Proposed Intervenors also deny any allegations that Plaintiffs suffer any harm.

54. Paragraph 54 references a statute, which speaks for itself. To the extent that the allegations in Paragraph 54 differ from the statute, Proposed Intervenors deny the allegations. Proposed Intervenors admit that the previous 2010 Congressional Map is unconstitutionally malapportioned, but deny any allegation that this map is still in force in any way in New York or causes any injury to Plaintiffs, given the state court's decision in *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022). To the extent that Paragraph 54 contains legal conclusions, no response is required; however, if a response is required, Proposed Intervenors deny

the conclusions. Finally, Proposed Intervenors also deny any allegations that Plaintiffs suffer any harm.

55. Paragraph 55 references a statute, which speaks for itself. To the extent that the allegations in Paragraph 55 differ from the statute, Proposed Intervenors deny the allegations. Proposed Intervenors admit that the previous 2010 Congressional Map is unconstitutionally malapportioned, but deny any allegation that this map is still in force in any way in New York or causes any injury to Plaintiffs, given the state court's decision in *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822 (N.Y. Apr. 27, 2022). To the extent that Paragraph 55 contains legal conclusions, no response is required; however, if a response is required, Proposed Intervenors deny the conclusions. Finally, Proposed Intervenors also deny any allegations that Plaintiffs suffer any harm.

#### **PRAYER FOR RELIEF**

Proposed Intervenors deny that Plaintiffs are entitled to any of the relief that they claim on pages 15 and 16 of their Complaint.

The Proposed Intervenors deny any allegations not otherwise answered in the prior paragraphs, including any allegations in headings, to the extent such denials are consistent with the Proposed Intervenors' prior answers.

#### **AFFIRMATIVE DEFENSES**

1. Plaintiffs' lack standing, including lacking any actual injury in fact, meaning that their Complaint does not present a case or controversy as required by Article III of the U.S. Constitution for this Court to exercise jurisdiction.

2. Plaintiffs' claims are moot, meaning that their Complaint does not present a case or controversy as required by Article III of the U.S. Constitution for this Court to exercise jurisdiction.

3. Plaintiffs' Complaint does not seek "an acceptable Article III remedy." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998).

4. Plaintiffs' claims in their Complaint are otherwise not justiciable.

5. Plaintiffs' Complaint fails to state a claim for which relief can be granted.

6. This Court should dismiss Plaintiffs' Complaint under *Burford* abstention. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

7. The Proposed Intervenors reserve the right to identify additional affirmative defenses.

### **PRAYER FOR RELIEF**

WHEREFORE, the Proposed Intervenors request that this Court:

- A. dismiss this action in its entirety;
- B. grant Proposed Intervenors their attorneys' fees and reasonable costs expended in defending this frivolous litigation; and
- C. grant Proposed Intervenors such other relief as this Court deems just and proper.

Dated: New York, New York.  
May 3, 2022

Respectfully submitted,

By: /s/Bennet J. Moskowitz

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*Attorneys for Proposed Intervenors*

*\*pro hac vice pending*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of May, 2022, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

*/s/ Bennet J. Moskowitz*

---

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**PROPOSED INTERVENOR DEFENDANTS' PROPOSED  
OPPOSITION TO PLAINTIFFS' APPLICATION FOR A TEMPORARY  
RESTRAINING ORDER AND MOTION FOR PRELIMINARY  
INJUNCTION**

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## INTRODUCTION

Plaintiffs' federal lawsuit is an eleventh-hour, thinly veiled collateral attack on the New York courts' ongoing redistricting efforts in *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. Steuben Cnty.), in which Proposed Intervenors are Petitioners. Plaintiffs seek to disrupt the orderly state-court proceedings already in progress—proceedings in which Plaintiffs decided not to intervene—by asking this Court to force the State to conduct congressional elections under a map that was not validly enacted by the New York Legislature. This Court should reject Plaintiffs' request for a temporary restraining order and a preliminary injunction.

Plaintiffs have no likelihood of success on the merits of their frivolous lawsuit for at least two reasons.

First, Plaintiffs have not suffered an injury in fact and assert only moot claims because the Steuben County Supreme Court *has already invalidated* the 2012 congressional map, *see Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223, at \*1 (E.D.N.Y. Mar. 19, 2012), as malapportioned, Declaration of Bennet J. Moskowitz, Ex.C at 17 ("Moskowitz Decl."). Given that both of Plaintiffs' claims are premised on challenging this already invalidated map, Dkt.1 at 14–15, they have no chance of success here, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136 (1992); *Chafin v. Chafin*, 568 U.S. 165, 172, 133 S. Ct. 1017, 1023.

Second, Plaintiffs seek relief based upon their misplaced belief that New York “must conduct its congressional primary on June 28, 2022.” Dkt.1 at 1–2. Yet, the Northern District of New York—the federal court that entered the injunction setting

New York’s congressional primaries for “the fourth Tuesday in June”—expressly recognized that “this decision by no means precludes New York from . . . selecting a different date, so long as the new date fully complies with” the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). *United States v. New York*, No. 1:10-cv-1214, 2012 WL 254263, at \*2 (N.D.N.Y. Jan. 27, 2012). The Northern District has since permitted New York to move deadlines related to its primary election on multiple occasions, only ensuring that the new deadlines are in compliance with the UOCAVA and the Military and Overseas Voter Empowerment (MOVE) Act. *See United States v. New York*, No. 1:10-cv-1214, Dkts.88, 91. The Steuben County Supreme Court ordered that New York hold its congressional primary election on August 23, 2022, Moskowitz Decl., Ex.D at 2, and that date complies with the UOCAVA and the MOVE Act, thus, there would be no possible basis for the Northern District to block this date change.

Plaintiffs’ requested remedy is unequitable and against the public interest. Plaintiffs are asking this Court to strike down the 2012 Congressional Map that New York courts have *already invalidated* and replace it with another map that the same courts have *also already invalidated*: the unconstitutionally gerrymandered map that the Legislature never validly enacted under the New York Constitution’s constitutional procedures for redistricting. *Harkenrider v. Hochul*, \_\_\_N.E.3d.\_\_\_, 2022 WL 1236822, at \*1 (N.Y. Apr. 27, 2022). Mere consideration of such a request would create chaos within New York’s election system and runs contrary to the principle that “reapportionment is primarily the duty and responsibility of the State

through its legislature or other body, rather than of a federal court.” *Grove v. Emison*, 507 U.S. 25, 34, 113 S. Ct. 1075, 1081 (1993).

This Court should deny Plaintiffs’ motion for a temporary restraining order and request for a preliminary injunction.

### **FACTUAL BACKGROUND<sup>1</sup>**

New York currently has no maps to govern the 2022 elections, and New York courts are in the process of adopting such maps. Since the 2012 decision in *Favors v. Cuomo* that established New York’s then-27 congressional districts, the State has experienced population shifts that caused its districts to become unconstitutionally malapportioned, *see generally Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012), and also changed its per-district population goal from 719,298 persons per each of its previous 27 congressional districts to 776,971 persons per each of its now 26 congressional districts. The New York Constitution provides an exclusive process for enacting a replacement map, but the Independent Redistricting Commission (“IRC”) and the Legislature failed to follow that process, meaning that the Legislature never validly enacted any map to govern the 2022 congressional elections. Under the New York Constitution, the IRC has the initial authority to draw congressional maps, and the Legislature must vote on and reject at least *two* IRC-submitted maps before the Legislature regains primary redistricting authority. N.Y. Const. art. III, § 4(b). Violating this exclusive process, which the

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<sup>1</sup> Given the press of time, Proposed Intervenors adopt the same fact statement for their Memorandum In Support Of Intervention and their proposed Opposition To Plaintiffs’ Application For A Temporary Restraining Order And Motion For Preliminary Injunction.

Constitution mandates “shall govern” all “redistricting in this state,” *id.* § 4(e), the IRC failed to submit to the Legislature a second-round congressional map, after the Legislature rejected the IRC’s first submission. Nevertheless, and in violation of the New York Constitution, the Legislature inexplicably attempted to enact its own 2022 congressional redistricting map, *see* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196, A.9039-A (as technically amended by A.9167), A.9040-A and A.9168, even though it had no authority to do so under the New York Constitution. Further, the map that the Legislature tried to enact outside of New York’s constitutional processes was also substantively unconstitutional because it was drawn “to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.” N.Y. Const. art. III, § 4(c)(5).

Proposed Intervenors challenged New York’s 2022 congressional map in the Steuben County Supreme Court on the day of its enactment. Proposed Intervenors argued that the 2022 congressional map was never validly enacted under N.Y. Const. art. III, §§ 4–5, and also substantively invalid as partisan gerrymanders under N.Y. Const. art. III, § 4(c)(5). Proposed Intervenors specifically requested that relief for their constitutional claims take effect immediately, in time for the 2022 elections. *See* Amended Petition, *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. Steuben Cnty. Feb. 8, 2022), Dkt.18 at 82. Proposed Intervenors sued the State Board of Elections, among other defendants, which chose to take no position on the case. *See*

Letter to Hon. Patrick F. McAllister, *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. Steuben Cnty. Feb. 16, 2022), Dkt.54.<sup>2</sup>

On March 31, 2022, the Supreme Court ruled in favor of Proposed Intervenors, holding that the 2022 congressional map was both never validly enacted and an unconstitutional partisan gerrymander; and that the court would retain a neutral expert to prepare a new congressional map, should the Legislature fail to adopt new, bipartisan, and constitutionally sound maps by April 11, 2022. Decision and Order at 10, 14, 18, *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. Steuben Cnty. Mar. 31, 2022), Dkt.243. Moreover, the Supreme Court also ruled that the 2012 congressional map was “no longer valid due to unconstitutional malapportionment and therefore can not be used,” *id.* at 17, with no party appealing from this aspect of the Decision.

On appeal, the Appellate Division affirmed the Supreme Court’s determination that the 2022 congressional map constituted an unconstitutional partisan gerrymander in violation of Article III, Section 4(c)(5) of the New York Constitution. *Harkenrider v. Hochul*, \_\_ N.Y.S.3d \_\_, 2022 WL 1193180, at \*5 (N.Y. App. Div. 4th Dep’t Apr. 21, 2022). However, the Appellate Division reversed the Supreme Court’s determination that the congressional map was never validly, constitutionally enacted under New York’s Constitution. *Id.* at \*2.

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<sup>2</sup> All filed documents in the Steuben County proceedings are available at: <https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=kmywkTvfaoSsQ66zseQsg=&display=all&courtType=Steuben%20County%20Supreme%20Court&resultsPageNum=1> (all websites last visited May 3, 2022).

Then, on an appeal to the New York Court of Appeals, that Court of Appeals reversed the Appellate Division's holding on Proposed Intervenors' claim that the Legislature never enacted any congressional map under the New York Constitution's exclusive procedures for redistricting, concluding that "the enactment of the congressional and senate maps . . . was procedurally unconstitutional," while affirming that the map was "substantively unconstitutional as drawn." *Harkenrider*, 2022 WL 1236822, at \*11; *see also id.* at \*4–9, \*9–10. Further, the court did not disturb the Supreme Court's judgment that the 2012 congressional map was unconstitutionally malapportioned and thus enjoined. *Id.*

Given these unconstitutional infirmities permeating the 2022 congressional map, the court also "reject[ed] [the State's] invitation to subject the People of this state to an election conducted pursuant to an unconstitutional reapportionment," and ordered "prompt judicial intervention" to draw new, constitutionally compliant maps. *Id.* at \*11–12. The Court of Appeals acknowledged that enacting a remedial map would require "mov[ing] the congressional . . . primary election[ ] to August," but noted that "the Board of Elections [and] Supreme Court can swiftly develop a schedule to facilitate an August primary election, allowing time for the adoption of new constitutional maps" and compliance with all "federal voting laws, including the Uniformed and Overseas Citizens Absentee Voting Act." *Id.* at 12. The Court of Appeals then remanded the matter to the Supreme Court and ordered the court to adopt remedial maps "with all due haste" in time for the 2022 elections. *Id.* at \*13.

On remand, the Supreme Court followed the Court of Appeals' directions for haste, entering an order on April 29, 2022, stating that it would adopt a proposed remedial congressional map by May 20, 2022, with the primary election to be held on August 23, 2022. *See* Preliminary Order, *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. Steuben Cnty. Apr. 29, 2022), Dkt.301. In the interim, the parties and other interested persons have already submitted proposed congressional maps to the Supreme Court, and all interested persons are to appear before the Supreme Court and Special Master on May 6, for a final hearing to voice any opposition to any previously submitted congressional map. *See* Second Amended Order, *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. Steuben Cnty. Apr. 29, 2022), Dkt.296.

On May 2, 2022, Plaintiffs filed this federal lawsuit. Plaintiffs' Complaint asserts two claims, both fundamentally premised on the malapportionment of New York's 2012 Congressional Map. Dkt.1 at 14–15. First, Plaintiffs assert a "Congressional Malapportionment" claim asserting that "significant population shifts . . . have occurred since the 2010 Census," meaning that the 2012 Congressional Map is "now unconstitutionally malapportioned" under Article I, Section 2 of the U.S. Constitution and its use "would violate Plaintiffs' constitutional right to an undiluted vote." Dkt.1 at 14. Second, Plaintiffs assert a "Congressional Malapportionment" claim asserting that the 2012 Congressional Map violates 2 U.S.C. § 2c's "requirement that the number of congressional districts be 'equal to the number of Representatives to which [New York] is so entitled,'" since New York is now entitled to 26 seats in the House, not 27 seats, after the 2020 census. Dkt.1 at 15 (quoting 2

U.S.C. § 2c (brackets in original)). As a remedy for both claims, Plaintiffs request that this Court declare that the 2012 Congressional Map “violates Article I, Section 2 of the United States Constitution, and 2 U.S.C. § 2c”; enjoin the use of this map; and draw its own remedial map in time for the State to “conduct its primary on June 28, 2022, as required by federal court order.” Dkt.1 at 15–16. Plaintiffs request that this Court replace the 2012 Congressional Map with the flagrantly gerrymandered map that the Legislature never validly adopted under the New York Constitution. Dkt.9 at 16–18.

### LEGAL STANDARD

In order to obtain a preliminary injunction, the plaintiff “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34 (2d Cir. 2010) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 374 (2008)). Although the Second Circuit recognizes that a party may update a preliminary injunction if “there are sufficiently serious questions going to the merits to make them a fair ground for litigation, provided that the balance of hardships tips decidedly in favor of the moving party,” that more flexible standard does not apply where, as here, “a party seeks an injunction that will affect governmental action taken in the public interest pursuant to a statutory or regulatory scheme.” *Mullins v. City of New York*, 626 F.3d 47, 52–53 (2d Cir. 2010). It is “well established” that the standard for a temporary

restraining order mirrors the standard for a preliminary injunction. *Andino v. Fischer*, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008).

## ARGUMENT

### **I. Plaintiffs Have No Likelihood Of Success On The Merits Of Their Congressional Malapportionment Claims, Since Both Of Their Claims Are Certain To Fail**

Plaintiffs’ “Congressional Malapportionment” claims are certain to fail for two independently sufficient reasons, thus Plaintiffs have no likelihood of success on the merits. First, Plaintiffs’ claims are unquestionably moot and Plaintiffs lack standing, since the New York State Courts already struck down the 2012 Congressional Map on malapportionment grounds. *Infra* Part I.A. Second, and independently, Plaintiffs’ claims rest on the demonstrably incorrect premise that New York must inflexibly hold its congressional primary on June 28, 2022. *Infra* Part I.B.

#### **A. Plaintiffs Both Lack Standing And Assert Only Moot Claims, Since The New York State Courts Have Already Invalidated The State’s 2012 Congressional Map On Malapportionment Grounds**

1. This Court may only enter judgments in cases in which a plaintiff has standing—meaning that the plaintiff has suffered an “injury in fact” that is “actual or imminent, not conjectural or hypothetical,” that there is “a causal connection between the injury and the conduct complained of,” and that it is “likely” that a “favorable decision” would “redress[ ]” the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136 (1992) (citations omitted). Further, this Court may only enter a judgment where plaintiffs’ claims present a “live” controversy, as opposed to controversies that are moot. *Chafin v. Chafin*, 568 U.S. 165, 172, 133 S. Ct. 1017, 1023 (2013); accord *Green v. Mazzucca*, 377 F.3d 182, 183 (2d Cir. 2004)

(per curiam). A case is moot where “the issues presented” are not “live,” or where the plaintiff never had “a legally cognizable interest in the outcome.” *Chafin*, 568 U.S. at 172, 133 S. Ct. at 1023 (citations omitted). Accordingly, “[t]he test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties.” *Green*, 377 F.3d at 183.

2. Plaintiffs have not suffered a concrete injury to support their standing and their case is moot, as the entirety of their lawsuit is a challenge to the already invalidated 2012 Congressional Map. Both of Plaintiffs’ claims in this case rest on the assertion that the 2012 Congressional Map is malapportioned after the 2010 Census. Dkt.1 at 14–16. Thus, the essential elements of Plaintiffs’ claims are that the 2012 Congressional Map is malapportioned—both because it does not contain the required population equality among districts, and because it contains one too many districts—and that this malapportionment violates Plaintiffs’ constitutional and statutory rights to an undiluted vote. Dkt.1 at 14–16.

Plaintiffs have not suffered an actual “injury in fact” to support their standing to assert their malapportionment-based claims against the 2012 Congressional Map. *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136. Further, Plaintiffs’ malapportionment-based dispute with the 2012 Congressional Map does not present a “live” controversy—and, moreover, this dispute was not “live” even before Plaintiffs filed their Complaint. *Chafin*, 568 U.S. at 172, 133 S. Ct. at 1023. That is because the Steuben County Supreme Court has *already* declared that the 2012 Congressional Map is malapportioned in light of the 2020 Census and, accordingly, has enjoined its

use in all future elections—including the upcoming 2022 congressional elections. Moskowitz Decl., Ex.C at 17–18. Further, the appellate courts of New York did not disturb that judgment on appeal from the Steuben County Supreme Court’s order. *See Harkenrider v. Hochul*, \_\_\_N.E.3d\_\_\_, 2022 WL 1236822, at \*11 (N.Y. Apr. 27, 2022). Indeed, as the New York Court of Appeals explained in its opinion affirming the Steuben County Supreme Court’s judgment, “[d]ue to shifts in New York’s population, the state lost a congressional seat and other districts were malapportioned, undisputedly rendering the 2012 congressional apportionment . . . unconstitutional and necessitating the drawing of new district lines.” *Id.* at \*2.

Given the Steuben County Supreme Court’s unambiguous judgment and binding order, the 2012 Congressional Map cannot possibly cause Plaintiffs any actual “injury in fact,” *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136, nor do Plaintiffs possess any “cognizable interest in the outcome” of this case, *Chafin*, 568 U.S. at 172, 133 S. Ct. at 1023 (citations omitted). In light of this judgment, there is no chance that this map will govern the upcoming congressional elections in New York. While Plaintiffs complain that the 2012 Congressional Map harms them by diluting the weight of their vote, since they live in malapportioned districts and/or under a congressional map with one too many districts, the Steuben County Supreme Court’s undisturbed judgment already remedies those injuries by enjoining the 2012 Congressional Map and ordering the drawing of a remedial map. Moskowitz Decl., Ex.C at 17–18. Therefore, no further order from this Court would vindicate Plaintiffs’

“cognizable interest[s]” *Chafin*, 568 U.S. at 172, 133 S. Ct. at 1023 (citations omitted), or “legal interests” here, *Green*, 377 F.3d at 183.

**B. Plaintiffs’ Claims Rest On The Mistaken Assertion That Federal Law Requires New York To Hold Its Congressional Primary On June 28, 2022**

Beyond Plaintiffs’ fatal mootness and standing problems, *supra* Part I.A, Plaintiffs’ claims have no likelihood of success for the independent reason that those claims rest on the demonstrably false premise that federal law requires New York to hold its congressional primary on June 28, 2022.

1. The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and the Military and Overseas Voter Empowerment (MOVE) Act “protect[ ] the federally-guaranteed voting rights of New York’s military and overseas voters” by “guarantee[ing]” these individual’s right “to vote by absentee ballot in general, special, primary, and runoff elections for Federal office.” *New York*, 2012 WL 254263, at \*1 (quoting 42 U.S.C. § 1973ff–1(a)(1), *transferred to* 52 U.S.C. § 20302(a)(1)). Among other things, the UOCAVA requires the States to transmit absentee ballots to military and overseas voters no later than 45 days “prior to a federal general election.” *Id.*; 52 U.S.C. § 20302(a)(8) (requiring States to “transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter . . . not later than 45 days before the election” “in the case in which the request is received at least 45 days before an election for Federal office”). Thus, “New York is responsible for complying with UOCAVA and ensuring that validly-requested absentee ballots

are sent to UOCAVA voters in accordance with its terms.” *New York*, 2012 WL 254263, at \*1.

In 2012, the Northern District of New York entered a permanent injunction against New York to ensure that the State would comply with UOCAVA’s 45-day deadline. *New York*, 2012 WL 254263, at \*2–3. Specifically, the Northern District considered the claim that an August primary in New York did not “provide sufficient time to deal with the foreseeable obstacles in certifying a primary election result or the ballot” while meeting UOCAVA’s 45-day deadline. *Id.* at \*2. The Northern District “conclude[d] that the fourth Tuesday in June for [its] non-presidential primary is in the best interest of the State,” given UOCAVA, *but that its “decision by no means precludes New York from reconciling their differences and selecting a different date, so long as the new date fully complies with UOCAVA.”* *Id.* (emphasis added). Indeed, the Northern District recognized that the primary date “is best left to New York,” so long as federally-protected voting rights are “preserve[d].” *Id.*

In the years since the Northern District of New York’s entering of this permanent injunction in 2012, that court has repeatedly permitted New York to move deadlines related to its primary election, so long as those new deadlines comply with UOCAVA and the MOVE Act, including its 45-day deadline for the delivery of absentee ballots for the general election. *See United States v. New York*, No. 1:10-cv-1214, Dkts.88, 91. Indeed, given the terms of the Northern District’s injunction, this Court must permit such changes, so long as New York’s newly selected dates comply with federal law. *New York*, 2012 WL 254263, at \*2–3.

2. Here, New York may hold its congressional primary on August 23, 2022, consistent with the UOCAVA and the MOVE Act, which is the end of this lawsuit.

In the proceedings before the state courts, the Court of Appeals of New York expressly ordered the Steuben County Supreme Court to “adopt constitutional maps with all due haste,” while recognizing that “it will likely be necessary to move the congressional . . . primary elections to August.” *Harkenrider*, 2022 WL 1236822, at \*12–13. Further, the New York Court of Appeals explained that it was “confident” the Steuben County Supreme Court “can swiftly develop a schedule to facilitate an August primary election,” in “consultation with the Board of Elections,” that “compli[es] with federal voting laws, including the Uniformed and Overseas Citizens Absentee Voting Act.” *Id.* at \*12. In line with the New York Court of Appeals’ judgment, the Steuben County Supreme Court has ordered that New York hold its congressional primary on August 23, 2022, so that the court may swiftly adopt a remedial map for the upcoming 2022 congressional elections that complies with the New York Constitution. Moskowitz Decl., Ex.D at 2.

New York holding its congressional primary on August 23, 2022, fully complies with UOCAVA and the MOVE Act, as the New York Court of Appeals already recognized. All that the UOCAVA requires New York to do, as relevant here, is deliver absentee ballots to those overseas and military voters who have requested them by 45 days “prior to a federal general election.” *New York*, 2012 WL 254263, at \*1; 52 U.S.C. § 20302(a)(8). New York holding its primary on August 23 may comply with this federal requirement, as the state courts—“in consultation with the Board of

Elections . . . can swiftly develop a schedule to facilitate an August primary election, allowing time for the adoption of new constitutional maps, the dissemination of correct information to voters, the completion of the petitioning process, and compliance with federal voting laws, including the Uniformed and Overseas Citizens Absentee Voting Act.” *Harkenrider*, 2022 WL 1236822, at \*12. Indeed, other States hold their primary elections on August 23 or later, with no UOCAVA and MOVE Act concerns. *See, e.g.*, Fla. Div. of Elections, *Election Dates (2022)* (“Election Dates For 2022 are: Primary Election: August 23”);<sup>3</sup> *see generally* Federal Elections Comm’n, *2022 Congressional Primary Dates And Candidate Filing Deadlines For Ballot Access*.<sup>4</sup>

There is no chance whatsoever that the Northern District of New York’s permanent injunction will prevent New York from holding its congressional primary on August 23, 2022. The Northern District specifically recognized in its permanent-injunction order that its “decision by no means precludes New York from reconciling their differences and *selecting a different date*, so long as the new date fully complies with UOCAVA.” *New York*, 2012 WL 254263, at \*2 (emphasis added). This is because selection of the primary date “is best left to New York,” so long as federal protected voting rights are “preserve[d].” *Id.* And the Northern District has previously modified its permanent injunction multiple times to allow New York to adopt different election-related deadlines, while also complying with UOCAVA. *United*

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<sup>3</sup> Available at <https://dos.myflorida.com/elections/for-voters/election-dates/>.

<sup>4</sup> Available at <https://www.fec.gov/resources/cms-content/documents/2022pdates.pdf>.

*States v. New York*, No. 1:10-cv-1214, Dkts.88, 91. So, given that the holding of a congressional primary on August 23, 2022, does not violate UOCAVA, there could be no basis for the Northern District to block the change of New York's congressional primary to that date.

3. Plaintiffs' "Congressional Malapportionment" claims rely completely upon their fatally flawed assertion that the Northern District's permanent injunction inflexibly requires New York to hold its congressional primary on June 28, 2022, which means that the state courts cannot adopt a remedial map in time to comply with that date. *See* Dkt.1 at 14–15; Dkt.9 at 5–7. Incredibly, while Plaintiffs recite certain terms of the Northern District of New York's permanent injunction in their Memorandum supporting their request for a temporary restraining order or a preliminary injunction, they *wholly omit* any reference to the key provision that the "decision by no means precludes New York from reconciling their differences and selecting a different date, so long as the new date fully complies with UOCAVA." *New York*, 2012 WL 254263, at \*2 (emphasis added); *see generally* Dkt.9 at 5–7. Plaintiffs' flagrant omission of this crucial term is hardly an unintentional oversight: if Plaintiffs truly believed that there is any chance that the Northern District would not permit an August 23 primary, *they would have intervened in that court rather than starting a new lawsuit in this Court*. So, because New York may hold its congressional primary on August 23 while complying with UOCAVA, nothing would justify the Northern District of New York from blocking that date under its permanent injunction, as explained above.

**II. The Balance Of The Equities And The Public Interest Weigh Decisively Against Issuing A Preliminary Injunction, Including Because Plaintiffs Seek To Sow Chaos Into New York’s Election Administration**

Plaintiffs will suffer no harm—let alone irreparable harm—from this Court denying their request for a temporary restraining order or a preliminary injunction. *Winter*, 555 U.S. at 20, 129 S. Ct. at 374; *accord Citigroup*, 598 F.3d at 34. As explained above, Plaintiffs’ only asserted harm here is the vote-dilution harm from the 2012 Congressional Map. That is, Plaintiffs’ sole asserted injury—which injury underlies both of their “Congressional Malapportionment” claims—is that any future election held under the 2012 Congressional Map would dilute the strength of their votes. Dkt.1 at 14–16. Yet, as already explained, *the Steuben County Supreme Court has already declared that the 2012 Congressional Map is malapportioned* and has enjoined its use in the upcoming 2022 congressional elections. Moskowitz Decl., Ex.C at 17–18; *accord Harkenrider*, 2022 WL 1236822, at \*2. ***Therefore, there is absolutely no possibility that this map will govern the upcoming congressional elections—or any other future election in the State.***

Further, the irreparable harm caused by this Court entering any preliminary relief decisively outweighs whatever interests that Plaintiffs could assert. *Winter*, 555 U.S. at 20, 129 S. Ct. at 374; *accord Citigroup*, 598 F.3d at 34. Plaintiffs have requested that this Court invalidate the already invalidated 2012 Congressional Map and then replace it with the flagrantly gerrymandered map that the New York Legislature never validly adopted under the New York Constitution, Dkt.9 at 16–18. This absurd and unthinkable remedy would undo the judgment that Proposed

Intervenors secured in the state courts by instituting the very map that they successfully challenged as unlawful—including for the upcoming 2022 congressional elections. *Id.* at \*11–13. That is, without question, an irreparable harm that strongly weighs against preliminary relief here. *Winter*, 555 U.S. at 20, 129 S. Ct. at 374; *accord Citigroup*, 598 F.3d at 34.

A temporary restraining order, specifically, will cause further chaos for other reasons. If this Court places any doubt upon the state-court proceedings to adopt a constitutional map for the 2022 elections on August 23, such an order will lead to immediate litigation before the three-judge panel and, if necessary, the U.S. Supreme Court. *See Growe*, 507 U.S. at 34, 113 S. Ct. at 1081; *accord Scott v. Germano*, 381 U.S. 407, 409, 85 S. Ct. 1525, 1526–27 (1965) (per curiam). Proposed Intervenors respectfully believe that these courts are extremely unlikely to allow such federal-court interference with an ongoing state-court process to create a map for the 2022 election, where the State never enacted a replacement map and will do so immediately for an August 23 primary that is unquestionably valid under federal law. *See Growe*, 507 U.S. at 34, 113 S. Ct. at 1081 (“[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.”) (quoting *Chapman v. Meier*, 420 U.S. 1, 27, 95 S. Ct. 751, 766 (1975)); *accord Scott*, 381 U.S. at 409, 85 S. Ct. at 1527 (“The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.”). Meanwhile, such a

temporary restraining order would create uncertainty for the people of New York if the election were to go forward under an unconstitutional, grossly gerrymandered map that—as the Court of Appeals of New York recently held—was never constitutionally enacted to begin with. Indeed, as of now, all congressional candidates in New York know that the lines of Legislature’s gerrymander map will not govern the 2022 congressional elections, and there is absolutely no basis to create doubt in that status quo situation.

More broadly, Plaintiffs’ requested relief would significantly harm the public interest, *Winter*, 555 U.S. at 20, 129 S. Ct. at 374; accord *Citigroup*, 598 F.3d at 34, including the State’s interest in conducting redistricting free from undue federal-court interference, *Grove*, 507 U.S. at 34, 113 S. Ct. at 1081. As the Supreme Court has repeatedly held, “reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.” *Id.*; accord *Scott*, 381 U.S. at 409, 85 S. Ct. at 1526–27. The New York state courts are diligently completing that reapportionment process now for the benefit of the people of this State—as the New York Constitution expressly requires under the circumstances here. N.Y. Const. art. III, § 4(e), 5. This Court disrupting that orderly process now, while the Steuben County Supreme Court is poised to consider remedial congressional maps this week, would throw New York’s election process into chaos, see *Purcell v. Gonzalez*, 549 U.S. 1, 4–5, 127 S. Ct. 5, 7 (2006) (per curiam), inflicting the very public harms that Plaintiffs purportedly seek to avoid, see Dkt.9 at 17–18.

Importantly, this Court ordering the use of the Legislature’s unconstitutional map for even one election cycle significantly harms the interests of the public. As the Court of Appeals of New York explained, “[d]elaying a remedy” of a court-drawn remedial map “until the next election would *substantially undermine* the People’s efforts to temper partisan gerrymandering” in the New York Constitution. *Harkenrider*, 2022 WL 1236822, at \*12 n.18 (emphasis added). “Delaying a remedy” of a court-drawn remedial map “in this election cycle—[thus] permitting an election to go forward on unconstitutional maps [*i.e.*, the same maps that Plaintiffs would have this Court impose]—would set a troubling precedent for future cases raising similar partisan gerrymandering claims, as well as other types of challenges, such as racial gerrymandering claims.” *Id.*

Plaintiffs’ various arguments on the equities all fail. Dkt.9 at 16–19. Plaintiffs bizarrely claim that New York is “on track” to violate UOCAVA, Dkt.9 at 16, but they cannot explain how an August 23 primary violates that statute or why New York could not comply with its UOCAVA obligations with such a primary date, contrary to the Court of Appeals of New York’s conclusion, *supra* pp.14–16. Next, Plaintiffs claim that the grossly gerrymandered map, which the Legislature never validly enacted under the New York Constitution, somehow provides a ready alternative for 2022. Dkt.9 at 16–18. Yet, as Plaintiffs admit, the Court of Appeals of New York has already invalidated that map, Dkt.9 at 18, *while also concluding that the Legislature and Governor had no authority to enact it in the first place*, *Harkenrider*, 2022 WL 1236822, at \*9. Accordingly, that map has no legitimacy whatsoever. *See* Dkt.9 at

3–4, 18. Plaintiffs also claim, incredibly, that this court disrupting the ongoing remedial-map-drawing process in the state courts will *reduce* voter confusion, but that is risible. Dkt.9 at 17. The wholly unprecedented action of federal court abruptly halting ongoing state proceedings and imposing the very map on the State that the Court of Appeals of New York just invalidated in a landmark, high-profile decision would obviously cause deep, irreparable voter confusion throughout the State. *Accord Purcell*, 549 U.S. at 4–5, 127 S. Ct. at 7.

Finally, Plaintiffs cite cases out of Alabama, Georgia, and Ohio for support, but these do not help them. The case out of Alabama involved a stay of a federal-court order for the State to redraw its maps, *Merrill v. Milligan*, 142 S. Ct. 879 (2022), while the federal court in the case out of Georgia declined to order the State to redraw its map in advance of an election because the State’s “election machinery is already in progress,” *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 1:21-CV-5337-SCJ, 2022 WL 633312, at \*74 (N.D. Ga. Feb. 28, 2022)—***circumstances that bear no resemblance to those here, where the state courts themselves are adopting remedial maps for the State to remedy a state constitutional violation.*** And the case out of Ohio is no better, since the federal court only ordered the election to proceed under an invalidated map there after the Ohio Supreme Court, which was “*constitutionally barred from imposing a map itself,*” rejected four maps submitted by that State’s independent commission. *Gonidakis v. LaRose*, No. 2:22-CV-0773, 2022 WL 1175617, at \*1 (S.D. Ohio Apr. 20, 2022) (emphasis added). Here, the state courts

have the state constitutional *responsibility* to adopt remedial maps and will exercise that authority “with all due haste,” *Harkenrider*, 2022 WL 1236822, at \*13.

### CONCLUSION

This Court should deny Plaintiffs’ Application For A Temporary Restraining Order And Motion For Preliminary Injunction.

Dated: New York, New York.  
May 3, 2022

Respectfully submitted,

By: /s/Bennet J. Moskowitz

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 3rd day of May, 2022, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

By: /s/Bennet J. Moskowitz

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