SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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Anthony S. Hoffmann; Marco Carrión; Courtney Gibbons; Lauren Foley; Mary Kain; Kevin Meggett; Clinton Miller; Seth Pearce; Verity Van Tassel Richard; and Nancy Van Tassel,

Index No. 904972-22

Petitioners,

-against-

The New York State Independent Redistricting Commission; Independent Redistricting Commission Chairperson David Imamura; Independent Redistricting Commissioner Ross Brady; Independent Redistricting Commissioner John Conway III; Independent Redistricting Commissioner Ivelisse Cuevas-Molina; Independent Redistricting Commissioner Elaine Frazier; Independent Redistricting Commissioner Lisa Harris; Independent Redistricting Commissioner Charles Nesbitt; and Independent Redistricting Commissioner Willis H. Stephens,

Respondents.

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MEMORANDUM OF LAW IN SUPPORT OF PROPOSED INTERVENORS' MOTION FOR LEAVE TO INTERVENE

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PRELIMINARY STATEMENT

Proposed Intervenors* successfully challenged the Legislature's unconstitutional, gerrymandered congressional map in the Steuben County Supreme Court, the Appellate Division, and the Court of Appeals, resulting in a Court of Appeals decision "endors[ing]" a process of "judicial oversight of remedial action in the wake of [the] determination of unconstitutionality," *Harkenrider v. Hochul*, ___ N.Y.3d ___, 2022 WL 1236822, at *12 (N.Y. Apr. 27, 2022), and a new, judicially adopted map that would govern congressional elections "for the next 10 years," *id.* at *14 (Troutman, J., dissenting in part). Petitioners—despite trying and failing to undermine that victory in the remedial phase of the prior litigation—now ask this Court to undo that victory and the remedial map that Proposed Intervenors obtained for the vast majority of that map's application.

This Court should permit Proposed Intervenors to intervene in this proceeding, both as a matter of right and in the Court's discretion, so they can defend their substantial interest in protecting the *Harkenrider* judgment and map from this lawsuit. Under CPLR 1012, the Court should permit Proposed Intervenors to intervene in this proceeding as a matter of right because Proposed Intervenors have filed a timely motion seeking to defend their interest in the validity of the *Harkenrider* judgment and map. This interest is not shared by any of the existing parties and is threatened by the potential for a judgment in Petitioners' favor, which would bind Proposed Intervenors. Alternatively, this Court should grant Proposed Intervenors permissive intervention under CPLR 7802(d), given Proposed Intervenors' substantial interest in protecting the *Harkenrider* judgment and the remedial congressional map they obtained, and given the fact that

* 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 Violante.

their timely involvement would not prejudice the existing parties at all at this early stage of these proceedings.

BACKGROUND

A. The 2014 Anti-Gerrymandering Amendments Set Up An Exclusive, Carefully Crafted Redistricting Process

Before 2014, partisanship and political interests ruled the redistricting process. *See Harkenrider*, 2022 WL 1236822, at *1. Courts interpreted extant provisions of the New York Constitution as not barring partisan gerrymandering, *Bay Ridge Cmty. Council, Inc. v. Carey*, 103 A.D.2d 280, 284 (2d Dep't 1984), thereby giving politicians carte blanche to draw lines for political gain.

In 2014, the People rejected this failed regime by amending Article III, Sections 4 and 5 of the New York Constitution, and adding a new Section 5-b to the same Article (collectively, "the 2014 Amendments"), "significantly alter[ing] both substantive standards governing the determination of district lines and the redistricting process established to achieve those standards," in order to "introduce a new era of bipartisanship and transparency." *Harkenrider*, 2022 WL 1236822, at *2. Under the 2014 Amendments, the Constitution now vests primary redistricting responsibility in the newly created Independent Redistricting Committee ("IRC") and establishes procedural and substantive safeguards against gerrymandering. N.Y. Const. art. III, §§ 4(c)(5), 5-b. The Constitution lays out a mandatory process that "*shall govern* redistricting in this state," meaning that redistricting cannot take place outside of this process. *Id.* § 4(b), (e) (emphasis added).

Under the 2014 Amendments, the IRC only has constitutional authority to act following each decennial census for the purpose of drawing new districts, with the sole exception being that the IRC may "amend" district maps in response to a court order. *Id.* §§ 4, 5-b. "On or before

February first of each year ending with a zero," the New York Constitution requires the establishment of the 10-member IRC, which comprises two members each appointed by the Temporary President of the Senate, the Speaker of the Assembly, the Senate Minority Leader, and the Assembly Minority Leader, and two members appointed by a vote of the politically appointed members. *Id.* § 5-b(a)(1)–(5); *see also Harkenrider*, 2022 WL 1236822, at *5. Thereafter, these ten members must hold twelve public hearings throughout the State, accepting public comments and suggestions on what districts should look like, N.Y. Const. art. III, § 4(c); *Harkenrider*, 2022 WL 1236822, at *5, and then "prepare a redistricting plan to establish senate, assembly, and congressional districts every ten years commencing in two thousand twenty-one," N.Y. Const. art. III, § 4(b). The IRC must submit to the Legislature an initial set of maps and the necessary implementing legislation "as soon as practicable," but in no event "later than January fifteenth in the year ending in two beginning in two thousand twenty-two," after which the Legislature votes on the maps and implementing legislation as provided, without any amendment. *Id.* § 4(b). If the Legislature fails to adopt this first set of maps and implementing legislation, or if the Governor vetoes adopted implementing legislation, then the redistricting process reverts to the IRC. *Id.* § 4(b). The IRC must then submit a second set of maps and implementing legislation to the Legislature, subject to the requirements outlined above, at least "[w]ithin fifteen days" of notification of the first rejection, but "in no case later than February twenty-eighth." *Id.* § 4(b). The Legislature then votes on the second set of proposed maps and implementing legislation, without any amendment. *Id.* § 4(b); *see also Harkenrider*, 2022 WL 1236822, at *2. Only then, if the Legislature fails to adopt the IRC's second set of maps and implementing legislation, or if the Governor vetoes the second adopted implementing legislation, can the Legislature amend the IRC's proposed maps and enact its own maps. N.Y. Const. art. III, § 4(b); *see also* N.Y. Legis.

Law § 93(1). Outside of this every-ten-years process, the Constitution only gives the IRC the constitutional authority to act in one particular instance: if "a court orders that congressional or state legislative districts be *amended*." N.Y. Const. art. III, § 5-b(a) (emphasis added).

If the constitutional deadline for the IRC to submit a second redistricting plan passes without the IRC sending to the Legislature new maps for a second vote, or if there are any other procedural or substantive infirmities in purportedly enacted redistricting legislation, "any citizen" may file suit in the Supreme Court for "review" of the "apportionment." *Id.* § 5. The Constitution requires that the Supreme Court "give precedence" to the redistricting lawsuit "over all other causes and proceedings," and mandates that the Supreme Court "render its decision within sixty days after a petition is filed." *Id.* § 5. Upon any showing of a "violation of law" in the enactment of redistricting legislation, the Constitution "require[s]" a reviewing court "to order the adoption of, or changes to, a redistricting plan as a remedy." *Id.* § 4(e). It is only when the reviewing court finds a correctable violation of the constitutional redistricting requirements that "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities," *id.* § 5, whereas when a court determines that there have been procedural infirmities after the conclusion of the timeline for IRC and legislative enactment, the Constitution does not permit giving the Legislature a chance to fix, because "the legislature is incapable of unilaterally correcting the infirmity," *Harkenrider*, 2022 WL 1236822, at *12 n.19.

B. The Legislature Violates The Anti-Gerrymandering Amendments By Attempting To Enact A Partisan Gerrymandered Congressional Map Outside Of The Amendments' Exclusive Process

In January 2022, the IRC submitted two initial redistricting plans to the Legislature, which plans the Legislature rejected out-of-hand, without even holding any hearings. 2021–2022 N.Y. Reg. Sess. Leg. Bills A.8587, A.8588, A.8589, A.8590, S.7631, S.7632, S.7633, S.7634; *see also* *Harkenrider*, 2022 WL 1236822, at *2. The IRC subsequently failed to submit revised maps to

the Legislature by the constitutional deadline, and announced on January 24, 2022, that it was deadlocked and would not submit a second redistricting plan to the Legislature. *Harkenrider*, 2022 WL 1236822, at *2. Nevertheless, the Legislature unconstitutionally attempted to enact its own 2022 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, A.9168, even though it had no authority to do so under the New York Constitution, *Harkenrider*, 2022 WL 1236822, at *5–7. Further, as Proposed Intervenors proved, the map that the Legislature tried to enact outside of New York's constitutional processes was 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); *see Harkenrider*, 2022 WL 1236822, at *9–11.

C. Proposed Intervenors Successfully Challenge The Legislature's Unconstitutional Maps in *Harkenrider v. Hochul*

Proposed Intervenors challenged the congressional map in Steuben County Supreme Court on the very same day it was enacted, *see Harkenrider* No.1,[†] and the new state Senate map days later, *Harkenrider* No.18. Proposed Intervenors alleged that the congressional map was both procedurally invalid because the Legislature did not follow the exclusive process for adopting replacement redistricting maps set out in Sections 4 and 5 of Article III of the New York Constitution, *see id.* at 73–75; N.Y. Const. art. III, §§ 4–5, and an unconstitutional partisan gerrymander, in violation of Article III, Section 4(c)(5) of the New York Constitution, *see Harkenrider* No.18 at 77–78.

After a three-day trial, the Supreme Court issued its decision on March 31, 2022, within the expedited 60-day window for redistricting challenges. N.Y. Const. art. III, § 5. The court first

[†] All citations to filings in *Harkenrider v. Hochul*, Index No.E2022-0116CV (Steuben Cnty. Sup. Ct.), may be found at https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=kmywkTvfcaoSsQ66zseQsg==&display=all. Such documents will be cited as "*Harkenrider* No.XX."

held that the Legislature failed to follow the exclusive process for enacting replacement maps. *Harkenrider* No.243 at 10. Because "the IRC failed to act and submit a second set of maps," the Legislature constitutionally could not step in to draw its own maps. *Id.* The court also held that the congressional map was unconstitutionally gerrymandered beyond a reasonable doubt. *Id.* at 10, 14. The defendants appealed the Supreme Court's decision to the Appellate Division, Fourth Department, which reversed the conclusion of procedural invalidity but affirmed the substantive-violation holding. *Harkenrider v. Hochul*, 204 A.D.3d 1366, 1366–75 (4th Dep't 2022).

The Court of Appeals, ruling on the parties' cross-appeals, then concluded that the congressional map was both procedurally and substantively unconstitutional, and that the congressional map's procedural unconstitutionality was "incapable of a legislative cure." *Harkenrider*, 2022 WL 1236822, at *12. The Court held "the enactment of the congressional and senate maps by the legislature was procedurally unconstitutional," and also found the congressional map to be "substantively unconstitutional as drawn with impermissible partisan purpose," ordering the Supreme Court to adopt new maps. *See Id.* at *11, 13. On the process, the Court held that the Constitution established a single, "constitutionally mandated procedure," which "permits the legislature to undertake the drawing of district lines only after two redistricting plans composed by the IRC have been duly considered and rejected," and which "drawing" would amount only to "'amendments' to such plan, not the wholesale drawing of entirely new maps." *Id.* at *5–6 (emphasis omitted) (quoting N.Y. Const. art. III, § 4(b)). Dissenting in part, Judge Troutman observed that the majority's decision results in a judicially adopted "electoral map" "for the next 10 years." *Id.* at *14 (Troutman, J., dissenting in part). Judge Troutman agreed with the majority that the maps were unconstitutional but believed "the legislature should be ordered to adopt one of the IRC-approved plans on a strict timetable." *Id.* at *13. The majority rejected this

suggestion, pointing out that the Legislature rejected the IRC's initial maps and "the deadline in the Constitution for the IRC to submit a second set of maps has long since passed. *Id.* at *8–9, 12.

D. On Remand In *Harkenrider v. Hochul*, The Supreme Court Adopts A Remedial Congressional Map That Will Govern For The Next Decade, Over The Objections Of Petitioners In The Present Case

On remand, the Supreme Court began the process of adopting a "final enacted [congressional] map[ ]." *Harkenrider* No.696 at 1; *see Harkenrider* No.670. To aid in its creation of preliminary and final maps, the court offered the parties and any other interested persons the opportunity to submit proposed remedial maps, and all interested persons had the opportunity to appear and give public testimony on proposed maps before the Steuben County Supreme Court and the court's appointed Special Master. With the aid of the voluminous testimony submitted to the IRC and the thousands of additional comments submitted to the court, the Special Master drafted preliminary remedial maps.

Several of the Petitioners in the present case—Courtney Gibbons, Lauren Foley, Seth Pearce, Verity Van Tassel Richards, and Nancy Van Tassel—represented by many of the same attorneys as in this case, raised objections to the Special Master's proposed map and urged that the map only govern the 2022 congressional elections. *See* Affirmation of Bennet Moskowitz ("Moskowitz Aff."), Ex.1. In particular, these Petitioners criticized the Supreme Court's process, claiming it "did not provide the public, including minority voters who live in historically marginalized communities, with an opportunity to provide input." *Id.* at 1. They also raised what they claimed were several "serious concerns" they had with the Special Master's proposed congressional map, including that it would break up communities of interest. *Id.* at 1–10. These Petitioners urged the Supreme Court "to ensure that the map drawn by the Special Master only be used for the 2022 congressional election," after which, the Supreme Court should "require the elected representatives of the people—who are best equipped to consider the interests of local

populations and to weigh the specific equities involved—to enact a congressional map that complies with both the United States and New York Constitutions to be used for the rest of the decade." *Id.* at 1, 10–11. In response to this request, Proposed Intervenors pointed out that Petitioners' proposal of limiting the remedial map to only the 2022 elections violated the Court of Appeals' decision and the Constitution. *Harkenrider* No.660 at 3.

The Steuben County Supreme Court released its final congressional map on May 21, 2022, accompanied by the Special Master's detailed report documenting the process and the court's written explanation regarding how it considered objections raised by Petitioners and others, how the final map preserved communities of interest, and how the court utilized the voluminous public testimony and comments in the mapdrawing process. *Harkenrider* No.670 at 1–31. Following certain proposed minor technical corrections, the Supreme Court "ORDERED, ADJUDGED, and DECREED" that the proposed technical changes were approved and the maps "as modified" "become the *final* enacted redistricting maps." *Harkenrider* No.696 at 1 (emphasis added). The court thus declined to adopt Petitioners' request that the court limit the applicability of the remedial congressional map only to the 2022 election. *See id.*; *Harkenrider* No.670 at 1–5.

No interested party, including Petitioners in this case, appealed the Supreme Court's final redistricting order either on the grounds that it unnecessarily split communities of interest or resulted from a flawed process that deprived the public of a sufficient opportunity to be heard, or on the grounds that the Supreme Court did not limit the map to the 2022 elections only.

E. Months Later, Petitioners Bring This Action

On July 28, 2022, Petitioners Anthony S. Hoffmann, Marco Carrión, Courtney Gibbons, Lauren Foley, Mary Kain, Kevin Meggett, Reverend Clinton Miller, Seth Pearce, Verity Van Tassel Richards, and Nancy Van Tassel, many of whom participated in the proceedings in Steuben County, as noted above, filed this Article 78 special proceeding. Pet. ¶ 1. In an Amended Petition

filed on July 14, Petitioners narrowed their focus to attack only the congressional map that the Steuben County Supreme Court had put in place, asking this Court to "compel" the members of the IRC, named as Respondents in this case, "to 'prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan,'" to be put in place "following the 2022 elections" to be "used for subsequent elections this decade." Amend. Pet. ¶ 1. Petitioners submit that because "[t]he IRC failed to complete its mandatory duty to submit a second set of congressional plans to the Legislature for consideration," the IRC must be given another chance to draft and submit a congressional map for the Legislature's vote. Amend. Pet. ¶ 65 & at 20. Petitioners contend that "the Steuben County Supreme Court adopted a congressional plan that unnecessarily shifts residents into new districts and divides long-recognized communities of interest," Amend. Pet. ¶ 56 & at 16, failed to have adequate "transparency," and deprived voters of sufficient participation. Amend. Pet. ¶¶ 52, 55. Petitioners argue that "the IRC's failure to send a second set of maps to the Legislature not only stymied the constitutional procedure . . . , but also resulted in a congressional map that does not properly reflect the substantive redistricting criteria contained in the Redistricting Amendments." Amend. Pet. ¶ 57.

ARGUMENT

CPLR 1012 provides that "any person" may intervene in an action as of right "[u]pon timely motion," "when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." CPLR 1012(a)(2). A court may also allow all "other interested persons to intervene" under CPLR 7802(d), which governs permissive intervention in Article 78 proceedings. CPLR 7802(d); *Roosevelt Islanders for Responsible Southtown Dev. v. Roosevelt Island Operating Corp.*, 291 A.D.2d 40, 48 (1st Dep't 2001) (CPLR 7802(d) "confer[s] upon the court broader authority to allow intervention in an

article 78 proceeding than is permitted pursuant to CPLR 1013"). Statutory differences aside, "liberal rules of construction" suggest that the label of intervention—whether as of right or permissive—is of little practical significance, as intervention "should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings." *Berkoski v. Bd. of Tr. of Inc. Vill. of Southampton*, 67 A.D.3d 840, 843 (2d Dep't 2009). Here, Proposed Intervenors satisfy the requirements of CPLR 1012, thus, this Court should grant them intervention as of right. *Infra* Part I. Alternatively, this Court should grant Proposed Intervenors permissive intervention under CPLR 7802(d). *Infra* Part II.

I. Proposed Intervenors Are Entitled To Intervene As Of Right Under CPLR 1012, Given Their Direct And Substantial Interest In Protecting The Judgment Intervenors Received In *Harkenrider v. Hochul* From Collateral Attack

A movant must satisfy three elements to intervene as of right under CPLR 1012: (1) the motion must be timely; (2) the movant "is or may be bound by the judgment"; and (3) the existing parties' representation of the movant's interest "is or may be inadequate." *See Yuppie Puppy Pet Prods., Inc. v. St. Smart Realty, LLC*, 77 A.D.3d 197, 200–01 (1st Dep't 2010). Proposed Intervenors satisfy each of these three elements.

A. *The motion is timely*. Proposed Intervenors' motion is plainly timely. "In examining the timeliness of the motion, courts do not engage in mere mechanical measurements of time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party." *Id.* at 201. "Where . . . there is no 'showing of prejudice resulting from delay in seeking intervention, [a] motion [to intervene] should not be denied as untimely.'" *Jones v. Town of Carroll*, 158 A.D.3d 1325, 1328 (4th Dep't 2018) (citation omitted). Proposed Intervenors' motion is timely, given that they filed this Motion within 20 days of the filing of Petitioners' amended petition, and on the same day Respondents are to file their responses to the Petition. Respondents have not yet answered, and discovery has not begun. Further, Proposed

Intervenors "do[ ] not seek to assert any new claims or to conduct extensive additional discovery," *id.*; rather, they merely seek to protect the judgment and map that they successfully litigated for in *Harkenrider v. Hochul* and the resulting enactment of fair, constitutional, congressional maps, from collateral attack. Allowing Proposed Intervenors to participate in this litigation in such a manner would not prejudice any party by prolonging the dispute or complicating the issues.

B. *Proposed Intervenors would be bound by a judgment in this case, which could jeopardize their interests*. "[W]hether the [intervenor] will be bound by the judgment within the meaning of [CPLR 1012] is determined by its *res judicata* effect." *Vantage Petroleum v. Bd. of Assessment Rev. of the Town of Babylon*, 61 N.Y.2d 695, 698 (1984). The right to participate depends on "the extent [to which] the judgment will adjudicate the legal rights, duties and/or obligations of the third party." *State ex rel. Field on Behalf of Field v. Cronshaw*, 527 N.Y.S.2d 165, 167 (Nassau Cnty. Sup. Ct. 1988); *see also Harrison v. Mary Bain Estates, Inc*., 152 N.Y.S.2d 239, 241 (Bronx Cnty. Sup. Ct. 1956), *aff'd*, 2 A.D.2d 670 (1st Dep't 1956) ("[A]s a general rule, a third party will be permitted to intervene if his interests will be jeopardized by his absence.").

Here, Proposed Intervenors would clearly be bound by a judgment rendered in this proceeding. *Cronshaw*, 527 N.Y.S.2d at 167. Proposed Intervenors obtained a favorable judgment in *Harkenrider v. Hochul*, which judgment resulted in the adoption of a fair, court-drawn map that complies with the New York Constitution and establishes constitutional congressional districts for use during the remainder of the decade. A ruling in Petitioners' favor here would nullify that fair, constitutional map after the 2022 elections, and result in the replacement of that map. Further, Proposed Intervenors, as voters in New York, will be bound by the outcome of this proceeding, as that outcome will dictate where, and consequently, for whom, they are able to cast votes and campaign for congressional candidates.

C. *The parties do not adequately represent Proposed Intervenors' real and substantial interest in the outcome of this litigation*. To intervene under CPLR 1012, a movant must have "a real and substantial interest in the outcome of the proceedings," *Wells Fargo Bank, Nat'l Ass'n v. McLean*, 70 A.D.3d 676, 677 (2d Dep't 2010), that "is or may" not be adequately represented by the existing parties, CPLR 1012(a)(2). On this basis, courts have granted intervention where a movant's interests are "not identical" to those represented by the existing parties. *N.Y. State Pub. Emp't Rels. Bd. v. Bd. of Educ. of City of Buffalo*, 46 A.D.2d 509, 513 (4th Dep't 1975), *aff'd*, 39 N.Y.2d 86 (1976). This requirement is designed to "facilitate[ ] the disposal in one action of all the issues involved, thus avoiding both court congestion and undue delay and expense to the parties." *Harrison*, 152 N.Y.S.2d at 241; *N.Y. State Pub. Emp't Rels. Bd.*, 46 A.D.2d at 513 ("full intervention is required to insure complete litigation of [movant's] interests in the judicial forum").

Proposed Intervenors have a "real and substantial interest," *Wells Fargo Bank*, 70 A.D.3d at 677, in the outcome of this case—specifically in protecting from collateral attack the judgment they obtained in the Steuben County Supreme Court, which judgment ultimately resulted in the adoption of a fair and constitutional congressional map, *see Harkenrider* Nos. 670, 696. Here, Petitioners seek an order commanding the IRC to submit "a second round of proposed congressional districting plans for consideration by the Legislature." Amend. Pet. at 20. Proposed Intervenors in particular, and all New Yorkers more generally, "will be directly affected by" the outcome of this case, *White v. Inc. Vill. of Plandome Manor*, 190 A.D.2d 854, 854 (2d Dep't 1993), as a ruling in Petitioners' favor here would result in the nullification of the court-drawn, constitutional map Proposed Intervenors successfully obtained in *Harkenrider v. Hochul*.

Further, Proposed Intervenors' interest in the continued applicability of the current map is not adequately represented by any of the existing parties to this special proceeding. Petitioners

have specifically requested that the Court order the IRC to propose *new* maps for use in the remaining elections during this decade, Amend. Pet. at 20. Thus, Petitioners' interest is not only "not identical" to Proposed Intervenors', but rather *directly adverse* to it. *See N.Y. State Pub. Emp't Rels. Bd.*, 46 A.D.2d at 513. Nor can Respondents—the IRC and its individual Commissioners—adequately represent Proposed Intervenors' interests. Respondents were not parties to *Harkenrider v. Hochul*, and do not share Proposed Intervenors' interest in protecting that judgment and resulting map from this attack. Further, having been sued in their official capacities, the individual commissioners will not suffer the consequences of having to vote under new congressional map, should Petitioners obtain a favorable judgment in this proceeding. Because neither Petitioners nor Respondents adequately represent Proposed Intervenors' interests in this matter, Proposed Intervenors should be permitted to intervene.

II. Alternatively, This Court Should Grant Permissive Intervention To Proposed Intervenors Under CPLR 7802 Because They Have A Real And Substantial Interest in New York's Congressional Districts and The Map Adopted In *Harkenrider v. Hochul* And Their Intervention Would Not Prejudice The Existing Parties

Under CPLR 7802(d), a Court "may allow other interested persons to intervene" in an Article 78 special proceeding. As with intervention as of right under CPLR 1012, the primary consideration "for intervention in [an Article] 78 proceeding is whether the person is 'interested.'" *Toll Land V Ltd. P'ship v. Planning Bd. of Vill. of Tarrytown*, 12 N.Y.S.3d 874, 882 (Westchester Cnty. Sup. Ct. 2015) (citations omitted); *see also Berkoski*, 67 A.D.3d at 843. In exercising its "broad[ ] authority" under CPLR 7802(d), *Greater N.Y. Health Care Facilities Ass'n v. DeBuono*, 91 N.Y.2d 716, 720 (1998), the Court "balance[s] the benefit to be gained by intervention, and the extent to which the proposed intervenor may be harmed if it is refused, against other factors, such as the degree to which the proposed intervention will delay and unduly complicate the litigation

and whether any party would be prejudiced." *People v. Schofield*, 199 A.D.3d 5, 9 (3d Dep't 2021) (citations omitted).

Proposed Intervenors should be permitted to intervene under CPLR 7802(d), as they have a substantial interest in the outcome of the litigation and their involvement would not prejudice the existing parties in any way.

A. *Proposed Intervenors are "interested persons."* "The interested persons standard of CPLR 7802(d) is more liberal than that provided in CPLR [1012 and 1013] for intervention in other civil actions." *Schofield*, 199 A.D.3d at 9 (citations omitted); *DeBuono*, 91 N.Y.2d at 720. An "interested person[ ]" for the purposes of CPLR 7802(d) is one who "will be directly affected by the outcome of [the] proceeding." *White*, 190 A.D.2d at 854; *Schofield*, 199 A.D.3d at 10 (individuals reliant upon public transportation were "interested persons" in an Article 78 proceeding challenging designation of polling places for early voting because the individuals' "preference to take advantage of early voting . . . will be hampered by the locations of the early voting polling places chosen by the Board"); *Rent Stabilization Ass'n of N.Y.C. v. State Div. of Hous. & Cmty. Renewal*, 252 A.D.2d 111, 116 (3d Dep't 1998) (tenants of rent-controlled apartments had a "direct and substantial interest" in the outcome of an Article 78 proceeding challenging regulation governing rent calculation); *Bernstein v. Feiner*, 43 A.D.3d 1161 (2d Dep't 2007) (property owners were "interested persons" in an Article 78 proceeding in which a judgment for the petitioner would have increased property owners' property tax rates). In other words, intervention is appropriate when the movant demonstrates "a real and substantial interest" in the outcome of the litigation, and the existence of "a legally cognizable claim." *McCrory v. Vill. of Mamaroneck*, 932 N.Y.S.2d 850, 862 (Westchester Cnty. Sup. Ct. 2011) (citations omitted).

Additionally, the "interested person['s]" claim must be "based on the same transaction or occurrence" as that of the original petitioners. *DeBuono*, 91 N.Y.2d at 720–21.

Proposed Intervenors easily qualify as "interested persons" under CPLR 7802(d), and thus satisfy this threshold requirement for intervention. Proposed Intervenors' position in this matter is obviously "based on the same transaction or occurrence" as Petitioners' Amended Petition, as all parties' claims and defenses involve the validity of the current congressional map. *See DeBuono*, 91 N.Y.2d at 721. Further, a judgment in Petitioners' favor here would undermine Proposed Intervenors' litigation success in *Harkenrider v. Hochul* and revoke the constitutional congressional map adopted in that litigation for most of the decade. Thus, as discussed above, *supra* p.12, Proposed Intervenors have a "real and substantial interest," *McCrory*, 932 N.Y.S.2d at 862, in protecting the *Harkenrider v. Hochul* judgment from a collateral attack designed to nullify the fair, constitutional map adopted as a result of Proposed Intervenors' efforts in that case.

B. *Intervention will not prejudice any party.* Because intervention under CPLR 7802(d) is discretionary, a court may nevertheless deny leave to intervene where it would prejudice the existing parties by delaying the resolution of the matter or needlessly complicating the issues. *See, e.g.*, *Schofield*, 199 A.D.3d at 10 (granting motion to intervene that "was filed quite late in the process" because intervenors' delay did not prejudice the existing parties); *Leonard v. Planning Bd. of Town of Union Vale*, 136 A.D.3d 866, 868 (2d Dep't 2016) (intervention properly denied where proposed intervenors sought to "raise various . . . questions which are not relevant to the resolution of the issue herein").

Allowing Proposed Intervenors to participate in this lawsuit will not prejudice the existing parties in any way. Proposed Intervenors' motion is plainly timely, as discussed above. *Supra* Part I.A. Proposed Intervenors seek only to protect the *Harkenrider v. Hochul* judgment from

collateral attack, so allowing Proposed Intervenors to participate in this litigation in such a manner would not prejudice any party by prolonging the dispute or complicating the issues. *Id.* Finally, Petitioners were clearly on "notice" of Proposed Intervenors' position with respect to the validity of the court-drawn map, as this entire action is premised on a challenge to the method in which the current map was drawn and adopted, which directly implicates *Harkenrider v. Hochul* and Proposed Intervenors' efforts. *See DeBuono*, 91 N.Y.2d at 721. Indeed, Petitioners raised these same arguments before the Steuben County Supreme Court, Moskowitz Aff., Ex.1, and Proposed Intervenors opposed that request on the merits before that court, *Harkenrider* No.660 at 3, which court ultimately rejected Petitioners' request to limit the remedial congressional map to only the 2022 elections, *Harkenrider* No.696 at 1; *Harkenrider* No.670 at 1–5.

CONCLUSION

This Court should grant Proposed Intervenors' Motion To Intervene as of right under CPLR 1012, or permissively under CPLR 7802(d).

Dated: New York, New York
August 23, 2022

TROUTMAN PEPPER HAMILTON
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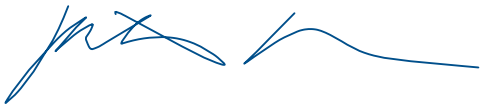
By: 

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CERTIFICATION

I hereby certify that the foregoing memorandum of law complies with the word count limitations set forth in 22 NYCRR § 202.8-b(a). According to the word-processing system used to prepare this memorandum of law, it contains 5,060 words, excluding parts of the document exempted by Rule 202.8-b(b).

Dated: New York, New York
August 23, 2022

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