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,

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.

Index No. E2022-0116CV

McAllister, J.S.C.

Return Date:
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MEMORANDUM OF LAW IN OPPOSITION TO ORDER TO SHOW CAUSE WHY PETITIONERS SHOULD NOT BE GRANTED LEAVE TO CONDUCT EXPEDITED DISCOVERY

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Respondents Kathy Hochul, Governor of the State of New York, and Brian A. Benjamin, Lieutenant Governor and President of the Senate (collectively, "Executive Respondents"), respectfully submit this memorandum of law in opposition to Petitioners' motion, brought by Order to Show Cause on February 17, 2022, NYSCEF 30, for expedited discovery.

PRELIMINARY STATEMENT

This is a special proceeding brought under Article 4 of the Civil Practice Law and Rules ("CPLR"). Discovery in special proceedings is presumptively impermissible; and may occur only with leave of the Court under CPLR 408.

Petitioners fall far short of satisfying their heavy burden. The discovery requested is overbroad, not material and necessary for resolution of the issues in this proceeding and will cause significant undue delay in the resolution of this matter. Additionally, much of what Petitioners' demand is protected by privilege. Accordingly, Petitioners' motion should be denied in its entirety.

STANDARDS GOVERNING DISCOVERY IN SPECIAL PROCEEDINGS

Rule 408, which governs Petitioners' application, provides that "[l]eave of court shall be required for disclosure." Although courts generally have "broad discretion in granting or denying disclosure," discovery in special proceedings is disfavored, and the court "must balance the needs of the party seeking discovery against such opposing interests as expedition and confidentiality." *Grossman v. McMahon*, 261 AD2d 54, 57 (3d Dept 1999). Courts consider "whether the party seeking disclosure has established that the requested information is material and necessary, whether the request is carefully tailored to obtain the necessary information, and whether undue delay will result from the request." *Suit-Kote Corp. v. Rivera*, 137 AD3d 1361, 1365 (3d Dept 2016).[1]

[1] Internal citations/quotations have been omitted unless otherwise noted.

With respect to the first factor identified in *Suit-Kote*, disclosure may be considered material and necessary *only* if it will assist resolving a disputed issue of fact. Accordingly, disclosure is only required for "'facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.'" *Gerber Prod. Co. v. New York State Dept of Health*, 47 Misc.3d 249, 253 (Sup. Ct. Albany Cnty. 2014) (quoting *Allen v. Crowell–Collier Publ. Co*., 21 NY2d 403, 406 (1968)). Discovery is not needed for the resolution of pure issues of law. *Kronish Lieb Weiner & Hellman LLP v. Tahari, Ltd*., 35 AD3d 317, 318 (1st Dept 2006); *Arnot-Ogden Mem'l Hosp. v. Blue Cross of Cent. New York, Inc.,* 122 Misc.2d 639, 644 (Chemung Co Sup Ct 1984).

With respect to the second factor, under no circumstances is a party entitled to discovery that is overly broad and not tailored to obtain necessary information. *Gilman & Ciocia, Inc. v. Walsh*, 45 AD3d 531, 531 (2d Dept 2007). "[T]hose demands which are unduly burdensome or lack specificity or seek privileged matter or seek irrelevant information or are otherwise improper must be denied." *Lopez v. Huntington Autohaus, Ltd*., 150 AD2d 351, 352 (2d Dept 1989).

The overriding concern in examining a request for discovery in a special proceeding, however, is the third factor: whether discovery will impede expeditious resolution of the issues therein. "[D]iscovery tends to prolong a case, and is therefore inconsistent with the summary nature of a special proceeding." *Aylward v. Assessor, City of Buffalo, Bd. of Assessment Rev. for City of Buffalo*, 125 AD3d 1344, 1345 (4th Dept 2015); *see also Bramble v. New York City Dept of Educ*., 125 AD3d 856, 857 (2d Dept 2015) (party seeking discovery must demonstrate "that providing the requested discovery would not unduly delay [the] proceeding"); *Marshall v. Katsaros*, 152 AD2d 542, 543 (2d Dept 1989) ("Supreme Court should not allow discovery to impede the expeditious disposition of" a claim in a special proceeding). Thus, where discovery is

sought in a special proceeding, "ample need" must be demonstrated. *Shore*, 109 AD2d at 843. Moreover, "[b]ecause of the expedited nature of special proceedings, [the party seeking discovery] must demonstrate special or unusual circumstances which would justify permitting discovery." *People v. Condor Pontiac, Cadillac, Buick and GMC Trucks, Inc*., 2003 WL 21649689, at *4 (Greene Co Sup Ct 2003).

ARGUMENT

I. PETITIONERS' DISCOVERY DEMANDS ARE VASTLY OVERBROAD AND NOT CAREFULLY TAILORED

Contrary to any contention in their memorandum of law that Petitioners' desired discovery demands are "narrowly-tailored," NYSCEF 48, it is apparent from a cursory review of the demands themselves, NYSCEF 34, that they are *preposterously* overbroad and palpably improper.[2] For the reasons discussed below, this finding would be appropriate even if this were a plenary action; and it is virtually inescapable in a time-sensitive special proceeding, where discovery is heavily disfavored to begin with.

"[U]nlimited disclosure is not required," *Blagrove v. Cox*, 294 AD2d 526 (2d Dept 2002), and litigants do not "have carte blanche to demand production of whatever documents they speculate might contain something helpful," *Vyas v. Campbell*, 4 AD3d 417, 418 (2d Dept 2004). *See also Higgins v. Montemurro*, 203 AD2d 799, 800 (3d Dept 1994) ("[T]he scope of permissible discovery is not entirely unlimited."). Instead, "[a] party seeking discovery must satisfy the threshold requirement that the request is reasonably calculated to yield information that is 'material and necessary'—i.e., relevant." *Forman v. Henkin*, 30 NY3d 656, 661 (2018). Moreover, it is "well settled that the use of the description 'all documents' within broad categories . . . renders the notice

[2] Since the demands are what the Governor and Lt. Governor would actually be required to respond to, the demands control over Petitioners' attempts in their memorandum of law to recharacterize them as being somehow more limited or narrowly focused than what the plain terms of the demands actually call for.

improper." *Benzenberg v. Telecom Plus of Upstate NY, Inc.*, 119 AD2d 717 (2d Dept 1986) (citing cases).

Here, Petitioners' demands run afoul of these well-settled principles. Though totaling only 5 in number, they are wholly unrestricted and unlimited in terms of content, subject matter, privilege, or relevance to the issues in this proceeding. The fifth demand is perhaps most illustrative of this point, calling for the production of "[a]ll Documents and Communications concerning the subject matter of the Amended Petition." NYSCEF 34. On its face, such a demand is not only entirely beyond the scope of the issues in this proceeding—as Petitioners have not yet been granted leave to file their Amended Petition—making the discovery not material and necessary, but also the opposite of a narrowly-tailored request. The requests to depose the Governor and Lt. Governor suffer from the same defects, as the notices state that the questioning will "concern[] the allegations contained in the Petition and Amended Petition," and will "continue from day to day until complete." NYSCEF 35 & 36.

Petitioners' other demands fare no better. Their first demand for all documents and communications "with or otherwise concerning the Commissioners of the Democratic Caucus of the IRC" could encompass something as far afield from the issues in this proceeding as an accident report about one of them slipping on a wet floor in the Capitol. And though Petitioners have included certain specific examples of materials that would be encompassed by their demands, *see, e.g.* NYSCEF 34, Demand 2, their demands cannot be read as being *limited* to these more discrete materials. Instead, Petitioners' demands seek the materials specified, as well as all other things that otherwise fall within the scope of the requests. *See id.*, Demands 1 & 2 (stating that they "include[], without limitation . . ."). This "blunderbuss" approach to discovery runs directly afoul of CPLR 3120(2)'s requirement that a requesting party "shall describe each item and category with

reasonable particularity," *Conway v. Bayley Seton Hosp.*, 104 AD2d 1018, 1019–20 (2d Dept 1984), and should not be permitted here.

Notwithstanding that Petitioners' demands are facially overbroad and improper, such a conclusion is further reinforced insofar as "Documents," "Communications," and "concerning" are all defined terms. NYSCEF 34. Tellingly, these terms have been crafted to *exponentially* expand the scope of the discovery sought, bringing far more materials within the scope of the demands as would otherwise reasonably be encompassed. Petitioners' instructions additionally demand not only the production of a privilege log, but also a log summarizing—if not recreating—the contents of documents that were lost or destroyed. *Id.* p.6. The demands, therefore, are "patently burdensome," "verge[] on harassment," and must not be permitted. *See Blank v. Schafrann*, 180 AD2d 886, 887 (3d Dept 1992) (striking discovery demands in part due to the inclusion "of five pages of definitions and instructions which increase their scope and the burden of answering them exponentially").

Petitioners' cursory attempt to limit their discovery in temporal terms by setting an August 1, 2021 to the present time frame, NYSCEF 34 p.8, does not serve to narrow the scope of the demands either. This is because the only claim in this proceeding which could ostensibly support a claim for factual discovery—*i.e.* Petitioners' assertion that the maps were drawn "for the purpose of favoring or disfavoring incumbents or other particular candidates or parties" discussed further *infra*—only became an issue after the first set of IRC maps was rejected by the Legislature on or about January 10, 2022. *See* NYSCEF 1 ¶¶ 95-97. Yet, Petitioners' demands impermissibly and unnecessarily go back *months* before these events occurred, encompassing materials with no connection to the issues or claims presented in this proceeding.

"The burden of serving a proper demand is upon counsel, and it is not for the courts to correct a palpably bad one." *Lopez*, 150 AD2d at 352. Thus, "[w]here, as here, discovery demands are palpably improper in that they are overbroad, lack specificity, or seek irrelevant or confidential information, the appropriate remedy is to vacate the entire demand rather than to prune it." *Bell v. Cobble Hill Health Ctr., Inc.*, 22 AD3d 620, 621 (2d Dept 2005); *see also Dicostanzo v. Schwed*, 146 AD3d 1044, 1047 (3d Dept 2017) ("[W]here, as here, a majority of the disclosure demands were overbroad, duplicative, immaterial or improper, a trial court may vacate, rather than prune, the entire demand.").

Seen in totality, Petitioners' demands are so outrageously overbroad as to render them improper even under the standards applicable to a plenary action. Here, however, under the stricter standards applied to discovery requests in a special proceeding like Petitioners chose to bring—and the impossibility of Petitioners' desire to have full and complete responses *within a week* of service of the demands due to the upcoming election, NYSCEF 34 p.1—this conclusion is *inescapable*. The Court, therefore, should deny Petitioners' motion for discovery. *See e.g. Suit-Kote*, 137 AD3d at 1365 (affirming denial of disclosure where due in part to the "exceedingly broad and undefined nature of the information sought").

II. DISCOVERY IS NOT RELEVANT, MATERIAL, AND NECESSARY TO THE ISSUES IN THIS PROCEEDING

Next, Petitioners have not—and cannot—shown that discovery is necessary for resolution of the issues in this proceeding. Initially, as the Governor and Lt. Governor argue in the Affirmation of Heather McKay, Esq., sworn to February 3, 2022, with exhibits and their Memorandum of Law responding to the Petition and in support of their Motion to Dismiss, *see* NYSCEF 76-82, this proceeding should be dismissed as against them as a matter of law. Thus, Petitioners are not entitled to *any* discovery as against the Governor and Lt. Governor. *See e.g.*

Payne v. Enable Software, 229 AD2d 880, 882 (3d Dept 1996) (affirming decision to "vacat[e] plaintiff's demands for discovery" where "Supreme Court was correct in its determination to dismiss plaintiff's second cause of action").

Notwithstanding this, Petitioners cannot reasonably contend that any discovery from the Governor and/or Lt. Governor is necessary for the resolution of this proceeding. This is because—using Petitioners' characterization of this action as presenting two theories of recovery, *see* NYSCEF 48 p.5–6—the first theory involves purely legal issues, whilst the second neither reasonably implicates the Governor or Lt. Governor, nor provides any factual allegations to support such a contention in any event.

A. *Petitioners' First Theory Presents Purely Legal Issues for Which Discovery is Irrelevant*

Petitioners' first theory asserts that "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." NYSCEF 48 p.6. As argued throughout the various papers in this proceeding, this theory turns *exclusively* on the purely legal question of whether the process that led to the creation of the challenged maps was constitutional; focusing on whether the Legislature had the authority to enact legislation "filling in the gaps" following the 2014 amendments to the State constitution. These legal questions are capable of resolution without reference to any underlying facts; and indeed, Petitioners' papers examine them in exactly such a way. *See* NYSCEF 25 p.10–14.

Factual discovery, therefore, would have absolutely no impact on this Court's resolution of these purely legal issues, because if the actions were constitutionally and legally permissible—or, indeed, even if they were not—any motivation or reasons underlying these events are irrelevant. *See Chase-Hibbard Milling Co. v. City of Elmira*, 207 NY 460, 467 (1913) ("If the public

authorities were authorized to do what they did do," then "the reasons that moved them do not concern the plaintiff[.]"); *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 NY 345, 362 (1891) ("If the state has the right . . . then the motives that underlie the act are not material.").

When faced with purely legal questions—or when discovery is collateral to the court's resolution of the issues before it—courts have refused to permit discovery regardless of whether the action arises under § 408 or another analogous context. *See Arnot-Ogden Mem'l Hosp.* 122 Misc.2d at 644 (denying motion for discovery under § 408 where court was presented solely with a question of law); *see also Shields v. Carbone*, 78 AD3d 1440, 1443 (3d Dept 2010) (finding that court erred in addressing discovery motion because "the demanded disclosure was irrelevant" to resolution of questions before the court); *Kronish Lieb Weiner*, 35 AD3d at 318 (affirming decision to grant summary judgment and deny discovery where court was presented with "a pure issue of law"); *Delaney v. Good Samaritan Hosp.*, 204 AD2d 678, 679 (2d Dept 1994) (reversing decision allowing discovery where the "specific factual allegations that the plaintiff contends would be supported by this additional discovery are collateral to the question" presented to the court); *Fed. Deposit Ins. Corp. v. Hyer*, 66 AD2d 521, 527 (2d Dept 1979) (finding it would have been "an improvident exercise of discretion" to permit discovery where "this is not a case where discovery was necessary . . . to oppose the motion"); *D.D. v. C.N.D.*, 2021 NY Slip Op 50913(U) (Monroe Co Sup Ct July 28, 2021) (rejecting arguments in favor of discovery where the case presents "purely legal issues for which no further analysis or discovery of facts is necessary"); *U.S. Bank Nat'l Ass'n v. DLJ Mortg. Capital, Inc.*, 2014 NY Slip Op 50029(U) (NY Co sup Ct Jan. 14, 2014) (refusing to permit discovery and thereby "defer[ring] consideration" of arguments presenting "purely legal issues for which no further analysis or discovery of facts is necessary").

As a result, Petitioners are not entitled to any discovery from *any* Respondent—including, but not limited to the Governor and Lt. Governor—with respect to the purely legal issues presented in their first theory.

B. *Petitioners' Second Theory Does Not Implicate the Governor and/or Lt. Governor; Making the Discovery Sought Unnecessary and Irrelevant*

Petitioners' second theory is that the challenged maps "are substantively invalid because they [we]re . . . drawn 'for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.'" NYSCEF 48 p.6. Petitioners' efforts to seek tremendously burdensome, wide-ranging, and essentially unfettered discovery from the Governor and Lt. Governor with respect to this claim casts *far* too wide a net, however, as neither was alleged to be involved with the creation of the challenged maps.

To illustrate, the Petition (and nonoperative Proposed Amended Petition)—spanning more than 67 pages with over 226 separate paragraphs—are effectively *devoid* of allegations against the Executive Respondents. This statement is literally true with respect to Lt. Governor Benjamin, as his name only appears in the Petition at ¶ 25, identifying him as the Lieutenant Governor of the State of New York. *See also* NYSCEF 18 ¶ 27. And this statement is effectively true with respect to Governor Hochul as well; other than alleging that she is the Governor, Petition ¶ 24, *see also* NYSCEF 18 ¶ 26, and that she signed certain legislation, Petition ¶¶ 57, 173, 193, 221, *see also* NYSCEF 18 ¶¶ 59, 217, 241, 267, 269, the Petition contains only *one* quasi-substantive allegation against her.[3]

[3] For the avoidance of doubt, any factual inquiry into to why Governor Hochul may have signed certain legislation is utterly irrelevant—and therefore wholly improper and impermissible here—because as Governor, she has the *unquestionable* right to sign or veto legislation put before her, and legislative privilege attaches when she does so. *Chase-Hibbard Milling*, 207 NY at 467 ("If the public authorities were authorized to do what they did do," then "the reasons that moved them do not concern the plaintiff[.]"); *Waterloo Woolen*, 128 NY at 362 ("If the state has the right . . . then the motives that underlie the act are not material."). *See also infra* (discussing legislative privilege).

This allegation—found at Petition ¶¶ 6 & 214—essentially asserts that Governor Hochul intended "'to help Democrats' by way of 'the redistricting process,'" and that she "lived up to her promise." *See also* NYSCEF 18 ¶¶ 8 & 262. Yet, even assuming *arguendo* that Petitioners' characterization of the Governor's comments is accurate,[4] the Petition and Proposed Amended Petition fail to provide any factual allegations—or even claims based on information and belief—contending that Hochul *actually did* what they claim.[5] Instead, Petitioners conclusorily and speculatively assert that because the challenged maps purportedly favor Democrats, the Governor must have "lived up" to her promise.

The absence of any factual allegations indicating the Governor and/or Lt. Governor's involvement in the complained-of events shows that Petitioners' desired discovery from them simply *cannot* be narrowly tailored or material and necessary; and that instead, it is merely an incredibly burdensome and wildly improper "fishing expedition" to see what Petitioners can uncover. *Aaron v. Pattison, Sampson, Ginsberg & Griffin, P.C.*, 69 AD3d 1084, 1086 (3d Dept 2010) (affirming denial of discovery that was "patently immaterial and unnecessary" as "nothing more than a 'fishing expedition' made for the illegitimate purpose of uncovering facts supporting insufficient, conclusory allegations."); *see also Wyly v. Milberg Weiss Bershad & Schulman, LLP*, 12 NY3d 400, 409 (2009) (affirming decision to reject use of Article 4 special proceeding seeking discovery as a "fishing expedition" where petitioner "offers nothing, other than mere speculation"

[4] As detailed in the Executive Respondents' memorandum of law in support of their motion to dismiss and in opposition to the Petition, *see* NYSCEF 82, Petitioners' characterizations of the Governor's statement are misleading. *See* https://www.nytimescom/2021/08/25/nyregion/kathy-hochul-interviewv.html.

[5] Indeed, the Petition is replete with allegations that the challenged maps—as well as any purportedly improper gerrymandering or motivations for the drafting of those maps—were the result of the *Legislature's actions*, rather than the Governor and/or Lt. Governor. *See e.g.* Petition ¶¶ 4, 8–9, 29, 53, 55–58, 77–78, 94–96, 100, 104–107, 109, 111 ("The Legislature created a congressional map[.]"), 112–117, 120, 123 ("[T]he Legislature has decreased competitiveness[.]"), 127, 129–130, 132, 134, 139 ("[T]he legislative Democracts . . ."), 148, 154, 156, 158, 165, 166 ("[T]he Legislative Demoerats' specific goal . . ."), 167, 169–170, 172, 174–175 ("The Legislature's egregious attempt . . ."), 182–83, 213 ("The Legislature drew the 2022 congressional map[.]").

that facts exist to support claims); *Devore v. Pfizer, Inc.*, 58 AD3d 138, 144 (1st Dept 2008) (rejecting litigant's attempts to use "discovery as a fishing expedition when they cannot set forth a reliable factual basis for what amounts to, at best, mere suspicions"); *Manley v. NYC. Housing Auth.*, 190 AD2d 600, 601 (1st Dept 1993) (rejecting requests for discovery as "hypothetical speculations calculated to justify a fishing expedition" where litigant "failed to provide a foundation to warrant discovery of the extent and breadth demanded").

To this end, *Mosey v. County of Erie*, 148 AD3d 1572 (4th Dept 2017), is instructive; the Fourth Department rejected a litigant's attempt to obtain discovery—"any and all documents consulted, referred to, or relied upon by [the] County Executive"—from a county executive with respect to the preparation of nineteen separate pieces of proposed legislation. *Id.* at 1573. Instead, the Fourth Department ruled that the documents sought were "irrelevant to the issues raised by plaintiff and [] thus 'not material and necessary to the prosecution . . . of this proceeding,'" and that plaintiff's claims to the contrary "were improperly based upon hypothetical speculations calculated to justify a fishing expedition." *Id.* at 1574.

The same conclusion must be reached here. There is no factual or legal basis to support Petitioners' claims that the Governor and/or Lt. Governor should be subjected to Petitioners' attempts to obtain such overbroad and legally irrelevant discovery. Petitioners' motion, therefore, should be denied. *Goldstein v. County of Monroe*, 77 AD2d 232, 237–38 (4th Dept 1980) (refusing to let plaintiff "indulge in a fishing expedition and subject [governmental] defendants to the needless expenditures of money and man-hours and protracted discovery proceedings" where plaintiff has submitted "no evidence" and "no proof" of his claims).

III. DISCOVERY WILL UNNECESSARILY DELAY RESOLUTION OF THIS PROCEEDING

The presumption against discovery and requirement that the party seeking disclosure obtain permission from the court are "intended to preserve the summary nature of a special proceeding." *Matter of Shore*, 109 AD2d 842, 843 (2d Dept 1985). Here, Petitioners not only fail to overcome the strong presumption against discovery, but also fail to make any showing that the discovery sought will not unduly delay resolution of this matter. Instead, the fishing expedition on which Petitioners seek the Court's permission to embark is designed to entirely frustrate the summary nature of this proceeding.

First, Petitioners' undue delay in filing this motion is reason alone for denial. Petitioners submitted their first Order to Show Cause on February 3, 2022, NYSCEF 1, yet waited until February 14, 2022, to submit this motion. NYSCEF 31.[6] Petitioners offer no reason for this delay.

In addition to the unnecessary and unexplained delay in moving for this relief, the very scope of the discovery Petitioners seek is *certain* to unduly prolong this matter. *See supra* (discussing the tremendous overbreadth of Petitioners' demands). In addition, Petitioners wish to take thirteen depositions, including those of the highest-level public officials in the State, as well as multiple non-parties, unbridled by any limitation on length or scope. NYSCEF 35–47 (proposing questioning on "the allegations contained in the Petition and Amended Petition," that will "continue from day to day until complete"). Petitioners should not be permitted to delay the resolution of this proceeding—which was selected by them and designed to be summary in nature—by way of these unnecessary and overbroad demands or depositions. *Aylward*, 125 AD3d at 1345.

[6] In the interim, Petitioners have caused further delay by submitting a second Order to Show Cause with a proposed amended petition seeking to assert claims that they could have included in the original Petition, and by failing to attached their expert report and memorandum of law at the time of commencement.

Petitioners' own arguments compel the conclusion that their motion should be denied, as they repeatedly emphasize the need for swift resolution of this matter; stressing that "time is of the essence" because redistricting cases must take precedence over all others. NYSCEF 31 ¶ 7. Petitioners highlight that "redistricting is an extremely time-sensitive requirement, including because candidates must know what their districts are in advance of an election, in order to meet state ballot-access requirements," and note the looming March 1, 2022 deadline for prospective candidates to begin collecting petitions. *Id*. Petitioners also point out the Court's obligation to issue a ruling within 60 days; a deadline which will be nearly half-expired by the time this motion is fully submitted. *Id*.

Yet, despite the heavy emphasis Petitioners place on the need for expediency in the resolution of this proceeding, the discovery they seek is specifically designed to generate *significant* delays. Standing alone, the tasks of searching for, identifying, compiling, and ultimately reviewing documents responsive to Petitioners' sweeping document requests will take vastly longer than one week, especially as these demands concern and implicate voluminous electronic discovery. In addition, the vagueness and overbreadth of the requests will be legitimate grounds for objections that will lead to disputes; consuming additional time and further delaying the progress of this litigation. In addition, the review process for these broad, all-encompassing requests will undoubtedly turn up many privileged documents, leading to additional litigation over the content of privilege logs and the proper scope of asserted privileges. The Fourth Department's observation that "discovery tends to prolong a case," *Aylward*, 125 AD3d at 1345, is, if anything, an understatement in the context of the discovery sought in this matter.

Tellingly, Petitioners offer the Court no solution to the irreconcilable situation they seek to create. Instead, they merely assert that their demands are carefully tailored, ignoring the actual

effect and impact that compliance with such demands would have on this proceeding. But, as demonstrated *supra*, Petitioners' demands are far from carefully tailored, and Petitioners offer no indication that they intend to limit the scope of the depositions they seek either. "Disclosure must be for purposes of sharpening the issues and reducing delay," *Eur. Am. Bank v. Competition Motors*, Ltd., 186 AD2d 784, 785 (1992), but Petitioners' requested discovery will neither sharpen issues nor reduce delay. Instead, the lack of limitations on the scope of the discovery sought will have the complete opposite effect in this proceeding.

Petitioners have failed to meet their heavy burden of showing that the inevitable delays caused by the discovery they seek will be anything close to reasonable; and the Court, therefore, should deny Petitioners' motion. *Blank*, 180 AD2d at 887 (forbidding plaintiffs from exposing government defendants to "needless expenditures of money and man-hours and protracted discovery proceedings").

IV. THE DISCOVERY SOUGHT IS PROTECTED BY THE LEGISLATIVE, ATTORNEY-CLIENT, AND/OR WORK PRODUCT PRIVILEGES

Finally, notwithstanding the arguments above, the Governor and Lt. Governor note that permitting discovery would be wholly inappropriate as the documents and testimony sought are constitutionally shielded from disclosure by the Speech or Debate Clause, as well as the derivative legislative privilege. Moreover, additional privileges—including the attorney-client and work product privileges—will undoubtedly apply to considerable swathes of the information sought. *Stalker v. Abraham*, 69 AD3d 1172, 1175 (3d Dept 2010) ("[I]nformation which is privileged is not subject to disclosure no matter how strong the showing of need or relevancy.").

A. New York's Speech or Debate Clause Protects These Materials from Disclosure

The Speech or Debate Clause of The New York State Constitution, safeguards the independence of legislators to perform their functions without fear of lawsuits or interference from

other branches of government. *See* NY Const. art. III § 11; *see also People v. Ohrenstein*, 77 NY2d 38, 53–54 (1990) (holding that the state Speech or Debate Clause provides "at least as much protection as the immunity granted by the comparable provision of the Federal Constitution"). The Speech or Debate Clause provides immunity for legislative acts undertaken as "an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either house." *Gravel v. United States*, 408 U.S. 606, 625 (1972).

These protections encompass not only the legislative body itself, but also the executive branch—such as the Governor and Lt. Governor—when it performs legislative functions. *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998); *Warden v. Pataki*, 35 F. Supp. 2d 354, 358 (SDNY 1999) ("The well-settled doctrine of absolute legislative immunity . . . bars actions against legislators or governors . . . on the basis of their roles in enacting or signing legislation."); *Larabee v. Spitzer*, 19 Misc. 3d 226, 238–39 (Ny Co Sup Ct 2008) (finding Governor immune from suit in action seeking an order requiring him to sign specific legislation), *aff'd* 65 AD3d 74 (1st Dept 2009), *modified* 14 NY3d 230 (2010); *Urban Justice Ctr. v. Pataki*, 10 Misc.3d 939, 949 (Sup Ct. NY Cnty. 2005) ("[The Governor] may also assert a common-law legislative immunity on his own behalf, when performing a legislative task."), *aff'd* 38 AD3d 20 (1st Dept 2006). Here, despite their paucity, the allegations in the Petition and Proposed Amended Petition as related to Governor Hochul and Lt. Governor Benjamin unquestionably implicate their actions in exclusively legislative matters, *see* Petition ¶¶ 6, 24, 25, 57, 173, 193, 221, 214; NYSCEF 18 ¶¶ 8, 26, 27, 59, 217, 241, 262, 267, 269, thereby entitling them to the full protection of this immunity from suit.

Derivative of the constitutional immunity enshrined in the Speech or Debate Clause is a legislative privilege against compelled testimony and discovery; activities "which have the potential to create a distraction and force Members to divert time, energy and attention from their legislative tasks to defend the litigation." *Citizens Union of City of New York v. Attorney General of NY*, 269 F.Supp.3d 124, 150 (SDNY 2017). "The protections afforded by the Speech and Debate Clause are broad." *Id.* "[I]n addition to speeches on the floor of the House and debating, a range of activities, including voting, preparing committee reports and conducting committee hearings, are protected." *Straniere v. Silver*, 218 AD2d 80, 83 (3d Dept 1996), *aff'd* 89 NY2d 825 (1996). Furthermore, to the extent "testimony would reveal a legislator's thought process or the iterative process of creating legislation," it too is protected by legislative privilege. *Campaign for Fiscal Equity v. State*, 179 Misc. 2d 907, 911–12 (NY Co Sup Ct 1999), *aff'd* 265 AD2d 277 (1st Dept 1999); *see also Humane Society of NY v. City of NY*, 188 Misc.2d 735, 739–40 (NY Co Sup Ct 2001) (denying depositions and discovery from the City Board of Health on privilege grounds due to its legislative functions).

Documents produced at the behest of legislators—which could "reveal the various policy options considered by individual legislators"—are also protected from disclosure. *Campaign for Fiscal Equity*, 687 NYS. 2d at 231. Thus, background materials and the data underlying proposed legislation are privileged and undiscoverable, as the privilege is "designed to provide state legislators and other state officials acting within the legislative sphere with breathing room to debate and decide on policy and mold it into legislation." *Id.* at 232. "There can be little dispute that internal communications and deliberations about the drafting of proposed legislation are 'integral steps in the legislative process.'" *Citizens Union*, 269 F.Supp.3d at 160 (quoting *Bogan*, 523 U.S. at 55).

In assessing whether the Speech or Debate Clause shields disclosure, "[j]udicial review must be limited to determining whether the action constitutes a legitimate legislative activity. Once a determination is made that the action is within the purview of legitimate legislative activity, the court's review *must end*." *Straniere*, 218 AD2d at 85 (emphasis added); *see also Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 299 (D. Md. 1992) (granting the governor complete immunity in redistricting case after determining the acts at issue were within "the sphere of legitimate legislative activity").

Importantly, New York's legislative privilege as articulated in *Straniere* is absolute; and is more protective than that applied in federal cases. Nevertheless, even under a more lenient "balancing" standard—which, as discussed above, is not applicable here—federal courts addressing other redistricting challenges, including in New York, have refused to order disclosure of material exactly like that sought here on the basis of legislative privilege, protecting information concerning the actual deliberations of the legislation and individual legislators. *See Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 103 (SDNY 2003) (holding that "information concerning the actual deliberations of the Legislature—or individual legislators—which took place outside LATFOR, or after the proposed redistricting plan reached the floor of the Legislature," were blocked from disclosure); *Committee for a Fair and Balanced Map v. Illinois State Bd. of Elections*, 2011 WL 4837508 (N.D. Ill. 2011) (document requests with respect to motives, plans, reports, or procedures utilized in drafting the plan, as well as the identities of individuals who participated in decision-making process, were protected from disclosure by the legislative privilege).

Here, all of the allegations in the Petition and Amended Petition concern or directly implicate this constitutionally protected legislative process. Notwithstanding that there are no factual allegations against Lt. Governor Benjamin, the allegations against Governor Hochul clearly

implicate her role in legislative functions. To illustrate, Petitioners cite to the Legislature referring—and the Governor signing—a bill (Petition ¶¶ 57–58 & 173), bedrock legislative processes. The proposed Notices of Depositions for Governor Hochul and Lt. Governor Benjamin, NYSCEF 35–36, also seek privileged information regarding their participation in the legislative process, and are thus impermissible as well. The document requests fare no better, for the same reasons, as any documents, communications, reports, data, or information that Governor Hochul used, created, or otherwise relied upon in her role connected to the legislature's redistricting efforts—*i.e.* those materials specifically sought in Petitioners' document requests—is subject to and protected by legislative privilege.

Petitioners cannot override the protections of the Speech or Debate Clause merely by alleging that the Governor or Lt. Governor had illegal or unconstitutional motives. "Because judgements of legality or constitutionality obviously involve 'questioning' of legislative acts, courts may not strip acts taken in the legislative process of their constitutional immunity by finding that the acts are substantively illegal or unconstitutional." *Straniere*, 218 AD2d at 84. Nor may Petitioners overcome these constitutional protections with unsupported allegations of bad faith or improper motives; as any inquiry into a legislator's motivations and deliberative processes are also prohibited by the legislative privilege. *Humane Society of NY,* 188 Misc.2d at 738–39.

It is settled law that the legislative process is shielded from judicial probing. Here, based on the Petition itself, the broad discovery sought should be rejected in its entirety as implicating information wholly protected from disclosure under these constitutionally enshrined doctrines.

B. The Demands Also Seek Materials Subject to the Attorney-Client and Work Product Privileges

"The attorney-client privilege, the oldest among common-law evidentiary privileges, fosters the open dialogue between lawyer and client that is deemed essential to effective

representation." *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 NY2d 371, 377 (1991) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). "[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn*, 449 U.S. at 389. "For the privilege to apply when communications are made from client to attorney, they must be made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose." *Rossi v. Blue Cross & Blue Shield*, 73 NY2d 588, 593 (1989).

"[T]he attorney-client privilege is not tied to the contemplation of litigation. Legal advice is often sought, and rendered, precisely to avoid litigation, or facilitate compliance with the law, or simply to guide a client's course of conduct." *Spectrum Sys. Int'l Corp.*, 78 NY2d at 380. "As is plain from mere statement of the principles, whether a particular document is or is not protected is necessarily a fact-specific determination, most often requiring in camera review. *Id.* at 378. But, where "it is plain from the content and context of the communication that it was for the purpose of facilitating the lawyer's rendition of legal advice to his client," protecting a document from disclosure is "consistent with the lawful and honest aims of the privilege to foster uninhibited communication between lawyer and client in the fulfillment of the professional relationship." *Rossi*, 73 NY2d at 594.

As already discussed, the information sought by Petitioners here is all-encompassing and excessively overbroad. There is no doubt that a considerable number of the documents requested would be protected from disclosure due to attorney-client and/or work product privileges. As discussed *supra*, the process that would have to be undertaken to review and log privileged material would be considerable, requiring substantial time and resources. Accordingly, the Executive

Respondents respectfully request that the Court deny Petitioners' motion to conduct expedited discovery for this reason as well.

CONCLUSION

For all of the foregoing reasons, Respondents Governor Hochul and Lieutenant Governor Benjamin respectfully request that the Court deny Petitioner's motion for leave to conduct discovery, in its entirety, and grant such other and further relief that the Court deems just and equitable.

February 25, 2022
Rochester, New York

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CERTIFICATION

In accordance with Rule 202.8-b of the Uniform Rules of Supreme and County Courts, the undersigned certifies that the word count in this memorandum of law (excluding the caption, table of contents, table of authorities, signature block, and this certification), as established using the word count on the word-processing system used to prepare it, is 6,176 words.

Rochester, New York
February 25, 2022

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