Phillips Lytle LLP

Via NYSCEF May 19, 2022

Hon. Laurence L. Love
New York State Supreme Court Justice
New York County Supreme Court
80 Centre Street, Room 128
New York, New York 10013

Re: *Matter of Nichols v. Hochul* (New York County Index No. 154213/2022)

Dear Justice Love:

As co-counsel with Graubard Miller to New York State Assembly Speaker Carl Heastie, we respond to the letter filed on behalf of Petitioners yesterday afternoon, May 18, 2022 (NYSCEF Dkt. No. 23). If this Court holds oral argument on Petitioners' pending motion for a temporary restraining order ("TRO"), we will fully address their arguments then. Some of Petitioners' assertions, however, are particularly troubling and require immediate response.

First, Petitioners misconstrue CPLR 6313(a), which prohibits the TRO they seek. In each of the cases Petitioners cite, the court issued a TRO *requiring* public officers to comply with statutory duties (Dkt. No. 23, at p. 3). Petitioners here ask for the opposite: a TRO *preventing* Boards of Elections from complying with duties imposed by the Election Law. This would be impermissible under CPLR 6313(a). *See DiFate v. Scher*, 45 A.D.2d 1002, 1003 (2d Dep't 1974) (holding that TRO against public officers, which enjoined them from making certain civil-service appointments, was "void on its face" under CPLR 6313(a)).

Second, Petitioners claim "[t]he requested TRO is about the unconstitutional Assembly map -- and only the unconstitutional Assembly map." Dkt. No. 23, at p. 2. Not so. Enjoining Respondents from using the enacted Assembly map, as Petitioners request (Dkt. No. 2, at p. 3), means annulling already certified candidacies not only for State Assembly, but also for delegates and alternate delegates for State Supreme Court judicial nominating conventions, for county party committee members, for New York

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State Democratic Committee members, and for party District Leaders in New York City, all of whom run for office in districts that depend on the Assembly districts where the candidates live and have already collected valid petitions to run for office. As per their prayer for relief in the Petition, moreover, Petitioners also want this Court, among other things, to "vacat[e] any certifications" of candidates who have already qualified for the primary ballot, and to reopen "designating and independent nominating petition periods" for claimed candidates like Petitioner Paul Nichols, whom the New York State Board of Elections already ruled off the Democratic primary ballot for Governor because his designating petitions contained an insufficient number of valid signatures. Dkt. No. 1, at p. 30. Under New York Election Law § 16-102, the time for making all these requests of the Court expired on April 21, 2022, 24 days before this proceeding was untimely commenced.

Third, Petitioners incorrectly assert that the impossibility of overhauling the 2022 elections for State Assembly (as well for delegates and alternate delegate to State Supreme Court judicial nominating conventions, for county party committee members, for New York State Democratic Committee members, and for party District Leaders in New York City) is somehow Respondents' fault. While they are quick to blame this Court for claimed scheduling delays (Dkt. No. 23, at p. 2), Petitioners were the ones who sat on their hands for three months, choosing to commence this proceeding on May 15, 2022, instead of in February. This is why, far from casting any "pall of suspicion" over the enacted Assembly district lines, the Court of Appeals expressly declined to invalidate them. *Matter of Harkenrider v. Hochul*, __ N.Y.3d __, 2022 WL 1236822, at *11 n.15 (Apr. 27, 2022).

Petitioners also were the ones who chose the less-efficient path by bringing this proceeding in New York County, rather than in Steuben County where Justice McAllister has presided over redistricting litigation since February and is keenly familiar with the issues. Of course, Petitioners likely shopped for this second venue because Justice McAllister issued an Order rejecting their untimely proposed intervention to challenge to the Assembly map on May 11, 2022. Having declined to appeal from that Order, Petitioners instead hope a different Judge will give them the remedy Justice McAllister would not. Further, the ongoing preparations by Boards of

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Elections for the June primaries is a statutory obligation, not some improper "tactic" (Dkt. No. 23, at p. 4). Petitioners' suggestion of bad faith is baseless, and disappointing.

Fourth, Petitioners' desperate request for a "unified primary date of September 13" only exposes their untimeliness (Dkt. No. 23, at p. 4). The Court of Appeals instructed Justice McAllister to "swiftly develop a schedule to facilitate an August primary election." *Matter of Harkenrider v. Hochul*, 2022 WL 1236822, at *12. Justice McAllister then ordered that the "Congressional and State Senate [primary] elections will be held on Tuesday, August 23, 2022" (Steuben Dkt. No. 301, at p. 2). And the United States District Court for the Northern District of New York approved the August 23, 2022 date for the Congressional primary. *United States v. New York*, 2022 WL 1473259, at *3 (N.D.N.Y. May 10, 2022). It is too late now to re-draw the Assembly map in time for August primaries, as Petitioners likely understand. But that is no justification to override two Court orders and the instructions of the Court of Appeals by moving every single primary to mid-September.

Finally, notwithstanding Petitioners' empty assurances to the contrary, yet another overhaul of the 2022 elections would create chaos and voter confusion. Boards of Elections are already scrambling to hold the unexpected August primaries, and ballots for the June primaries were mailed to military and overseas voters last week. Petitioners' proposed solution to the latter problem—"discard[ing]" or "not count[ing]" ballots cast by the men and women who defend our freedoms (Dkt. No. 23, at p. 3)—should give this Court great pause.

Respectfully,

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By

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