SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

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TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, and MARIANNE VOLANTE,

Petitioners,

-against-

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, and THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents.

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Index No. E2022-0116CV

Motion Sequence No.: 003

Justice Patrick F. McAllister

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MEMORANDUM OF LAW OF THE SENATE MAJORITY LEADER IN OPPOSITION TO PETITIONERS' MOTION FOR LEAVE TO ENGAGE IN DISCLOSURE

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PRELIMINARY STATEMENT

The sole question on this motion is whether this Court should grant Petitioners leave to engage in disclosure under CPLR 408. It should not.

Petitioners commenced this special proceeding on February 3, 2022. The Constitution requires this Court to issue its final judgment no later than April 4, 2022. N.Y. Const. art. III, § 5 ("The court shall render its decision within sixty days after a petition is filed."). Petitioners waited eleven days, until February 14, 2022, before filing their motion for leave to engage in disclosure, making clear that if such leave is granted, they contemplate serving sweeping document demands and noticing eight party depositions, including of the Governor, the Senate Majority Leader, the Speaker of the Assembly, and other legislators and persons directly involved in the legislative process, as well as serving subpoenas for documents and depositions on five non-parties. The Court should deny Petitioners leave to engage in disclosure for several reasons.

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First, there is a reason discovery is disfavored in a special proceeding, which is a procedural vehicle intended to mirror the ease, speed, and efficiency of an ordinary motion. This is not an action, and the law is clear that Petitioners face a heightened standard for seeking permission to engage in disclosure in this special proceeding. Leave is to be denied unless the movant shows the discovery it seeks to obtain is essential and necessary to enable the Court to decide the matter. Allowing Petitioners to serve the overbroad, burdensome, and otherwise improper discovery requests and notices that they contemplate would lead unavoidably to undue delay, undermining the very purpose of the special proceeding.

Second, discovery is not necessary in this proceeding because Petitioners' own expert report fatally undermines their allegations, because Petitioners lack standing to pursue nearly all

of their claims, and because the record contains ample objective information upon which the Court can and should conclude that Petitioners have not met their formidable burden and thus render judgment in favor of Respondents on the Petition return date.

Third, permitting Petitioners to engage in disclosure would be futile because substantially everything they appear to contemplate seeking would be protected by absolute legislative privilege. If Petitioners were allowed to engage in disclosure, and if they then were to serve sweeping requests to obtain documents from and depose legislators and others performing legislative functions, the recipients of such demands and notices would be able to assert absolute legislative privilege and other applicable privileges, and the parties, this Court, and most likely the appellate courts, would become embroiled in exactly the kind of ancillary litigation about collateral matters that special proceedings are designed to avoid.

For all of these reasons, and those set forth below, there is no basis to permit discovery in this special proceeding. Therefore, the Court should deny Petitioners' application for leave to engage in disclosure under CPLR 408.

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BACKGROUND

Petitioners filed this special proceeding on February 3, 2022. Dkt. No. 1 ("Petition"). The Court must decide the Petition within sixty days of that date. N.Y. Const. art. III, § 5. On February 8, 2022, Petitioners filed a proposed order to show cause seeking leave to file an Amended Petition. The following day, this Court signed the order, fixing March 3, 2022 as the return date for the Petition and for the motion to amend, and requiring Respondents to file their papers opposing the Petition and the motion to amend by February 24, 2022. Dkt. No. 24. On February 14, 2022 – only ten days before Respondents were required to respond to the pending Petition – Petitioners filed a memorandum of law, two affidavits, and two expert reports in

support of their Petition. They also filed yet another order to show cause, this one seeking leave to conduct discovery. Dkt. No. 30. The next day, in accord with CPLR 406, the Court entered an order that set a March 3, 2022 return date for the motion for leave to engage in disclosure and required Respondents to file papers opposing that motion by February 25, 2022. Dkt. No. 51.

Petitioners have made clear that, if the Court were to grant them leave to engage in disclosure, they would seek to conduct broad discovery on a highly compressed schedule. First, the request for production of documents that Petitioners wish to serve would require Respondents (within 7 days of service) to identify, review, assert privileges, and/or produce documents (including email and other communications) concerning: (i) the Commissioners of the Democratic Caucus of the Independent Redistricting Commission, including all information received by the Legislature from any third parties, (ii) "the drawing of the 2022 New York Congressional and state Senate districts," (iii) any consultants and experts whom Respondents may have engaged in connection with this proceeding, (iv) the evidence Respondents intend to submit in this proceeding, and, most broadly of all (v) "the subject matter of the [proposed] Amended Petition." Dkt. No. 34.

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Second, Petitioners contemplate noticing eight party depositions of senior government officials and employees. *See* Dkt. Nos. 35-42 (appending sample notices of depositions of the Governor, the Lieutenant Governor, the Senate Majority Leader, the Speaker of the Assembly Heastie, and four members of a Legislative Task Force (including a Senator and a member of the Assembly)).

Finally, Petitioners contemplate serving five non-party subpoenas (with expedited return dates) that would seek to compel members of the Independent Redistricting Commission to produce documents and sit for depositions. *See* Dkt. Nos. 43-47.

ARGUMENT

I. THERE IS NO BASIS TO GRANT PETITIONERS LEAVE TO ENGAGE IN DISCLOSURE IN THIS SPECIAL PROCEEDING

A special proceeding is a "quick and inexpensive way to implement a right" and is intended to be "brought on with the ease, speed, and economy of a mere motion." Siegel, N.Y. Prac. § 547 (6th ed. 2021). Accordingly, "[i]ts speed has made it appropriate to test election squabbles . . . especially preelection challenges carried on under the pressure of an approaching election." *Id.* In line with these objectives, and recognizing that "among the main purposes of a special proceeding are speed and economy, the disclosure devices, so pervasively relied on in an action . . . are available in special proceedings only by leave of court" and only with "good cause." *Id*. § 555; CPLR 408 ("Leave of court shall be required for disclosure except for a notice [to admit] under section 3123.").

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There is a "well-established rule that the nature and purpose of summary proceedings are such that disclosure will rarely be granted[.]" 7 Carmody-Wait 2d § 42:20 (2021). *See also Matter of Suit-Kote Corp. v Rivera*, 137 A.D.3d 1361, 1364 (3d Dep't 2016) ("Consistent with the summary nature of a special proceeding, CPLR 408 generally disallows pretrial disclosure without leave of court.") (quoting Vincent C. Alexander, Practice Commentaries, McKinney's Con. Laws of N.Y., Book 7B, CPLR 408, at 405)); *Neighborhood P'ship Hous. Dev. Corp. v. Okolie*, No. 2001–1142 K C., 2003 WL 1923731 (Sup. Ct. App. Term 2003) (stating that discovery is "deemed presumptively 'antithetical to [the] purposes'" of a special proceeding) (quoting *Cox v. J.D. Realty Assocs.*, 217 A.D.2d 179, 184 (1st Dep't 1995)); *People v. Condor Pontiac, Cadillac, Buick and GMC Trucks, Inc.*, Index Nos. 02–1020, 19–02–0497, 2003 WL 21649689, at *4 (Sup. Ct. N.Y. Cnty. 2003) (stating that "[a] party seeking discovery in a [special] proceeding carries a heavy burden to justify its use" and that the party "must

demonstrate special or unusual circumstances which would justify permitting discovery"); *Plaza Operating Partners Ltd. IRM (U.S.A.) Inc.*, 143 Misc. 2d 22, 23 (Civ. Ct. N.Y. Cnty. 1989) ("[B]ecause discovery tends to prolong an action" it is "therefore inconsistent with the expeditious nature of a special proceeding") (quoting *Dubowsky v. Goldsmith*, 202 A.D. 818 (2d Dep't 1922)).

Given this stringent standard, New York courts routinely deny leave for petitioners to engage in disclosure in special proceedings where they fail to meet their heavy burden of showing that there is "ample need," *Okolie*, 2003 WL 1923731 at *1, to engage in disclosure and that doing so is "essential" for their claims or defenses. *Town of Wallkill v. N.Y. State Bd. of Real Prop. Servs.*, 274 A.D.2d 856, 860 (3d Dep't 2000) (petitioner was not entitled to engage in disclosure, having failed to "establish[] that [it was] essential to establish its position"). *See also People v. Bestline Prods., Inc.*, 41 N.Y.2d 887, 888 (1977) (grant of leave to engage in disclosure was abuse of discretion where "[t]he record provide[d] ample detail and definition of the alleged practice attacked as fraudulent"); *Aylward v. Assessor*, *City of Buffalo Bd. of Assessment Review for City of Buffalo*, 125 A.D.3d 1344, 1345 (4th Dep't 2015) (reversing Supreme Court's grant of leave to engage in disclosure because parties failed to meet burden of showing disclosure was "reasonable and necessary to prepare their defense"), *appeal dismissed*, 25 N.Y.3d 1056 (2015); *Entergy Nuclear Indian Point 2, LLC v. New York State Dep't of State*, 130 A.D.3d 1190, 1195-96 (3d Dep't 2015) (affirming denial of motion for leave to engage in disclosure where the record already contained sufficient evidence to deny petitioners' claims); *In re Protect the Adirondacks! Inc.*, 38 Misc. 3d 1235(A), 2013 WL 1189216, at *3 (Sup Ct. Albany Cnty. Mar. 19, 2013) (denying leave to engage in disclosure in part because petitioners "already claim to

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possess irrefutable proof of their . . . cause of action"; thus, there was "limited necessity associated with their sweeping effort to obtain 'even more' evidence").

As discussed in Part II(B), *infra*, Petitioners have not met their burden of demonstrating that engaging in disclosure is "essential" or "necessary" to obtaining the relief they are seeking. In fact, in asserting that the purported unconstitutionality of the enacted plan is obvious, Petitioners implicitly concede that engaging in disclosure would be superfluous. *See* Memorandum of Law in Support of Request for Leave to Conduct Discovery, Dkt. No. 48 ("Pets. Discovery Br.") at 2 (seeking to engage in disclosure so that "they may *more fully discover* . . . facts *further establishing* their claims") (emphasis added).

Moreover, as Petitioners concede, demonstrating that engaging in disclosure might lead to information that is material, necessary, and essential is only the first step in proving entitlement to engage in disclosure under CPLR 408. The Court must also "balance the needs of the party seeking discovery against such opposing interests as expedition and confidentiality." *Protect the Adirondacks!*, 38 Misc.3d 1235(A), at *2 (citing *Matter of Town of Pleasant Val. v. New York State Bd. of Real Prop. Servs.*, 253 A.D.2d 8, 15 (3d Dep't 1999)). This analysis not only requires consideration of whether the parties from whom discovery would be sought would have privilege or other objections, *see* Part II, *infra*, but also other factors, such as whether the contemplated discovery requests are "carefully tailored to obtain the necessary information" and whether "undue delay" would result from granting leave to engage in disclosure. *See Matter of Suit-Kote Corp.*, 137 A.D.3d at 1364-65. Both of these factors weigh strongly against granting Petitioners leave to engage in any disclosure, much less the notably broad discovery they apparently would attempt to conduct if such leave were granted.

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First, the discovery Petitioners contemplate is anything but narrow. Petitioners assert that their proposed discovery requests "narrowly focus" on "only two categories of facts" – "(a) whether Respondents acted with impermissible partisan intent in drawing the 2022 state Senate and congressional maps, *contra* N.Y. Const. art. III, § 4(c)(5); and (b) whether Respondents worked with the Democratic IRC Commissioners, politicians, officials, or interest groups to frustrate the mandatory constitutional process for redistricting, N.Y. Const. art. III, §§ 4–5." Pets. Discovery Br. at 6. That Petitioners are able to divide their fourteen different contemplated discovery demands into two categories is beside the point; what matters is the sweep and patent overbreadth of the demands they contemplate. For example, Petitioners intend to serve a generalized and broad document request seeking "[a]ll Documents and Communications with or otherwise concerning the Commissioners of the Democratic Caucus of the IRC[,]" "[a]ll Documents and Communications concerning the drawing of the 2022 New York Congressional and state Senate districts[,]" and "[a]ll Documents and Communications concerning the subject matter of the Amended Petition." *See* Dkt. No. 34. They also contemplate seeking to take eight party depositions, including of high-level officials, and serving subpoenas on five non-parties to sit for depositions and to produce documents. Petitioners have made no attempt to tailor their contemplated requests in any way, instead conjuring requests that would be overbroad, unduly burdensome, and prejudicial in an ordinary action, let alone in an article 4 special proceeding. *See, e.g.*, *Protect the Adirondacks!*, 38 Misc.3d 1235(A), at *3 (declining to permit "wide ranging, unfocused and intrusive inquiry" in "special proceeding in which petitioners already claim to have irrefutable proof in hand" of their cause of action).

Second, there is no question that "undue delay" would result if Petitioners were allowed to engage in disclosure. As explained below, were the Court to grant Petitioners such leave,

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Respondents would object and assert their absolute legislative privilege. *See* Point II, *infra*. As a result, time-consuming motion practice would inevitably follow.

Because Petitioners have not shown that engaging in disclosure is essential to proving their claims, that the discovery they would conduct would be narrow, or that there would be no undue delay, the Court should deny their motion for leave to engage in disclosure.

II. PETITIONERS ARE NOT ENTITLED TO ENGAGE IN DISCLOSURE UNDER ANY STANDARD

No matter what standard of materiality and necessity applies under CPLR 408, it would be pointless to permit Petitioners to engage in disclosure because Respondents would assert an absolute legislative privilege under the New York Constitution that forbids a court from ordering them to respond to questioning or other demands for information regarding the performance of legislative activities. *See* Point II.A, *infra*.[1] Moreover, Petitioners' papers implicitly acknowledge that this matter is susceptible of proof by reference to objective facts and information already in the public record. *See* Point II.B, *infra*. Finally, nothing about the rulings of other courts in different states supports Petitioners' request to engage in disclosure in this proceeding because those cases all arose under different procedural postures and involved maps and foreign laws not involved here. *See* Point II.C, *infra*.

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[1] We emphasize that Respondents are not asserting legislative or any other privilege at this time or otherwise briefing the appropriateness of any specific demands for discovery, because no such demands have been served. Instead, Respondents are merely providing the Court with a preview of the law of absolute privilege to illustrate that permitting Petitioners to engage in disclosure would create unnecessary and pointless delay. Respondents reserve all of their rights, including the right to object and/or move for protective orders based on burdensomeness, privilege, and/or any other grounds if Petitioners are permitted to engage in disclosure.

A. Petitioners Contemplate Engaging in Disclosure that Would Be Barred by Absolute Legislative Privilege

Petitioners contemplate obtaining information from and questioning Respondents – all of whom are legislators, aides, or other officials performing legislative functions – about basic legislative activities relating to the enacted congressional reapportionment. The Court should deny leave to engage in such disclosure. The Court of Appeals has held that the Speech or Debate Clause of the New York Constitution provides at least as much protection to members of the New York State Assembly and Senate as the federal Speech or Debate Clause does to members of Congress, *People v. Ohrenstein*, 77 N.Y.2d 38, 53 (1990), which a long line of Supreme Court cases makes clear includes an absolute privilege to refuse to provide testimony or other information about legislative activities.

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The federal Speech or Debate Clause provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. "Two interrelated rationales underlie the Speech or Debate Clause: first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence." *United States v. Gillock*, 445 U.S. 360, 369 (1980); *see also United States v. Johnson*, 383 U.S. 169, 178 (1966) (the legislative privilege embodied in this Clause "has been recognized as an important protection of the independence and integrity of the legislature" which "serves the additional function of reinforcing the separation of powers so deliberately enshrined by the Founders."); *see also United States v. Helstoski*, 442 U.S. 477, 491 (1979) (same); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975) (same).

The legislative privilege emanating from the Speech or Debate Clause and separation-of-powers principles broadly and categorically bars inquiry into legislative activity. If the actions

of a Representative or Senator "fall within the 'sphere of legitimate legislative activity,'" then that legislator "'shall not be questioned in any other Place' about those activities since the prohibitions of the Speech or Debate Clause are absolute." *Eastland*, 421 U.S. at 501; *see also Helstoski*, 442 U.S. at 489. Members of Congress (and their aides) thus enjoy an absolute privilege to be free from judicial or executive questioning about legislative activities. *See United States v. Gravel*, 408 U.S. 606, 615-16 (1972).[2]

Gravel is instructive. There, a grand jury issued a subpoena to an aide to Senator Gravel seeking to obtain information regarding "events occurring at [a] subcommittee hearing," and the Court found it "incontrovertible" that the Senator could not be subjected to "questioning elsewhere than in the Senate" about legislative activities. *Gravel*, 408 U.S. at 616 ("We have no doubt that *Senator Gravel may not be made to answer – either in terms of questions* or in terms of defending himself from prosecution – *for the events that occurred at the subcommittee meeting*.") (emphasis added). This evidentiary privilege applies in equal force in civil actions given "the absoluteness of the terms 'shall not be questioned,' and the sweep of the term 'in any other Place.'" *Eastland*, 421 U.S. at 503.

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To be sure, the federal Speech or Debate Clause does not apply to members of the New York Assembly or Senate. *See Gillock*, 445 U.S. at 366 n.5. But the New York Constitution likewise contains a Speech or Debate Clause, *see* N.Y. Const. art. III, § 11, and its own tripartite separation of governmental power, *see Saratoga Cnty. Chamber of Com., Inc. v. Pataki*, 100

[2] The Supreme Court has made clear that the absolute legislative privilege "prohibits inquiry into things done by . . . the Senator's agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." *Gravel*, 408 U.S. at 616-17. This doctrine applies not just to personal staff of a legislator, but also to other third persons, such as "Committee staff, . . . consultant[s], or . . . investigator[s]." *Doe v. McMillan*, 412 U.S. 306, 312 (1973).

N.Y.2d 801, 821-22 (2003). Thus, the immunity provided under the New York Constitution affords New York legislators "at least as much protection as the immunity granted by the comparable provision of the Federal Constitution." *Ohrenstein*, 77 N.Y.2d at 53; *accord Straniere v. Silver*, 218 A.D.2d 80, 82-85 (3d Dep't 1996).

Cases construing New York's Speech or Debate Clause make clear that state lawmakers have an absolute evidentiary and testimonial privilege. *Humane Soc'y of New York v. City of New York*, 188 Misc. 2d 735, 739-40 (Sup. Ct. N.Y. Cnty. 2001) (rejecting plaintiff's requests for document and deposition discovery because such discovery would defeat the purpose of the privilege).[3] For example, in *Campaign for Fiscal Equity v. State of New York*, 179 Misc. 2d 907 (N.Y. Sup. Ct. N.Y. Cnty. 1999), the plaintiffs sought to depose the Education Department employee who was primarily responsible for creating the computer software that evaluated the distributional impact of changes to the state's public school funding formulae regarding her interactions with legislators. *Id*. at 909-10. Noting that New York's legislative privilege is at least as extensive as the federal Constitution's and relying on Supreme Court and other federal court decisions construing the federal Clause, *see id*. at 911-12, the Court upheld the aide's absolute privilege to be free from questioning about her legislative activities. *Id.* at 914 (holding that "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

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[3] Courts in several other states also interpret their state constitutions to provide the same, or greater, protection to state legislators than that afforded to members of Congress under the federal Constitution, *see*, *e.g.*, *Kerttula v. Abood*, 686 P.2d 1197, 1202-05 (Alaska 1984) (recognizing absolute testimonial privilege), including in cases involving redistricting litigation, *see Edwards v. Vesilind*, 292 Va. 510, 523-27 (Va. 2016) (same); *Arizona Independent Redistricting Com'n v. Fields*, 206 Ariz. 130, 136-41 (Ct. of App. Div. 1 2003) (same); *Holmes v. Farmer*, 475 A.2d 976, 981-83 (R.I. 1984) (same).

legislation" and that "discovery of background documents and data would defeat this purpose of immunity"), *aff'd*, 265 A.D.2d 277, 278 (1st Dep't 1999). Nothing in either opinion – or in any New York state court decision involving an assertion of legislative privilege under state law – even suggests that the privilege is qualified in any way, or subject to any sort of balancing test.[4]

If Respondents are required to assert it, the absolute legislative privilege under New York law would apply with particular force here given the nature of the discovery Petitioners contemplate. Petitioners hope to require Respondents to answer questions about their individual thoughts and motivations in enacting the congressional plan. *See* Pets. Discovery Br. at 6. But that is "*precisely* what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." *Johnson*, 383 U.S. at 181 (emphasis added); *see also United States v. Brewster*, 408 U.S. 501, 525 (1972) (privilege bars discovery into legislative acts and motivations for them); *Campaign for Fiscal Equity*, 179 Misc. 2d at 912 (same).

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B. Petitioners Seek Discovery That Is Not Necessary

Beyond the absolute legislative privilege that would bar the disclosure Petitioners seek, Petitioners have not and cannot show that they need the information. Petitioners have repeatedly stated that the objective, publicly available evidence and expert opinions on which they rely demonstrate that Respondents "brazenly enacted a congressional map that is undeniably politically gerrymandered," and that their right to relief "is so obvious" because the "redistricting maps here are blatantly unconstitutional." *See* Dkt. No. 1 ¶ 1; *id*. ¶ 110; Dkt. No. 52 at 3. It is therefore no surprise that Petitioners argue that broad, burdensome discovery is *not* essential to

[4] To the extent Petitioners seek support from decisions regarding assertions of legislative privilege by state legislators in federal court, such cases are inapposite because they do not apply either federal or state constitutional law, but instead look to the federal common law, where there are no separation of powers concerns and where federal interests may outweigh the common law privilege. *See*, *e.g.*, *United States v. Gillock*, 445 U.S. 360, 370 (1980).

proving their claims. *See* Pets. Discovery Br. at 2 (seeking discovery so that "they may *more fully discover* . . . facts *further establishing* their claims") (emphasis added).

Petitioners are flatly wrong about the conclusions to be drawn from the information before the Court. Indeed, as explained in the Legislature's Memorandum of Law, *see* Dkt. No. 72 at 17-28, this proceeding is ripe for dismissal on the merits in favor of the Legislature because Petitioners' own expert refutes their claims, because they lack standing, and because the objective characteristics of the congressional plan confirm that it is lawful. For decades, New York courts have resolved redistricting challenges in favor of the Legislature without resort to burdensome discovery. *See, e.g.*, *Bay Ridge Cmty. Council v. Carey*, 115 Misc. 2d 433 (N.Y. Sup. Ct. Kings Cnty. 1982) (upholding constitutionality of redistricting plan and denying request for discovery), *aff'd sub nom. Bay Ridge Cmty. Council, Inc. v. Carey*, 103 A.D.2d 280 (2d Dep't 1984), *aff'd*, 66 N.Y.2d 657 (1985); *Schneider v. Rockefeller*, 38 A.D.2d 495 (N.Y. Sup. Ct. Albany Cnty. 1972), *aff'd*, 31 N.Y.2d 420 (1972) (same). The same result should follow in this proceeding.

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C. Petitioners' Reliance on Other Courts' Handling of Redistricting Challenges Is Misplaced

Petitioners' citations to other states' redistricting decisions are beside the point. None of those cases, of course, involved the New York Constitution. All of them are also readily distinguishable on other grounds.

Petitioners cite five redistricting cases in other states as purported support for the position that they are entitled to engage in sweeping disclosure in this article 4 special proceeding. *See* Pets. Discovery Br. at 6-8. Each of those cases involved challenges to redistricting plans pursued through dramatically different procedural vehicles and/or where an absolute legislative privilege either was not at issue or resulted in significant limitations on the scope of permitted discovery.

Three of the cases on which Petitioners rely were ordinary actions commenced long after the challenged apportionment plans were enacted, and where the plaintiffs sought no form of expedited process. In North Carolina, plaintiffs filed a federal action six months after enactment of the challenged redistricting plan, which was not decided until seventeen months after the complaint was filed. *See Common Cause v. Rucho*, 16 Civ. 1026 (M.D.N.C.). In Maryland, the federal complaint was filed twenty-three months after dismissal of the initial challenge to the October 2011 Congressional plan, and the first discovery-related motion was filed more than three years after the complaint. *See Benisek v. Lamone*, 13 Civ. 3233 (D. Md.) (federal action filed in November 2013; motion to compel made and decided in January 2017). And in Pennsylvania, plaintiffs filed their challenge to the 2011 redistricting plan in June 2017, *see League of Women Voters of Pennsylvania v. Commonwealth*, 261 MD 2017 (Pa. Commw. Ct.), and the Pennsylvania Supreme Court decided the matter more than seven months later. *See League of Women Voters of Pennsylvania v. Commonwealth*, 645 Pa. 1 (2018). Given the procedural posture here – a special proceeding designed to be treated like a motion, and subject to an express constitutional 60-day deadline – these cases are plainly irrelevant to the question of whether the Court should permit Petitioners to seek discovery.

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Any attempt to compare this proceeding with the North Carolina litigation is particularly untenable because that litigation spanned seven years, and no party asserted legislative privilege. *Common Cause v. Rucho*, 16 Civ. 1026 (M.D.N.C.). If anything, the federal district court's handling of that case cuts against Petitioners' request to seek discovery that will inevitably involve collateral litigation and delay. There, on September 4, 2018 – more than two years after the filing of the complaint challenging the 2013 remedial map – the district court held that it was too close to the approaching midterm election to cure any deficiencies in the map in advance of

the November election or to tinker with the election schedule. *Common Cause v. Rucho*, Nos. 16 Civ. 1026, 16 Civ. 1164, 2018 WL 4214334, at *1 (M.D.N.C. Sept. 4, 2018) (declining to enjoin the use of the 2016 plan in the November 6, 2018 general election).

Petitioners' reliance on the federal court decision in *Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018), is also misplaced. As noted above, that litigation involved challenges to a redistricting plan filed and heard in an ordinary federal court action over many years. The state legislator defendants could assert no absolute legislative privilege because such a privilege does not exist under federal common law. *See* p. 12 fn. 4, *supra* (distinguishing federal courts' determination of federal common law legislative privilege from the assertion in a state court proceeding of the absolute legislative privilege under the New York Constitution); *Benisek v. Lamone*, 263 F. Supp. 3d 551, 553 (D. Md. 2017) (discussing invocation of "the federal common-law legislative privilege accorded to state legislative officials").

Although challenges to Florida's 2012 redistricting plan and to Ohio's 2021 redistricting plan followed a more expedited schedule, neither of those litigations involved the proposed breadth of discovery or privilege issues present here.

In Florida, for example, the challenge to the February 2012 reapportionment of state legislative districts was brought under a provision of the Florida Constitution permitting an original declaratory judgment action in the Florida Supreme Court (to be decided within 30 days), which that Court decided on March 9, 2012. *In re Senate Joint Resolution of Legislative Apportionment 1176 (Apportionment I),* 83 So. 3d 597, 617 (Fla. 2012). Notably, the Court decided the constitutionality of those maps based on "objective, undisputed evidence in the limited record before the Court," which it noted was necessitated by the time constraints imposed by the constitutionally mandated expedited proceeding. *See Florida House of Representatives v.*

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League of Women Voters, 118 So.3d 198, 201 (2013). The Florida decision that Petitioners cite, *League of Woman Voters v. Detzner*, 172 So. 3d 363 (Fla. 2015), bears no similarity to this proceeding. That challenge to Florida's congressional maps was brought in an ordinary action, which featured motion practice regarding the scope of discovery and interlocutory appeals.[5]

Contrary to Petitioners' assertion, comparison to the recent Ohio litigation is unpersuasive. It is true that that matter has proceeded quickly, and that the Ohio Supreme Court permitted streamlined discovery in the proceeding, including by directing that each party be deposed only once, jointly by counsel for all Relators, and that each of those depositions be limited to two hours of questioning by opposing counsel. *League of Women Voters of Ohio v. Ohio Redistricting Comm.*, 174 N.E.3d 805 (Table), 805-06 (Ohio 2021). But Petitioners never mention the critical fact: it does not appear that any party in Ohio even *raised* an issue of legislative privilege. Thus, there is no way of knowing what possible effects an assertion of legislative privilege under the Ohio Constitution (which does contain a Speech or Debate Clause) might have altered the course of that litigation.

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Of the five redistricting challenges Petitioners cite, only Pennsylvania involved consideration of legislative privilege under a state constitution. And that case does not help Petitioners because the only court to decide the issue *upheld* the claim of legislative privilege.

[5] It is not only the procedural posture of the Florida litigation that dramatically differs from the situation here. The decision of the Florida Supreme Court to afford its state legislators only a qualified legislative privilege does not remotely support Petitioners' request for disclosure because it rests entirely on the Florida Constitution, which does not contain a Speech or Debate Clause and also includes specific provisions requiring legislative transparency. *See Fla. House of Representatives v. Romo*, 113 So.3d 117, 132 n.12 (Fla. Dist. Ct. App.), *decision quashed sub nom. League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So.3d 135 (Fla. 2013) (Benton, C.J., dissenting). The New York Constitution is obviously very different. *See* pp. 10-12, *supra*; *see also* fn. 3, *supra* (states with constitutions containing a Speech or Debate clause upholding absolute legislative privilege).

League of Women Voters of Pennsylvania v. Commonwealth, 177 A.3d 1000, 1005 (Pa. Commw. Ct. 2017) ("[T]his Court lacks the authority to compel testimony or the production of documents relative to the intentions, motivations, and activities of state legislators and their staff with respect to the consideration and passage of [the challenged redistricting plan]."). Although the Pennsylvania Supreme Court, in *dicta*, expressed some uncertainty about that holding under Pennsylvania law, it did not decide the question. *See League of Women Voters v. Commonwealth*, 645 Pa. 1, 40 n.38 (Pa. 2018).

In short, Petitioners have cited no authority demonstrating their entitlement to engage in disclosure in this streamlined proceeding in which discovery is highly disfavored and, even if permitted, would be pointless because an absolute evidentiary and testimonial privilege would apply.

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CONCLUSION

For the foregoing reasons, Petitioners' motion to seek expedited discovery in this article 4 special proceeding should be denied.

Dated: February 25, 2022
New York, New York

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ATTORNEY CERTIFICATION

I, John R. Cuti, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this memorandum of law complies with the bookmark requirement in section 202.5(a)(2) of the Uniform Civil Rules for the Supreme Court and the County Court (22 NYCRR 202.5(a)(2)) and with the word count limit set forth in section 202.8-b(a) of the Uniform Civil Rules for the Supreme Court and the County Court (22 NYCRR 202.8-b) because it contains 5,304 words, not including the parts of the memorandum excluded under section 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum.

Dated: February 25, 2022
New York, New York

/s/ John R. Cuti
John R. Cuti

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