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,

Petitioner,

-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 SUPPORT OF THE GOVERNOR'S AND LT. GOVERNOR'S MOTION TO DISMISS AND IN OPPOSITION TO THE PETITION

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PRELIMINARY STATEMENT

The respondents, Kathy Hochul, the Governor of the State of New York, and Brian A. Benjamin, the Lieutenant Governor and President of the Senate (collectively herein, "Executive Respondents"), respectfully submit this memorandum of law in support of their motion to dismiss and in opposition to the Petition. In four causes of action, Petitioners allege that the 2022 new district lines violate a 2014 state constitutional amendment process for enacting new congressional districts and violates the NY State Constitution's provisions meant to protect against partisan gerrymandering.

Petitioners' claims against the Executive Respondents should be dismissed in their entirety for the following reasons:

- Petitioners' failure to properly serve the Office of the Attorney General constitutes a jurisdictional defect;
- The Lieutenant Governor should be dismissed because Petitioners fail to make any factual allegations against him;
- The Governor should be dismissed because Petitioners fail to present nonspeculative, "competent evidence" against her as required in a special proceeding;
- The Executive Respondents are entitled to legislative immunity;
- The claims against the Executive Respondents are nonjusticiable;
- As to their first cause of action, Petitioners' interpretation of the 2014 Amendments contravenes the clear and unambiguous language, and any ambiguity that does exist should be resolved in Respondents' favor to avoid absurd results and violating the separation of powers;
- Any claims against the Executive Respondents contained in Petitioners' second and third causes of action lack merit given their limited role in approving the Congressional maps; and
- Petitioners' desire for prolonged litigation threatens the upcoming election.

Accordingly, the Executive Respondents respectfully request that the Court grant their motion and dismiss them from this special proceeding.

FACTS

THE 2014 AMENDMENTS

On March 14, 2012, the State Legislature approved a constitutional amendment establishing new redistricting procedures. *See* NYSCEF 1, Petition ("Pet.") at ¶ 54. On November 4, 2014, voters approved the amendment, which was set to take effect during the 2020 redistricting cycle ("the 2014 amendments"). Pet. ¶44. Under the 2014 amendments, preliminary redistricting responsibility was vested in the newly created Independent Redistricting Commission ("IRC"), whereas the Legislature retained authority to make amendments and even draw its own maps. *Id*.

Specifically, Article III, Section 4 of the New York Constitution requires the IRC to submit an initial set of maps and the necessary implementing legislation to the Legislature by January 15 of the second year following the census. The Legislature then votes on the maps and implementing legislation without amendment. N.Y. Const. art. III, § 4(b); N.Y. Legis. Law § 93(1); Pet. ¶49. If the Legislature fails to adopt the first set of maps and implementing legislation, or the Governor vetoes them, the IRC must then submit a second set of maps and implementing legislation to the Legislature, subject to the requirements outlined above, within 15 days of being notified of the first rejection and no later than February 28. The Legislature then votes on the second set of proposed maps and implementing legislation without amendment. N.Y. Const. art. III, 4(b); Pet. ¶50. If the legislature fails to adopt the IRC's second set of maps and implementing legislation, or the Governor vetoes them, the Legislature can create its own

maps and implementing legislation. Pet. ¶51.

THE IRC STALEMATE

On September 15, 2021, the IRC released two sets of draft maps for state legislative redistricting. Pet. ¶80. On January 3, 2022, the IRC voted to decide which maps to submit to the Legislature; resulting in 5-5 tie for a map proposed by the Democrats on the IRC and a map proposed by the Republicans on the IRC. Pet. ¶90. Thus, the IRC submitted *both* sets of map proposals to the Legislature. Pet. ¶¶94-96. On January 10, 2022, the New York Legislature voted down both of the IRC's congressional and legislative map proposals. Pet. ¶97.

Per the 2014 amendments, the process then reverted to the IRC to prepare a second plan. The IRC, however, was unable to reach consensus on a set of revised maps; on January 24, 2022, the IRC announced that it would *not* submit another set of legislative and congressional maps to the State Legislature. Pet. ¶101. On January 25, 2022, the 15-day window for the IRC to submit revised maps to the Legislature closed without the IRC submitting new maps. Pet. ¶103.

THE 2021 LEGISLATION AND 2022 CONGRESSIONAL MAPS

In 2021, concerned about a potential gap in the 2014 amendments, the Legislature proposed legislation to ensure that the upcoming election would not be disrupted or delayed, which would have had disastrous results statewide. The legislation sought to clarify the process to be followed in the event of a stalemate within the IRC; namely, in conjunction with the clear and unambiguous language already contained in the 2014 amendments, it provides that, in the case of disagreement, the Legislature must be provided with all of the plans and data before the IRC. Under such circumstances, per the existing constitutional provisions, the Legislature retains authority to draw the maps, the Governor then signed the maps, which may of course be

subject to certain constitutional challenges within the courts.

Specifically, the subject legislation provides, in relevant part: "If the commission does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan, the commission shall submit to the legislature all plans in its possession, both completed and in draft form, and the data upon which such plans are based." *See* McKay Aff., Exh 2 (the "2021 Legislation"). On November 24, 2021, Governor Hochul signed the 2021 Legislation into law. Pet. ¶57.

Here, because the IRC failed to submit a second plan to the Legislature by the deadline, on January 30 and 31, 2022, the Legislature released its own draft Congressional maps, as well as maps for the Assembly and Senate districts. Pet. ¶107. On February 2, 2022, the Senate approved the Congressional maps by a 43-20 vote, and the Assembly approved them by 103-45. Pet. ¶167.

The next day, Governor Hochul signed the maps into law. Pet. ¶173. The Governor's Approval Memoranda provide, in relevant part:

> These bills are necessary to reapportion districts and to provide certainty and clarity regarding such districts in a timely manner, allowing for efficient administration of the electoral process. . . .
>
> Signing these bills will allow the boards of elections to begin the process of administering elections with these new district maps, and ensure that New Yorkers and candidates for elected office have the information they need with as much notice as possible to exercise their right to vote and participate in our democracy.
>
> This bill is approved.

McKay Aff., Exh 5.

STANDARD OF REVIEW

In special proceedings such as this one, "[t]here shall be a petition, which shall comply with the requirements for a complaint in an action." C.P.L.R. § 402. On a motion to dismiss pursuant to C.P.L.R. § 3211(a)(7), a defendant may:

> test the facial sufficiency of a pleading in two different ways. On the one hand, the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law. On the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action.

Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc., 115 AD3d 128, 134 (1st Dept 2014).

In reviewing the motion, the court will "accept the facts as alleged in the complaint as true, accord Petitioners the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Nonnon v. City of New York*, 9 NY3d 825, 827 (2007). "However, 'allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration.'" *Myers v. Schneiderman*, 30 NY3d 1, 11 (2017). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141-142 (2017).

ARGUMENT

I. LACK OF SERVICE ON THE CORRECT OFFICE OF THE ATTORNEY GENERAL IS A JURISDICTIONAL DEFECT.

Petitioners failed to comply with the terms of CPLR 2214(d). Section 2214(d) expressly provides that:

> An order to show cause against a state body or officers must be served in addition to service upon the defendant or respondent state body or officers upon the attorney general by delivery to an assistant attorney general at an office of the attorney general in the county in which venue of the action is designated or if there is no office of the attorney general in such county, *at the office of the attorney general nearest such county.*

(emphasis added). This requirement is "jurisdictional," *Gill v. Portmando*, 234 AD2d 547, 547 (2d Dept 1996), and "[t]he word 'must' is interpreted as mandatory," *Randall v. Toll*, 72 Misc. 2d 305, 306 (Suffolk Co Sup. Ct 1972).

Since all Respondents are state officers, Petitioners must comply with § 2214(d), and personally deliver papers to an assistant attorney general at the Office of the Attorney General nearest to Steuben County, which, in this case, is in the City of Rochester. Yet, Petitioners' affidavits of service on the Attorney General show personal service on the Office of the Attorney General in New York City. NYSCEF 62. The accompanying Affirmation of Heather L. McKay confirms Petitioners' failure to serve the Petition and signed first Order to Show Cause on the Rochester Regional Office, and that any subsequent agreement to email service postdated this failure and did not occur in any event. *See* McKay Aff. ¶¶ 9-13.

Petitioners' failure to serve the correct office with the papers commencing this litigation is not trivial. It deprives this Court of jurisdiction over the Respondents and requires dismissal of this proceeding without consideration of the merits. *See Gill*, 234 AD2d at 547 ("[T]he proceeding

should have been dismissed on jurisdictional grounds because the petitioner failed to serve his papers on the Attorney-General as required under CPLR 2214(d)."); *De Carlo v. De Carlo*, 110 AD2d 806, 806 (2d Dept 1985) (reversing and vacating decision below because "plaintiff failed to serve the Attorney-General, who represents the board, as required under CPLR 2214(d)"); *Randall v. Toll*, 72 Misc. 2d 305 at 306 (Sup. Ct. 1972) (granting motion to dismiss petition); *see also U.S. Bank N.A. v. Feliciano*, 103 AD3d 791, 791 (2d Dept 2013) (affirming denial of motion brought by order to show cause where movants "did not strictly comply" with requirements for service of that order).

II. THE PETITION MUST BE DISMISSED AGAINST LT. GOVERNOR BENJAMIN BECAUSE THERE ARE NO FACTUAL ALLEGATIONS AGAINST HIM.

Even if Petitioners did obtain jurisdiction over the Executive Respondents, the Petition must be dismissed as against the Lt. Governor because Petitioners utterly fail to state any factual allegations against him. Failing to include any allegations means that Petitioners have failed to state any cause of action against him, and he should be dismissed from this proceeding. *See Greenfield v. Harris*, 109 AD2d 869, 869 (2d Dept 1985) ("[P]laintiffs failed to state a cause of action as against defendant . . . by failing to allege any wrongdoing on its part."); *Lindo v. NY City Hous. Auth.*, Index No. 107596/02, 2002 N.Y. Misc. Lexis 1348, at *12–13 (NY Co Sup Ct July 25, 2002) (granting cross-motion to dismiss because "[p]etitioners are entitled to no relief from Respondent, DCAS, as their petitions fail to allege any wrongdoing against DCAS as it relates to the Petitioners"); *Long Island Region NAACP v. N. Hempstead*, 102 Misc. 2d 704, 710 (Nassau Co Sup Ct 1979) ("The motion by defendant . . . to dismiss the entire complaint as against it is granted. There are no wrongs alleged to have been committed by this defendant, no relief sought

against it, and in the posture of the complaint as viewed herein, there is no reason for continuing to join it as a party to this action.").

III. PETITIONERS FAIL TO PRESENT COMPETENT EVIDENCE AND NONSPECULATIVE CLAIMS AGAINST GOVERNOR HOCHUL

As this is a special proceeding, Petitioners must support the claims in their Petition with nonconclusory "competent evidence.". Similar to the complete absence of factual allegations against the Lt. Governor, Petitioners have not carried their heavy burden with respect to any causes of action against Governor Hochul, and she too should be dismissed from this proceeding.

This proceeding is governed by C.P.L.R. Article 4, which dictates the standard required for Petitioners to state a valid claim against Respondents. "Unlike a complaint in a plenary action, a petition in a special proceeding must be accompanied by competent evidence raising a material issue of fact." *Trustco Bank NA v. Strong*, 261 AD2d 25, 27 (3d Dept 1999); *see also Matter of Centerpointe Corporate Park Partnership 350 v. MONY*, 96 AD3d 1401, 1402 (4th Dept 2012); *Matter of Town of Verona (Oneida County) v Cuomo*, 44 Misc. 3d 1225[A] (Albany Co Sup Ct 2014).

"Therefore, the court in which the proceeding is initiated will apply summary judgment analysis and absent a factual issue requiring a trial, will summarily dismiss the petition." *Trustco Bank*, 261 AD2d at 27 (internal citation omitted); *Matter of Stanton*, 37 AD3d at 474 ("[P]etitioner's allegations . . . are unsupported by the record. Thus, the petitioner failed to carry his burden of proving the allegations of his petition." (internal citation omitted)); *Garofano v. State*, 122 AD2d 209, 210 (2d Dept 1986) ("The petition and supporting affidavits herein failed to go any further than stating conclusions of fact. Thus, Special Term acted properly in dismissing the proceeding."); *see also Spacht v. County of Chautauqua*, 133 AD3d 1335, 1336 (4th Dept

2015) ("[C]onclusory [and speculative] assertions are insufficient to demonstrate the absence of any material issues of fact." (internal quotation marks omitted, second alteration in original)).

Here, Petitioners have submitted no proof of the Executive Respondents' involvement in any wrongdoing. They allege no facts about Lt. Governor Benjamin (*see* Point II above), and the only factual allegation involving Governor Hochul is a conspiracy theory derived exclusively from a New York Times article containing "edited and condensed excerpts" of an interview with her on August 25, 2021. *See* McKay Aff., Exh 4. This allegation—found at ¶¶ 6 & 214 in the Petition—essentially asserts that Governor Hochul intended "'to help Democrats' by way of 'the redistricting process,'" and that she "lived up to her promise."

Setting aside evidentiary and authentication concerns for purposes of this motion only, Petitioners' characterizations of the Governor's statements are simply misleading. *See Levy v. SUNY Stony Brook*, 185 AD3d 689, 690 (2d Dept 2020) (holding "bare legal conclusions [and] 'factual claims either inherently incredible or flatly contradicted by documentary evidence" are not entitled to any presumption of truth."). In addition to being made months prior to the November election when voters were still deciding whether to pass Ballot Proposal 1, the Governor's alleged statements are innocuous when read in context and reveal no intention to violate the Constitution. *See* McKay Aff, Exh 4 at p. 3. Specifically, after being asked if she "plan[ned] to use [her] influence to help Democrats expand the House majority through the redistricting process," the Governor reportedly responded in the affirmative as part of a lengthier response, also explaining: "I'm going to be doing whatever I can to let people know that the values of the Democratic Party today are part of who I am, fighting for people that just had a tough blow dealt to them in life. The Democratic Party has to regain its position that it once had when I was

growing up. My grandparents were F.D.R. Democrats. My parents were J.F.K. Democrats. Today, I'm a Biden Democrat." *Id.*

Yet, even assuming *arguendo* that Petitioners' interpretation of the Governor's comments is accurate, the Petition still fails to provide any factual allegations—or even claims based upon information and belief—contending that Governor Hochul *actually did* what they claim she threatened to do. In contrast, the Petition is replete with allegations that the challenged maps—and any purportedly improper gerrymandering or partisan motivation for the drafting of those maps—resulted from the *Legislature's actions*, not the Executive Respondents'. *See e.g.* Pet. ¶¶ 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 Democrats . . ."), 148, 154, 156, 158, 165, 166 ("[T]he Legislative Democrats' specific goal . . ."), 167, 169–170, 172, 174–175 ("The Legislature's egregious attempt . . ."), 182–83, 213 ("The Legislature drew the 2022 congressional map[.]"). Petitioners' conclusion that the Governor must have "lived up" to her promise is pure speculation based on their belief that the challenged maps purportedly favor Democrats, and therefore cannot support a valid claim as against her.

IV. THE EXECUTIVE RESPONDENTS ARE ENTITLED TO DISMISSAL DUE TO LEGISLATIVE IMMUNITY

The allegations in the Petition against the Executive Respondents unquestionably implicate their actions in exclusively legislative matters, *see* Petition ¶¶ 6, 24, 25, 57, 173, 193, 221, 214, thereby entitling them to the full protection of absolute immunity from suit. Besides their speculative conspiracy theory, Petitioners allege only that on February 2, 2022, the Governor signed the redistricting implementing legislation into law. Petition ¶ 173. Meanwhile, Petitioners'

make no factual allegations against the Lt. Governor, but any actions he could have taken pursuant to his role as President of the Senate are also quasi-legislative. The Executive Respondents are thus entitled to legislative immunity and should be dismissed.

"The concept of legislative privilege, and the parallel doctrine of legislative immunity, "developed in sixteenth- and seventeenth-century England as a means of curbing monarchical overreach, through judicial proceedings, in Parliamentary affairs." *Citizens Union of City of New York v Attorney Gen. of New York,* 269 F Supp 3d 124, 149 (SDNY 2017), citing *Favors v. Cuomo*, 285 F.R.D. 187, 207 (EDNY 2012); *United States v. Johnson*, 383 U.S. 169, 177–80 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951)). This concept is so pivotal to the function of government that it was included in the United States Constitution as the Speech and Debate Clause which holds that Senators and Representatives shall not be questioned in any other place for any speech or debate in either House. *See* U.S. Constitution, Article I, Section 6, Clause 1.

The Clause provides broad protection. "'In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity 'should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.' *Dombrowski v. Eastland, supra, at 85, 87 S.Ct., at 1427*." *Eastland v U. S. Servicemen's Fund*, 421 US 491, 503 (1975). Further, "[t]he Clause has been construed as providing Members of Congress with two distinct, but related, absolute protections: (1) immunity from suit for their legislative acts and (2) protection from being compelled to testify in court." *Citizens Union of City of New York*, *supra* at 150.

The State Constitution's Speech and Debate Clause mirrors the one in the U.S. Constitution and, accompanied by well-established common law, provides broad legislative immunity to New

York lawmakers. *See* N.Y. CONST. art. III, § 11. Indeed, "many states, including New York, recognize a privilege that provides immunity from suit and protection from being compelled to testify and produce information about legislative acts. *See People v. Ohrenstein*, 77 NY2d 38, 53–54 (1990)" *Citizens Union of City of New York, supra* at 152. Because the language in the U.S. Constitution and the N.Y. Constitution mirror one another, we can look to both state and federal caselaw to analyze legislative immunity as it applies in this proceeding.

Legislative immunity extends to the Governor. Setting aside their conspiracy theory based on the New York Times article discussed above, Petitioners allege that Governor Hochul took one action with respect to redistricting: she signed the maps into law. *See* Pet. ¶ 173. Because this is a quasi-legislative action entitled to legislative immunity, the Governor should be dismissed from this lawsuit.

Governors and government officials in the executive branch also receive immunity when they are engaged in legislative activities. *See 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."), *aff'd sub nom. Chan v. Pataki*, 201 F.3d 430 (2d Cir. 1999). Therefore, the Governor's signing of the district maps into law is entitled to legislative immunity.

Those entitled to legislative immunity are protected not only from relief on the merits of a claim – they are also relieved of "'the burden of defending themselves in court.'" *Urbach v. Farrell*, 229 AD2d 275, 277 (3d Dept 1997) (quoting *Straniere*, 218 AD2d at 83). Legislative immunity from civil liability is absolute, and bars actions for declaratory and injunctive relief. *See Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998) (absolute immunity); *Supreme Court of Va. v.*

Consumer Union, 446 U.S. 719, 732 n.10 (1980); *NY State Motor Truck Ass'n v. Pataki*, 2004 WL 2937803, at *11 (SDNY 2004) (where Governor was entitled to legislative immunity, "he is immune from suit even though the remedy sought here is only injunctive and declaratory relief").

The Governor's executive action in signing a bill into law does not establish jurisdiction over her:

> "A governor's "general executive power" is not a basis for jurisdiction in most circumstances. *See Harris v. Bush,* 106 F. Supp. 2d 1272, 1276–77 (N.D.Fla. 2000) (citing multiple cases supporting this principle). If a governor's general executive power provides sufficient connection to a state law to permit jurisdiction over him, any state statute could be challenged simply by naming the governor as a defendant. *Id.* at 1277. Where the enforcement of a statute is the responsibility of parties other than the governor (the cabinet in this case), the governor's general executive power is insufficient to confer jurisdiction. *Id."*

Women's Emergency Network v Bush, 323 F3d 937, 949-50 (11th Cir 2003).

Further, as the Court in *Women's Emergency Network* states, "Appellants further contend Governor Bush is a proper party because he signed Fla. Stat. § 320.08058 into law. This argument, too, must fail. Under the doctrine of absolute legislative immunity, a governor cannot be sued for signing a bill into law. *Supreme Ct. of Va. v. Consumers Union of United States, Inc.,* 446 U.S. 719, 731–34 (1980). *Supra,* at 950.

The U.S. Supreme Court, in *Supreme Court of Virginia, supra*, relied on the intent of the concept of legislative immunity to hold it applied to judges in Virginia acting in a legislative capacity when they enacted the Virginia Code of Professional Responsibility for attorneys. The judiciary had statutory authority to enact the Code. Since they were taking on a legislative role, the Court held they were entitled to the same immunity afforded, by law, to state and federal representatives. "The purpose of this immunity is to insure that the legislative function may be performed independently without fear of outside interference. *Ibid*. To preserve legislative

independence, we have concluded that "legislators engaged 'in the sphere of legitimate legislative activity,' *Tenney v. Brandhove* [341 U.S. 367, 376 (1951)], should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Supreme Ct. of Virginia, supra*, at 731-32, quoting *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

The Governor is acting in a legislative capacity when she signs legislation into law. *See Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (holding that an executive's acts in "signing into law an ordinance" are "formally legislative" and "and entitled to legislative immunity"); *Urban Justice Ctr. v. Pataki*, 10 Misc. 3d 939, 949 (NY Co Sup Ct 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); *see also 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."), *aff'd sub nom. Chan v. Pataki*, 201 F.3d 430 (2d Cir. 1999). Accordingly, she is entitled to legislative immunity for that act. The Court in the *Women's Emergency Network* correctly concluded that to deny the Governor absolute immunity would allow for any state statute to be challenged merely because she signed it. Such an outcome is nonsensical and counterproductive to the intent of the legislative process.

As demonstrated by the approval memoranda signed by Governor Hochul, *see* McKay Aff., Exh 5, she signed the redistricting legislation to fulfill her duty to voters and candidates so they would have as much information as quickly as possible to ensure that the election process could proceed. Her intent was to allow New Yorkers and candidates to exercise their right to vote and participate fully in our democracy; Petitioners have no proof to suggest otherwise.

Based on the foregoing, the Petition must be dismissed as against the Executive Respondents, since they are entitled to absolute legislative immunity for the only actions they are alleged to have taken regarding redistricting.

V. THE PETITION MUST BE DISMISSED BECAUSE THE ISSUES BEFORE THE COURT ARE NONJUSTICABLE

The claims against the Executive Respondents must also be dismissed because the issues raised and remedy sought are nonjusticiable and threaten to violate the separation of powers. It is the function of the Legislative branch, as conferred by Article III, §4 of the N.Y. Constitution, to adopt legislation implementing an election redistricting plan after the Federal decennial census and to submit that implementing legislation to the Executive for signature or veto. In the absence of a legislative impasse, which did not occur here, the Court is not empowered to usurp this essential legislative function. Accordingly, the claims against the Executive Respondents are nonjusticiable.

"Free government consists of three departments, each with distinct and independent powers, designed to operate as a check upon those of the other two co-ordinate branches. The legislative department makes the laws, while the executive executes, and the judiciary construes and applies, them. Each department is confined to its own functions and can neither encroach upon nor be made subordinate to those of another without violating the fundamental principle of a republican form of government." *In re Davies*, 168 NY 89, 101-02 (1901).

The way the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government. *Matter of New York State Inspection, Sec., & Law Enforcement Empls, Dist. Council 82, AFSCME, AFL-CIO v. Cuomo,* 64 NY2d 233, 239-40 (1984). It is fundamental that each department of government should be free from interference

by either of the other branches in the lawful discharge of duties expressly conferred. *Id.* No concept is "more universally received and cherished as a vital principle of freedom." *Id.* (citation omitted). For this reason, the Court of Appeals consistently holds that "questions of broad legislative and administrative policy [are] beyond the scope of judicial correction." *Jones v. Beame,* 45 NY2d 402, 408 (1978); *Matter of Abrams v. New York City Tr. Auth.,* 39 NY2d 990, 992 (1976).

As the Supreme Court has stated, "under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan." *Bell v. Wolfish,* 441 U.S. 520, 562 (1978). Thus, this Court has "no more right to usurp the authority conferred upon a coordinate branch of government than to decline the exercise of jurisdiction which is granted." *Matter of New York State Inspection, supra,* 238-39. Accordingly, the Court must determine, as a threshold issue, whether Petitioners' claims are justiciable.

It is undeniable that the authority to enact legislation implementing redistricting maps rests with the Legislative branch, which in this case performed its duty by timely enacting Congressional maps. This is not a case where the Legislature was unable to agree on redistricting maps, at which point judicial involvement could be necessary. *Cf. Favors*, 285 F.R.D. 187; *Carter v. Chapman*, No. 7 MM 2022 (Pa. Sup. Ct. Feb. 9, 2022). The Legislative branch, elected by the people of the State of New York, is entrusted by law with the duty to implement redistricting legislation. They, together with Governor, have fulfilled that duty. Absent a legislative impasse, "New York's redistricting laws are well within the purview and political prerogative of the State Legislature." *Rodriguez v Pataki*, 308 F. Supp. 2d 346, 352 (SDNY 2004), *affd*, 543 US 997

(2004), citing *Miller v. Johnson,* 515 U.S. 900, 915 (1995) ("Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.... Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."); *Georgia v. Ashcroft,* 539 U.S. 461, 123 S.Ct. 2498, 2511–12 (2003); *Md. Comm. for Fair Representation v. Tawes,* 377 U.S. 656, 676 (1964).

Respectfully, the Court would be in error to substitute its authority for that of the Legislature and Governor, who act as the voice of the People in our governmental system. The intent of the Constitution is the allow the branches of government elected by the People to perform the function of redistricting. To usurp the authority of the Legislature is to usurp the authority of the People. As the Court in *Rodriquez* concluded, electoral redistricting is a very difficult subject. Nevertheless, the Legislature has performed that function for decades and is equipped with the knowledge, resources, and skill to do so. The Executive Respondents respectfully submit that the Court need not wade into this subject matter since the issue is nonjusticiable and the Petition should be dismissed in its entirety.

VI. PETITIONERS' INTERPRETATION OF THE 2014 AMENDMENTS RUNS COUNTER TO THE PLAIN LANGUAGE, WOULD LEAD TO ABSURD RESULTS, AND VIOLATES THE SEPARATION OF POWERS

Petitioners assert that because the process outlined in Article III, Section 4, "shall govern redistricting in this state," the IRC's inability to reach consensus over a second plan within the required timeframe means this Court must redraw the challenged maps rather than the Legislature. Petitioners' arguments are incorrect, and risk results that are less, not more, representative of the majority of voters in New York State. First, although purportedly based on the "plain and ordinary

meaning" of Article III, Section 4, Petitioners' interpretation runs counter to the clear and unambiguous wording of the constitutional provisions at issue. Second, even if an ambiguity did exist, it should be resolved in Respondents' favor, since Petitioners' "wooden application of the literal language would lead to an absurd conclusion," *Anderson v. Regan*, 53 NY2d 356, 362 (1981), and violate the separation of powers doctrine. Finally, the legislative action to resolve any potential ambiguity created by the 2014 amendments does not run afoul of the Constitution.

a. *The 2014 amendments clearly and unambiguously authorize the Legislature to fulfill its quintessential legislative duty of preparing the maps.*

As discussed *supra*, New York's redistricting provisions clearly and unambiguously indicate that drawing maps is an essential legislative function; while signing them into law is an executive function (albeit one still entitled to legislative immunity). Redistricting legislation necessarily entails the kind of policymaking and weighing of priorities traditionally performed by the political branches of government, not the judiciary. As the Fourth Department, Appellate Division, has explained:

> Power to legislate is vested in the Legislature, and not in the courts. If ill-advised statutes are enacted, the Legislature, and not the courts, is responsible to the people. We have no right to pass upon the wisdom, expediency, or necessity of the particular statute under review. We had nothing to do with its enactment, and, except as individuals forming a part of the great body politic, we have nothing to say as to the fitness or propriety of the legislation. *That responsibility rests entirely upon the Legislature which passed the statute, and the Governor who gave it his [or her] approval. We are given no revisionary powers of legislation. So long as a statute does not infringe any provision of the Constitution, our hands are tied, no matter how sympathetic we may be with the criticisms aimed at the act*. The court must always be careful not be blur the line of demarcation between the legislative and judicial functions of the government.

Bareham v. Bd. of Sup'rs of Monroe Cty., 247 AD 534, 536-537 (4th Dept 1936) (emphasis added).

In the redistricting context, the New York Court of Appeals has further declared:

> "[I]t is not our function to determine whether a plan can be worked out that is superior to that set up by [the Legislature]. Our duty is, rather, to determine whether the legislative plan substantially complies with the Federal and State Constitutions" (*id*., at 427, 340 NYS2d 889, 293 N.E.2d 67). A strong presumption of constitutionality attaches to the redistricting plan and we will upset the balance struck by the Legislature and declare the plan unconstitutional " 'only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible' " (*Matter of Fay*, 291 NY 198, 207, 52 N.E.2d 97). . . .
>
> *Balancing the myriad requirements imposed by both the State and the Federal Constitution is a function entrusted to the Legislature. It is not the role of this, or indeed any, court to second-guess the determinations of the Legislature, the elective representatives of the people, in this regard. We are hesitant to substitute our own determination for that of the Legislature even if we would have struck a slightly different balance on our own.* Having considered the competing demographic and statistical data submitted by all of the parties in these cases, we find that the petitioners have not overcome the presumption of constitutionality that attaches to the redistricting plan.

Wolpoff v. Cuomo, 80 NY2d 70, 78-79 (1992) (emphasis added).

Petitioners offer no basis or justification for this Court to depart from such well-established precedent respecting the balance of powers between the three branches of government. *See* N.Y. Const. Art. III, § 13 ("The enacting clause of all bills shall be "The People of the State of New York, represented in Senate and Assembly, do enact as follows," and no law shall be enacted except by bill."); N.Y. Const. Art. IV, § 7 ("Every bill which shall have passed the senate and assembly shall, before it becomes law, be presented to the governor"). To the contrary, Petitioners admit that, even after the 2014 amendments, the State Legislature is still endowed with authority

to draw and vote on redistricting maps. *See* NYSCEF 25 at p.10. Specifically, the 2014 amendments expressly provide that the Legislature may disapprove the IRC's first and second plans, at which point "each house shall introduce such implementing legislation with any amendments each house of the legislature deems necessary." N.Y. Const. art. III, § 4(b).

The role of the Court is not to draw maps essentially from scratch as Petitioners would have it do, but to review the maps approved by the Legislature and approved by the Governor when faced with well-pled, ripe controversies over their constitutionality. Yet, according to Petitioners' theory, courts would become embroiled in these policy disputes whenever the IRC is unable or unwilling to reach an agreement; and allowing a single judge to redraw the challenged maps could lead to even more hyper-partisan results than those originally challenged. Because Article III, § 4, contains no such requirement for judicial involvement on its face, however, it is clear and unambiguous that the Legislature's and Executive's constitutional authority cannot be thwarted so easily.

b. *Any ambiguity must be resolved in Respondents' favor since Petitioners' interpretation would lead to absurd and futile results and violate the separation of powers.*

In any event, even if the Court disagrees that the 2014 amendments clearly and unambiguously permit the Legislature to overcome an IRC stalemate, then at the very least the amendments create an ambiguity that must be resolved in Respondents' favor. The 2014 amendments do not evidence any intention to exclude the Legislature and Governor (i.e., the elected representatives of the People), and wholly transform the historically legislative redistricting process into a purely judicial function. And even if that had been, such a purpose runs afoul of the separation of powers principles cited above. Simply put, there is nothing in the 2014 amendments, nor elsewhere in the State Constitution, to indicate such a drastic shift in the delicate

balance of powers between governmental branches. Indeed, the reapportionment and redistricting provisions remain contained in Article III of the Constitution pertaining to the Legislature, not Article VI pertaining to the Judiciary. And these provisions clear that, even if a reviewing court declares a district map to be invalid, the Constitution still provides that the Legislature "shall have a full and reasonable opportunity to correct" it. See N.Y. Const. Art. III, § 5.

Notably, this is the proper outcome even if Petitioners' "plain meaning" interpretation of the 2014 amendments was correct (which it is not). "When th[e plain] meaning has led to absurd or futile results, [the] Court [of Appeals] has looked beyond the words to the purpose of the act." *New York State Bankers Ass'n v. Albright*, 38 NY2d 430, 436 (1975). The absurdity of Petitioners' position is highlighted by their insistence that "the Constitution requires that the Legislature receive and vote upon two sets of maps *before* it may enact its own redistricting legislation." NYSCEF 25 at p. 10. This would mean that IRC members could usurp the Legislature's function by simply refusing to meet or reach a quorum. It would lead to both absurd and futile results for the Legislature to purportedly maintain its authority to "enact its own redistricting legislation," NYSCEF 25 at p. 10, only if a separate committee reaches a consensus on two plans that are in no way binding upon it, otherwise, the Legislature loses the ability to even participate.

c. *The 2021 Legislation is constitutional.*

Finally, in seeking to resolve any potential ambiguity created by the 2014 amendments, the Legislature passed L.2021, c. 633, § 1, which Petitioners likewise attack as unconstitutional. This argument fails for similar reasons set forth above, namely, the legislation does not contradict anything in the 2014 amendments. *Compare* McKay Aff., Exh. 2 *with* N.Y. Const. Art. III § 4. The Legislature is undeniably empowered to enact, and the Governor to approve, legislation that

supplements or clarifies the law, so long as it is not inconsistent with the Constitution. *See generally* N.Y. Const. Art. 6, § 33 ("The legislature shall enact appropriate laws to carry into effect the purposes and provisions of this article, and may, for the purpose of implementing, supplementing or clarifying any of its provisions, enact any laws, not inconsistent with the provisions of this article, necessary or desirable in promoting the objectives of this article."). In a similar vein, the fact that certain fundamental rights may be identified in the State Constitution does not prevent the Legislature from enacting legislation recognizing yet more fundamental rights, such as the New York Human Rights Law. *See* Executive Law § 296, et al.

Lastly, Petitioners' claim that the "statute . . . largely achieves the same result as the failed amendment," Doc. No. 25 at p. 5, is incorrect. Clarification of the process if the IRC fails to agree on first and second maps was one small detail contained in Ballot Proposal 1, and it alone did not require constitutional amendment. Rather, the clarification was merely grouped in with other changes—aimed specifically at amending and repealing portions of the 2014 amendments such as the voting thresholds to approve or adopt a plan and requiring submission of the IRC's plan two months earlier—which would have required a successful referendum vote. See McKay Aff., Exh 3. Petitioners offer no support (and the Executive Respondents have found none) for their belief that a provision previously appearing in a failed ballot proposal can never be passed by subsequent legislation.

VII. PETITIONERS' SECOND AND THIRD CAUSES OF ACTION LACK MERIT AND RESPONDENTS ARE ENTITLED TO A DECLARATION THAT THE 2021 LEGISLATION AND 2022 CONGRESSIONAL MAPS ARE CONSTITUTIONAL

In their second and third causes of action, Petitioners challenge the number of residents and specific districts contained in the Congressional maps. Because the Executive Respondents

were not involved in the drawing of those maps, any claim against them should be dismissed. Specifically, Petitioners fail to offer any credible evidence that the Executive Respondents were involved in deciding how many residents would fall within a particular district, or where the district lines would lie. In contrast, the Governor's approval message makes clear that she merely signed the bills enacting the new congressional districts to "provide certainty and clarity regarding such districts in a timely manner," so as to allow "efficient administration of the electoral process" and "the boards of elections to begin the process of administering elections," and to ensure voters and candidates would "have the information they need with as much notice as possible" to participate in the electoral process. *See* McKay Aff., Exh. 5. To the extent the Petition claims an improper partisan purpose in the drawing of the new congressional district maps, those claims are against the Legislature. Thus, the second and third causes of action should be dismissed as against the Governor (or Lt. Governor).

To the extent that the Court disagrees and does not dismiss these claims against them, the Executive Respondents join in and adopt the arguments made and proof submitted by co-Respondents in opposition to the Petition and in support of the 2021 Legislation and 2022 Congressional maps. As set forth in Point VI above, "[a] strong presumption of constitutionality attaches to the redistricting plan and we will upset the balance struck by the Legislature and declare the plan unconstitutional 'only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible.'" *Wolpoff*, 80 NY2d at-79, quoting *Matter of Fay*, 291 NY 198, 207 (1943). Petitioners' speculative claims do

not come close to overcoming the presumption of constitutionality by demonstrating that the maps are unconstitutional "beyond reasonable doubt."

Finally, regarding Petitioners' fourth cause of action, where, as here, a defendant moves to dismiss a claim for declaratory judgment and "the only issues presented are questions of law," the motion to dismiss "should be treated as one seeking a declaration in [the] defendant's favor and treated accordingly." *Dodson v. Town Bd. of the Town of Rotterdam*, 182 A.D.3d 109, 119 N.Y.S.3d 590, 594 (3d Dept 2020) (internal quotation marks omitted); *see Plaza Dr. Group of CNY, LLC v. Town of Sennett*, 115 A.D.3d 1165, 1166 (4th Dept 2014). Thus, rather than dismiss Petitioners' fourth cause of action, this Court should enter judgment in Respondents' favor and declare that the 2021 Legislation and 2022 Congressional maps are constitutional.

VIII. PETITIONERS' DESIRE FOR PROLONGED LITIGATION THREATENS THE UPCOMING ELECTION

Since commencing this special proceeding, Petitioners have sought to double its scope by amending their petition to include claims challenging the 2022 Senate maps and moved for extensive discovery to conduct a fishing expedition foreseeably lasting weeks and months. As detailed in separate submissions, the Executive Respondents oppose both motions for several reasons, including the urgently approaching deadlines of the upcoming election. Now, in Section III of Petitioners' Memorandum of Law, they further urge this Court to "pause election-related deadlines." *See* NYSCEF 25 at p. 56. In addition to violating long-standing precedent and potentially the State Constitution, the requested delay would have disastrous results and risk infringing New Yorkers' fundamental right to vote.

As a procedural matter, Petitioners' belated request for relief is not contained in their Petition, *see* NYSCEF 1, nor even their proposed amended petition, *see* NYSCEF 18, and

therefore is not properly before this Court. *See* CPLR §§ 402, 3013, 3016; *Bisk v. Manhattan Club Timeshare Ass'n, Inc.*, 118 A.D.3d 585, 585 (1st Dept 2014) (holding it "was error" to decide motion to dismiss in plaintiffs' favor where their "contention [was] not in their complaint or in an affidavit opposing the motion to dismiss, but in their memorandum of law opposing the motion to dismiss"), citing *Basilotta v. Warshavsky*, 91 A.D.3d 460 (1st Dept 2012); *Castleton v. Broadway Mall Properties, Inc*., 41 A.D.3d 410, 411 734 (2d Dept 2007) ("Since the plaintiff alleged a violation of Labor Law § 376 only in the bill of particulars and not in the complaint, he did not assert a viable cause of action to recover damages based on a violation of Labor Law § 376.")

Regardless, on the merits, the State Constitution provides that "[t]he court shall render its decision within sixty days after a petition is filed," i.e., on or before April 4, 2022. N.Y. Const. art. III, § 5. After that, an appeal can be anticipated, during which time a stay may be automatic or ordered. *See* CPLR 5519(a). The New York State primary election is June 28, 2022, as set by statute and U.S. District Court Order, *see* N.Y. Election Law § 8-100; *U.S. v. State of New York*, 2012 WL 254263 (N.D.N.Y. Jan. 27, 2012), and the last day to mail out absentee ballots to military servicemen and women under federal law is May 13, 2022, meaning that ballots must be printed and finalized by that date. *See* NYSCEF 6; 52 USC § 20302(a)(8)(b).

Interfering with an election process on the eve of its commencement is forbidden. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls."); *In re Khanoyan*, 65 Tex. Sup. Ct. J. 207, 2022 WL 58537 (Jan. 6, 2022) (denying challenge to redistricting for 2022 election because of the timing of the election and nature of the

relief sought); *Alliance for Retired Americans v. Secretary of State*, 240 A.3d 45 (Maine 2020) (denying injunctive relief and holding that court should not alter rules on the eve of election).

New York courts have recognized these well-settled principles. *See Honig v. Bd. of Sup'rs of Rensselaer Cnty.*, 31 A.D.2d 989, 989 (3d Dept 1969) ("[W]e consider, further, that, if employed as a temporary measure, the plan before us, having been adopted by the representative body, is preferable, generally and despite some measure of infirmity, to a plan to be fashioned by the court, as would otherwise be necessary in this case, by reason of the present time exigencies."), *aff'd* 24 N.Y.2d 861 (1969); *Duquette v. Bd. of Sup'rs of Franklin Cnty.*, 32 A.D.2d 706 (3d Dept 1969) ("Despite some slight measure of infirmity, however, we conclude that the present time exigencies require that the plan as adopted should govern the 1969 elections and continue thereafter until validly superseded."); *In re Sturm*, 215 A.D. 693 (2d Dept. 1925) ("While the court is in accord with the expressed desire of the applicant to facilitate the casting of the votes, and the canvass thereof, we think we should not, on the eve of a general election, assume to establish new election districts not established by the municipal authorities as required by the Election Law."); *see also Abate v. Mundt*, 33 A.D.2d 660, 663 (2d Dept), *aff'd* 25 N.Y.2d 309 (1969), *aff'd* 403 U.S. 182 (1971) (reapportionment plan upheld by majority; dissenting judge found plan to be unconstitutional but agreed election should proceed given exigencies and would have "modif[ied] the judgment only to the extent of directing that a new reapportionment plan be submitted after the election."). Hence, courts have repeatedly refused to implement the extreme remedy Petitioners seek. *See Vill. of S. Blooming Grove v. Vill. of Kiryas Joel Bd. of Trustees*, 49 Misc. 3d 1212(A) (N.Y. Sup. Ct. 2015); *Burns v. Flynn,* 155 Misc. 742, 744

(Albany Co. Sup. Ct.. 1935), *aff'd*, 245 A.D. 799, 281 N.Y.S. 497 (3d Dept 1935), *aff'd*, 268 N.Y. 601 (1935).

Finally, Petitioners' reliance upon *Carter v. Chapman*, No. 7 MM 2022 (Pa. Sup. Ct. Feb. 9, 2022) is misplaced, since (as discussed in Point VII above) the Legislature was able to pass 2022 maps in this case, whereas that case involved a legislative impasse. Accordingly, Petitioners' haphazard request for a delay should be denied.

CONCLUSION

For the foregoing reasons, this Court should dismiss the Executive Respondents from this special proceeding, deny and dismiss the Petition in its entirety, and issue a declaration that the 2021 Legislation and 2022 Congressional maps are constitutional.

Dated: February 24, 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 8,177 words, which falls within the 10,000 maximum word count agreed to by the parties via email dated February 11, 2022. *See* McKay Aff., Exh. 1.

Dated: February 24, 2022
Rochester, NY

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