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NEW YORK

New York legislative Dems lawyered up for redistricting turmoil months before process unraveled

The state spent hundreds of thousands of dollars in legal fees defending gerrymandered maps.



Democratic leaders in the state Legislature hired legal counsel for the redistricting fight long before the redistricting commission failed. Pictured: state Senate Majority Leader Andrea Stewart-Cousins and Deputy Majority Leader Michael Gianaris celebrate a supermajority in 2020. NYS SENATE MEDIA SERVICES

By VAUGHN GOLDEN | OCTOBER 18, 2022

This story was published as a collaboration between [WSKG News](#) and [City & State](#).

Leaders in the New York Legislature were prepared to spend millions of dollars drawing their own redistricting lines and fighting resulting litigation months before the state's Independent Redistricting Commission failed.

According to records obtained by WSKG News and City & State, the Democratic majorities in the state Senate and Assembly contracted with law firms to provide counsel to lawmakers about the state's redistricting process as early as June 2021. The IRC only announced its schedule for public hearings in July, when talk of the panel's failure was purely hypothetical.

The Senate majority signed a retainer letter with Cuti, Hecker and Wang, a Manhattan-based firm, on June 22, 2021. The agreement stipulates that the attorneys work with the Senate majority and its appointees to the Legislative Task Force on Demographic Research and Reapportionment (LATFOR), the lawmakers in charge of drawing maps in the event of the IRC's failure.

The Senate and Cuti, Hecker and Wang signed a formal [contract](#) on Dec. 28, several days before the IRC voted to send two opposing maps to the Legislature for approval – setting into motion the events leading the Legislature to draw its

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own maps. The contract specified that Cuti, Hecker and Wang would serve as a consultant throughout the redistricting process, including providing advice on drafting redistricting plans and representing the Senate in any litigation stemming from the maps.

The firm had been regularly logging hours going back to June 22, 2021 – culminating in almost \$149,000 in legal fees before the IRC even voted to send maps to the Legislature, [according to invoices](#).

According to the retainer, Cuti, Hecker and Wang is contracted to provide up to \$3 million in legal services, travel and other costs like expert witnesses. The firm has invoiced almost \$529,000 of work to date, and is retained until June 2024.

Manhattan-based firm, effective for August 2021 through July 2024. The contract stipulates a cap of \$1.5 million on legal services, travel and expenses.

Democrats had criticized the IRC as “doomed to fail” since it was put on the ballot in a 2014 referendum following a deal between then Gov. Andrew Cuomo and state Senate Republicans. The panel consists of an equal number of Republican and Democratic appointees, making it easy to deadlock as happened in January.

“People are right when they say this process was designed to fail, but it was designed by the Senate Republicans with Governor Cuomo 10 years ago, so we were dealing with what we had in front of us.” state Sen. Michael Gianaris, who largely headed Democrats’ redistricting portfolio in the Senate, told [Gothamist](#) in an interview published in early February.

Other good government groups like Common Cause, have also [opined](#) against the IRC process.

Since Republicans lost control of the state Senate and Democrats secured a two-thirds majority in both chambers, redistricting experts [point out](#) that the majority had an incentive to deadlock the commission – giving the authority to lawmakers to draw the maps instead.

Democrats in the state Legislature attempted to cement this possibility through another [ballot referendum](#) in 2021, though voters rejected the measure. Lawmakers then passed many of the same provisions of the ballot measure through legislation, though that was eventually invalidated by the state’s highest court when it also tossed out state Senate and Congressional maps earlier this year.

Both Graubard Miller and Cuti, Hecker and Wang are representing the Legislature’s Democratic majorities in the ongoing process for redrawing state Assembly maps. A judge [ordered](#) the IRC to redraw the Assembly maps and submit them to the Legislature for approval by June of 2023, meaning the firms may likely continue doing work for lawmakers for several more months.

Spokespeople for neither the Assembly Majority nor Senate Majority returned requests for comment for this story. [c](#)

New ethics panel pursuing charges against Cuomo over book deal, former governor suing in response

WSKG | By [Vaughn Golden](#)

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Former Gov. Andrew Cuomo is suing New York's new ethics panel, which is pursuing ethics charges related to his pandemic-era book deal.

The new iteration of New York's ethics watchdog is pursuing ethics charges against Andrew Cuomo, leading the former governor to sue the panel in response.

The Commission on Ethics and Lobbying in Government (COELIG) is picking up ethics charges first levied by its predecessor panel, the Joint Commission on Public Ethics (JCOPE). The original charges allege Cuomo used false pretenses to secure permission to write his memoir "American Crisis", and later ordered state employees to work on the book.

Cuomo, who continues to maintain that senior employees appropriately indicated their work on their timesheets, filed a lawsuit in Albany County Supreme Court Tuesday asking courts to deem COELIG unconstitutional.

Cuomo's [lawsuit](#) argues that the structure of the new ethics panel removes powers allowed to the governor by the state constitution, specifically surrounding the process of appointing and removing members of COELIG.

"In this way, the Act recognizes (even as it transgresses) the dictates of separation of powers that inhere when one branch of government is subjected to the disciplinary authority of another," attorneys for Cuomo write in the complaint. "Indeed, in light of those separation of powers principles, a constitutional amendment was required to empower the Commission on Judicial Conduct, a body composed of a hybrid of executive, legislative, and judicial appointees, to impose disciplinary sanctions against members of the judiciary for ethics violations."

As remedy, Cuomo is asking courts to stop COELIG from continuing any investigative or enforcement actions.

“The lawsuit speaks for itself, but there’s clearly been politics behind all of this,” Rich Azzopardi, a spokesman for the former Governor, told WSKG.

A spokesperson for COELIG declined to comment on the pending litigation.

Last year, a [court ruled](#) that JCOPE did not allow Cuomo proper due process after it reversed the decision to approve his memoir and ordered him to return the proceeds from it. Still, the judge in that case left open the possibility for COELIG to pick the case back up. According to Cuomo’s complaint, COELIG staff has been in communication with his attorneys as early as September of last year.

According to the complaint, the matter is set to go before an adjudicatory hearing on June 12.

Rape kits sit in labs, untested as required

Backlog exists despite law mandating stricter turnaround for labs

Vaughn Golden

Feb. 15, 2020 Updated: Feb. 17, 2020 7:54 a.m.

ALBANY — Hundreds of rape kits are sitting untested in New York State Police crime laboratories as standards are being skirted, a situation that's left law enforcement officials also questioning whether the labs can keep up with new pre-trial discovery rules.

A law passed in 2016 placed requirements on how much time law enforcement and crime labs had to collect, process and return the kits. It also instituted increased reporting requirements meant to streamline the system and increase the accountability of the labs and law enforcement agencies. As of August 2019, over 1,500 kits were still in the possession of State Police, according to records obtained by the Times Union.

The rape kits are usually collected by specially trained medical staff at hospitals in cases in which victims, most often women, allege they have been sexually assaulted. The invasive procedure can last more than five hours and includes taking swabs, photographs, hair, blood and urine samples, scraping fingernails for evidence and conducting full pelvic exams.

Three years after the law went into effect, the Division of Criminal Justice Services has also failed to publish an annual report of rape kit inventories for 2019, which was required to be delivered to the Legislature by Jan. 1. The 2018 report, which had been overdue for more

than a year, was published last week, a day after the Times Union asked DCJS officials why it hadn't been published.

Under the new statutes, law enforcement agencies and crime laboratories are supposed to submit quarterly figures for how many rape kits they've collected, sent to laboratories and received back. DCJS collects that data and compiles it into a yearly report. For the first report compiled for part of the 2017 calendar year, only 434 of the 604 state law enforcement agencies submitted data. In 2018, that number rose to 534 of 604 agencies submitting data.

Mishandling of rape kits, which are used to collect DNA evidence after a possible crime, is a pervasive problem across the country. In 2000 New York had a backlog of over 17,000 kits, leaving victims without answers and potential offenders not held accountable. DNA analysis technology has improved immensely over the last decade, and many times, old kits are tested and DNA evidence is linked to the perpetrator in another case.

In 2016, the state Senate passed a bill by then-Sen. Kemp Hannon, R-Garden City, that put in place most of the statutes requiring the testing of all rape kits and yearly reports on inventories. Assemblywoman Aravella Simotas sponsored the bill in the Assembly. Hannon said he never could point to exact reasons why officials denied the existence of backlogs and couldn't take steps to clear them.

"Whatever the circumstances were, they were real," Hannon said. "In other words, people were very reluctant and the belief of criminal justice folks was that they didn't have a backlog."

Hannon's legislation passed the Legislature unanimously and was signed by Gov. Andrew M. Cuomo. Hannon lost reelection in 2018, but before then he pushed for additional statutes on rape kits that were included in a sexual assault bill of rights.

One of the entities instrumental in helping craft the 2016 legislation was the Joyful Heart Foundation, which advocates to clear kit backlogs across

the country. Director of Policy and Advocacy Ilse Knecht has been working on the issue for more than a decade and says while New York's laws are fairly strict, the issue comes down to resources.

"We would expect the lab to be their own cheerleaders and go out and ask for money so they can reach this," Knecht said. "If they aren't getting to the 90 days, they need to do something about it"

According to Knecht, the policies enacted by New York are similar to other states, but other systems are more centralized and outfitted with more resources. Twenty-three states now require a tracking system, similar to those used to track packages in the mail, giving victims the ability to see where their kit is at any point. Law enforcement agencies are also required to submit every kit for testing, which has, in a few cases, revealed connections to other DNA tested in other cases, sometimes leading to the identification of serial offenders.

The statute in New York also places a mandatory time frame in which labs must process the kits. Knecht says in most states, that timeframe is 30 days, but New York allows a 90-day window to test, process and return the kits to the agency that submitted it.

Eight counties, including New York City, have their own crime labs which process rape kits, but the rest of the state sends their kits to a State Police lab. Some of those labs are located in higher populated areas including Buffalo, Rochester, Syracuse and Westchester County, though law enforcement agencies in those counties can still send their kits to the State Police, as Onondaga County did to try and alleviate their own backlog in 2017.

In July 2018 the Times Union first requested an inventory of the kits held by the State Police. But the agency's response to the request languished and it also failed to respond to an appeal for the records filed under the provisions of the Freedom of Information Law. The records were only provided after State Police were sent a demand letter from the Cornell

Law School First Amendment Clinic, which intervened on behalf of the Times Union.

The first inventory was provided in January 2019, but only provided records through the original date of the written request that had been made in July 2018. The records indicated that State Police had 1,001 kits in their possession at that time. A second records request was eventually fulfilled showing that number rose to 1,560 in August 2019. Some of those kits had been in the laboratory for more than two years, eight times longer than the law permits. There were also 1,313 kits sitting in the lab longer than 90 days.

The police agency with the most kits in the lab at that time was the city of Binghamton, which had 84 kits, followed closely by Syracuse and Albany, which had 79 and 70 kits, respectively. Police departments that handle sexual assault and rape investigations at several colleges were among the agencies waiting on a high number of kits to be tested and returned.

In 2018, the state allocated \$500,000 for processing rape kit back logs. Since then the State Police lab has had to bolster staffing to keep up with the flow of kits, but the backlog persists.

“Police agencies sent more than 2,200 kits to our crime lab for testing in 2017 following enactment of the law, which was much higher than anticipated, and more than three times the average number of kits the lab handled in previous years,” said Beau Duffy, a State Police spokesman. “Since that time, the lab has added staff and implemented new procedures to improve the speed and accuracy of processing the kits.”

State Police Laboratory Director Ray Wickenheiser declined to be interviewed for this story.

Public records requests were also sent to the other eight municipal crime labs across the state. All of those facilities — except New York City’s Office of the Chief Medical Examiner — provided data on their kit

inventories. The Onondaga County Forensics Laboratory was the only lab with kits that had not been tested in the proper time frame. Of the 106 kits in the Onondaga lab, 79 had not been processed within the 90-day window.

Prosecutors and law enforcement have been well aware of the lengthy turnaround time for kits from the State Police lab over the last few years, but some interviewed for this story indicate they're increasingly anxious about how quickly the lab will be able to respond under new statutes that went into effect last month and require evidence to be turned over to defendants in a much shorter time period. The law, part of sweeping criminal justice reforms that are facing harsh criticism by some lawmakers and police leaders for going too far, requires prosecutors to turn over their evidence, which could include results of a rape kit analysis, less than 45 days after a defendant is arraigned.

"Unfortunately, with the rhetoric and the vitriol regarding the bail and all of the cliches that you hear regarding that, the rape kit is not on anybody's radar screen," Onondaga County District Attorney William J. Fitzpatrick said.

He has also raised concern about the ability of his office's cold-case task force to pursue investigations if Onondaga and State Police laboratories have to prioritize testing rape kits and other evidence to meet the new pre-trial discovery requirements. Fitzpatrick said that could leave older kits that could be crucial to solving crimes sitting on the shelf.

Vaughn Golden is an Ithaca College student and freelance journalist who reports on upstate issues.

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OPENSECRETS NEWS

Congressional portraits are pricey — and not totally transparent

By [Vaughn Golden](#) | [June 28, 2019](#)



Former House Speaker Paul Ryan, with his Congressional Portrait (Tom Williams/CQ Roll Call)

Since 2004, congressional campaigns and PACs have spent more than \$144,000 on paintings portraying prominent members of Congress, often themselves.

That's in addition to an unknown level of contributions from outside entities, including wealthy individuals and businesses anonymously routed through a nonprofit to fund the congressional art.

The tradition of painting portraits of retiring House speakers and other prominent leaders from the chamber dates back to the mid-1800's, but the idea really took off during the New Deal period. President Franklin D. Roosevelt and the New Dealers wanted artists to be able to survive the Great Depression, so the federal government commissioned dozens of portraits of national and congressional leaders.

Most committee chairs and party leaders who were the subjects of the portraits kept the practice alive long after the New Deal, but as time went on opposition to the use of federal money for the portraits grew, especially during economic downturns.

In 1999 the [U.S. Capitol Historical Society](#), a congressionally chartered 501(c)(3) nonprofit organization, provided members of Congress another way to fund the portraits without taxpayer dollars. They're now able to set up a committee through the historical society to raise money and make decisions surrounding the procurement of the portrait.

"They didn't want to deal with appropriated money and so they agreed that if there was a private entity that wanted to create a portrait and donate it to the Capitol that the society was the logical group to do that, and the society created a mechanism to do that," Jane Campbell, president of the U.S. Capitol Historical Society said in an interview with OpenSecrets.

In 2016, the practice of using federal taxpayer money for portraits ended altogether in a mostly bipartisan bill spearheaded by Sen. [Bill Cassidy](#) (R-La.) called the [End Government-funded Oil-painting \(EGO\) Act](#).

"Senator Cassidy's primary concern with the EGO Act was to stop the use of taxpayer dollars to fund these oil paintings. We can certainly look into the other avenues in which these paintings are funded as well," a spokesperson for Cassidy said in a statement.

Since the passage of Cassidy's bill, all portraits are handled through the historical society and are funded mostly by donations which, unlike contributions from PACs and campaign committees, aren't publicly disclosed.

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Since the member's portrait committee is funded through the non-profit institution, donations for the portraits, which cost between \$20,000 and \$80,000 each, aren't subject to the same restrictions for contributing to elected officials under campaign finance laws. This means any donors -- including individuals, companies, PACs or other campaigns -- may contribute unlimited amounts of cash toward a member's portrait without any public disclosure of the transaction. Campbell said she's never heard of a single donor financing a whole portrait and that most draw a significant number of contributors.

"For some people, a donation of \$5,000 is a very large donation, for some people that's a very modest donation. We can't really opine on that, but the [portrait] committees usually have a larger number of donors," Campbell said

The historical society has facilitated 80 portraits since 2000, including those for former speakers [Newt Gingrich](#) (R-Ga.), [Dennis Hastert](#) (R-Ill.), [John Boehner](#) (R-Ohio), [Paul Ryan](#) (R-Wis.). It's optional for members to have a portrait done.

The PACs donating to committee chairmen are often from similar policy areas as the committees they oversaw prior to retirement. Last year, chairman of the House Agriculture Committee Rep. [Mike Conaway](#) (R-Texas) retired. At the same time the [United Egg Association](#) EGGPAC, representing a trade association for chicken egg processors, contributed \$2,000 to the U.S. Capitol Historical Society for "Mike Conway Portrait" (sic) [according to FEC filings](#).

Democrats [Dave Obey](#) (D-Wis.) and [Ike Skelton](#) (D-Mo.) also had PACs donate to their portrait funds.

PACs for postal workers, resorts, pilots and others have donated at least \$19,000 for portraits of members, though that number is likely higher because the figure only include disbursements to the historical society specifically mentioning portraits.

Other members have used campaign accounts to fund part of their portraits. Rep. [Lamar Smith](#) (R-Texas) retired last year after serving in Congress since 1987. During that time, he chaired the House Judiciary, Science and Ethics committees, allowing him to commission multiple portraits. Between 2013 and 2014, FEC filings show Smith spent almost \$44,000 on portrait services. In 2018, [Gulf States Toyota Inc.](#), contributed \$2,500 toward his portrait fund.

Ahead of another planned run in 2020, Rep. [Karen Handel](#) (R-Ga.) is sitting on a war chest of campaign cash after being unseated last year, following her special-election win in the most expensive House race of all time. She contributed \$2,500 to the portrait fund for outgoing Rep. [Diane Black](#) (R-Tenn.) who lost her bid for governor.

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Vaughn is a student at Ithaca College where he double majors in journalism and economics. He also covers state and national politics to various print and radio outlets in upstate New York. His clients have included NPR, WRVO, WSKG, The Ithaca Voice, The Hornell Evening Tribune, The Ithaca Times and the Corning Leader.

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Former board members cast light on Danks Burke's good government PAC

By [Vaughn Golden](#)

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[Leslie Danks Burke](#) founded Trailblazers PAC after the 2016 election to promote candidates with ideals promoting honest government. (Sarah Gager/WSKG)

Since founding Trailblazers in late 2016, Leslie Danks Burke has held up the organization as a testament to her support of good government and transparency, but former board members and others close to the organization say its values were tainted as she sought office.

Following a failed bid for state Senate in 2016, Danks Burke [formed Trailblazers](#), a political action committee (PAC) aimed at mentoring and financially supporting candidates who held themselves to higher standards, specifically with regards to how they raised money.

“If the 2016 election cycle was about anything, it was about people across the country waking up to what folks in New York State have seen for a while – the convergence of money and power at the top has warped our political process. It’s time for citizens to take back our democracy. Real, lasting change starts with getting people elected at the local level, where our property taxes are set, our schools are funded, and our roads are maintained,” Danks Burke wrote in a [press release](#) announcing formation of the PAC in 2017.

The organization supports both Republican and Democratic candidates and its board members consist of members of both parties as well.

“I believe in the power of local politics, and supporting good people who run for local election because those representatives are the ones closest to the people, and so that's why I got involved with trailblazers,” Denise King, a former chair of the Trailblazers executive board, told WSKG.

King served as Danks Burke’s campaign manager in 2016 and helped her found Trailblazers after the race.

Trailblazers would go on to branch out to serve candidates nationwide. Since its formation, the organization has mentored 300 candidates. It “paused” its activity in early 2022.

Trailblazers changes ahead of 2020

In the fall of 2019, Danks Burke had decided to launch another bid for state Senate. At the same time, she remained as president of Trailblazers, despite protests from some board members that doing so was ethically questionable given the PAC’s non-partisan nature. Former board members, including King, said they encouraged her to temporarily step down as she campaigned.

Danks Burke said she doesn’t see an issue with a political candidate running a non-partisan organization.

“Everybody who was on the Trailblazers board was involved in politics in some form or another,” Danks Burke said. “It is a nonpartisan organization because it works with candidates across the political spectrum. We had other

people on the board who also were running for office. We had Democrats, Republicans, people from all political stripes on that board.”

King said Danks Burke told board members she planned to align the PAC with her campaign in 2020, touting its standards of transparency alongside her own messaging.

“I felt like the alignment of the PAC and the campaign discredited the PAC,” Rachel Barbour, another former executive board member, said.

Additionally, the organization would cut back on mentoring candidates, training workshops and other educational aspects.

“The things that made Trailblazers important to me, the training workshops, the mentoring, the selection of candidates who really represented, you know, honest government was all being put on hold and I did not see the organization, it was not going to be the organization that I helped found and the organization that I believed in, so I resigned in December of 2019,” King said.

Barbour followed suit shortly after.

“I wasn’t even sure, pardon me, what the hell was left of Trailblazers,” Georgia Reynolds, another former board member said.

Reynolds had also been involved since the founding of the organization, mentoring candidates and helping fundraise. She also stepped down and distanced herself from the organization as Danks Burke launched her 2020 bid.

Reynolds said she and others, including candidates she’d helped mentor, received fundraising solicitations asking to contribute to Danks Burke state Senate campaign. She believes they were sent out using Trailblazers’ mailing list.

In a [copy of a letter](#) obtained by WSKG dated Oct. 14, 2020, Amory Houghton III, a Trailblazers board member, touts the PAC’s activity and asks for contributions to Danks Burke’s campaign.

“I have known Leslie for many years and worked with her to promote honest, transparent campaigns for local and regional office. The non-partisan organization she founded, Trailblazers PAC, encourages young local-level

leaders to roll up their sleeves and be part of the solution,” the letter reads in part.

Danks Burke denied her campaign solicited mailing lists from Trailblazers.

King, Barbour and Reynolds have all contributed to Danks Burke’s primary opponent, Lea Webb, though they say their reasons for speaking out about Trailblazers are not politically motivated.

“We wish that this had gotten traction a year and a half ago when this happened, but it didn't, but it is now because of the primary, but that's not that's not on us,” Barbour said. “We've been talking about this from the beginning.”

Endorsement of anti-government sheriff

In October of 2020, Trailblazers announced its endorsement of Scott Nichols, a candidate for sheriff in Franklin County, Maine.

“Scott is setting a precedent in his community that voters should be the loudest voices in the room. Even during these difficult times, he is going above and beyond what the law requires by taking measurable action for honest government, right now,” Trailblazers’ then executive Director Alli Woodard wrote in a [press release](#) announcing the endorsement.

Earlier that year, Nichols had been named “sheriff of the year” by the Constitutional Sheriffs and Peace Officers Association, a group the [Southern Poverty Law Center](#) and [Anti-Defamation League](#) describe as an extremist anti-government organization. The group also has ties to the Oathkeepers, an [extremist militia group](#) involved with the storming of the U.S. Capitol on Jan. 6, 2021.

The CSPOA and [conservative media](#) lauded Nichols’ [refusal to enforce](#) COVID-19 emergency orders by the Governor of Maine. Nichols posted to Facebook about his award from the CSPOA in September which was noted by the [Maine Beacon](#) a week before Trailblazers announced its endorsement. Nichols’ campaign Facebook page has since been deleted or removed.

Reynolds and others close to Trailblazers who asked not to be identified said they were shocked by the endorsement of Nichols and immediately asked Danks Burke and other members of the PAC’s board to reverse its decision.

“I, honest to god, was horrified,” Reynolds said.

Trailblazers PAC also [contributed](#) \$850 to Nichols’ campaign according to his campaign’s financial disclosures to Maine’s election authority. (WSKG reviewed Trailblazers’ campaign finance disclosures and could not find any record of the contribution on its filings. The Trailblazers PAC’s federal arm [was terminated in February 2021](#) after failing to file disclosure reports per the FEC.)

Danks Burke maintains that Nichols met the PAC’s “objective criteria” for endorsement.

“What Trailblazers PAC does is set policy views aside and look scrupulously at whether the candidate is demonstrating through active work, through actually filing financial filings and through actually garnering donations from fully disclosed sources, that they are walking the talk on honesty in government,” Danks Burke said. “And when a candidate does that, and earns the Trailblazers endorsement, but then after the fact, does something that shows that they did not fully have that commitment, then Trailblazers PAC has rescinded that endorsement.”

Barbour said Nichols’ ties to the CSPOA were clear and would’ve shown up on a Google Search of his name. She also disagrees with the assessment that Nichols’ anti-government record should be considered a view on policy, and therefore should’ve immediately disqualified him from consideration by the Trailblazers board in the first place.

“Extremist ideology isn’t partisan,” Barbour said.

In February of 2021, almost four months after making the endorsement, Trailblazers [released a statement](#) rescinding it, citing Nichols support of the CSPOA in the wake of the Jan. 6 attack on the U.S. Capitol.

“This is a dishonest attack from a desperate campaign, but let’s stick to the facts,” Danks Burke’s campaign manager Kierra Powell wrote in a statement to WSKG. “Trailblazers was created as a non-partisan organization to encourage transparency across the political spectrum, not just from those candidates we agree with. It had clear and objective criteria for candidates to meet to earn an endorsement. The Trailblazers board followed those criteria, and Leslie did not inject her partisanship and progressive beliefs into the Trailblazers decision-making process. When candidates later took actions that

went against the pro-democracy principles that Trailblazers adhered to, they rescinded the endorsement.”

https://www.nny360.com/news/stlawrencecounty/lawyers-for-owner-of-potsdam-s-toilet-gardens-update-suit-after-judge-s-ruling/article_191604d7-93a5-5f7c-97b4-52ca8b900568.html

Lawyers for owner of Potsdam’s ‘toilet gardens’ update suit after judge’s ruling

By VAUGHN GOLDEN

vgolden@wdt.net

Sep 29, 2020



A driveway on a Pine Street property in Potsdam owned by Frederick J. Robar Sr. is lined Aug. 19 with decorative toilets. Christopher Lenney/Watertown Daily Times

POTSDAM — Lawyers for Frederick “Hank” Robar have amended their lawsuit’s complaint against the village as they seek to shore up legal arguments in the case.

Last week, the judge in the case granted Mr. Robar an injunction — barring the village from forcibly removing fixtures from his seven “toilet gardens” across the village.

On Monday, the legal team for Mr. Robar filed an amended complaint that made several changes — likely in reaction to the judge’s 42-page ruling — that show areas where Mr. Robar is trying to strengthen his legal arguments that his porcelain planters are constitutionally protected.

In July, the village Board of Trustees passed a resolution ordering Mr. Robar to comply with code related to “junk storage,” requiring him to remove all of the “bathroom fixtures” from his seven notorious toilet gardens in the village. In mid-August, Mr. Robar struck back. He filed a lawsuit in U.S. District Court’s Northern District of New York, which alleges the village order is illegal under the First Amendment, Fourteenth Amendment and the Visual Artists Rights Act of 1990.

Likely the most significant addition made to Mr. Robar’s complaint this week was new evidence he’s presenting to support his claim that he alone is being unfairly targeted by the village, in violation of the Fourteenth Amendment.

Last week, Judge Lawrence E. Kahn wrote in his memorandum on the case that Mr. Robar did not provide any evidence beyond a personal statement, stating he isn’t “personally aware” of any such instances in which the junk storage law has been enforced against other residents who publicly display repurposed junk.

In order to win his equal protection claim, the judge wrote, Mr. Robar would have to provide sufficient evidence he experienced malicious selective treatment as compared to other similarly situated individuals.

The additions to the complaint appear to provide examples of six such properties that have historically displayed items that may constitute “junk” under the village’s code. Some of the items on the properties include tires, junked vehicles and milk jugs. The Times was able to spot some, but not all, of the items referenced in the amended complaint.

Another change in the complaint appears to be aimed at solidifying Mr. Robar’s position that the artistic value of his toilet displays would be degraded if they were moved or covered up.

“The porcelain planters incorporated into Mr. Robar’s artistic installations cannot be moved without causing the destruction of Mr. Robar’s artistic installations,” his updated complaint reads in part.

This point appeared to be a matter of confusion.

“It also bears noting that Mr. Robar’s planters are not site-specific,” a memorandum of law from Mr. Robar’s team filed prior to the judge’s ruling. “They can be moved and installed in various locations, and accomplish their artistic message and political protest, so long as they are publicly visible.”

In his ruling, Judge Kahn said Mr. Robar’s statements on whether the placement of the toilets and bathroom fixtures on his properties would affect his purported value of the installations were contradictory with each other.

A subtle addition in the complaint may also signal Mr. Robar’s team is still attempting to convince the court the issue is subject to strict scrutiny under the First Amendment.

The new line to Mr. Robar’s complaint reads, in part, “defendants are suppressing Plaintiff from expressing an artistic and political message based on its content and medium.”

In the original memorandum of law, Mr. Robar’s lawyers made the case that the action made by the village was based on the message of protest meant to be conveyed through the toilet gardens.

This, the attorneys argued, would be a content-based regulation. Courts apply a level of strict scrutiny, having very little leniency, where a governmental response is made due to the message an individual is trying to deliver. In Mr. Robar’s case, the message in his art is, in his eyes, a form of protest he is exhibiting against the town after being denied a zoning variance in 2005.

In the ruling last week, the judge denied the plaintiff’s argument that the regulation from the village was content-based, but he did deem it content-neutral, which is still subject to an intermediate level of scrutiny. By adding the language to the complaint, it may signal Mr. Robar’s attorneys will continue pushing that the junk storage law be considered content-based.

Earlier this month, attorneys for the village moved to have the case dismissed entirely. A hearing over that motion is scheduled for Oct. 16 in Albany.

Vaughn Golden