STATE OF NEW YORK
SUPREME COURT : 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

Assigned Justice:
Hon. Patrick F.
McAllister, A.J.S.C.

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR LEAVE TO CONDUCT DISCOVERY

Respectfully submitted,

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Respondent Carl Heastie, Speaker of the New York State Assembly, opposes Petitioners' request for permission to conduct discovery in this special proceeding (Dkt. Nos. 30-31). Specifically, Speaker Heastie opposes the Heastie Notice of Deposition (Dkt. No. 38), the Zebrowski Notice of Deposition (Dkt. No. 39), and the Request for Document Production (Dkt. No. 34).[1,2]

PRELIMINARY STATEMENT

In special proceedings like this one, the parties have no right to conduct discovery. Discovery is the exception, not the rule. CPLR 408. This presumption against discovery is particularly appropriate here, given the State Constitution's requirement that this proceeding be decided by April 4, 2022, *viz.*, within 60 days after its commencement on February 3, 2022. N.Y. CONST. art. III, § 5.

Nevertheless, Petitioners want Respondents to produce "[a]ll Documents and Communications concerning the subject matter of the Amended Petition" (Dkt. No. 34). This virtually limitless request — which Petitioners somehow describe as "narrowly-tailored" and "targeted" (Dkt. No. 48, pp. 6, 12) — includes "[a]ll Documents and Communications with or otherwise concerning the Commissioners of the Democratic Caucus" of the New York Independent Redistricting Commission ("IRC") and "All Documents and Communications concerning the drawing of the 2022 New York Congressional and state Senate districts" (Dkt. No. 34). Petitioners also seek to depose Speaker Heastie, Assemblyman Zebrowski, and 11 other public officials, with all 13

[1] "Dkt. No." and any associated page citations refer to the document and page numbers assigned by the New York State Courts Electronic Filing ("NYSCEF") System in this proceeding.

[2] Assemblyman Kenneth Zebrowski has authorized Speaker Heastie's counsel to file this memorandum of law on his behalf. Should any discovery be authorized (which it should not be), Speaker Heastie reserves the prerogative to raise further substantive objections to any discovery request Petitioners may serve, whether by means of a motion for a protective order or opposition to any motion to compel.

depositions to "continue from day to day until complete" (Dkt. Nos. 35-47). Petitioners ask that the depositions and document production occur on an expedited basis: within a mere "seven days of service" of the discovery demands (Dkt. No. 48, p. 13).

Expedited or not, this Court should deny Petitioners' request to conduct discovery. For one thing, all the materials and testimony sought are protected by an absolute legislative privilege under the State Constitution. The discovery requests also seek attorney-client communications and attorney work product, which are not discoverable. Moreover, according to Petitioners' memorandum of law on the merits (Dkt. No. 25), no discovery is needed to resolve the underlying dispute between the parties.

In short, the proposed discovery would be inappropriate even under normal circumstances. But the circumstances here are anything but normal. Given the tight timeline — and with election deadlines on the near horizon — the boundless discovery Petitioners seek would accomplish little more than to overburden Respondents and generate chaos. Petitioners' motion for leave to conduct discovery should be denied.

ARGUMENT

In special proceedings, "[l]eave of court shall be required for disclosure" (except for notices to admit). CPLR 408. Naturally, leave should not be granted to discover privileged matter, which is not discoverable. *Cirale v. 80 Pine St. Corp.*, 35 N.Y.2d 113, 117 (1974). And regarding discoverable matter, leave should be granted only after balancing various factors identified by the Appellate Division. *Matter of People by James v. N. Leasing Sys., Inc.*, 193 A.D.3d 67, 73-74 (1st Dep't 2021).

Here, the documents and information Petitioners seek are privileged, and permission to conduct discovery should be denied for this reason alone. Even absent

privilege, however, permission should be denied because the discovery would be unnecessary and unduly burdensome.

POINT I

ALL THE DISCOVERY PETITIONERS SEEK IS PRIVILEGED

A. The proposed discovery is protected by an absolute legislative privilege under the State Constitution

The New York State Constitution's Speech or Debate Clause provides that "[f]or any speech or debate in either house of the legislature, the members shall not be questioned in any other place." N.Y. CONST. art. III, § 11. It derives from a virtually identical clause in the Federal Constitution, which itself draws from principles "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 N.Y. v. Att'y Gen. of N.Y.*, 269 F. Supp. 3d 124, 149 (S.D.N.Y. 2017) (citation omitted).

The Clause's protection is broad. It does not apply merely to hearings, speeches, and meetings that occur in the legislative chamber. *People v. Ohrenstein*, 77 N.Y.2d 38, 54 (1990). Rather, it "'protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.'" *Matter of Maron v. Silver*, 14 N.Y.3d 230, 256 (2010) (quoting *United States v. Brewster*, 408 U.S. 501, 525 (1972)). Stated differently, "it precludes any showing of how a legislator acted, voted, or decided." *United States v. Helstoski*, 442 U.S. 477, 489 (1979) (cleaned up). Materials and testimony within the Clause's scope are protected by an absolute evidentiary privilege. *Matter of Rivera v. Espada*, 98 N.Y.2d 422, 428 (2002); *Matter of Straniere v. Silver*, 218 A.D.2d 80, 83 (3d Dep't), *aff'd*, 89 N.Y.2d 825 (1996).

Campaign for Fiscal Equity v. State, 179 Misc. 2d 907, 909 (Sup. Ct. N.Y. County), *aff'd*, 265 A.D.2d 277 (1st Dep't 1999), in which the plaintiffs challenged the adequacy of funding for public schools, is illustrative. During a deposition, a State Education Department employee was questioned about her work with State legislators on school funding issues. *Campaign for Fiscal Equity*, 179 Misc. 2d at 909. The defendants moved for a protective order, asserting an absolute legislative privilege under the Speech or Debate Clause. *Id.* at 910. Supreme Court granted the motion, barring plaintiffs from "seeking disclosure ... concerning the creation, consideration and enactment of legislation." *Id.* at 914. The privileged matter included anything that "would reveal a legislator's thought processes or the iterative process of creating legislation," as well as "documents or data that [the employee] produced at the behest of legislators." *Id.* at 912. The Appellate Division affirmed, noting that the legislative privilege's purpose is "to safeguard the legislative function from judicial interference inimical to the Legislature's constitutional stature and performance as a separate, co-equal branch of government." 265 A.D.2d at 278.[3]

This Court should reach the same conclusion here. According to Petitioners, they seek only "two categories of facts" (Dkt. No. 48, p. 10). Both are privileged. The first category concerns "whether Respondents acted with impermissible partisan intent" when drafting the maps and enacting them into law. *Id.* But as explained above, legislators' motivations for drafting and enacting legislation fall squarely within the Speech or Debate Clause's scope. Petitioners' second category of facts concerns "whether Respondents

[3] In the same litigation, Supreme Court later allowed the plaintiffs to introduce evidence of legislative intent at trial. *Campaign for Fiscal Equity v. State*, 1999 WL 34782728 (Sup. Ct. N.Y. County Oct. 18, 1999). The Appellate Division reversed, concluding that "the Speech or Debate Clause of our Constitution creates a privilege which would preclude the testimony sought to be introduced by plaintiffs." *Campaign for Fiscal Equity v. State*, 271 A.D.2d 379, 379 (1st Dep't 2000).

worked with the Democratic IRC Commissioners, politicians, officials, or interest groups to frustrate the mandatory constitutional process for redistricting." *Id.* To the extent this information is even relevant, it is merely a roundabout effort to determine whether "impermissible partisan intent" motivated the Legislature — and, again, is protected by the Speech or Debate Clause.

The out-of-State case law cited by Petitioners is not to the contrary (Dkt. No. 48, pp. 10-13). Not only are those cases nonbinding in New York, but they are also uninstructive.

For instance, the Federal cases Petitioners cite are irrelevant here. In those cases, the legislative privilege afforded to State officials was governed by the Federal common law, not State constitutions. *See* Federal Evidence Rule 501; 81A C.J.S. States § 101 ("Although most states have ratified [Speech or Debate Clauses], federal courts are not bound by those state protections when plaintiffs assert federal claims against state legislators."). For example, in *Citizens Union*, the plaintiffs challenged the constitutionality of a New York State law. 269 F. Supp. 3d at 133. They subpoenaed the Governor, who moved to quash based on legislative privilege. *Id.* The State Senate and Assembly intervened to support the motion. *Id.* at 136. In analyzing (and ultimately granting) the motion, the court held that, "[b]ecause Plaintiffs' primary claims arise under federal law, federal common law, and not the New York constitutional privilege, is applicable to the Governor's and Intervenors' claims of privilege." *Id.* at 152 n.11. Critically, while New York's Speech or Debate Clause creates an absolute legislative privilege, the Federal common law affords State officials only a qualified privilege. *Id.* at 154–55. Thus, Federal case law is irrelevant to what this State's Constitution requires here.

The Florida and Ohio cases do not support Petitioner, either. First of all, Florida's Constitution does not contain a Speech or Debate Clause, and Florida does not recognize the absolute legislative privilege that New York does. *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 143-47 (Fla. 2013). And while a brief "table" decision of the Ohio Supreme Court authorized document production and two-hour depositions of certain Ohio State officials, that Court did not explain its reasoning, and those officials did not assert legislative privilege. *See League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 174 N.E.3d 805 (Ohio 2021) (table).

Finally, the Pennsylvania litigation cited by Petitioners actually supports Respondents. There, the Pennsylvania Commonwealth Court held that Pennsylvania's Speech or Debate Clause barred discovery regarding "the intentions, motivations, and activities of state legislators and their staff with respect to the consideration and passage of [a state law]." *League of Women Voters of Pa. v. Commonwealth of Pennsylvania*, 177 A.3d 1000, 1005 (Pa. Commw. 2017). On appeal, the Pennsylvania Supreme Court questioned but did not reverse that decision. *League of Women Voters of Pa. v. Commonwealth of Pennsylvania*, 178 A.3d 737, 767 n.38 (Pa. 2018).

Simply put, Petitioners brought this special proceeding in New York State Court, not in some other forum, and New York's Constitution prohibits the proposed discovery. Of course, Petitioners are not precluded from seeking evidence of legislative intent, to the extent such evidence is relevant. They may seek direct evidence of intent from public sources, including news reports, press releases, bill jackets, and transcripts of legislative proceedings. They may also seek direct evidence from legislators who are willing to testify, like State Senator Robert Ortt (Dkt. No. 28). Petitioners may also rely on indirect

evidence, such as statistical data, and in fact cite such sources in their memorandum of law on the merits (Dkt. No. 25). But the State Constitution forbids them from probing legislative intent by deposing legislators or by compelling the production of legislative papers. For this reason alone, Petitioners' request to conduct discovery should be denied.

B. The proposed discovery also includes attorney-client communications and attorney work product

Attorney-client communications and attorney work product are "absolutely immune from discovery" under CPLR 3101. *Teran v. Ast*, 164 A.D.3d 1496, 1498 (2d Dep't 2018) (citing *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 376-77 (1991); *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 592 (1989)). Although Petitioners do not expressly demand such materials, the broad scope of their requests undoubtedly encompasses them.

Redistricting plans in New York must comply with a panoply of legal requirements, including under the New York State Constitution, the United States Constitution, and the Federal Voting Rights Act of 1965 (52 U.S. Code Subtitle I). For instance, under the United States Constitution's "one person, one vote" principle, legislative districts must provide "substantially equal state legislative representation for all citizens, of all places as well as of all races." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). The United States Constitution also requires that States refrain from diluting the votes of racial and ethnic minorities. *Abbott v. Perez*, 585 U.S. ___, 138 S. Ct. 2305, 2314 (2018). And the Voting Rights Act often "pulls in the opposite direction," sometimes demanding that States "draw opportunity districts in which minority groups form effective majorities." *Abbott*, 138 S. Ct. at 2314-15 (cleaned up).

In short, the Legislature was faced with an excruciatingly difficult task in drawing district maps that complied with these "complex and delicately balanced requirements." *Abbott*, 138 S. Ct. at 2314. The United States Supreme Court itself has recognized that "[r]edistricting is never easy." *Id.* Justice Brett Kavanaugh reiterated this observation less than a month ago, when he observed that "the Court's case law in this [voting rights] area is notoriously unclear and confusing." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Mem) (Kavanaugh, J., concurring). In the same case, Chief Justice John Roberts lamented the "considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim." *Id.* at 883 (Roberts, C.J., dissenting).

Naturally, then, legislators rely heavily on legal counsel when they draw new district lines. They receive ongoing advice from attorneys, who produce confidential work product in furtherance of their services. Thus, attorney-client communications and attorney work product are undoubtedly among the "Documents and Communications concerning the subject matter of the Amended Petition," including the "Documents and Communications concerning the drawing of the 2022 New York Congressional and state Senate districts" (Dkt. No. 34). These materials are not discoverable.

POINT II

PRIVILEGES ASIDE, PERMISSION TO CONDUCT DISCOVERY SHOULD BE DENIED UNDER CPLR 408

"Discovery is disfavored in a special proceeding and is permitted [under CPLR 408] only on leave of court upon a showing of ample need or unusual circumstances." *N. Leasing Sys.*, 193 A.D.3d at 74 (quotation marks and citations omitted). The party seeking discovery bears the burden to demonstrate that discovery is appropriate. *Id.* Courts have broad discretion to authorize disclosure of "material and necessary

information" (*Matter of Wendy's Rests., LLC v. Assessor, Town of Henrietta*, 74 A.D.3d 1916, 1917 (4th Dep't 2010) (citation omitted)), but that discretion is limited (*see Matter of Aylward v. Assessor, City of Buffalo*, 125 A.D.3d 1344, 1345 (4th Dep't 2015)).

Structuring their analysis around a five-factor test articulated in *Matter of Georgetown Unsold Shares, LLC v. Ledet*, 130 A.D.3d 99 (2d Dep't 2015), Petitioners incorrectly assert the case was decided by the Fourth Department (Dkt. No. 48, pp. 8-9). In fact, *Ledet* was decided by the Second Department, it apparently has not even been cited in this Department, and it seems no Court in this Department has applied those factors. The Second Department itself sometimes eschews *Ledet* in favor of a less rigid approach. *See, e.g., Matter of Bramble v. N.Y. City Dep't of Educ.*, 125 A.D.3d 856, 857 (2d Dep't 2015).

Under whatever rubric, this Court should deny Petitioners' request to conduct the unnecessary, unduly burdensome discovery they propose.

A. The proposed discovery is unnecessary

"Because discovery tends to prolong a case, and is therefore inconsistent with the summary nature of a special proceeding, discovery is granted only where it is demonstrated that there is need for such relief." *Aylward*, 125 A.D.3d at 1345 (citation omitted). For example, in *Matter of Town of Wallkill v. New York State Board of Real Property Services*, the Appellate Division held that discovery was unwarranted because the petitioner already had "all necessary information" to pursue its claim and failed to demonstrate that discovery was "essential to establish its position." 274 A.D.2d 856, 859-60 (3d Dep't 2000). Likewise, in *Aylward*, Supreme Court granted a request for discovery under CPLR 408, but the Fourth Department reversed, finding the requested discovery was not necessary. 125 A.D.3d at 1345.

Similarly, the proposed discovery here is unnecessary. By Petitioners' own account, they do not need legislative documents or testimony to pursue their claim. Their memorandum of law on the merits (Dkt. No. 25) makes this conclusion clear: it asserts only two substantive arguments, and neither requires discovery. To be clear, Respondents contend that Petitioners incorrectly frame the issues and that the evidence supports dismissal of this proceeding. Even if Petitioners' contentions could have merit, however, they do not require discovery for adjudication.

1. Petitioners' procedural argument requires no discovery

Petitioners first argue that the process of enacting the New York's Congressional and State Senate district maps for the 2022 election was unconstitutional — *viz.*, that the Legislature lacked authority to adopt those maps without waiting for the IRC to propose a second set of maps (Dkt. No. 25, pp. 9-11). But the process is a matter of public knowledge. The IRC's website (www.nyirc.gov) contains public comments, recordings of meetings, maps, and more. Petitioners themselves create a timeline of events by citing publicly available sources, including a press release and legislative transcript (Dkt. No. 25, pp. 19–20). Deposing legislators and reviewing reams of privileged documents will not shed new light on Petitioners' procedural argument, which essentially presents a legal question, not a fact question.

2. Petitioners' substantive argument requires no discovery, either

Petitioners also contend that Respondents acted with undue partisan motivation when drafting the district maps and enacting them into law (Dkt. No. 25, p. 9). Petitioners urge this Court to determine legislative intent by considering only three factors: "whether the map-drawing process itself was partisan," the "overall partisan impact or effect

of the map," and "whether specific district lines subordinated traditional redistricting criteria for partisanship reasons" (*id.* p. 25-26) (quotation marks and citation omitted). None of those factors gives rise to any need to probe legislative intent through depositions or document production.

First, even according to Petitioners, the privileged information they seek is irrelevant to "whether specific district lines subordinated redistricting criteria for partisanship reasons." Instead, their memorandum of law on the merits analyzes differences between the 2012 and 2022 Congressional and State Senate maps and how those differences changed the concentration of Republicans and Democrats in each district (Dkt. No. 25, pp. 29-49). This information is public.

Second, Petitioners assert that "the overall partisan impact or effect of the map" is measured through statistics and "the latest social science" (Dkt. No. 25, p. 25), not by reviewing privileged documents or deposing legislators. They rely upon the statistical analysis of Mr. Sean Trende, and identify no necessary discovery (*id.* pp. 25-29).

Third, Petitioners contend the partisanship of "the map-drawing process itself" is relevant to whether the maps are unconstitutional (Dkt. No. 25, p. 25). They go on to identify several sub-factors: which political party "controlled" the process, "floor speeches," and "[t]he historical background of the decision" (*id.*) (citations omitted). Again, the map-drawing process is public knowledge. Petitioners also ask this Court to consider "correspondence between those responsible for the map drawing" (*id.*), citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). But *Arlington Heights* cautioned that "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government," so

eliciting testimony from legislators is "usually to be avoided." *Id.* at 268 n.18. (It also noted that "such testimony frequently will be barred by privilege." *Id.* at 268.) Likewise, the United States Supreme Court recently warned against "allow[ing] depositions of state legislators and governors" and "hal[ing] them into court for cross-examination at trial about their subjective motivations" in passing a statute. *Va. Uranium, Inc. v. Warren*, 587 U.S. ___, 139 S. Ct. 1894, 1906 (2019) (Gorsuch, J.).

Simply put, Petitioners cannot identify a need for non-public information, so their request to conduct discovery should be denied.

B. Expedited or not, the proposed discovery would be unduly burdensome

When determining whether to allow discovery under CPLR 408, New York Courts also consider whether the requested discovery "is carefully tailored to obtain the necessary information" and "whether undue delay will result from the request." *Matter of Suit-Kote Corp. v. Rivera*, 137 A.D.3d 1361, 1365 (3d Dep't 2016); *accord*, *Bramble*, 125 A.D.3d at 857. In other words, discovery is inappropriate if its breadth would unduly burden a party or jeopardize the lawsuit's timely resolution. For instance, in *Suit-Kote*, the Appellate Division held that discovery was unwarranted because the information sought was "exceedingly broad and undefined," and because the proposed discovery would create "unduly protracted delay." 137 A.D.3d at 1365.

The same is true here. Petitioners intend to compel the disclosure of "[a]ll Documents and Communications concerning the subject matter of the Amended Petition," including "All Documents and Communications concerning the drawing of the 2022 New York Congressional and Senate districts" (Dkt. No. 34). Their definition of "Documents" and "Communications" could hardly be more expansive, encompassing

emails, text messages, phone logs, computer data, voicemail records, memoranda, and handwritten notes (Dkt. No. 34, pp. 2-3). Respondents would need to dedicate legions of employees to the creation of privilege logs, which would list the sender, recipient, date, subject matter, and privilege asserted with respect to potentially tens of thousands of documents. And if Petitioners have their way, all of this document discovery — along with 13 "day to day" depositions (Dkt. Nos. 35–47) — will somehow occur on an expedited, seven-day timeline (Dkt. No. 48, p. 13), while the Legislature is in session and engrossed in what it should and needs to be doing: evaluating proposed bills and negotiating the State's budget due April 1, 2022, for the 2022-23 fiscal year. *See* N.Y. STATE FIN. LAW § 3.

Simply put, Petitioners' discovery proposal has no basis in reality. Expedited or not, such "broad and undefined" discovery would, to put it mildly, create unwarranted burdens resulting in "unduly protracted delay." *Suit-Kote*, 137 A.D.3d at 1365. Petitioners want the Legislature, in effect, to turn itself upside-down in service of a boundless fishing expedition, even while claiming in its merits briefing to have all the evidence it needs. A request of that nature cannot pass muster under CPLR 408.

CONCLUSION

Petitioners' proposed discovery is about as broad as it gets. They target privileged documents and testimony, and they fail to identify a need for any of it, all in a time-compressed special proceeding governed by a presumption against discovery, mere weeks before critical election deadlines and during the busiest time of the legislative calendar. This Court should deny Petitioners' request to conduct discovery and proceed to the merits of the parties' underlying dispute.

Dated: New York, New York
February 25, 2022

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CERTIFICATE OF COMPLIANCE WITH 22 N.Y.C.R.R. § 202.8-b

This memorandum of law complies with 22 N.Y.C.R.R. § 202.8-b because it contains 3,699 words, excluding the caption, table of contents, table of authorities, and signature block. The word count was generated by the word-processing system used to prepare this document.

Dated: Buffalo, New York
February 25, 2022

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