SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

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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,

Index No. E2022-0116CV

Petitioners,

-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.

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MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' PROPOSED ORDER TO SHOW CAUSE WHY PETITIONERS SHOULD NOT BE GRANTED LEAVE TO CONDUCT EXPEDITED DISCOVERY

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Petitioners 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 (together, "Petitioners") submit this Memorandum Of Law in support of their Proposed Order To Show Cause Why Petitioners Should Not Be Granted Leave To Conduct Expedited Discovery in this CPLR Art. 4 special proceeding. The specific discovery requests, notices and subpoenas that Petitioners seek leave to serve are attached as Exhibits 1–14 to the Affirmation of Bennet J. Moskowitz dated February 14, 2022 ("Moskowitz Aff."), submitted herewith.

PRELIMINARY STATEMENT

Petitioners are electors in the State of New York who commenced this special proceeding to challenge the validity of the New York Legislature's new congressional map ("2022 congressional map"), *see* Petition ("Pet."), NYSCEF Doc. No. 1, and—in their proposed amendment to their Petition filed a mere four days later—the new state Senate map ("2022 state Senate map"); Proposed Amended Petition ("Amend. Pet."), NYSCEF Doc. No. 18, ¶¶ 179–212; Moskowitz Aff. ¶ 3. Respondents[*] recently drew and enacted these maps without providing the public meaningful time to review and comment on them.

Petitioners have alleged in their Petition and (also for the state Senate map) in their proposed Amended Petition that the Legislature's new maps are unconstitutional on two separate and independent bases. *First*, the maps are procedurally invalid because the Legislature did not follow the exclusive process for enacting replacement redistricting maps set out in Sections 4 and 5 of Article III of the New York Constitution, which create and empower the New York

[*] Respondents are 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 E. Heastie, the New York State Board of Elections, and the New York State Legislative Task Force on Demographic Research and Reapportionment (together, "Respondents").

Independent Redistricting Commission ("IRC"). *See* Pet., First Cause Of Action, ¶¶ 186–97; Amend. Pet., First Cause Of Action, ¶¶ 234–45; N.Y. Const. art. III, §§ 4–5. *Second*, the maps are substantively invalid because they are blatantly partisan and incumbent-protection gerrymanders, in violation of Article III, Section 4(c)(5) of the New York Constitution, which explicitly prohibits redistricting maps drawn "for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." *See* Pet., Third Cause Of Action, ¶¶ 208–15; Amend. Pet., Third Cause Of Action, ¶¶ 256–63 (quoting N.Y. Const. art. III § 4(c)(5)); *see generally* Pet., Second & Fourth Causes Of Action, ¶¶ 198–207, 216–26; Amend. Pet., Second & Fourth Causes of Action, ¶¶ 246–55, 264–74 (also asserting that the existing maps are now unconstitutionally malapportioned, and seeking a declaratory judgment as to all claims).

Petitioners now move this Court for an order permitting expedited discovery so that they may more fully discover additional material and necessary facts further establishing their claims against the 2022 state Senate map and 2022 congressional map. Specifically, Petitioners request leave to conduct the narrowly-tailored discovery summarized here and attached to the Moskowitz Aff.:

> Party document requests to Respondent the Governor, Respondents Legislative Leaders, and the Democratic heads of Respondent the New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR"), namely, Assemblymember Kenneth Zebrowski and Senator Mike Gianaris, Eric Katz and Phillip Chonigman—concerning: (a) any and all documents and communications relating to their contacts with the Democratic IRC Commissioners; (b) any and all documents and communications relating to the IRC's work, which they received from third parties; and (c) any and all documents and communications relevant to the drawing of the 2022 Congressional and state Senate districts, if such documents and communications relate in any way to the use or consideration of any political data or information; use or considerations of any data or information relating to any political party; use or considerations of any data or information relating to any incumbent politician; or use or considerations of any data or information relating to any particular candidate for congressional or state Senate office;

Party depositions of Respondent the Governor, Respondents Legislative Leaders, and the Democratic heads of Respondent LATFOR, specifically Assemblymember Kenneth Zebrowski and Senator Michael Gianaris, Eric Katz, and Phillip Chonigman;

Non-party document requests to Democratic IRC Commissioners concerning their communications with Democratic Members of the Legislature, the Governor, and any other Democratic Party politicians, officials, or aligned interest groups that encouraged these Commissioners to undermine the constitutional redistricting process; and

Non-party Depositions of the Democratic IRC Commissioners.

See Moskowitz Aff. Exs. 1–14.

LEGAL STANDARD: THE COURT HAS BROAD DISCRETION TO GRANT PETITIONERS' LEAVE TO CONDUCT EXPEDITED DISCOVERY

Section 408 of the Civil Practice Law And Rules provides that "[l]eave of court shall be required for disclosure [of discovery]" in an Article 4 special proceeding. CPLR § 408; *see, e.g.*, *Wendy's Rests., LLC v. Assessor*, 74 A.D.3d 1916, 1917, 903 N.Y.S.2d 849, 850 (4th Dep't 2010) (unanimously affirming trial court order granting motion to compel discovery pursuant to CPLR § 408). The Court has broad discretion to grant such leave. *Wendy's Rests.*, 74 A.D. 3d at 1917, 903 N.Y.S.2d at 850.

In determining whether to exercise its broad discretion to grant such leave, the Court "must balance the needs of the party seeking discovery against such opposing interests as expedition and confidentiality." *Town of Pleasant Valley v. N.Y. State Bd. of Real Prop. Servs.*, 253 A.D.2d 8, 16, 685 N.Y.S.2d 74, 79 (2d Dep't 1999); *see also J.G. v. Zachman*, 34 A.D.3d 1277, 1278, 825 N.Y.S.2d 621, 622 (4th Dept. 2006) (*quoting Cerasaro v. Cerasaro*, 9 A.D.3d 663, 781 N.Y.S.2d 375 (3d Dept. 2004)) ("'A trial judge is vested with broad discretion to control discovery and disclosure and its determination of such issues will only be disturbed on a showing of clear abuse.'"). Multiple "pertinent criteria" guide this Court's consideration of whether to permit disclosure of discovery in a special proceeding under Section 408, including: "(1) whether the petitioner has asserted facts to establish a cause of action; (2) whether a need to determine

information directly related to the cause of action has been demonstrated; (3) whether the requested disclosure is carefully tailored so as to clarify the disputed facts; (4) whether any prejudice will result; and (5) whether the court can fashion or condition its order to diminish or alleviate any resulting prejudice." *Georgetown Unsold Shares, LLC v. Ledet*, 130 A.D.3d 99, 106, 12 N.Y.S.3d 160, 165 (4th Dept. 2015) (citations omitted) (reversing trial court's order denying petitioner's motion for leave to conduct discovery). As set forth in the Argument section below, Petitioners have met all of these criteria.

Further, as discovery contemplated by Section 408 proceeds under CPLR § 3101(a), a movant under Section 408 must also satisfy the liberally-construed, broad discovery standard applicable to discovery in regular proceedings—*i.e.*, that the requested information is "material and necessary" to the prosecution or defense of the proceeding. *Wendy's Rests.*, 74 A.D.3d at 1917, 903 N.Y.S.2d at 850 (citing CPLR § 3101(a)). "The Court of Appeals has ruled that 'material and necessary' should be 'interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." *Id.* (quoting *Town of Pleasant Valley*, 253 A.D.2d at 15–16, 685 N.Y.S.2d at 79). The material-and-necessary test is "one of usefulness and reason." *Id.* (quoting *Town of Pleasant Valley*, 253 A.D.2d at 16, 685 N.Y.S.2d at 79).

The Court also has broad discretion to order expedited discovery. *See* CPLR § 3106(b) ("Where the person to be examined is not a party or a person who at the time of taking the deposition is an officer, director, member or employee of a party, he shall be served with a subpoena. *Unless the court orders otherwise*, on motion with or without notice, such subpoena shall be served at least twenty days before the examination. (emphasis added)); CPLR § 3107 ("A party desiring to take the deposition of any person upon oral examination shall give to each party

twenty days' notice, *unless the court orders otherwise*." (emphasis added)); *Rational Strategies Fund v. Hill*, 977 N.Y.S.2d 669, 669 (Sup. Ct. N.Y. Cnty. 2013) (citing *J.G. v. Zachman*, 34 A.D.3d 1277, 825 N.Y.S.2d 621 (4th Dept. 2006)) ("The decision of whether to grant expedited discovery is within the discretion of this Court.").

ARGUMENT

I. This Court Should Allow Petitioners To Pursue Limited, Expedited Discovery Because They Need It And No Prejudice Will Result

This Court should grant Petitioners leave to conduct limited, expedited discovery in this special proceeding because their need for such discovery far outweighs any opposing interests, *Town of Pleasant Valley*, 253 A.D.2d at 16, 685 N.Y.S.2d at 79, and Petitioners seek only information that is "material and necessary" to establishing their claims, *Wendy's Rests.*, 74 A.D.3d at 1917, 903 N.Y.S.2d at 850 (citations omitted). Petitioners satisfy each criteria set forth in *Georgetown Unsold*, 130 A.D.3d at 106, 12 N.Y.S.3d at 165.

First, Petitioners have "asserted facts to establish a cause of action," which essentially means "facts to establish the facial validity" of their causes of action. *Georgetown Unsold*, 130 A.D.3d at 106, 12 N.Y.S.3d at 165. As the Petition and proposed Amended Petition explain, Respondents Legislative Leaders violated Article III, Section 4 of the New York Constitution both procedurally and substantively by enacting the partisan-gerrymandered congressional maps and (for the proposed Amended Petition) 2022 state Senate maps. *See* Pet., First Cause Of Action, ¶¶ 186–97; Amend. Pet., First Cause Of Action, ¶¶ 234–45; N.Y. Const. art. III, §§ 4–5. The plain language of Article III, Section 4 both establishes a mandatory procedure for redistricting, N.Y. Const. art. III, §§ 4–5, and explicitly bars the drawing of state Senate and congressional districts "to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties," *id.*, § 4(b), (c)(5). Petitioners allege that Respondents

ignored the Constitution's mandatory procedures in enacting their own map without receiving and considering a second map from the IRC, Amend. Pet. ¶¶ 239–40, and that they politically gerrymandered those maps by purposefully empowering the Democratic Party and Democratic Party politicians. *See* Amend. Pet. ¶¶ 268–70.

Second, Petitioners have both demonstrated "a need to determine information directly related to the[ir] cause[s] of action." *Georgetown Unsold*, 130 A.D.3d at 106, 12 N.Y.S.3d at 165. Petitioners require disclosure of discovery to further show that the 2022 state Senate and congressional maps violate those constitutional standards.

Third, Petitioners have shown that "the requested disclosure is carefully tailored so as to clarify the disputed facts" underlying Petitioners' claims. *Georgetown Unsold*, 130 A.D.3d at 106, 12 N.Y.S.3d at 165.

Petitioners seek only two categories of facts: (a) whether Respondents acted with impermissible partisan intent in drawing the 2022 state Senate and congressional maps, *contra* N.Y. Const. art. III § 4(c)(5); and (b) whether Respondents worked with the Democratic IRC Commissioners, politicians, officials, or interest groups to frustrate the mandatory constitutional process for redistricting, N.Y. Const. art. III, §§ 4–5. *See* Moskowitz Aff. ¶ 9. All of Petitioners' proposed discovery requests narrowly focus on these two essential factual categories.

Courts across the country regularly allow plaintiffs asserting partisan-gerrymandering claims like Petitioners' claims here to conduct discovery that is indistinguishable from the proposed disclosure-of-discovery requests of Petitioners here. *See Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018), *vacated and remanded sub nom. Rucho v. Common Cause*, 139 S. Ct. 2484 (2019); *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018), *vacated and remanded*, 138 S. Ct. 2679 (2018); *League of Women Voters v. Pennsylvania*, 178 A.3d 737, 766–

67 & n.38 (Pa. 2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 392 (Fla. 2015). For example, in *League of Women Voters v. Pennsylvania*, the Supreme Court of Pennsylvania ordered "all necessary and appropriate discovery" to be conducted "on an expedited basis" before trial "so as to create an evidentiary record on which Petitioners' claims [including that legislative officials drew districts to disfavor Democratic voters and candidates] may be decided." 178 A.3d at 766–67 (citation omitted). Such discovery in partisan-gerrymandering cases allows plaintiffs to access documents, records, and testimony that reveal "unconstitutional partisan intent" of the map drafters "tainted" the redistricting process and produced unlawful maps. *Detzner*, 172 So. 3d at 391–92.

This discovery is relevant to proving partisan gerrymandering claims because direct evidence of impermissible partisan intent can be uniquely within the possession of the executive and legislative leaders who control the redistricting process. *See, e.g.*, *Benisek*, 348 F. Supp. 3d at 497, 518 (noting that, due to "extensive discovery," "the record is replete with direct evidence of . . . precise [partisan] purpose," including documentary and testimonial evidence from elected officials); *see also Rucho*, 279 F. Supp. 3d at 640; *League of Women Voters*, 178 A.3d at 766–67 & n.38; *Detzner*, 172 So. 3d at 392. So, in *Benisek*, the same type of discovery that Petitioners request here resulted in an undisputed factual record proving that Democratic lawmakers worked with outside consultants to draw a map "with a narrow focus on diluting the votes of Republicans" and with "actual intent" to "flip party control." 348 F. Supp. 3d at 497, 517 519–20. Similarly, in *Common Cause v. Rucho*, discovery led to "a wealth of evidence prov[ing] the General Assembly's intent to 'subordinate' the interests of non-Republican voters." 279 F. Supp. 3d at 640. The court there focused on how "the facts and circumstances surrounding the [map] drawing" presented at

trial showed how "Republican leadership . . . denied Democratic legislators access to the principal mapdrawer." *Id.*

In a particularly prominent and more recent example, the Supreme Court of Ohio allowed the type of discovery that Petitioners seek here in a challenge to the State's general assembly plan that alleged an unlawful partisan gerrymander. Order, *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, No. 2021-1193 (Ohio Oct. 7, 2021). There, the court compelled written discovery and allowed the depositions of state legislators and executive officials involved in the redistricting process. *Id.* This discovery revealed clear evidence of incumbent protection and partisan gerrymandering, *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-65, slip op. ¶¶ 30–56 (Ohio Jan. 12, 2022), and, as a result, the court invalidated the general assembly plan as an unconstitutional partisan gerrymander, *id.* ¶ 2. Petitioners request the same type of limited discovery here, seeking to reveal evidence of incumbent protection and partisan gerrymandering in a targeted fashion.

Fourth, no prejudice would result from the requested discovery. Petitioners seek only targeted discovery related to the process of redistricting that is at the core of this dispute. Such requests would not frustrate or overburden Respondents from their ongoing government tasks—and their counsel's say so without concrete evidence to the contrary is insufficient to warrant denying Petitioners' their fundamental right to fully pursue their claims. Indeed, the IRC and LATFOR Respondents' official work is largely if not entirely complete now that the Legislature has purported to enact all redistricting maps for the next decade. *See* N.Y. Const. art. III, §§ 4–5.[†]

[†] Even assuming any prejudice exists—which it does not—that is not a reason to foreclose discovery. Rather, the Court may fashion any order "to diminish or alleviate any resulting prejudice" in granting disclosure of discovery to Petitioners. *Georgetown Unsold*, 130 A.D.3d at 106, 12 N.Y.S.3d at 165.

Fifth, Petitioners have demonstrated a need for this Court to expedite the disclosure-of-discovery timeline by ordering responses to Petitioners' disclosure-of-discovery requests within seven days of service. Moskowitz Aff. ¶ 7. The New York Constitution explicitly provides that redistricting cases like the case here take "precedence . . . over all other causes and proceedings," and that the Court "shall render its decision within sixty days after a petition is filed." N.Y. Const. art. III, § 5. Thus, the State Constitution plainly compels this Court and all parties to resolve this case in an expeditious fashion. Further, the time for candidates to file to run for public office is fast approaching—with March 1, 2022, as the first day for candidates to file designating petitions for the state's 2022 elections, *see* N.Y. Election Law §§ 6-134(4), 6-158(1), unless this Court enjoins this deadline in light of this case—and this case could impact whether individuals begin campaigns, support other potentially more successful candidates, or withdraw from the political process from this cycle altogether.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court grant their Proposed Order To Show Cause Why Petitioners Should Not Be Granted Leave To Conduct Expedited Discovery, together with such other and further relief as the Court deems just and proper.

Dated: February 14, 2022

Respectfully submitted,

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