UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BELINDA DE GAUDEMAR, ANTHONY HOFFMANN, SUSAN SCHOENFELD, NANCY PASCAL, and MICHAEL CORBETT, *Plaintiffs*, v. PETER S. KOSINSKI, in his official capacity as Co-Chair of the State Board of Elections; DOUGLAS A. KELLNER, in his official capacity as Co-Chair of the State Board of Elections; ANDREW J. SPANO, in his official capacity as Commissioner of the State Board of Elections; ANTHONY J. CASALE, in his official capacity as Commissioner of the State Board of Elections; TODD D. VALENTINE, in his official capacity as Co-Executive Director of the State Board of Elections; and KRISTEN ZEBROWSKI-STAVISKY, in her official capacity as Co-Executive Director of the State Board of Elections, *Defendants*.	Case No. 22-cv-03534-LAK

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'S MEMORANDUM IN SUPPORT OF THEIR MOTION TO INTERVENE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes And Rules

Constitutional Provisions

PRELIMINARY STATEMENT

Proposed Intervenor-Defendants 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 (collectively, "Proposed Intervenors"), who are citizens who reside and vote in New York, move to intervene as defendants under Federal Rule of Civil Procedure 24. As a threshold matter, Proposed Intervenors are entitled to intervene as of right under Rule 24(a)(2). Alternatively, and at a minimum, this Court should grant Proposed Intervenors permissive intervention under Rule 24(b)(1)(B). Proposed Intervenors' timely intervention is essential to allowing them to protect their interests in preserving and enforcing the judgment that they obtained in *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. Steuben Cnty. Mar. 31, 2022), which the New York Court of Appeals affirmed and expanded upon in *Harkenrider v. Hochul*, No.60, ___N.E.3d___, 2022 WL 1236822, at *1 (N.Y. Apr. 27, 2022). Further, Proposed Intervenors' timely intervention will also protect certain public concerns, namely, ensuring fair public elections that are free from partisan gerrymandering and thereby enforcing the Peoples' will as expressed in the 2014 amendments to the New York Constitution.

FACTUAL BACKGROUND*

New York currently has no maps to govern the 2022 elections, and New York courts are in the process of adopting such maps. Since the 2012 decision in *Favors v. Cuomo* that established New York's then-27 congressional districts, the State has experienced population shifts that caused its districts to become unconstitutionally malapportioned, *see generally Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012), and also changed its per-district population goal from 719,298 persons per each of its previous 27 congressional districts to 776,971 persons per each of its now 26 congressional districts. The New York Constitution provides an exclusive process for enacting a replacement map, but the Independent Redistricting Commission ("IRC") and the Legislature failed to follow that process, meaning that the Legislature never validly enacted any map to govern the 2022 congressional elections. Under the New York Constitution, the IRC has the initial authority to draw congressional maps, and the Legislature must vote on and reject at least *two* IRC-submitted maps before the Legislature regains primary redistricting authority. N.Y. Const. art. III, § 4(b). Violating this exclusive process, which the Constitution mandates "shall govern" all "redistricting in this state," *id.* § 4(e), the IRC failed to submit to the Legislature a second-round congressional map, after the Legislature rejected the IRC's first submission. Nevertheless, and in violation of the New York Constitution, the Legislature inexplicably attempted to enact its own 2022

* Given the press of time, Proposed Intervenors adopt the same fact statement for their Memorandum In Support Of Intervention and their proposed Opposition To Plaintiffs' Application For A Temporary Restraining Order And Motion For Preliminary Injunction.

congressional redistricting map, *see* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196, A.9039-A (as technically amended by A.9167), A.9040-A and A.9168, even though it had no authority to do so under the New York Constitution. Further, the map that the Legislature tried to enact outside of New York's constitutional processes was also substantively unconstitutional because it was drawn "to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." N.Y. Const. art. III, § 4(c)(5).

Proposed Intervenors challenged New York's 2022 congressional map in the Steuben County Supreme Court on the day of its enactment. Proposed Intervenors argued that the 2022 congressional map was never validly enacted under N.Y. Const. art. III, §§ 4–5, and also substantively invalid as partisan gerrymanders under N.Y. Const. art. III, § 4(c)(5). Proposed Intervenors specifically requested that relief for their constitutional claims take effect immediately, in time for the 2022 elections. *See* Amended Petition, *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. Steuben Cnty. Feb. 8, 2022), Dkt.18 at 82. Proposed Intervenors sued the State Board of Elections, among other defendants, which chose to take no position on the case. *See* Letter to Hon. Patrick F. McAllister, *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. Steuben Cnty. Feb. 16, 2022), Dkt.54.†

† All filed documents in the Steuben County proceedings are available at: https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=kmywkTvfcaoSsQ66zseQsg==&display=all&courtType=Steuben%20County%20Supreme%20Court&resultsPageNum=1 (all websites last visited May 3, 2022).

On March 31, 2022, the Supreme Court ruled in favor of Proposed Intervenors, holding that the 2022 congressional map was both never validly enacted and an unconstitutional partisan gerrymander; and that the court would retain a neutral expert to prepare a new congressional map, should the Legislature fail to adopt new, bipartisan, and constitutionally sound maps by April 11, 2022. Decision and Order at 10, 14, 18, *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. Steuben Cnty. Mar. 31, 2022), Dkt.243. Moreover, the Supreme Court also ruled that the 2012 congressional map was "no longer valid due to unconstitutional malapportionment and therefore can not be used," *id.* at 17, with no party appealing from this aspect of the Decision.

On appeal, the Appellate Division affirmed the Supreme Court's determination that the 2022 congressional map constituted an unconstitutional partisan gerrymander in violation of Article III, Section 4(c)(5) of the New York Constitution. *Harkenrider v. Hochul*, __ N.Y.S.3d __, 2022 WL 1193180, at *5 (N.Y. App. Div. 4th Dep't Apr. 21, 2022). However, the Appellate Division reversed the Supreme Court's determination that the congressional map was never validly, constitutionally enacted under New York's Constitution. *Id.* at *2.

Then, on an appeal to the New York Court of Appeals, that Court of Appeals reversed the Appellate Division's holding on Proposed Intervenors' claim that the Legislature never enacted any congressional map under the New York Constitution's exclusive procedures for redistricting, concluding that "the enactment of the congressional and senate maps . . . was procedurally unconstitutional," while

affirming that the map was "substantively unconstitutional as drawn." *Harkenrider*, 2022 WL 1236822, at *11; *see also id.* at *4–9, *9–10. Further, the court did not disturb the Supreme Court's judgment that the 2012 congressional map was unconstitutionally malapportioned and thus enjoined. *Id.*

Given these unconstitutional infirmities permeating the 2022 congressional map, the court also "reject[ed] [the State's] invitation to subject the People of this state to an election conducted pursuant to an unconstitutional reapportionment," and ordered "prompt judicial intervention" to draw new, constitutionally compliant maps. *Id.* at *11–12. The Court of Appeals acknowledged that enacting a remedial map would require "mov[ing] the congressional . . . primary election[ ] to August," but noted that "the Board of Elections [and] Supreme Court can swiftly develop a schedule to facilitate an August primary election, allowing time for the adoption of new constitutional maps" and compliance with all "federal voting laws, including the Uniformed and Overseas Citizens Absentee Voting Act." *Id.* at 12. The Court of Appeals then remanded the matter to the Supreme Court and ordered the court to adopt remedial maps "with all due haste" in time for the 2022 elections. *Id.* at *13.

On remand, the Supreme Court followed the Court of Appeals' directions for haste, entering an order on April 29, 2022, stating that it would adopt a proposed remedial congressional map by May 20, 2022, with the primary election to be held on August 23, 2022. *See* Preliminary Order, *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. Steuben Cnty. Apr. 29, 2022), Dkt.301. In the interim, the parties and other interested persons have already submitted proposed congressional maps to the

Supreme Court, and all interested persons are to appear before the Supreme Court and Special Master on May 6, for a final hearing to voice any opposition to any previously submitted congressional map. *See* Second Amended Order, *Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. Steuben Cnty. Apr. 29, 2022), Dkt.296.

On May 2, 2022, Plaintiffs filed this federal lawsuit. Plaintiffs' Complaint asserts two claims, both fundamentally premised on the malapportionment of New York's 2012 Congressional Map. Dkt.1 at 14–15. First, Plaintiffs assert a "Congressional Malapportionment" claim asserting that "significant population shifts . . . have occurred since the 2010 Census," meaning that the 2012 Congressional Map is "now unconstitutionally malapportioned" under Article I, Section 2 of the U.S. Constitution and its use "would violate Plaintiffs' constitutional right to an undiluted vote." Dkt.1 at 14. Second, Plaintiffs assert a "Congressional Malapportionment" claim asserting that the 2012 Congressional Map violates 2 U.S.C. § 2c's "requirement that the number of congressional districts be 'equal to the number of Representatives to which [New York] is so entitled,'" since New York is now entitled to 26 seats in the House, not 27 seats, after the 2020 census. Dkt.1 at 15 (quoting 2 U.S.C. § 2c (brackets in original)). As a remedy for both claims, Plaintiffs request that this Court declare that the 2012 Congressional Map "violates Article I, Section 2 of the United States Constitution, and 2 U.S.C. § 2c"; enjoin the use of this map; and draw its own remedial map in time for the State to "conduct its primary on June 28, 2022, as required by federal court order." Dkt.1 at 15–16. Plaintiffs request that this Court replace the 2012 Congressional Map with the flagrantly gerrymandered

map that the Legislature never validly adopted under the New York Constitution. Dkt.9 at 16–18.

ARGUMENT

Under Rule 24(a)(2) of the Federal Rules of Civil Procedure, a party can intervene as of right "[o]n timely motion," if that party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). When intervention as of right is not appropriate, this Court may allow permissive intervention under Rule 24(b)(1) to "anyone . . . who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Here, Proposed Intervenors satisfy Rule 24(a)(2), and this Court should grant them intervention as of right. *Infra* Part I. Alternatively, this Court should permit Proposed Intervenors to intervene under Rule 24(b)(1). *Infra* Part II.

I. Proposed Intervenors Are Entitled To Intervene As Of Right Under Rule 24(a)(2), Given Their Direct And Substantial Interests In New York's Congressional Districts And The 2022 Election Cycle

There are four elements an applicant must satisfy to intervene as of right under Rule 24(a)(2): The applicant "must (1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately

by the parties to the action." *In re N. Y. City Policing During Summer 2020 Demonstrations*, 27 F.4th 792, 799 (2d Cir. 2022).

Proposed Intervenors satisfy each of these four elements.

1. *Proposed Intervenors' Motion is timely*. To "determine[e]" whether a motion to intervene is "timel[y]," this Court considers : "(a) the length of time the applicant knew or should have known of its interest before making the motion; (b) prejudice to existing parties resulting from the applicant's delay; (c) prejudice to the applicant if the motion is denied; and (d) the presence of unusual circumstances militating for or against a finding of timeliness." *Floyd v. City of New York*, 770 F.3d 1051, 1058 (2d Cir. 2014). The Second Circuit has found intervention to be timely when an applicant moves for intervention early and causes no delay in the proceedings. *See, e.g.*, *Laroe Estates, Inc. v. Town of Chester*, 828 F.3d 60, 67 (2d Cir. 2016) (recognizing that intervention was timely where the parties had not yet begun discovery).

Proposed Intervenors' intervention motion is plainly timely, since they filed this Motion just one day after Plaintiffs filed their Complaint, which provides more than sufficient time for Proposed Intervenors to participate in this case as a party without causing undue prejudice to any of the existing parties.

2. *Proposed Intervenors have a direct and substantial interest.* For intervention-as-of-right purposes, an interest "must be direct, substantial, and legally protectable." *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001) (citations omitted); *accord Donaldson v. United States*, 400 U.S. 517, 531, 91 S. Ct. 534, 542 (1971) (requiring "significantly protectable interest"). When a party has

obtained a judgment in a matter, that can provide a "legally protectable" interest in the outcome of any related proceedings. *See, e.g.*, *XL Specialty Ins. Co. v. Lakian*, 632 F. App'x 667, 669–70 (2d Cir. 2015) (holding that investors who obtained a judgment against a financial services company had "legally protectable" interest in suit by insurance company against the same creditor because they had an interest in any funds paid pursuant to the policy). An interest "will not satisfy [Rule 24]" when it is "remote from the subject matter of the proceeding, or . . . is contingent upon the occurrence of a sequence of events before it becomes colorable." *Floyd*, 770 F.3d at 1060. Further, "[t]he Supreme Court has recognized that 'certain public concerns may constitute an adequate "interest" within the meaning of [Rule 24(a)(2)].'" *Herdman v. Town of Angelica*, 163 F.R.D. 180, 187 (W.D.N.Y. 1995) (quoting *Diamond v. Charles*, 476 U.S. 54, 68, 106 S. Ct. 1697, 1706 (1986)) (alteration in original). This Court, therefore, must "take into account both the public nature" of the instant litigation "and the basis for, and strength of, [Proposed Intervenors'] particular interest in the outcome of the litigation." *Id.*; *accord Commack Self-Serv. Kosher Meats, Inc. v. Rubin*, 170 F.R.D. 93, 100 (E.D.N.Y. 1996).

Proposed Intervenors have a direct and substantial interest in this case. Proposed Intervenors brought suit in New York state court and won a judgment in the Supreme Court requiring the redrawing of the congressional maps *for the 2022 elections*, *see* Moskowitz Decl., Ex.C at 10, 14, 18, which was Proposed Intervenors' key request for relief throughout the state-court case. Moskowitz Decl., Ex.A at 82. Ultimately, that judgment was also affirmed and expanded upon by the New York

Court of Appeals, which concluded not only that the Legislature had violated the procedural requirements of Article III, Section 4(b) of the New York Constitution but also that such a violation was not correctable by the Legislature, and so court-drawn maps were the only possible cure for that unconstitutionality, *see Harkenrider*, 2022 WL 1236822, at *11–12. Now, all that is left is for the Supreme Court to adopt a remedial map for the 2022 elections, which is the key component of Proposed Intervenors' relief. Nothing about the court's adoption of the remedial map for the 2022 election is "contingent on a sequence of events." Rather, the Supreme Court is in the process of creating a remedial map *now* and will provide relief for Proposed Intervenors imminently. *See* Moskowitz Decl., Ex.E at 2. Moreover, as New York residents who regularly vote in congressional elections and campaign for congressional candidates across the State, *see* Moskowitz Decl., Ex.F, Proposed Intervenors have a "direct, substantial, and legally protectable" interest in the district lines that will govern the congressional elections in November 2022, *Brennan*, 260 F.3d at 129, and will be gravely harmed if forced to vote in and campaign on an unconstitutional map. They have an interest in ensuring that the 2014 New York Constitutional Amendments are honored and that they have the ability to vote in elections that are free from impermissible partisan gerrymandering.

3. *Plaintiffs' lawsuit potentially impairs Proposed Intervenors' direct and substantial interest*. As just explained, Proposed Intervenors have a core interest in ensuring the Steuben County Supreme Court adopts a remedial congressional map for the State of New York for the upcoming 2022 congressional elections, per the

judgment secured by Proposed Intervenors in the Supreme Court and ultimately affirmed by the New York Court of Appeals. Plaintiffs' lawsuit may "impair or impede" Proposed Intervenors' "ability to protect their interests" after resolution of this case because "the possible stare decisis effect of an adverse decision" may compromise their interests. *N.Y. Pub. Int. Rsch. Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975). Indeed, Plaintiffs ask this Court to order that the very map that Proposed Intervenors just defeated in state court will govern the 2022 election. Dkt.1 at 3. That requested remedy impedes Proposed Intervenors' interests clearly at stake in this case. *See Brennan*, 260 F.3d at 130 (stating that Rule 24(a)(2) requires "an interest relating to the property or transaction which is the subject of the action").

4. *The parties do not adequately represent Proposed Intervenors' interests.* Intervention under Rule 24(a)(2) is warranted when there is "sufficient doubt about the adequacy of representation." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538, 92 S. Ct. 630, 636 (1972). "This requirement 'is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *In re N. Y. City Policing*, 27 F.4th at 803 (quoting *Trbovich*, 404 U.S. at 538 n.10, 92 S. Ct. at 636 n.10). Courts must permit intervention under this factor unless the interests of existing parties are "so similar to those of [Intervenors] that adequacy of representation [is] assured." *Brennan*, 260 F.3d at 132–33. Where Proposed Intervenors have the same ultimate objective as Defendants, it is Proposed Intervenors' burden to overcome the

presumption of adequacy. *See Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179–80 (2d Cir. 2001). The Second Circuit has not precisely defined what is necessary to meet this heightened burden. *See id.* at 180 (holding that, while "not an exhaustive list, . . . evidence of collusion, adversity of interest, nonfeasance, or incompetence may suffice to overcome the presumption of adequacy.").

Here, and as an initial matter, the liberal, default rule applies because no party's interests are identical to Proposed Intervenors' interests—and, *a fortiori*, no government party has the duty to represent Proposed Intervenors' interests in this case.

Plaintiffs bring this lawsuit to ask this Court to adopt a remedial map drawn by a federal court, specifically seeking the Court's adoption of an already-ruled-unconstitutional map for 2022 elections, *see* Dkt. 1 at 13, 16, and thus could not possibly represent Proposed Intervenors' interests in having the state courts adopt a remedial map, per Proposed Intervenors' affirmed-on-appeal judgment, *Brennan*, 260 F.3d at 132–33.

Further, the Defendants—New York Board of Elections ("NYBE") officials, sued in their official capacities—do not represent the Proposed Intervenors' interests either. As an initial matter, Proposed Intervenors seek to defend their own judgment, which was entered *against* these very Defendants (as members of NYBE) in the state case. In that litigation, the NYBE took no position on the state case, and thus its officials cannot be expected to vigorously defend Proposed Intervenors' interests in the judgment secured in that case. *See supra* p.3. Finally, and independently

sufficient, Defendants in this case are government bodies, while Proposed Intervenors are individuals, and "governmental entities do not adequately represent the interests of aspiring [private] intervenors." *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003) (internal quotations omitted); *see also, e.g.*, *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir 2015) ("[W]e look skeptically on government entities serving as adequate advocates for private parties.").

Therefore, because no party represents Proposed Intervenors' interests, they have easily cleared their "minimal" burden to show that the other parties' representation "may be inadequate." *In re N. Y. City Policing*, 27 F.4th at 803.

II. Alternatively, This Court Should Grant Proposed Intervenors Permissive Intervention Under Rule 24(b)(1)(B)

Alternatively, Proposed Intervenors respectfully request that this Court grant them permissive intervention under Rule 24(b)(1)(B). Permissive intervention has two elements: the intervenor must "timely" move to intervene and must have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Further, this Court may, in its "very broad" discretion, consider other relevant factors, including "the nature and extent of the intervenors' interests, and whether [the] parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *Bldg. & Realty Inst. of Westchester & Putnam Ctys., Inc. v. New York*, No. 19-CV-11285, 2020 WL 5658703, at *5–6 (S.D.N.Y. Sept. 23, 2020) (citations omitted; alteration in original); *see also U.S.*

Postal Serv. v. Brennan, 579 F.2d 188, 191–92 (2d Cir. 1978). Overall, permissive intervention under Rule 24(b) "is to be liberally construed" in favor of intervention. *Olin Corp. v. Lamorak Ins. Co.*, 325 F.R.D. 85, 87 (S.D.N.Y. 2018) (citation omitted); *see also U.S. Postal Serv.*, 579 F.2d at 191 ("Permissive intervention is wholly discretionary with the trial court."). The "principal guide in deciding whether to grant permissive intervention is whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Olin*, 325 F.R.D. at 87 (citation omitted).

This Court should grant Proposed Intervenors permissive intervention. First, Proposed Intervenors' Motion To Intervene is timely, as already described above with respect to intervention as of right. *Supra* p.8. Further, Proposed Intervenors have simultaneously filed a proposed Brief In Opposition and Answer to Plaintiffs' Complaint, that present common questions of fact or law as Plaintiffs' Complaint, thus, Proposed Intervenors "share[ ] with the main action a question of law or fact." *Bldg. & Realty Inst.*, 2020 WL 5658703, at *5 (quoting Fed. R. Civ. P. 24(b)(1)(B)). As for other factors supporting permissive intervention, Proposed Intervenors have direct and substantial interests here. As discussed above, Proposed Intervenors have an interest in ensuring the state court drafts the remedial maps, whereas Plaintiffs in this action seek to have this Court draft them instead. *Supra* pp.8–11. As such, Proposed Intervenors' interest "is not protected adequately by the parties to the action." *Bldg. & Realty Inst.*, 2020 WL 5658703, at *5 (citing *Floyd*, 770 F.3d at 1057).

CONCLUSION

This Court should grant Proposed Intervenors' Motion To Intervene.

Dated: New York, New York.
May 3, 2022

Respectfully submitted,

By:/s/ Bennet J. Moskowitz

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* *pro hac vice pending*

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of May, 2022, a true and accurate copy of the foregoing was served via the Court's CM/ECF system upon all counsel of record.

/s/ *Bennet J. Moskowitz*

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