

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF STEUBEN**

TIM HARKENRIDER, GUY C. BROUGHT,  
LAWRENCE CANNING, PATRICIA CLARINO,  
GEORGE DOOHER, JR., STEPHEN EVANS, LINDA  
FANTON, JERRY FISHMAN, JAY FRANTZ,  
LAWRENCE GARVEY, ALAN NEPHEW, SUSAN  
ROWLEY, JOSEPHINE THOMAS, and MARIANNE  
VOLANTE,

*Petitioner,*

-against-

GOVERNOR KATHY HOCHUL, LIEUTENANT  
GOVERNOR AND PRESIDENT OF THE SENATE  
BRIAN A. BENJAMIN, SENATE MAJORITY LEADER  
AND PRESIDENT PRO TEMPORE OF THE SENATE  
ANDREA STEWART-COUSINS, SPEAKER OF THE  
ASSEMBLY CARL HEASTIE, NEW YORK STATE  
BOARD OF ELECTIONS, and THE NEW YORK STATE  
LEGISLATIVE TASK FORCE ON DEMOGRAPHIC  
RESEARCH AND REAPPORTIONMENT,

*Respondents.*

**Declaration Opposing Motion  
to Amend the Petition**

Index No. E2022-0116CV

McAllister, J.S.C.

Return Date:  
March 3, 2022

**Matthew D. Brown**, an attorney admitted to practice before the Courts of the State of New York, hereby states under penalties of perjury:

1. I am an Assistant Attorney General in the New York State Attorney General’s Office, attorney for Respondents Governor Hochul and Lt. Governor Benjamin (the “Executive Respondents”).
2. This Declaration is submitted to oppose Petitioner’s Order to Show Cause seeking leave to amend the Petition.
3. The Executive Respondents oppose Petitioners’ motion for leave to amend because the Governor and Lt. Governor were not properly served with the Order to Show Cause for leave to amend and because the amendment would be futile.

**This Action**

4. Petitioners brought this action by filing a Petition and proposed Order to Show Cause on February 3, 2022 (NYSEC #1 and #2).

5. The Court signed the Order to Show Cause on February 7, 2022 (NYSEC #11).

6. Petitioners purported to serve the OTSC on Governor Hochul and Lt. Governor Benjamin on February 8, 2022 (NYSEC #56 and #57).

7. Petitioners purported to complete service of the OTSC on Governor Hochul and Lt. Governor Benjamin by serving the Attorney General's Office in New York, New York (NYSEC #62).

8. However, CPLR §2214(d) requires service be made at the office of the Attorney General nearest to where the action is venued (here Steuben County Supreme Court).

9. Petitioners filed a proposed Order to Show Cause seeking leave to file an Amended Petition on February 8, 2022 (NYSEC #13) and proposed Amended Petition (NYSEC #18).

10. The Court signed the second Order to Show Cause for leave to file an Amended Petition on February 9, 2022 (NYSEC #24).

11. Petitioners did not serve the second Order to Show Cause on Governor Hochul.

12. Petitioners purported to serve Lt. Governor Benjamin with the second Order to Show Cause on February 10, 2022 (NYSEC #63).

13. Petitioners purported to have completed service on Lt. Governor Benjamin by serving the second OTSC on the Attorney General's Office in New York, New York (NYSEC #62).

14. However, CPLR §2214(d) requires service be made at the office of the Attorney General nearest to where the action is venued (here, Steuben County Supreme Court).

15. By email from Misha Tsyetlin, Esq., to various individuals including the executive

Respondents' counsel, dated February 10, 2022 (attached as **Exhibit A**), Petitioners' counsel proposed that "[a]ll parties agree to accept email service of all documents not filed through NYSCEF, including the two Orders to Show Cause already entered and supporting papers."

16. It is unclear what is meant by "service of all documents **not** filed through NYSCEF, including the two Orders to Show Cause already entered" (emphasis supplied).

17. Eric Hecker, Esq. (attorney for the Senate Majority Leader) responded via email that "[r]egarding email service, we consent". See **Exhibit A**.

18. Attorneys for the Governor and Lt. Governor did not respond to this email exchange.

19. Regardless, copies of the first Order to Show Cause and second Order to Show Cause were not served via email on counsel for the Governor or Lt. Governor.

20. Thus, even if the email exchange between Mr. Hecker and Mr. Tsyetlin could be interpreted as the Governor and Lt. Governor agreeing to service of the first and second Orders to Show Cause by email (an interpretation that the Executive Respondents reject), such service was never completed because neither the first nor second Order to Show Cause was served via email, or any other means, upon the Governor or the Lt. Governor.

21. Because service of the second OTSC was not completed as to Governor Hochul or Lt. Governor Benjamin, the OTSC must be dismissed and Petitioners' motion for leave to amend the Petition should be denied.

**Amending the Petition Would Unduly Interfere with the 2022 Election Cycle**

22. The motion for leave to amend the Petition should be denied because allowing the amendment would interfere with the New York State 2022 election cycle.

23. Any change in the calendar will disrupt the intricate interrelated processes prescribed by the election law for ballot access (petitioning), administrative challenges to

petitions, judicial review of ballot access challenges, ballot preparation, scheduling poll workers and poll sites, early voting and voting. Moreover, the date of the primary as the fourth Tuesday in June is statutory and mandated by a federal district court order.

24. The New York State primary election is June 28, 2022, as set by law and US District Court Order. See NY Election Law §8-100 and **Exhibit B**, Decision and Order, NDNY, *United States v. State of New York*, 10-cv-1214, January 27, 2012 (NY's primary for federal office shall be held the fourth Tuesday of June).

25. The last day to mail out absentee ballots to military servicemen and women under federal law is May 13, 2022. See 52 USC §20302(a)(8)(b).

26. Ballots for the primary election must therefore be printed prior to May 13, 2022 and cannot be changed after that date because there cannot be different ballots with different candidates and different districts for the same election.

27. The local Boards of Election must have enough time to prepare ballots and get them printed.

28. The New York Election law Section 6-134(4) makes March 1, 2022 the first day for signing designating petitions.

29. By law, candidates are given a 37-day period to circulate designating petitions and collect signatures.

30. Under New York Election Law §6-158(1), designating petitions must be filed between April 4 and April 7, 2022.

31. The limitations period to commence legal challenges regarding designating petitions is 4/21.

32. The last date for the Board of Elections to certify ballots is April 27, 2022.

33. Counties must certify the primary ballot no later than 5/5.

34. Under federal law, militaries and overseas ballots must be mailed for federal elections—such as congressional elections—by 5/13.

35. Potential candidates must be given enough time to collect signatures from voters within the district for which they intend to run for election.

36. Here, if Petitioners amend their Petition, Respondents must be given time to respond to the Amended Petition.

37. Further, if the Court allows discovery there will be motion practice regarding the scope of discovery based on relevance and various privileges and immunities.

38. Further, if Petitioners are allowed the voluminous discovery they seek, such discovery will take several weeks, or more likely longer.

39. Then, the parties will need time to brief the Court regarding the discovery and the points of law.

40. The Court will then need time to digest the parties' briefs and make a ruling.

41. Regardless of how the Court rules, this matter will likely be appealed.

42. If the Court (and appellate courts) were to find in favor of Petitioners, the maps would need to be redrawn by the Legislature.

43. Based upon the foregoing, it is impossible to allow the Petitioners to amend their Petition and still have time to meet any of the deadlines for the 2022 election cycle.

44. As explained in the accompanying memorandum of law, Courts should not interfere with an electoral cycle that already began—as is the case here (candidates are already collecting signatures for their designating petitions). Thus, the Court should deny the motion for leave to amend the Petition.

45. Further, again, because the second OTSC was not properly served on the Governor or Lt. Governor, it should be dismissed, and the motion denied.

46. And, as explained in these Respondents' Memorandum of Law, because the Governor and Lt. Governor are entitled to legislative immunity, absolute immunity, and because this matter is nonjusticiable, the amendment would be futile, and Petitioners' motion should be denied.

47. Further, the Executive Respondents join in the arguments made by co-Respondents in opposition to the motion for leave to amend.

**WHEREFORE**, Respondents respectfully request an Order denying Petitioners' Order to Show Cause seeking leave to amend the Petition and granting such other relief as the Court deems proper.

**I declare under penalty of perjury that the foregoing is true and correct.**

Executed on February 23, 2022

s/ Matthew D. Brown  
Matthew D. Brown  
*Attorney for Defendants*  
Assistant Attorney General  
NYS Office of the Attorney General  
144 Exchange Boulevard  
Suite 200  
Rochester, New York 14614  
(585) 327-3257  
matthew.brown@ag.ny.gov

# Exhibit A

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**From:** Eric Hecker <ehecker@chwllp.com>  
**Sent:** Friday, February 11, 2022 10:27 AM  
**To:** Tseytlin, Misha <Misha.Tseytlin@troutman.com>; Moskowitz, Bennet J. <Bennet.Moskowitz@troutman.com>; Dutton, Sean T.H. <Sean.Dutton@troutman.com>; George H. Winner Jr. <gwinner@kmw-law.com>  
**Cc:** John Cuti <jcuti@chwllp.com>; Alex Goldenberg <agoldenberg@chwllp.com>; Alice Reiter <areiter@chwllp.com>; Chill, C. Daniel <DChill@graubard.com>; Reich, Elaine <EReich@graubard.com>; O'Brien, Ted <Ted.O'Brien@ag.ny.gov>; McKay, Heather <Heather.McKay@ag.ny.gov>; Halliyadde, Muditha <Muditha.Halliyadde@ag.ny.gov>  
**Subject:** Re: Tim Harkenrider, et al. v. Governor Kathy Hochul, et al., E2022-0116CV (Steuben Cnty.)

**[EXTERNAL]**

Misha,

We have carefully reviewed your email with our clients and with counsel for the Assembly and the Attorney General, and we submit this joint response.

We begin by reiterating that we will continue to reach compromises wherever feasible. However, we were surprised by the positions you have taken, many of which we believe are untenable.

Regarding the petition signature deadline, having now consulted with our clients, we have concluded that our clients do not have the authority to stipulate to what would amount to an amendment of duly enacted statutes, so we do not believe that we can push the deadlines back by stipulation.

Regarding the case schedule, all parties agreed during the meet and confer teleconference that Respondents' papers in opposition to the two pending orders to show cause are due on February 24. We hope to be able to meet that deadline, but our ability to do that will hinge on when you serve your expert reports and brief. For the record, our position is that it was improper for you to commence this special proceeding without filing and serving any expert reports or a brief with your petition, and that by failing to do so, you have waived your right to do so. Indeed, we do not read either of the orders to show cause to permit you to serve additional papers in support of either the Petition or your pending motion. With that said, if you will serve your expert reports by Monday, February 14, we will not move to strike them. Especially given the highly complex nature of the statistical issues we are assuming you will attempt to raise, it would be impractical for us to be able to submit rebuttal expert reports by February 24 without having at least ten days to review and respond to your expert reports. We see no reason why you should need any additional time, much less time past Monday, to serve your brief (which you did not file with your petition as is customary, or seek leave to file or even mention in either of your proposed orders to show cause). So long as you serve your expert reports and brief no later than Monday, February 14, we see no reason to adjourn the current March 3 return date for the Petition and the pending motion.

Regarding discovery, we are surprised by the breadth and depth of the discovery you are seeking in this special proceeding, in which discovery is disfavored and available only by leave of the Court. With respect to your question about where and how the documents you are seeking are maintained, you purportedly are seeking every single document that was relevant to or considered by anyone in connection with the redistricting process, so the answer is that those documents are maintained in the electronic and/or paper files of every person who was involved in the redistricting process in any way. If you would like to provide us with proposed demands, we will review them and continue this discussion in good faith, but our position is that you currently do not have leave to obtain discovery and that the Court should not grant you such leave. Our reasons for that position – including, without limitation, the overbreadth of what you are seeking, and the impossibility of gathering and reviewing documents, creating a privilege log, briefing the weighty legislative and attorney-client privilege issues that would be raised, submitting documents that are claimed to be privileged for an in camera review, and exhausting any appeals that may be necessary in the next two weeks – are beyond the scope of this response, and we reserve all of our rights with respect to opposing any discovery you may seek leave to conduct. But again, we of course will continue our discussions with you to see if any common ground can be identified.

Regarding your motion to amend, we do not consent to the filing of your amended petition. Our position is, among other things, that allowing you to greatly expand the scope of this proceeding, with no realistic hope of obtaining a final judgment and completing any appeals that may be necessary anytime soon, would be unduly prejudicial to the election process, and also that it would be unduly prejudicial for Respondents to have to address expert reports regarding two reapportionment plans on such a compressed schedule.

**Regarding email service, we consent.**

Regarding brief length, as set forth above, our position is that you have waived your right to submit an opening brief. If you serve your brief by Monday February 14, we will not move to strike it, and we would consent to 10,000 words, provided that you likewise consent to the same for Respondents. We believe that the 4,200 words provided for in Rule 202.8-b is sufficient for your reply brief, but we would consent to 5,000 words as a courtesy.

If you prefer to respond to the above by email, of course feel free to do so. If you would prefer to resume our discussions by telephone, we will make ourselves available at the soonest time that is convenient for all counsel. We look forward to continuing to work with you constructively to narrow any areas of disagreement to the greatest extent possible.

Eric Hecker  
Cuti Hecker Wang LLP  
305 Broadway, Suite 607  
New York, New York 10007

Tel: 212.620.2600 | Fax: 212.620.2612

Email: [hecker@chwllp.com](mailto:hecker@chwllp.com)

Pronouns: he/him/his

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**From:** "Tseytlin, Misha" <[Misha.Tseytlin@troutman.com](mailto:Misha.Tseytlin@troutman.com)>

**Date:** Thursday, February 10, 2022 at 4:58 PM

**To:** Eric Hecker <[hecker@chwllp.com](mailto:hecker@chwllp.com)>, John Cuti <[jcuti@chwllp.com](mailto:jcuti@chwllp.com)>, Alex Goldenberg <[agoldenberg@chwllp.com](mailto:agoldenberg@chwllp.com)>, Alice Reiter <[areiter@chwllp.com](mailto:areiter@chwllp.com)>, "Chill, C. Daniel" <[DChill@graubard.com](mailto:DChill@graubard.com)>, "Reich, Elaine" <[EReich@graubard.com](mailto:EReich@graubard.com)>, "O'Brien, Ted" <[Ted.O'Brien@ag.ny.gov](mailto:Ted.O'Brien@ag.ny.gov)>, "McKay, Heather" <[Heather.McKay@ag.ny.gov](mailto:Heather.McKay@ag.ny.gov)>, "Halliyadde, Muditha" <[Muditha.Halliyadde@ag.ny.gov](mailto:Muditha.Halliyadde@ag.ny.gov)>

**Cc:** "Moskowitz, Bennet J." <[Bennet.Moskowitz@troutman.com](mailto:Bennet.Moskowitz@troutman.com)>, "George H. Winner Jr." <[gwinner@kmw-law.com](mailto:gwinner@kmw-law.com)>, "Dutton, Sean T.H." <[Sean.Dutton@troutman.com](mailto:Sean.Dutton@troutman.com)>

**Subject:** RE: Tim Harkenrider, et al. v. Governor Kathy Hochul, et al., E2022-0116CV (Steuben Cnty.)

Counsel,

Thank you for taking the time to speak with us earlier today. Given the forthcoming March 1, 2022 deadline for candidates to start collecting signatures for petitions, we greatly appreciate that you all made time to speak about these important issues. We reiterate that we appreciate your professionalism and desire – which we share – to reach compromises wherever feasible.

Per your request, we are providing the following draft proposal to facilitate the parties' ongoing discussions regarding the case schedule and related matters. As discussed, we understand no party is committing to a particular path unless and until an agreement is formalized (i.e., the list below is for discussion only).

Eric: You had mentioned some concerns you had about potential undue burdens related to discovery requests. We have no desire to unduly burden anyone. To enable us to address your concerns, we ask that you please share with us where and how the documents referenced below are maintained, so we can consider ways to reduce any potential burdens.

#### **Moving March 1 Petition Signature Deadline**

- Parties agree to the Court entering an order pushing back the period for candidates to collect signatures for petitions, N.Y. Election Law § 6-134(4); N.Y. Election Law § 6-158(1), by one week, so that this period now would start on March 8, and end on April 11–14.

#### **Proposed Case Schedule (Working Backwards And Assuming Petition Signature Date Moved to March 8)**

- Parties agree that scheduling applies to all issues in the Amended Petition (i.e., both Senate and congressional districts), so as to avoid separate or serial briefing.
- Petitioners' Expert Reports: February 15, 2022.
- Petitioners' Opening Brief: February 17, 2022.
- Respondents' Response And Expert Reports: February 24, 2022 (if return date remains March 3) or February 28, 2022 (if Court moves return date to March 7, 2022).
- Petitioners' Reply with any Reply Expert Reports due: March 2, 2022 (if return date remains March 3) or March 6, 2022 (if Court moves return date to March 7, 2022).
- Return date: March 3, 2022 or March 7, 2022, based upon what the Court decides.

**Discovery** (Without prejudice to any Party's right to seek leave to serve additional discovery requests as appropriate)

- Petitioners' Discovery Requests
  - Depositions
    - IRC (Subpoena)
      - Elaine Frazier
      - John Flateau
      - Ivelisse Cuevas-Molina
      - David Imamura
      - Eugene Bengier
    - Respondents
      - Governor Hochul
      - Senate Majority Leader Andrea Stewart-Cousins
      - Speaker Carl Heastie
      - LATFOR
        - Eric Katz (Counsel to NY Senate Office of Majority Counsel)
        - Phil Chonigman (Co-Executive Director)
        - Assemblymember Kenneth Zebrowski
        - Senator Mike Gianaris
  - Request for documents to Respondents seeking:
    - Documents concerning Respondents' contacts with IRC Commissioners Frazier, Flateau, Cuevas-Molinas, Imamura, and Bengier.
    - Communications concerning the IRC's work, which Respondents received from third parties.
    - Any other documents and communications relevant to and considered by Respondents in the process of New York's redistricting of Congressional and state Senate districts in the current decennial.
- Petitioners would serve their discovery requests tomorrow, February 11.
- Parties to stipulate to expedited response deadlines for stipulated discovery requests, with the goal of having discovery completed by February 24. This is without prejudice to any party raising any objections it may have with any discovery request.

#### **Stipulate to amended petition.**

- Respondents to stipulate to Petitioners' leave to file the Amended Petition, thereby relieving all parties of having to devote further resources to Petitioners' pending Motion for Leave to Amend.

#### **Email Service**

- All parties agree to accept email service of all documents not filed through NYSCEF, including the two Orders to Show Cause already entered and supporting papers.

#### **Word Limits on Briefs**

- All parties agree to double the word limits from those found in Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court.
  - Memoranda of Law in Chief: 14,000 words
  - Reply Memoranda: 8,400 words.

Best,

**Misha Tseytlin**  
Partner  
troutman pepper

Direct: 312.759.5947 | Mobile: 608.999.1240 | Internal: 20-5947  
[misha.tseytlin@troutman.com](mailto:misha.tseytlin@troutman.com)

---

**From:** Eric Hecker <[hecker@chwllp.com](mailto:hecker@chwllp.com)>  
**Sent:** Wednesday, February 9, 2022 5:13 PM  
**To:** Moskowitz, Bennet J. <[Bennet.Moskowitz@troutman.com](mailto:Bennet.Moskowitz@troutman.com)>; George H. Winner Jr. <[gwinner@kmw-law.com](mailto:gwinner@kmw-law.com)>; Tseytlin, Misha <[Misha.Tseytlin@troutman.com](mailto:Misha.Tseytlin@troutman.com)>  
**Cc:** John Cuti <[jcuti@chwllp.com](mailto:jcuti@chwllp.com)>; Alex Goldenberg <[agoldenberg@chwllp.com](mailto:agoldenberg@chwllp.com)>; Alice Reiter <[areiter@chwllp.com](mailto:areiter@chwllp.com)>; Chill, C. Daniel <[DChill@graubard.com](mailto:DChill@graubard.com)>; Reich, Elaine <[EReich@graubard.com](mailto:EReich@graubard.com)>; O'Brien, Ted <[Ted.O'Brien@ag.ny.gov](mailto:Ted.O'Brien@ag.ny.gov)>; McKay, Heather <[Heather.McKay@ag.ny.gov](mailto:Heather.McKay@ag.ny.gov)>; Halliyadde, Muditha <[Muditha.Halliyadde@ag.ny.gov](mailto:Muditha.Halliyadde@ag.ny.gov)>  
**Subject:** Re: Tim Harkenrider, et al. v. Governor Kathy Hochul, et al., E2022-0116CV (Steuben Cnty.)

### EXTERNAL SENDER

Thank you for reaching out. I am copying my colleagues, counsel for the Assembly, and attorneys with the Attorney General's office, which may or may not represent certain Respondents. We have conferred about our respective schedules and are available at noon tomorrow if that works for you.

Eric Hecker  
Cuti Hecker Wang LLP  
305 Broadway, Suite 607  
New York, New York 10007

Tel: 212.620.2600 | Fax: 212.620.2612  
Email: [hecker@chwllp.com](mailto:hecker@chwllp.com)  
Pronouns: he/him/his

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**From:** "Moskowitz, Bennet J." <[Bennet.Moskowitz@troutman.com](mailto:Bennet.Moskowitz@troutman.com)>  
**Date:** Wednesday, February 9, 2022 at 4:17 PM  
**To:** Eric Hecker <[hecker@chwllp.com](mailto:hecker@chwllp.com)>  
**Cc:** "George H. Winner Jr." <[gwinner@kmw-law.com](mailto:gwinner@kmw-law.com)>, "Tseytlin, Misha" <[Misha.Tseytlin@troutman.com](mailto:Misha.Tseytlin@troutman.com)>  
**Subject:** Tim Harkenrider, et al. v. Governor Kathy Hochul, et al., E2022-0116CV (Steuben Cnty.)

Mr. Hecker,

We represent Petitioners in the referenced matter. We would like to meet and confer with you about the case schedule at your earliest convenience. What is your availability tomorrow?

Sincerely,  
Bennet

**Bennet J. Moskowitz\***

Partner

Direct: 212.704.6087 | Internal: 13-6087  
[bennet.moskowitz@troutman.com](mailto:bennet.moskowitz@troutman.com)

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# Exhibit B

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**1:10-cv-1214  
(GLS/RFT)**

**v.**

**STATE OF NEW YORK et al.,**

**Defendants.**

**APPEARANCES:**

**OF COUNSEL:**

**FOR THE PLAINTIFF:**

HON. RICHARD J. HARTUNIAN  
United States Attorney  
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Albany, NY 12207-2924

BARBARA D. COTTRELL  
THOMAS SPINA, JR.  
Assistant U.S. Attorneys

United States Dept. of Justice  
Civil Rights Division  
950 Pennsylvania Ave. NW  
Washington, D.C. 20530

RICHARD A. DELLHEIM, ESQ.  
RISA A. BERKOWER, ESQ.

**FOR THE DEFENDANTS:**

*State of New York*  
HON. ERIC T. SCHNEIDERMAN  
New York State Attorney General  
Albany Department of Law  
The Capitol  
Albany, NY 12224

JEFFREY M. DVORIN  
BRUCE J. BOIVIN  
Assistant Attorney Generals

*Board of Elections*  
New York State Bd. of Elections  
Office of Special Counsel  
40 Steuben Street

KIMBERLY A. GALVIN, ESQ.  
PAUL M. COLLINS, ESQ.

Albany, NY 12207-1650

**Gary L. Sharpe**  
**Chief Judge**

## **MEMORANDUM-DECISION AND ORDER**

### **I. Introduction**

Nothing is more critical to a vibrant democratic society than citizen participation in government through the act of voting. It is unconscionable to send men and women overseas to preserve our democracy while simultaneously disenfranchising them while they are gone. To some extent, that is precisely what New York has done. Having had ample opportunity to correct the problem, it has failed to find the political will to do so. While matters of comity ordinarily counsel federal courts to refrain from becoming embroiled in state election schemes, New York has left the court no choice. If federally-guaranteed voting rights are to be protected, the court must act.

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) of 1986, 42 U.S.C. §§ 1973ff to 1973ff-7, as amended by the Military and Overseas Voter Empowerment (MOVE) Act, Pub. L. No. 111-84, subtitle H, §§ 575-589, 123 Stat. 2190, 2318-2335 (2009) protects

the federally-guaranteed voting rights of New York's military and overseas voters. Since at least 2010, New York has recognized that its voting laws are not compliant with UOCAVA's federal mandate. Accordingly, the State entered a Consent Decree on October 19, 2010. (See Dkt. No. 9.) Among other things, it agreed to amend its law to ensure future compliance with UOCAVA and agreed to take certain steps to correct UOCAVA violations. (See Consent Decree Terms, *id.*) Furthermore, the State transmitted additional absentee ballots after October 1, 2010—that were unknown to the court at the time it entered the Decree—which constituted additional UOCAVA violations that fell beyond the scope of the relief ordered in the Consent Decree. (See *id.*)

Now pending is the United States' motion seeking permanent and supplemental relief to ensure New York's primary election date complies with UOCAVA and to address the additional violations found subsequent to the Decree. (See Dkt. No. 16.) For the reasons that follow, the motion is granted.

## **II. Background**

On October 12, 2010, the United States filed this action to remedy violations of UOCAVA. UOCAVA guarantees 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.” 42 U.S.C. § 1973ff-1(a)(1). 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. 42 U.S.C. §§ 1973ff-1 & 1973ff-6(6).

New York’s statutorily-prescribed non-presidential federal primary election date prevents it from complying with UOCAVA’s ballot transmission deadline of forty-five (45) days prior to a federal general election. On August 27, 2010, the Secretary of Defense granted New York a hardship waiver for the November 2, 2010 federal general election on that basis. The waiver exempted New York from complying with UOCAVA’s ballot transmission deadline of September 18, 2010. Thus, the waiver extended New York’s UOCAVA ballot transmission deadline until October 1, 2010. The waiver was granted based in part upon New York’s representations that all ballots would be transmitted by October 1, 2010.

However, New York failed to transmit all UOCAVA ballots by October 1, 2010, prompting the United States to contact State officials. During these communications, New York represented that at least thirteen (13)

counties transmitted UOCAVA ballots after October 1, 2010, but stated that all UOCAVA ballots had been transmitted no later than October 10, 2010.

On October 19, 2010, and based on these representations, this court entered the Decree to remedy these UOCAVA violations. (See Dkt. No. 9.) The Decree required New York to accept as valid all UOCAVA ballots that were properly executed and postmarked or showing a date of endorsement of receipt by another agency of the United States government by November 1, 2010, and that were received by New York's election officials by November 24, 2010 and otherwise valid. The Decree left open the issue of additional relief should New York fail to take necessary measures to ensure future UOCAVA compliance. The Decree also contemplated supplemental relief should additional UOCAVA violations be discovered.

### **III. Discussion**

#### **A. Primary Election Date**

Determining an UOCAVA-complaint date for New York's 2012 primary election requires consideration of a multitude of positions, all of which were presented by New York. While the Election Commissioners' Association (ECA), the State Senate, which was granted amicus status,

and the State Assembly<sup>1</sup> expressed their views, the Governor did not take a position.

Specifically, the ECA and State Assembly urge the court to move the September Primary to the fourth Tuesday in June in order to reliably meet the mandates of UOCOVA. The ECA contends that an August primary election does not provide sufficient time to deal with the foreseeable obstacles in certifying a primary election result or the ballot. Thus, ECA claims that an August election would potentially disenfranchise military and overseas voters.

On the other hand, the State Senate seeks an August primary date because it would be the least disruptive to the current, and long-standing, September primary system. In so arguing, the Senate urges the court to consider the economic implications of the primary date, the hardship of candidates to obtain signatures in the winter months, and that June is at the end of the legislative session. More specifically, the Senate points out that a June primary would force its members to have to weigh their elected responsibilities against the need for political presence in their district.

Having considered the parties submissions, and considering their

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<sup>1</sup> Not a party to this litigation and did not seek amicus status.

contentions with care, the court concludes that the fourth Tuesday in June for the non-presidential primary is in the best interest of the State.

However, this 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. The court fully recognizes that a permanent primary date is best left to New York, but has acted as it must to preserve federally protected voting rights.

**B. Additional UOCAVA violations**

Following the entry of the Decree, the court has been informed that at least thirty-six (36) of New York's sixty-two (62) counties transmitted UOCAVA ballots after October 1, 2010. Furthermore, at least thirteen (13) counties transmitted UOCAVA ballots after the October 10, 2010, transmission date stipulated in the Decree. Since there appears to be no dispute on the subsequent violations, the court grants the relief sought by the United States to determine the extent of the UOCAVA violations and the proposed remedy to rectify those violations.

**IV. Conclusion**

**WHEREFORE**, for the foregoing reasons, it is hereby

**ORDERED** that the United States' motion for permanent and

supplemental relief (Dkt. No. 16) is **GRANTED**; and it is further

**ORDERED** that:

- (1) **Notwithstanding any current state law or administrative procedure to the contrary, New York shall conduct its 2012 non-presidential federal primary election on a date no later than 35 days prior to the 45-day advance deadline set by the MOVE Act for transmitting ballots to the State's military and overseas voters, *i.e.*, at least 80 days before the November 6, 2012 federal general election. In 2012, that date shall be June 26, 2012.**
- (2) **In subsequent even-numbered years, New York's non-presidential federal primary date shall be the fourth Tuesday of June, 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.**
- (3) For the purposes of determining the date and time for performing any act prescribed by any law and/or administrative procedure applicable to New York's non-presidential federal

primary, such non-presidential federal primary election date shall be deemed to be held on the dates provided in paragraphs (1) and (2) above.

- (4) The New York State Board of Elections (“NYSBOE”) shall, within five (5) days of this Order, provide the court with a proposed non-presidential federal primary election calendar for all statutory and administrative election-related deadlines based upon the non-presidential federal primary election date set by the court. The United States shall have five (5) days to respond. Once approved by the court, the NYSBOE shall have ten (10) days to take all steps necessary to adopt and promulgate this non-presidential federal primary calendar.
- (5) Having promulgated an approved non-presidential federal primary election calendar, the NYSBOE shall take all steps necessary to ensure that such non-presidential federal primary election calendar is implemented by and complied with by local boards of election. To this end, and to ensure future UOCAVA compliance, the parties shall confer as to an appropriate schedule for defendants to provide pre-election reporting to the

United States with respect to the State's UOCAVA compliance.

- (6) Within fourteen (14) days of this Order, the parties, having conferred, shall provide the court with a list of those county boards of elections, if any, to be re-surveyed concerning UOCAVA ballots from the 2010 federal general election, along with an explanation of any differences between the parties' proposals.
- (7) If necessary and appropriate, the court will determine the list of counties to be re-surveyed. Within seven (7) days of that determination, the NYSBOE shall transmit the attached questionnaire concerning ballots transmitted to voters in the 2010 federal general election pursuant to UOCAVA to each county board of elections on that list with instructions for the chief official or officials of each county board to certify the accuracy of the board's responses to the questionnaire.
- (8) Defendants shall instruct each affected county board of elections that each completed questionnaire must be returned to the NYSBOE within thirty (30) days of its receipt. After consulting with counsel for the United States, the NYSBOE

shall file all completed questionnaires with this court within sixty (60) days of this Order, along with an accurate summary of the survey results, and, if necessary, an explanation as to why the survey results are incomplete. The United States may respond to this filing within ten (10) days. This court retains jurisdiction to take all appropriate steps to ensure the completeness and accuracy of the information provided by defendants and the county boards of elections.

- (9) After the actions in paragraphs (7) and (8) above are complete, defendants shall ensure that local election officials in New York State take such steps as are necessary to count as validly-cast ballots in the November 2, 2010 federal general election all those ballots cast for federal offices, including Federal Write-in Absentee Ballots, requested up to and including October 10, 2010 and transmitted to overseas and military voters after that date but received by such election officials after November 24, 2010, so long as such ballots are executed and postmarked, or show a dated endorsement of receipt by another agency of the United States government (or in the case of military voters, are

signed and dated by the military voter and one witness thereto) by November 1, 2010 and are otherwise valid under New York law.

- (10) Within twenty (20) days of the completion of the actions required by paragraphs (7)-(9) above, defendants shall, after consulting with the United States, present a plan to the court detailing the procedures it will employ to count such ballots and certify the votes for federal offices. Defendants shall conclude ballot counting and recertification of all affected ballots within thirty (30) days after the court approves the ballot counting and recertification plan.
- (11) Defendants shall take all reasonable steps to notify all affected voters of the terms of this Order and that their votes were counted in the 2010 federal general election.
- (12) Defendants shall file a report with this court, in a format to be agreed upon by the parties, no later than five (5) days following the completion of any recertification process, detailing the number of UOCAVA absentee ballots, by county, that meet the conditions of this Order and that have been counted for the

November 2, 2010 federal general election. The report will set forth the following information, by county, categorized by absent uniformed services voters with APO/FPO addresses or non-US street addresses; uniformed services voters at a street address within the US; and overseas civilian voters:

- a. The number of absentee ballots requested by UOCAVA voters between October 1, 2010 and October 10, 2010;
- b. The number of absentee ballots requested by UOCAVA voters between October 1, 2010 and October 10, 2010 but sent to such voters after October 10, 2010;
- c. The number of absentee ballots identified in subparagraph (b) that were received from UOCAVA voters later than the close of business on November 24, 2010 and rejected solely for that reason; and
- d. The number of absentee ballots that, pursuant to this Order, have been counted and included in recertified election totals.

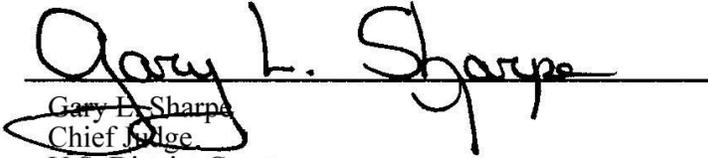
(13) This court shall retain jurisdiction to ensure additional relief as appropriate; and it is further

**ORDERED** that the Clerk provide a copy of this Memorandum-

Decision and Order to the parties.

**IT IS SO ORDERED.**

January 27, 2012  
Albany, New York

  
\_\_\_\_\_  
Gary L. Sharpe  
Chief Judge  
U.S. District Court

**Questionnaire**

County: \_\_\_\_\_

Instructions: Each New York county board of elections must answer the following questions. The chief official of the board must sign the responses to these questions and attest to their accuracy under penalty of perjury. Responses must be submitted to the New York State Board of Elections within 30 days of receiving this survey. Please attach additional sheets of paper if necessary to respond completely to each question. All responses will be filed by the State with the U.S. District Court for the Northern District of New York in connection with United States v. New York, et al., No. 1:10-CV-1214 (GLS/RFT) (N.D.N.Y. filed Oct. 12, 2010).

**Part I: UOCAVA Ballot Requests**

1. Please provide the number of UOCAVA ballot requests received by your county prior to September 18, 2010: \_\_\_\_\_.
2. Please provide the number of UOCAVA ballot requests received by your county between September 18, 2010 and October 1, 2010: \_\_\_\_\_.
3. Please provide the number of UOCAVA ballot requests received by your county between October 1, 2010 and October 10, 2010: \_\_\_\_\_.
4. Please provide the number of UOCAVA ballot requests received by your county after October 10, 2010: \_\_\_\_\_.

**Part II: UOCAVA Ballot Transmittals**

1. Please provide the number of UOCAVA ballots that were transmitted to voters (including by electronic transmission) by October 1, 2010: \_\_\_\_\_.
2. Please provide the number of UOCAVA ballots that were transmitted to voters (including by electronic transmission) between October 1, 2010

and October 10, 2010: \_\_\_\_\_.

3. Please provide the number of UOCAVA ballots that were transmitted to voters (including by electronic transmission) after October 10, 2010: \_\_\_\_\_.

a. If ballots were transmitted after October 10, 2010, please provide the following:

i. The number of UOCAVA ballots transmitted after October 10, 2010 that were requested before October 10, 2010: \_\_\_\_\_.

ii. The number of UOCAVA ballots transmitted after October 10, 2010 that were requested after October 10, 2010: \_\_\_\_\_.

Part III: UOCAVA Ballots Returned to the County

1. Please provide the number of UOCAVA ballots received by the county prior to November 2, 2010: \_\_\_\_\_.

2. Please provide the number of UOCAVA ballots received by the county between November 2, 2010 and November 24, 2010: \_\_\_\_\_.

3. Please provide the number of UOCAVA ballots received by the county after November 24, 2010: \_\_\_\_\_.

Part IV: Rejected UOCAVA Ballots

1. Please provide: a.) the number of UOCAVA ballots that were received prior to November 2, 2010 that were rejected and not counted: \_\_\_\_\_; and b.) the reason(s) for rejection of each of those ballots:

\_\_\_\_\_  
\_\_\_\_\_

2. Please provide: a.) the number of UOCAVA ballots that were

received between November 2, 2010 and November 24, 2010 that were rejected and not counted: \_\_\_\_\_; and b.) the reason(s) for rejection of each of those ballots:

\_\_\_\_\_  
\_\_\_\_\_

3. Please provide the number of UOCAVA ballots that were received after November 24, 2010 that were rejected and not counted:

\_\_\_\_\_.

a. Were any ballots received after November 24, 2010 requested by October 10, 2010 and transmitted to the voter after that date?

\_\_\_\_\_.

i. If yes, please provide the number of such ballots: \_\_\_\_\_.

ii. If yes, please provide the number of such ballots that were not counted only because they were received after November 24, 2010:

\_\_\_\_\_.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signature:

\_\_\_\_\_

Printed name:

\_\_\_\_\_

Title:

\_\_\_\_\_

Date: \_\_\_\_\_