

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.

Case No. 22 Civ. 3534

MEMORANDUM OF LAW IN SUPPORT OF
APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND
MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65(a) and (b), Plaintiffs Belinda de Gaudemar, Anthony Hoffmann, Susan Schoenfeld, Nancy Pascal, and Michael Corbett are New York voters who respectfully move this Court for a temporary restraining order and, subsequently, preliminary injunction (1) enjoining Defendant members of the New York State Board of Elections from implementing, enforcing, or giving any effect to New York's congressional districting plans as adopted by the court in *Favors v. Cuomo*, *Favors v. Cuomo*, No. 1:11-cv-05632, 881 F. Supp. 2d 356 (E.D.N.Y. 2012), and (2) ordering such Defendants to proceed with certifying the primary

ballot by Wednesday, May 4, under a congressional plan as adopted by this court, that complies with Article I, Section 2 of the U.S. Constitution and 2 U.S.C. § 2c, in time for New York to conduct its primary on June 28, 2022, as required by federal court order. For the reasons set forth below, Plaintiffs are entitled to the immediate relief they seek.

INTRODUCTION

Under an existing federal court order, New York must conduct its congressional primary on June 28, 2022. This date is not negotiable: Ten years ago, the Department of Justice secured a permanent injunction against the State of New York for its repeated violations of the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and the Military and Overseas Voter Empowerment (MOVE) Act. To ensure that New York would finally meet its obligations to send ballots to military and overseas voters with adequate time for those voters to return them, the Northern District of New York entered a permanent injunction ordering the state to conduct its non-presidential federal primary on “the fourth Tuesday in June” in subsequent even-numbered years. *See* Ex. 1, *United States v. New York*, 1:10-cv-01214 (Jan. 27, 2012), ECF No. 59. In 2022, that date is June 28th, just eight weeks away.

Of course, New York must redraw its congressional boundaries before it can conduct a congressional primary—first, to remedy malapportionment in the existing districts, and second, to account for the fact that New York will only send 26 Representatives to the next Congress, one fewer than New York was allocated in the last decade. As of the date of this filing, 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. Nor is it even trying to do so: The Steuben County Supreme Court that has been tasked with redrawing New York’s congressional boundaries for the next decade has purportedly moved New York’s congressional primary until August 23, and does not

intend to finish its process until at least May 20—more than two weeks after primary ballots should be certified by the New York State Board of Elections, and a full week after UOCAVA ballots must be sent to military and overseas voters under a June 28 primary schedule.

Because the State of New York has failed to timely redistrict its congressional boundaries, the obligation to implement new congressional redistricting plans for the State now falls to this court. This obligation is serious: barring a swift adoption of an appropriate single-member congressional plan for the State of New York by this court, under 2 U.S.C. § 2a(c)(5) the state is obligated to hold at-large congressional elections—the “last-resort remedy” when a state has lost a congressional district, failed to timely redistrict, and no state or federal court has redistricted the state in time for elections. *Branch v. Smith*, 538 U.S. 254, 275 (2003). This court can avoid such an outcome by promptly adopting a congressional plan for New York, in time for the New York State Board of Elections to certify the primary ballot this week, for UOCAVA ballots to be mailed no later than the May 14 deadline set by federal law, and for New York to conduct its primary on June 28, 2022, as it is federally mandated to do.

Because this court has only a short window to implement such a plan—certainly not enough time to retain a special master and craft its own—it should adopt the plan passed by the New York Legislature and signed by Governor Hochul on February 3, 2022 (the “2022 Congressional Plan”). It is the plan that all of New York’s congressional candidates campaigned under, gathered petitions under, and are prepared to run under.

Plaintiffs recognize that the New York Court of Appeals found that the 2022 Congressional Plan violated the New York Constitution just days ago. Plaintiffs do not ask this Court to find to the contrary. But New York also has an obligation to timely redistrict, conduct timely federal elections, and to do so under a plan that remedies malapportionment from the prior decade.

Throughout this redistricting cycle, when other states have been in a similar bind to New York—where the decision to move forward with a revised congressional plan would disrupt the state’s ability to conduct orderly primary and general election—federal courts have ordered those states to proceed with their primary election under the plan as passed by the state legislature, even when another court has found the plan is flawed. Under these circumstances, this court has an obligation to do the same.

BACKGROUND

I. New York’s prior congressional plan may not be used in any future election.

Almost exactly ten years ago, a federal three-judge panel adopted congressional districts for the State of New York after the state failed to do so. *See Favors v. Cuomo*, 881 F. Supp. 2d 356 (E.D.N.Y. 2012). Just as here, the *Favors* Plaintiffs claimed that court intervention was necessary in light of existing congressional malapportionment and the state’s failure to timely adopt new districts. At the time, New York had been allocated 27 congressional seats. In adopting the then-new districts for the State of New York, the *Favors* Court properly relied on 2010 census data, dividing New York’s then-population of 19,378,102 persons into 27 districts of 717,707 or 717,708 people. *See Ex. 9* at 31 n.23.

Now ten years later, the 2020 Census reported that New York’s resident population is 20,201,249—an increase of 823,147 persons. *See Ex. 10*. But this population growth has not been equal across the state. In particular, New York City has gained population, while Upstate New York has lost population. *See Ex. 11*. In light of these population shifts, New York’s existing congressional district configurations are unconstitutionally malapportioned. In particular, the Fifth, Eighth, Tenth, and Twelfth Congressional Districts are significantly overpopulated, while the rest of the districts are underpopulated. *See Ex. 20* at 6.

Although New York gained population over the past decade, it did not keep pace with the population growth across the rest of the United States, meaning that New York is entitled to only 26 congressional seats for the next Congress, one fewer than in the past decade. *See* Ex. 12. New York’s congressional plan thus contains more districts than the number of representatives that New York is entitled send to the U.S. House in the next Congress. *See* 2 U.S.C. § 2c (explaining a state’s congressional plan must have the same number of congressional “districts equal to the number of Representatives to which such State is so entitled”). According to the 2020 Census results, the ideal population for each of these new 26 congressional districts is 776,971 or 776,972 persons.¹

II. Under federal law, New York’s congressional primary must be held on June 28, 2022.

In January 2012, the Northern District of New York entered a permanent injunction ordering New York to conduct its federal primary on the fourth Tuesday in June in even-numbered years. *See* Ex. 1. The order and injunction were the result of New York’s failure to comply with federal law, specifically the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986, as amended by the Military and Overseas Voter Empowerment (MOVE) Act of 2009. Together, these Acts guarantee active-duty members of the uniformed services (and their spouses and dependents), and United States citizens residing overseas, the right “to vote by absentee ballot in general, special, primary, and runoff elections for Federal office.” 52 U.S.C. § 20302(a)(1). To ensure that right was not illusory, starting in 2009, federal law required states to send absentee ballots to UOCAVA voters at least 45 days before an election for federal office to provide voters sufficient time to receive, mark, and return absentee ballots. 52 U.S.C. § 20302(a)(8)(A).

To comply with these statutes and meet its obligations to UOCAVA voters, a state must

¹¹ This number is calculated by dividing 20,201,249 persons by 26 congressional districts.

hold its primary election sufficiently early within the calendar year. Nonetheless, in 2010, New York held its federal primary election in early September, as it had done historically. *See* Ex. 13 ¶ 10. This date did not allow the state to certify the results of the primary election and print and mail absentee ballots for the general election by the 45-day deadline, and consequently, New York failed to provide UOCAVA voters with timely ballots before the November general election. *See generally id.* (describing UOCAVA violations).

As a result, the Department of Justice sought and obtained a permanent injunction from the Federal District Court for the Northern District of New York fixing the date of the state’s federal primary election in non-presidential years as “the fourth Tuesday in June,” which would guarantee the state sufficient time to certify the results of the primary election and print and mail absentee ballots for the general election. *See* Ex. 1. That date was not plucked out of thin air; it was specifically recommended to the court by the Officers of the New York State Election Commissioners’ Association (ECA), a bipartisan organization consisting of two election commissioners from each of New York State’s 62 counties. *See* Ex. 2. As those Officers explained to the court, the ECA had previously “voted overwhelmingly to recommend” a federal primary “the fourth Tuesday of June” to the New York Legislature and its Governor to allow “meaningful compliance with the federal MOVE Act.” *Id.* ¶ 4. The ECA warned the court that a later primary, such as in August, would hinder their ability to comply with federal law. *See generally id.* (explaining the logistical barriers to complying with UOCAVA and the MOVE Act when a federal primary occurs after June in New York).

Heeding this warning, the Northern District of New York entered a permanent injunction ordering New York to conduct its federal primary on the fourth Tuesday in June in even-numbered years, “unless and until New York enacts legislation resetting the non-presidential federal primary

election for a date that complies fully with all UOCAVA requirements, *and is approved by this court.*” Ex. 1 at 8 (emphasis added). The court further tasked the New York State Board of Elections with ensuring the aforementioned “federal primary calendar is implemented by and complied with by local boards of elections.” *Id.* at 9.

In every even-numbered year since the injunction, New York has held its congressional primary the fourth Tuesday in June. *See* Ex. 14. New York enacted legislation to permanently set its primary as the fourth Tuesday in June in 2019, *see* 2019 Sess. Law News of N.Y. Ch. 5 (A. 779), N.Y. Elec. Law § 8-100, however, it has never sought approval from the court to be released from the injunction.

Even with a June primary, delays in certifying primary results and preparing the general election ballot have affected UOCAVA voters. *See, e.g.,* Ex. 21 (noting six-week delay in certifying primary results after the June 2020 primary). In fact, in recent years, Plaintiff Schoenfeld, a UOCAVA voter, was forced to vote an emergency ballot after her regular ballot did not arrive in time for her to vote; she has also regularly assisted other New York UOCAVA voters with information about requesting an emergency ballot when their ballots similarly did not arrive on time. *See* Ex. 15 ¶ 9.

Even if New York had fully complied with its UOCAVA obligations over the past ten years, the fact remains that under the existing federal order New York is obligated to hold its federal primary on June 28, 2022. It may hold its state office primaries at a later date if it so chooses, but it cannot unilaterally trade away its federal primary for its preferred date without violating an existing federal order.

III. New York will not meet its obligation to adopt new congressional boundaries in time for a June 28, 2022 primary.

New York State has now been trying—and failing—to finalize its new congressional boundaries for the better part of a year. New York’s Independent Redistricting Commission (IRC) held hearings in the summer of 2021 to aid it in drawing the state’s congressional boundaries. But the IRC ultimately deadlocked when it came time to adopt plans, failing to send the Legislature its second-round recommended plans this past January. *See* Ex. 4 at 6. When the IRC failed, the New York Legislature stepped into the void, swiftly passing legislation remedying New York’s malapportionment in its congressional districts. *See* Exs. 6 and 7. The Legislature’s plan, as signed by Governor Hochul on February 3, would have divided the state, as required, into 26 congressional districts, each with 776,971 or 776,972 persons (the “2022 Congressional Plan”). *See id.* That legislation was passed well within the time for New York to conduct its primary on June 28, as planned.

After New York’s congressional plan was challenged in the Steuben County Supreme Court, that court waited an entire month to hold its first hearing on the matter. At that hearing on March 3, by which time active petitioning under the 2022 Congressional Plan had already begun, the court explained that it was too late to implement a different congressional plan in time for the 2022 elections. As the court explained, “even if I find the maps violated the Constitution and must be redrawn, it is highly unlikely that the new viable map could be drawn and be in place within a few weeks or even a couple of months, therefore, striking these maps would more likely than not leave New York without any duly elected Congressional delegates.” Ex. 8 at 70:6-15.

One month later, in a wholesale reversal, the Steuben County Supreme Court enjoined the Legislature’s 2022 Congressional Plan for the 2022 elections. *See* Ex. 3 at 17-18. In doing so, the Steuben County Supreme Court still admitted that there may not be time to develop a different

map with a special master, explaining, “it is possible that New York would not have a Congressional map in place that meets the Constitutional requirements in time for the primaries even with moving the primary date back to August 23, 2022.” Ex. 3 at 17. The court forged ahead anyway.

In the interim, on April 7, the window closed for congressional candidates to collect signatures and submit designating petitions from registered New York voters in their district, as required by New York law. *See* N.Y. Elec. Law § 6-136(2). Those petitions were gathered, signed, and submitted using the Legislature and Governor’s 2022 Congressional Plan. On April 27, after all petitions had been submitted, and after counties were just a week from the deadline to certify ballots for the primary election, the New York Court of Appeals, in a 4-3 decision, ordered the Steuben County Supreme Court to draw new maps for the 2022 elections with the help of a special master. *See* Ex. 4. In so ordering, the Court of Appeals explained, “it will likely be necessary to move the congressional and senate primary elections to August.” *Id.* at 30.

Two days later, long after the close of the petitioning period, and two weeks before the federal deadline for mailing ballots to military and overseas voters, the Steuben County court ordered that New York’s federal primary election occur on August 23, 2022, and that a new congressional plan would be finalized by May 20. *See* Ex. 5. Under the Steuben County Supreme Court’s timeline, a new congressional plan will not be finished until two weeks after primary ballots are due to be certified under a June 28 primary schedule by the New York State Board of Elections, *see* N.Y. Elec. Law § 4-110 (ordering primary ballots to be certified 55 days before a primary election), which this year is Wednesday, May 4, 2022. The Steuben Court’s congressional plan will also not be finished until at least a week after UOCAVA ballots would need to be mailed to those voters under a June 28 primary schedule, which is 45 days before an election, *see* 52

U.S.C. § 20302(a)(8)(A), which this year is Saturday, May 14, 2022.

Until now, the New York State Board of Elections indicated it planned to hold its federal primary, as planned, on June 28, 2022. But just yesterday, on May 1, the New York State Board of Elections website notified the public that its congressional primary will be held August 23, 2022, even while it still intends to hold its statewide primaries on June 28th. *See* Ex. 19. The NYSBOE's notice made no mention of the existing federal permanent injunction ordering it to hold its primary the fourth Tuesday in June. *See id.* There is no reason to believe the federal court would have approved a late August primary had the NYSBOE sought authorization for it, given the circumstances leading to the injunction in the first place. As of this filing, the Federal Election Commission and Federal Voting Assistance Program, the federal government's voter assistance program for UOCAVA voters, still maintain a June 28, 2022 congressional primary date for the State of New York. *See* Exs. 23 and 24.

IV. Congress has created a remedial scheme for when a state fails to timely redistrict.

Under its Elections Clause power, Congress may alter or make regulations for federal elections. U.S. Const. art. I, § 4. Congress exercised that power in passing 2 U.S.C. § 2c and 2 U.S.C. § 2a, both of which concern congressional redistricting in an apportionment year. The first, 2 U.S.C. § 2c, stands for the simple proposition that a state's congressional plan should be divided into the same number of single-member districts as the state was allocated in that decade's apportionment. For New York, this would mean 26 single-member congressional districts.

But Congress also envisioned that a state might fail to timely redistrict. In such circumstances, 2 U.S.C. § 2a, which was enacted before the Supreme Court adopted its one-person, one-vote jurisprudence, sets out a remedial scheme to follow; that scheme varies whether the state gained congressional seats, kept the same number of seats, or lost seats, as New York did. In most

circumstances, the statute originally contemplated the state should use “the districts then prescribed by the law of such State”—that is, the congressional plan used in the prior decade. 2 U.S.C. § 2a(c)(1)-(4). In recent years, however, the Supreme Court has held this specific remedy would perpetuate unconstitutional malapportionment and has explained these provisions of the statute are unconstitutional. *See Branch*, 538 U.S. at 273 (explaining that “paragraphs (1) through (4) of § 2a(c) have become (because of postenactment decisions of this Court) in virtually all situations plainly unconstitutional”).

But 2 U.S.C. § 2a(c) also has a fifth paragraph—one the Supreme Court refused to recognize as obsolete in *Branch*. Specifically, under 2 U.S.C. § 2a(c)(5), when a state loses a congressional seat in the apportionment process but fails to redistrict in time for congressional elections, the state shall hold an at-large election for all congressional seats. As the Supreme Court has explained, this provision functions as a “last-resort remedy to be applied when, on the eve of a congressional election, no constitutional redistricting plan exists and there is no time for either the State’s legislature or the courts to develop one.” *Branch*, 538 U.S. at 275; *see also id.* at 276 (“the statute does not come into play as long as it remains feasible for a state or federal court to complete redistricting”).

The U.S. Supreme Court has made clear that federal courts have an obligation to do everything they can to redistrict a state into single-member districts pursuant to 2 U.S.C. § 2(c) before triggering this remedial provision. In *Branch*, for instance, the U.S. Supreme Court explained that the federal district court had an obligation to adopt a single-member congressional plan for Mississippi when it became clear the state’s own plan would not be pre-cleared in time to be used for that year’s elections. *Id.* at 261-63. In that case, just as here, Mississippi had lost a congressional seat in the decennial apportionment of seats in the U.S. House; without the federal

court's swift intervention, Mississippians would have voted for its congressional members in an at-large election. *Id.* at 275 (explaining that “§ 2a(c) is inapplicable *unless* the state legislature, and state and federal courts, have all failed to redistrict pursuant to § 2c”). 2 U.S.C. § 2a(c) is similarly inapplicable here, as long as this court timely redistricts New York into single-member districts.

LEGAL STANDARD

“The standards for granting a temporary restraining order and a preliminary injunction are identical” pursuant to Rule 65 of the Federal Rules of Civil Procedure. *Sterling v. Deutsche Bank Nat'l Tr. Co. as Trs. for Femit Tr. 2006-FF6*, 368 F. Supp. 3d 723, 726–27 (S.D.N.Y. 2019). The moving party “must show (1) irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that [relief] is in the public interest. *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018) (citing *N. Y. ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015)). The Second Circuit applies “a heightened standard” requiring “a ‘clear’ or ‘substantial’ likelihood of success on the merits and . . . a ‘strong showing’ of irreparable harm” when “(i) an injunction is ‘mandatory,’ or (ii) the injunction ‘will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits.’” *N. Y. ex rel. Schneiderman*, 787 F.3d at 650 (internal citations omitted).

Under 28 U.S.C. § 2284(b)(3), a single judge of a three-judge court “may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted. . . .” That order “shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction.” *Id.*

ARGUMENT

I. Plaintiffs are substantially likely to succeed on the merits of their claims.

A. Plaintiffs have demonstrated New York’s current congressional plan is plainly unlawful.

Plaintiffs are New York voters (including UOCAVA voters), each of whom resides in a congressional district that has become overpopulated over the prior decade. *See* Exs. 15, 16, 17, 18 & 22. Each of these voters is harmed by the state’s failure to redistrict.

Article I, Section 2 of the U.S. Constitution requires “that when qualified voters elect members of Congress each vote be given as much weight as any other vote.” *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). This means that state congressional districts must “achieve population equality ‘as nearly as is practicable.’” *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Wesberry*, 376 U.S. at 7-8). Article I, Section 2 requires an even higher standard of exact population equality among congressional districts than what the Fourteenth Amendment requires of state legislative districts. It “permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.” *Id.*, 462 U.S. at 730 (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)). Any variation from “absolute population equality” must be narrowly justified. *Id.* at 732-33.

Given the significant population shifts that have occurred since the 2010 Census, *see* Ex. 11, New York’s congressional districts as drawn by the *Favors* Court are now unconstitutionally malapportioned. Plaintiffs, who reside in these malapportioned districts, are thus entitled to districts which equalize the weight of their vote. Given the New York state court system’s delay in redistricting, such districts are not forthcoming in time to be used in the state’s June 28 primary.

Similarly, 2 U.S.C. § 2c provides that, in a state containing “more than one Representative,” “there shall be established by law a number of districts equal to the number of

Representatives to which such State is so entitled.” Although New York’s current congressional district plan contains 27 districts, New York is only allotted only 26 seats in the U.S. House. As a result, the congressional plan as drawn by the *Favors* Court violates Section 2c’s requirement that the number of congressional districts be “equal to the number of Representatives to which [New York] is so entitled.” Plaintiffs are similarly entitled to a congressional plan that divides the state into an appropriate number of congressional districts under federal law. Given the New York state court system’s delay in redistricting, such districts are not forthcoming in time to be used in the state’s June 28 primary.

B. This court can remedy Plaintiffs’ injuries by timely redistricting.

Although states are to be given the first opportunity to redistrict, United States Supreme Court precedent instructs that federal courts have an obligation to adopt single-member congressional boundaries when a state fails to do so in a timely manner. *See Branch*, 528 U.S. at 254; *see also Grove v. Emison*, 507 U.S. 25, 1082 (1993) (instructing that a federal district court would be empowered to “adopt[] its own plan if it had been apparent that the state court . . . would not develop a redistricting plan in time for the primaries”); *Scott v. Germano*, 381 U.S. 407, 409 (1965) (ordering the federal district court to retain jurisdiction of a reapportionment case so that it may order “a valid reapportionment plan” “in the event a valid reapportionment plan . . . is not timely adopted” by the state legislature or state courts).

If this court does not act timely, the consequences for New York are enormous: Under 2 U.S.C. § 2a(c)(5), when a state loses a congressional seat in the apportionment process, but fails to redistrict in time for congressional elections, the state shall hold an at-large election for all congressional seats. As explained *supra* at 11-12, federal courts have an obligation to redistrict into single-members districts before triggering this provision, which functions as a “last-resort

remedy to be applied when, on the eve of a congressional election, no constitutional redistricting plan exists and there is no time for either the State's legislature or the courts to develop one." *Branch*, 538 U.S. at 275.

II. Plaintiffs' constitutional rights will be irreparably harmed without immediate relief.

"To establish irreparable harm, Plaintiffs must demonstrate that absent [relief] they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." *Gallagher v. N. Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 41 (S.D.N.Y. 2020) (citation and internal quotation marks omitted) (granting a preliminary injunction on a voting rights claims). "[T]he alleged violation of a constitutional right triggers a finding of irreparable injury." *Conn. Dep't of Env't Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004); *Statharos v. N.Y. City Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999) ("Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary."). Because Plaintiffs' own voting rights are at stake in this suit, "the very nature of [Plaintiffs'] allegations satisfies the requirement that it show irreparable injury." *Conn. Dep't of Env't Prot.*, 356 F.3d at 231 (citations omitted).

The window for this court to act to implement a congressional plan for the state of New York that remedies the existing malapportionment and divides the state into single-members congressional districts is swiftly closing. This court is already far behind the *Favors* Court, which adopted a congressional plan in mid-March, one day before petitioning was set to begin in advance of the state's then-June 26, 2012 primary. *See* Ex. 9, Order Adopting Remedial Plan, *Favors v. Cuomo*, No. 1:11-cv-05632 (E.D.N.Y Mar. 19, 2012), ECF No. 242. To adopt a congressional plan in time for New York to conduct a primary on June 28, this court should do so the week of May 2nd, in time for the New York State Board of Elections to certify the primary ballot this week, and

for UOCAVA ballots to be mailed no later than May 14. *See supra* at 10.

III. The equities and the public interest favor an injunction.

“In assessing the balance of equities, the court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief, as well as the public consequences in employing the extraordinary remedy of injunction.” *Gallagher*, 477 F. Supp. 3d at 49 (citation and internal quotation marks omitted).

It is plain that “securing [constitutional] rights is in the public interest.” *N. Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). There are, to say the least, *many* voting rights at stake in this case, including the right to an undiluted vote and the right of UOCAVA voters to receive their ballots on time to cast them. Although New York has not *yet* violated UOCAVA in this election cycle, it is clear it is on track to do so given New York elections officials’ previously admitted inability to guarantee proper administration of elections with an August primary. *See supra* at 6. And although Plaintiffs are not aware of a federal constitutional right to be free of voting in an at-large election, it is nonetheless in the public interest that New Yorkers vote in single-members districts in their upcoming congressional election, as Congress intended. *See* 2 U.S.C. § 2c.

An injunction ordering the New York State Board of Elections to certify the primary ballot under the 2022 Congressional Plan passed by the New York Legislature and Governor would provide a global remedy. The 2022 Congressional Plan divides New York into 26 congressional districts of equal population, *see supra* at 8, thus remedying the malapportionment in the existing plan and complying with 2 U.S.C. § 2c. The 2022 Congressional Plan is also already finished, meaning that this court can adopt it *today* to ensure New York is timely redistricted and is not subject to the “last-resort remedy” of 2 U.S.C. § 2a(c)(5). *Branch*, 538 U.S. at 275.

The equities also favor such an injunction. In balancing the equities, “a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles.” *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). Here, the primary election process in New York has been underway for several months. The candidate petitioning window has both opened and closed; all petitions were filed under the 2022 Congressional Plan. *See* Ex. 25-26. Candidates have also been actively campaigning under those lines since early February. *See id.* These recent state orders, several of which conflict with an existing federal order, have left both candidates and voters alike confused. *See* Exs. 15-18, 22. Voters, for one, do not know when the primary is, or who is running to represent them, or whether they will receive their ballots on time to be counted. *See id.* Candidates do not know whether they are still qualified, will need to restart the process, or will be drawn out of the district in which they were previously running. *See* Exs. 25-26.

There is little if any harm to ordering Defendants to proceed with a primary under the 2022 Congressional Plan on June 28. Until yesterday, Defendants publicly maintained on their respective websites that the primary election would be held on June 28, 2022 and have presumably been preparing for such election in due course. Any cost born by the Defendants since the Steuben County Supreme Court order purporting to alter the date of the primary election just three days ago cannot outweigh the cost to Plaintiffs. In any event, Defendants are already obligated hold a June 28, 2022, primary election date under federal court order. *See* U.S. Const. art. VI, para. 2; Ex. 1. No body or actor of New York state government has the power or authority to change that date without the express approval of the issuing court, which Defendants have neither sought nor received. *See Clean Air Mkts. Grp. v. Pataki*, 338 F.3d 82, 87 (2d Cir. 2003) (“[S]tate law is nullified to the extent that it actually conflicts with federal law”). Moreover, the June primary date

was not arbitrarily selected: it was the result of a federal court’s careful weighing of the evidence before it—including representations by New York elections officials that an August primary would not permit those officials to comply with federal law. *See supra* at 6.

Plaintiffs recognize that the New York Court of Appeals found that the 2022 Congressional Plan violated the New York Constitution just days ago. Plaintiffs do not ask this Court to find to the contrary. But New York also has obligation to timely redistrict, conduct timely federal elections, and to do so under a plan that remedies malapportionment from the prior decade, even if that requires using a plan that is far from perfect. *See, e.g., Diaz v. Silver*, 932 F. Supp. 462, 468 (E.D.N.Y. 1996) (citing cases in which maps deemed illegal in one respect or another have nonetheless served as the operative maps for pending congressional elections).

Throughout this redistricting cycle, when other states have been in a similar bind to New York—where the decision to move forward with a revised congressional plan would disrupt the state’s ability to conduct orderly primary and general election—federal courts have ordered those states to proceed with their primary election under the plan as passed by the state legislature, even if that plan is flawed.

Recently, for example, while a lower three-judge court unanimously held that Alabama’s congressional districts likely violated the Voting Rights Act, the U.S. Supreme Court stayed the order requiring Alabama to redraw its congressional districts due to the time remaining before Alabama’s primary election, resulting in Alabama using its legislatively-drawn (if unlawful) plan. *See Merrill v. Milligan*, 142 S. Ct. 879 (2022). As Justice Kavanaugh wrote: “State and local election officials need substantial time to plan for elections. Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges.” *Id.* at 880 (Kavanaugh, J.,

concurring). The same occurred this year in Georgia. *See Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 1:21-CV-5337-SCJ, 2022 WL 633312, at *75 (N.D. Ga. Feb. 28, 2022) (court ordering Georgia to conduct its congressional elections under congressional plan held likely to violate the Voting Rights Act given limited time before the primary election).

Above all, however, the State of Ohio's redistricting efforts this cycle, and its subsequent federal litigation, may be most instructive to this court. Less than two weeks ago, a three-judge court concluded that if on May 28, the state government had not yet produced a lawful plan under which it could conduct a primary election in a timely fashion, the federal court would instruct Ohio officials to conduct its state legislative primary elections under a plan that the Ohio Supreme Court had already held unconstitutional for its partisan favoritism. *See Gonidakis v. LaRose*, No. 2:22-CV-0773, 2022 WL 1175617 (S.D. Ohio Apr. 20, 2022) (three-judge court). The court did so "acutely aware of [the map's] flaws," after the state had reached a "drop-dead" date for election officials to begin implementing a map. *See id.* at *2, *30 ("April 20 is the drop-dead date to choose a new map that can be implemented in time for a primary and general election. That date has come, but a new map has not. So now this court must select a map to ensure Ohioans may vote in a state-legislative election this year.").

As that court aptly summarized, federal courts "must remain in the wings and act only when it becomes clear that the 'state branches will fail timely to perform [their] duty.' But at some point, the threat to the right to vote becomes so great that a federal court must intervene." *Id.* at *19 (citing *Grove*, 507 U.S. at 34). That time has come for New York.

CONCLUSION

For the reasons set forth above, Plaintiffs are entitled to immediate relief in the form of a temporary restraining order and, subsequently, preliminary injunction enjoining Defendant

Members of the New York State Board of Elections from implementing, enforcing, or giving any effect to New York's congressional districting plans as adopted by the *Favors* Court, and ordering Defendants to proceed with certifying the primary ballot by Wednesday, May 4, under a congressional plan as adopted by this court, that complies with Article I, Section 2 of the U.S. Constitution and 2 U.S.C. § 2c, in time for New York to conduct its primary on June 28, 2022, as required by federal court order. Plaintiffs further request that the Court expedite consideration of this motion, including the scheduling of any hearings, to ensure that necessary remedies are timely adopted in light of the rapidly approaching administrative deadlines necessary to ensure an orderly primary election, and subsequent general election, can proceed for the voters of New York and the Plaintiffs in this case.

Dated: May 2, 2022

Respectfully submitted,

**EMERY CELLI BRINCKERHOFF
ABADY WARD & MAAZEL, LLP**

By: Andrew G. Celli, Jr.
Matthew D. Brinckerhoff
Andrew G. Celli
600 Fifth Avenue, 10th Floor
New York, NY 10020
Tel. (212) 763-5000
mbrinckerhoff@ecbawm.com
acelli@ecbawm.com

ELIAS LAW GROUP LLP

By: /s/ Aria C. Branch
Aria C. Branch*
Shanna M. Reulbach*
Haley Costello Essig*
Maya M. Sequeira*
Christina A. Ford*
Aaron M. Mukerjee*

10 G St NE, Ste 600
Washington, DC 20002
Tel.: (202) 968-4490
abbranch@elias.law
sreulbach@elias.law
hessig@elias.law
msequeira@elias.law
cford@elias.law
amukerjee@elias.law

**Pro hac vice applications to be submitted.*