

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

<p>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,</p> <p style="text-align: right;">Petitioners,</p> <p style="text-align: center;">v.</p> <p>GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, and THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,</p> <p style="text-align: right;">Respondents.</p>

Index No. E2022-0116CV

**PROPOSED INTERVENOR-PETITIONER GARY GREENBERG’S MEMORANDUM
OF LAW IN SUPPORT OF EMERGENCY MOTION BY ORDER TO SHOW CAUSE TO
INTERVENE AND FOR RELATED RELIEF**

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Proposed Intervenor-Petitioner Gary Greenberg (“Petitioner Greenberg”), by his undersigned counsel, submits this Memorandum of Law in support of (1) his motion by Order to Show Cause to intervene pursuant to CPLR 1012 and CPLR 1013, and (2) his intervenor cause of action seeking to invalidate the New York State Assembly map and for ancillary relief.

PRELIMINARY STATEMENT

The relief sought herein flows in a simple and straightforward fashion from the Court of Appeals’ recent April 27, 2022 Opinion in this matter and this Court’s April 29, 2022 Order (Doc. No. [301](#)).

On April 27, 2022, the Court of Appeals held that the procedure adopted by the New York Legislature in adopting the congressional and State Senate maps was unconstitutional. But the Legislature used the same unconstitutional procedure to adopt the current State Assembly map, rendering it equally invalid—as this Court itself previously held. (Doc. No. [243](#), at 10). The Court of Appeals was compelled to refrain from granting such relief as to the Assembly map because the current petitioners in *Harkenrider* did not seek such relief in their petition. Nonetheless, the Court of Appeals made clear that the same rationale, and the same ruling, would necessarily apply to any such challenge, and essentially invited that challenge to be made. That challenge is being made, in this proceeding, by this motion.

The Court of Appeals further held that, in such circumstances, the proper remedy was for the Supreme Court, with the aid of a neutral redistricting expert, serving as special master, to oversee redistricting of the congressional and State Senate maps. Petitioner Greenberg simply seeks to extend the same remedy to the Assembly map.

Petitioner Greenberg is proceeding by Order to Show Cause because of the upcoming election deadlines. For all races other than congressional and State Senate races, the primary elections—including Assembly seat primaries—are currently set for June 28, 2022. Thus, among

other relief, Petitioner Greenberg requests that the Court enjoin the holding of Assembly primary elections until August 23, 2022, pending resolution of the Assembly map issue, and grant related ancillary relief, as the Court already has done for the congressional and New York Senate elections.

For these and other reasons, set forth below, the Court should grant the relief set forth in Petitioner Greenberg's proposed Order to Show Cause.

ARGUMENT

I. INTERVENTION IS WARRANTED UNDER CPLR 1012 OR 1013

Petitioner Greenberg's application readily satisfies the standards for mandatory and/or permissive intervention.

Mandatory Intervention: CPLR 1012(a) permits intervention as of right where (1) a state statute “confers an absolute right to intervene,” or (2) “the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment[.]”

Here, N.Y. Unconsolidated Laws § 4221 plainly confers upon Petitioner Greenberg the right to maintain an action to challenge apportionment, providing in relevant part: “[a]n apportionment by the legislature shall be subject to review by the supreme court at the suit of any citizen” Because such an action already exists—albeit with respect to other electoral maps that present the same constitutional issue—Section 4221 effectively recognizes Petitioner Greenberg's right to intervene.

Further, Petitioner Greenberg's representation by the existing parties is inadequate, since the current petitioners' petition does not seek—and they have never sought—to challenge the Assembly map. Because of the time-sensitive nature of the relief sought, the issuance of relief in this action that did not encompass the Assembly map could well foreclose Petitioner Greenberg's ability to seek such relief in any other forum with respect to the upcoming Assembly election.

Permissive Intervention: CPLR 1013 permits intervention “**when the person’s claim or defense and the main action have a common question of law or fact.**” The invalidation of the Assembly map based upon the unconstitutional procedure adopted by the Legislature in adopting all *three* maps at issue plainly presents a common question of fact or law with the congressional and State Senate maps that the current petitioners challenge, and thus amply satisfies the grounds for permissive intervention.

II. THE MERITS OF THE INTERVENOR PETITION ARE CLEAR BASED UPON THE COURT OF APPEALS’ APRIL 27, 2022 OPINION

In its April 27, 2022 Opinion (*Harkenrider v. Hochul*, 2022 WL 1236822, hereafter the “Opinion”), the Court of Appeals already has ruled on the four key “merits” issues underlying Petitioner Greenberg’s proposed petition in intervention.

Invalidation of the existing Assembly Map. The Opinion conclusively establishes Petitioner Greenberg’s right to the main relief sought, *i.e.*, invalidation of the Assembly map. The Court of Appeals held that the procedure used by the Legislature in adopting all three of its maps—congressional, State Senate, and State Assembly—was unconstitutional. *Harkenrider*, 2022 WL 1236822, at *5-*9. Thus, the existing Assembly map is invalid for exactly the same reasons as the congressional and State Senate maps that the Court of Appeals invalidated. The Court of Appeals only declined to extend such relief to the Assembly map because the petitioners themselves had not sought such relief in their petition or before the Court of Appeals.¹

¹ See Amended Petition at n.6 & n.7 (Doc. No. [33](#)) (“***the Petitioners do not challenge that map in this lawsuit,***” and “***do not ... ask for its invalidation***” (emphasis added)); *Harkenrider*, 2022 WL 1236822, at *11 n.15 (“***Inasmuch as petitioners neither sought invalidation of the 2022 state assembly redistricting legislation in their pleadings nor challenge in this Court the Appellate Division’s vacatur of the relief granted by Supreme Court with respect to that map, we may not invalidate the assembly map despite its procedural infirmity.***” (emphasis added)).

Requirement of New Map Before Elections. The Opinion conclusively establishes that because the map is invalid, it cannot form the basis for Assembly elections, and therefore a new map is required. Having found in relevant part that “**the enactment of the congressional and senate maps by the legislature was procedurally unconstitutional,**” the Court of Appeals rejected the state respondents’ argument that “**no remedy should be ordered for the 2022 election cycle because the election process for this year is already underway.**” *Id.* at *11. That is, while the state respondents requested that the 2022 congressional and Senate elections “**be conducted using the unconstitutional maps, deferring any remedy for a future election,**” the Court of Appeals squarely “**reject[ed] this invitation to subject the People of this state to an election conducted pursuant to an unconstitutional reapportionment.**” *Id.* (emphasis added). The People of New York have exactly the same right not to be subject to a State Assembly election conducted pursuant to an unconstitutional reapportionment.

Requirement of Judicial Oversight. The Opinion conclusively establishes that, because a map is required, and the Legislature has abdicated its constitutional role, the judiciary may—and must—supervise the process. Noting that Article III, § 4(e) and § 5 of the New York Constitution “**both require[] expedited judicial review of redistricting challenges . . . and authorizes the judiciary to ‘order the adoption of, or changes to, a redistricting plan’ in the absence of a constitutionally-viable legislative plan,**” the Opinion stated:

Where, as here, legislative maps have been determined to be unenforceable, we are left in the same predicament as if no maps had been enacted. *Prompt judicial intervention is both necessary and appropriate to guarantee the People’s right to a free and fair election.*

Id. at *12 (emphasis added).

Approval of Court’s Role in Setting Deadlines and Utilization of Special Master. The Opinion recognized the logistical difficulties involved in preparing for and executing an election,

and the impact of rescheduling on administrative officials, candidates, and the voters. Notwithstanding the foregoing, the Court was “**confident that, in consultation with the Board of Elections, Supreme Court 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 (see 52 USC § 20302).**” *Id.* (emphasis added).

Accordingly, the Court of Appeals “**remit[ted] the matter to Supreme Court which, with the assistance of the special master and any other relevant submissions (including any submissions any party wishes to promptly offer), shall adopt constitutional maps with all due haste.**” *Id.* at *13 (emphasis added).

As the Court is aware, that process is well underway. Petitioner Greenberg simply seeks to include remediation of the unconstitutional Assembly map and impacted administration in that process.

III. THE RELIEF SOUGHT WILL NOT PREJUDICE ANY PARTY, WHEREAS DENIAL OF INTERVENTION WILL PREJUDICE PETITIONER GREENBERG AND THE PEOPLE OF THE STATE OF NEW YORK

The relief sought herein is fully consistent with this Court’s April 29, 2022 Order (Doc. No. [301](#)). As such, it will not prejudice the existing parties, whereas denial of intervention and the relief sought will prejudice Petitioner Greenberg and the People of the State of New York.

The Court’s Order provides in relevant part:

- The Court has appointed Dr. Jonathan Cervas as an independent special master to develop both new congressional and State Senate maps.
- The new 2022 impartial redistricting maps for the congressional and State Senate prepared by Dr. Cervas will be available by May 20, 2022.
- The deadline for mailing military and overseas ballots is July 8, 2022.

- The 2022 primary for the congressional and State Senate elections will be held on August 23, 2022.

(Doc. No. [301](#)).

Predictably, the Legislature—obviously motivated to rig the upcoming election—has not extended the primary date for other elections. Instead, New York currently intends to hold these other primary elections, including for Assembly seats, on June 28. See “[N.Y. Moves Some Primaries to August After a Judge Tosses Maps](#)” (Associated Press April 29, 2022, appearing in Lockport-Union Sun & Journal).

The Court’s Order can readily be amended to include preparation of an Assembly map by the Court’s special master. Further, because the State is already committed to a July 8, 2022 military and overseas ballot mailing date, and an August 23, 2022 primary date, for congressional and State Senate elections, there is no prejudice to putting the Assembly military and overseas ballot distribution and primary dates on the same schedule.²

By contrast, Petitioner Greenberg—and the People of the State of New York—are plainly prejudiced if Petitioner Greenberg is not permitted to intervene and seek such relief, and instead

² The Legislature’s unconstitutional redistricting has also harmed voters’ and candidates’ interests in fair and accurate representation. As the Petition in Intervention explains, to appear on a ballot, candidates must collect signatures from voters who meet certain residency requirements under state law. Petition ¶¶ 62-66. The redrawing of district lines makes it likely that many of these signatures will no longer meet the statutory requirements. Unless the period for collecting such signatures is reopened, candidates who do *not* have the requisite signatures (which reflects a level of support within their relevant political unit for eligibility to appear on a ballot) will nonetheless be allowed to run for office. Further, potential candidates who decided not to run under the constitutionally defective maps—because they lacked the requisite support or found themselves uncompetitive—will be harmed. They will be denied the opportunity to seek election where—once the maps are redrawn—they are now competitive candidates for office.

As a result, voters will be deprived of a fair and accurate slate of candidates in the 2022 election cycle, as well as proper representation for the years to come. This deprivation will affect all offices: congressional, Senate, Assembly, and state-wide.

is consigned to initiating a plenary action seeking relief from another Court. By that time, too much time will have passed for effective relief. Further, the Court of Appeals has already balanced the competing public interest in, on the one hand, having elections conducted in accordance with an electoral map drawn in a constitutionally-permissible manner, versus, on the other hand, not upsetting the election time-table by proceeding with a set of electoral districts drawn by the Legislature, and approved by the Governor, in willful disregard of their constitutional obligations. The Court of Appeals held that, as a matter of constitutional law, the former trumps the latter.

CONCLUSION

For the reasons given, the Court should grant Petitioner Greenberg (1) leave to intervene so as to file the proposed Petition in Intervention, (2) the other relief sought in the Petition in Intervention and the Order to Show Cause, and (3) such other and further relief as the Court deems just and proper.³

³ This Court should ensure that candidates in the 2022 election cycle have met the statutory requirements to appear on the ballot and reflect the interests of their actual constituencies. Because some persons who may have chosen not to step forward as candidates based on the existing, unconstitutional, maps—believing themselves to be uncompetitive—and because some candidates may have invalid signatures but still be able to cure them, this Court should reopen the petition period for congressional, Senate, Assembly, and state-wide office and adopt any other necessary remedial measures. Nothing in the current existing election timetable or applicable statutes and regulations should bar such candidates from entering the race, or from fixing a tainted candidacy, particularly because there will be ample time with the August 23 primary schedule. To our knowledge, these issues are not currently being addressed by the existing petition in this case.

CERTIFICATE OF WORD COUNT COMPLIANCE

As an attorney at Walden Macht & Haran LLP, I hereby certify that this memorandum of law is in compliance with Commercial Division Rule 17. The foregoing document was prepared using Microsoft Word, and the document contains 2,561 words as calculated by the application's word counting function.

Dated: New York, New York
May 3, 2022

/s/ Jim Walden
Jim Walden