ELIAS LAW GROUP

10 G Street NE, Suite 600 | Washington, DC 20002

May 3, 2022

VIA ECF

Honorable Lewis A. Kaplan
U.S. District Court Judge
U.S. District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Re: *De Gaudemar et al. v. Kosinski et al.*, No. 22-cv-03534-LAK

Dear Judge Kaplan:

We write on behalf of the *de Gaudemar* plaintiffs ("Plaintiffs"), to advise the Court that Plaintiffs take no position on the intervention of the Petitioners in *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. Steuben Cnty.) ("*Harkenrider* Petitioners") in this action. Plaintiffs simply ask the Court to make whatever decision best lends itself to an expedited decision in this matter.

As discussed in Plaintiffs' Memorandum of Law in Support of Application for a Temporary Restraining Order and Motion for Preliminary Injunction ("Pls.' Mem. of Law"), the State Board of Elections must certify primary ballots by tomorrow, May 4. N.Y. Elec. Law § 4-110. As a result, this suit requires prompt attention. In contending otherwise, the *Harkenrider* Petitioners misrepresent the 2012 order from the Northern District of New York in *United States v. State of New York*, which establishes that, absent circumstances that are not present here, New York's primary elections must take place on the fourth Tuesday of June—this year, June 28, 2022. Instead, the *Harkenrider* Petitioners selectively quote from that order, leaving out crucial language. The operative language ordering relief states, in full: "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*." Mem. Decision & Order at 8, Case No. 1:10-cv-01214-GLS-RFT, *United States v. New York*, (Jan. 27, 2012), ECF No. 59 (emphasis added).

The language emphasized above was not included in the governing order by accident. In every order that has been issued in that case since, the court has continued to emphasize, emphatically, that New York must obtain that court's approval before changing the primary election date from the fourth Tuesday of June. *See* Suppl. Remedial Order at 2, 5–6, *id.* (Dec. 12, 2013), ECF No. 85 (stating (1) "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 for a date that complies fully with all UOCAVA requirements, *and is approved by the court*;" and (2)

"[N]othing herein shall prohibit the State of New York from making statutory changes in its federal office election process to put New York in compliance with the MOVE Act and that such changes, if made, may be implemented in 2014 *upon the determination of this court that such changes render the 2014 election of federal office MOVE Act compliant*") (emphasis added); Suppl. Remedial Order at 1–2, 5, *id.* (Oct. 29, 2015), ECF No. 88 (same for 2016); Suppl. Remedial Order at 1–2, 5, *id.* (Nov. 21, 2017), ECF No. 91 (same for 2018).

It is uncontested that no one has sought the Northern District of New York's permission to change this year's primary election date to August. In the absence of that permission, the primary election is to proceed on the fourth Tuesday in June. Nor is there any reason to believe that, if asked, the court will grant said permission. While the *Harkenrider* Petitioners argue that, "[t]he Northern District has repeatedly permitted New York to move deadlines related to its primary election," the Northern District of New York has *never* permitted the State of New York to hold a federal primary later than the fourth Tuesday of June since the 2012 order was issued, and New York has had a June primary every year since 2012. Letter of *Harkenrider* Pet'rs at 1 (May 2, 2022), ECF No. 11. The dates the Northern District of New York has allowed the State to move are the deadlines by which certain *pre-election* activities had to occur, and the court allowed for changes to those dates specifically to accommodate a June primary. *See* Mem. Decision & Order, *id.* (Feb. 9, 2012) ECF No. 64; Suppl. Remedial Order, *id.* (Dec. 12, 2013) ECF No. 85; Suppl. Remedial Order, *id.* (Oct. 29, 2015) Doc. 88; Suppl. Remedial Order, *id.* (Nov. 21, 2017) Doc. 91.

The *Harkenrider* Petitioners also do not use the proper metrics for measuring the feasibility of New York mailing ballots to UOCAVA voters on time. While they are correct that there are more than 45 calendar days between August 23 and November 8, that does not mean that New York can act quickly enough to comply with UOCAVA. New York has a history of UOCAVA non-compliance, even in election years where the state has held a June primary. *See, e.g.*, Schoenfeld Aff., TRO Ex. 15 ¶ 9, ECF No. 8-15 (UOCAVA Plaintiff voter explaining in recent years she has had to vote by federal write-in absentee ballot when her UOCAVA ballot "did not arrive in time for me to vote," and that "[i]n recent years," she has "assisted other overseas New York voters in understanding how to obtain [such a ballot] when their regular ballots similarly did not arrive on time").

As filings in the Northern District case revealed, New York elections officials—those who mail out absentee ballots—do not believe an August primary would allow New York to comply with federal law and guarantee overseas voters an opportunity to cast their ballots. In a declaration filed with the Northern District in 2012, representatives of the non-partisan New York State Election Commissioners' Association stated that: "While an August Primary date may work on paper, experience has shown that a late primary will likely produce late primary certifications that would still preclude our ability to get our military and special federal voters their general election absentee ballots in a timely fashion." Decl. of Laura P. Costello and Jerry O. Eaton as Officers of the N.Y.

State Election Comm'rs' Associate ¶ 5, Case No. 1:10-cv-01214-GLS-RFT (N.D.N.Y., Dec. 6, 2011), ECF No. 45-2.[1]

As to the 2012 maps, Plaintiffs agree that those maps are unconstitutionally malapportioned and should not be used in the 2022 elections. Far from "moot[ing]" Plaintiffs' claim, this highlights the need for immediate intervention by this Court. As a three-judge court facing similar issues in Ohio recently explained, "[i]t is hard to imagine that a state can be summoned to court for using an outdated map yet avoid litigation by declining to use any map at all." *Gonidakis v. LaRose*, No. 2:22-CV-0773, 2022 WL 1175617, at *11 (S.D. Ohio Apr. 20, 2022) (three-judge court). That is precisely where New York finds itself: There is *no map* in place in time for tomorrow's primary ballot certification, and under such circumstances, federal law requires New York's congressional election to proceed at-large, pursuant to 2 U.S.C. § 2a(c)(5). *See* Pls.' Mem. of Law at 3, ECF No. 9. Federal courts—*this Court*—must do everything possible to prevent that outcome. *See id.* at 14.

Faced with similar circumstances, just two weeks ago the federal three-judge court in Ohio held that it would reinstate a map struck down by the Ohio Supreme Court if the state failed to timely redistrict. It held that the map "has one significant advantage over the others—a shorter timeline between selection and election." *Gonidakis*, 2022 WL 1175617, at *2; *see also id.* (noting that "the counties had already begun implementing that map when the Secretary of State told them to 'press pause'"). And it reaffirmed what Plaintiffs are asserting here: that when states fail to timely redistrict, "[f]ederal courts must impose new maps to protect the right to vote." *Id.*, at *1 (citing *Branch v. Smith*, 538 U.S. 254, 260–62 (2003)). This Court, faced with an even more imminent election deadline—tomorrow—should hold the same.

Sincerely,

/s/ Aria C. Branch

Aria C. Branch
Christina A. Ford
Counsel for de Gaudemar Plaintiffs, pro hac vice motions pending

CC: All Counsel of Record (via ECF)

[1] The *Harkenrider* Petitioners seem to claim that because Florida plans to hold a primary on August 23 and comply with UOCAVA, New York can do the same. This compares apples to oranges. Florida has a quicker canvassing period and has a history of counting ballots more efficiently than New York. *Compare* Fla. Stat. §§ 102.111(2), 102.141, *with* N.Y. Elec. Law. §§ 9-200(1), 9-202.