SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
HON. PAUL I. MARX, J.S.C.

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HAZEL COADS, STEPHANIE M. CHASE, MARVIN AMAZAN, et al.,

Index No. 611872/2023

Plaintiffs,

ACTION I

-against-

NASSAU COUNTY, the NASSAU COUNTY LEGISLATURE, et al.,

Defendants.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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NEW YORK COMMUNITIES FOR CHANGE, MARIA JORDAN AWALOM, et al.,

Index No. 602316/2024

Plaintiffs,

ACTION II

v.

COUNTY OF NASSAU, THE NASSAU COUNTY LEGISLATURE, et al.,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION FOR DISQUALIFICATION

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Defendants Nassau County, the Nassau County Legislature, Bruce Blakeman, Michael C. Pulitzer, and Howard J. Kopel, by and through their undersigned counsel, respectfully submit this Memorandum of Law in support of their Motion for Disqualification.

PRELIMINARY STATEMENT

After only hearing part of Plaintiffs' case-in-chief and *none of Defendants' case-in-chief*, the Court engaged in an ex parte communication with Defendants' counsel, during which it revealed that it had already prejudged that Defendants had violated the law. Specifically, the Court asserted that it was "pretty clear what went on," referring to the Court's belief that Defendants had engaged in unlawful partisan gerrymandering. The Court then threatened Defendants that it would "blow the lid off this thing" if they did not settle the case, Affirmation of Mary "Molly" S. DiRago, Esq., dated January 5, 2025, Aff. ¶ 6—a settlement that this Court has, with all due respect, made much more difficult by openly advocating against Defendants on key issues during the trial so far. This Court's comments on and off the record have included the Court suggesting that Defendants would need to "stipulate" that a Defendant's challenge to the Even Year Election Law, S3505-B/A4282-B, in a different case pending before the Court of Appeals "is without merit" before continuing cross-examination. In a subsequent exchange, the Court said openly that Plaintiffs' witness made a "good point" on a disputed issue relating to the use of odd year versus all election data in analyzing partisanship and factors relevant to the New York Voting Rights Act ("NYVRA"), even though *none of Defendants' experts had yet testified*. After attempting to improperly elicit fact testimony from Defendants' counsel in the middle of trial and expressing unabashed incredulity at counsel's statements, the Court stated that a deposition of Defendants' counsel would be "fun" and expressed a desire that this Court itself conduct the deposition. These comments all followed a highly irregular procedure by which this Court was appointed to preside

over a case dealing with Nassau County, even though other New York local redistricting cases are being handled by courts in the relevant counties.

These circumstances independently and cumulatively require the Court's disqualification under New York law and the Due Process Clause. Under New York law, recusal is mandatory where the circumstances are such that a "judge's impartiality might reasonably be questioned," 22 N.Y.C.R.R. § 100.3(E)(1), which includes circumstances where a judge makes statements prejudging issues in the case, steps out of a neutral role to advocate for one side, or engages in ex parte communications. All of those circumstances have, very unfortunately, occurred here, including the Court stating that it was "pretty clear what went on" before Defendants have even had the opportunity to present their case, threatening Defendants that it would "blow the lid off this thing" if Defendants did not settle, and openly taking sides in court against Defendants on decisive issues. For many of the same reasons and more, the Court's continued adjudication of this case would violate the Due Process Clause, as these above-described circumstances clearly show a "risk of actual bias or prejudgment" "based on objective and reasonable perceptions." *Caperton v. A.T. Massey Coal. Co.*, 556 U.S. 868, 884 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

BACKGROUND

A. Factual Background

The Nassau County Legislature began the redistricting process after completion of the 2020 decennial census. *See, e.g.*, Nassau Cnty. Charter, §§ 102–104, 112–114. The Temporary Districting Advisory Commission ("TDAC") attempted to redraw the County's legislative maps pursuant to the Nassau County Charter, *id.* § 113(2), but failed to reach a consensus, resulting in separate proposals from the Democratic and Republican members of TDAC, respectively. The Presiding Officer of the Nassau County Legislature then developed his own map, while working

with retained counsel and a nationally renowned partisan fairness expert, after taking into account public comments during the TDAC process and reaching out across the political aisle. *See* February 16, 2023 Troutman Pepper Memorandum at 4, *Coads v. Nassau County*, No.611872/2023, NYSCEF No.157 (Sup. Ct. Nassau Cnty. Oct. 21, 2024) ("*Coads*"); *see also* Transcript of February 16, 2023 Nassau County Legislature Meeting at 17–19, 32–33, *Coads*, NYSCEF No.154 ("Feb. 16, 2023 Tr.").

On February 16, 2023, the Presiding Officer presented his proposed map to the Legislature for its consideration. Feb. 16, 2023 Tr. 10–12, 19–20. Despite bipartisan praise for several of the map's features, Democratic legislators sought certain changes. *Id.* at 12–15, 17, 51–54, 78, 96, 106–07, 109, 112, 133–34. The Presiding Officer then proposed a revised map that incorporated several significant suggestions requested by Democratic legislators. *See* February 27, 2023 Troutman Pepper Memorandum at 1–2, *Coads*, NYSCEF No.157. The Legislature adopted the revised map, and the County Executive signed Local Law 1 into law on February 28, 2023.[1]

B. Procedural Background

1. Two sets of Plaintiffs filed separate lawsuits challenging Local Law 1. The first, *Coads, et al. v. Nassau County, et al.*, Index No.611872/2023 was filed on July 27, 2023. The second, *N.Y. Communities for Change, et al. v. County of Nassau, et al.*, Index No.602316/2024 ("*NYCC*," and together with *Coads*, the "Actions"), was filed on February 7, 2024. The Plaintiffs allege that Local Law 1 violates Section 34 of New York's Municipal Home Rule Law and the New York Voting Rights Act, including, as is most relevant here, alleging that Local Law 1 is an unlawful

[1] Available at https://www.nassaucountyny.gov/DocumentCenter/View/40335/Local-Law-1-2023 (all websites last visited Jan. 5, 2025).

partisan gerrymander and that the map is unlikely to result in the election of a sufficient number of minority candidates of choice.

2. These Actions were assigned and reassigned to multiple Justices of the Nassau County Supreme Court within weeks of filing in early February 2024. *See generally Coads*, NYSCEF No.19; *Coads*, NYSCEF No.61. Three justices recused, but Hon. Gary F. Knobel did not. Yet, the Actions were administratively removed from his docket. *Coads*, NYSCEF No.76.

Eventually, First Deputy Chief Administrative Judge, Hon. Norman St. George, assigned this Court to oversee these Actions. *Coads*, NYSCEF Nos.86, 95. Defendants' counsel immediately requested "information regarding the basis and authority for assigning" the Actions to a Justice "seated in Westchester County" and "removing these cases from the jurisdiction of Nassau County jurists," especially because "within-county jurists [were] handling local and county-level redistricting challenges to local maps throughout the state." *Coads*, NYSCEF No.82. Defendants' counsel also noted that while some "Justices in Nassau County have recused themselves from these cases, . . . other Justices in Nassau County may well be willing and fully capable of adjudicating these cases," including Justice Knobel, who had the Actions "transferred away to correct a prior misimpression that this is an Election Law case." *Id.* The Administrative Judge "[t]hank[ed]" Defendants' counsel for "bringing [their] concerns to [his] attention" and simply stated that the assignment of an out-of-county justice was "appropriate and authorized" due to some unexplained "surrounding circumstances," without providing any explanation as to what these "circumstances" were or what legal authority justified these actions in light of these unidentified "circumstances." *Coads*, NYSCEF No.86.

Defendants followed up, asking for "(1) the specific statutory, regulatory, or other lawful authority that Judge St. George relied upon for the issuance of Administrative Order No.

AO/87/2024, and (2) the specific 'surrounding circumstances' justifying the exercise of that claimed authority in issuing the Order." *Coads*, NYSCEF No.94. Administrative Judge St. George responded with the following non-answer, including refusing to identify the "circumstances" that he believed justified such an unusual transfer of the case out of Nassau County: "[T]he Rules of the Chief Judge as well as the Uniform Rules for New York State Trial Courts provide authority to issue such directives in response to the administrative needs of local Administrative Judges. No further reply will be forthcoming on this matter." *Coads*, NYSCEF No.95.

3. This Court consolidated the Actions on March 7, 2024. *NYCC*, NYSCEF No.60 at 2. The parties completed expert discovery two months before trial. One of the main disputes between the parties' experts is whether the experts should use only odd-year election data to assess the map for purposes of both the partisanship and New York Voting Rights Act ("NYVRA") analysis. Plaintiffs' experts solely analyzed odd-year election data. Defendants' experts, Dr. Trende(who was also the expert in the landmark case *Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022)) and Dr. Brad Lockerbie, used data from both odd and even years to conduct their expert analyses. Plaintiffs' experts believe that only odd-year election data is relevant for assessing the partisanship of the districts in the enacted map because those county elections historically have occurred in odd-years. Defendants believe, and their experts are expected to testify at trial that, *inter alia*: (1) there is higher voter turnout in even-year elections, providing important information regarding the partisanship of the drawn districts; (2) the use of even-year election data was the data used in *Harkenrider*; (3) even-year elections are—at the very least—just as probative as odd-year elections; and (4) even-year and odd-year elections correlate strongly with each other. Further, S3505-B/A4282-B, the "Even Year Election Law" will change the County's elections to even years starting in 2026, pending the resolution of a currently pending appeal challenging that law,

underscoring the importance of not ignoring even-year elections.[2] The Even Year Election Law was introduced in the State Senate on January 31, 2023 and the State Assembly on February 14, 2023,[3] during the 2023 redistricting process. The Even Year Election Law became law when Governor Kathy Hochul signed S3505-B/A4282-B into law on December 22, 2023. *See* Governor Kathy Hochul, *Governor Hochul Signs Voting Rights Legislation to Expand Access to the Ballot Box and Improve Voter Participation* (Dec. 22, 2023).[4]

4. A bench trial in the Actions commenced on December 17, 2024. This first week of trial consisted of a portion of Plaintiffs' case-in-chief, during which Defendants cross-examined two of Plaintiffs' experts, Drs. Kassra A.R. Oskooii and Daniel Magleby, about the impact of the Even Year Election Law and their use of only odd-year election data in their analyses. These questions provided context for Defendants' experts' anticipated testimony in Defendants' case-in-chief. Several circumstances relevant to this motion arose during Defendants' cross-examinations.

First, on December 19, 2024, Defendants cross-examined Plaintiffs' expert, Dr. Oskooii, to confirm he "didn't examine statewide and federal elections held in even years," Affirmation of Bennet J. Moskowitz, Esq., dated January 5, 2025, Ex. A, Dec. 19, 2024 Tr. 646:16–17, and highlight the conflict between the parties' experts' use or exclusion of election data. During this cross examination, the Court interrupted to question Defendants' use of the Even Year Election Law as "a predicate upon which to base [the] cross examination" because one of the Defendants "is challenging the even year law." *Id.* at 650:9–11; 17–19. While Plaintiffs' counsel did not

[2] *See* Notice of Appeal, *Onondaga County v. New York*, Index No.003095/2024 (N.Y. Sup. Ct. Onondaga Cnty.), NYSCEF No.238.

[3] Available at https://www.nysenate.gov/legislation/bills/2023/S3505/amendment/B; https://www.nysenate.gov/legislation/bills/2023/A4282/amendment/B.

[4] Available at https://www.governor.ny.gov/news/governor-hochul-signs-voting-rights-legislation-expand-access-ballot-box-and-improve-voter.

object to this line of questioning, the Court interrupted and demanded to know if Defendants would "stipulate that [the County's] challenge [to the Even Year Election Law] is without merit or . . . [Defendants are] going to stipulate that [the County] want[s] to withdraw [its] challenge to that law" to continue the examination. *Id.* at 650:21–24.

On December 20, 2024, Defendants cross-examined Dr. Magleby to confirm he did not consider even-year election data despite "the New York Court [of Appeals] previously accept[ing] Dr. Trende's analysis and associated methodologies in *Harkenrider*." Moskowitz Aff., Ex. B, Dec. 20, 2024 Tr. 839:24–840:2. Again, these questions highlight a critical dispute about the exclusion of even-year election data in Plaintiffs' experts' analyses of the challenged map, including in light of the Even Year Election Law. The Court cautioned the questioning attorney that "you can go through the exercise of asking about even-year elections . . . but I think that this Court has greater interest in odd-year countywide elections since those would seem to be the most relevant, at least to me at the present time." *Id.* at 841:10–18.

During that same cross-examination of Plaintiffs' expert, the Court seized upon a "good point" that it believed was made by the testifying expert to interrupt Defendants' counsel's cross-examination and *ask a question about Defendants' knowledge*. *Id.* at 844:20–25. Specifically, the Court questioned Defendants' counsel about whether he "convey[ed]" the potential enactment of the Even Year Election Law to "anybody else within the legislature or on the TDAC" during his engagement as the Presiding Officer's counsel. *Id.* at 846:2–3. Expressing incredulity at counsel's answer, the Court then remarked that it would be "fun" to take Mr. Tseytlin's deposition on this factual point, which deposition had yet to take place, and asked if the Court could "do it." *Id.* at 845:19–21. Opposing counsel jested that the Court could "start [that deposition by the Court] now." *Id.* at 845:22.

5. On December 20, 2024, as the parties were packing up to leave after a trial day and after many had already left the courtroom, the Court summoned one of Defendants' trial counsel to the bench for a private conversation. DiRago Aff. ¶ 4. Upon approaching, the Court instructed counsel to "get the case settled" and questioned, "what the hell are those guys doing?"—which Defendants' counsel understood to refer to Defendants. *Id.* ¶ 5. In expressing its belief that Defendants should settle the Actions, the Court remarked that it was "pretty clear what went on"—that is, the Court's belief that Defendants had engaged in partisan gerrymandering—and warned that it would "blow the lid off this thing" if Defendants did not settle. *Id.* ¶ 6.

Plaintiffs have not yet concluded their case-in-chief, which is set to resume on January 6, 2025, at 9:45 a.m.

ARGUMENT

I. The Court's Disqualification Is Required Under 22 N.Y.C.R.R. § 100.3(E)(1)

The New York Code of Judicial Conduct (the "Code") requires that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." 22 N.Y.C.R.R. § 100.3(E)(1). Judges must "act at all times in a manner that promotes public confidence in the integrity and *impartiality of the judiciary*." *Id.* § 100.2(A) (emphasis added). "Equally important is the requirement that a Judge conduct himself in such a way that the public can perceive and continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property." *Sardino v. State Comm'n on Jud. Conduct*, 58 N.Y.2d 286, 290–91 (1983). "Not only must judges actually be neutral, they must appear so as well." *People v. Novak*, 30 N.Y.3d 222, 226 (2017).

The appearance of impropriety arises when there is a "clash in judicial roles," such as where the "Judge act[s] both as an advocate and as the trier of fact." *See In re Zyion B. (Fredisha B.)*, 205 N.Y.S. 3d 600, 602–03 (4th Dep't 2024) (citation omitted). When a judge crosses the line and

"takes on either the function or appearance of an advocate at trial . . . recusal is appropriate." *Id.* The appearance of impropriety also arises where a judge engages in ex parte communications regarding a pending matter. *See, e.g.*, *In re Levine*, 74 N.Y.2d 294, 297 (1989); *In re Ayres*, 30 N.Y.3d 59, 63 (2017). In determining whether a judge's impartiality might reasonably be questioned, so as to mandate disqualification pursuant to 22 N.Y.C.R.R. §§ 100.2 and 100.3, the court must review "any conduct that would lead a reasonable man knowing all the circumstances to harbor doubts about the panelist's impartiality." *Scott v. Brooklyn Hosp.*, 462 N.Y.S.2d 272, 274 (2d Dep't 1983). Three principles are particularly relevant here.

First, the appearance of impropriety arises when a judge makes statements that "presume[] unproven allegations to be true," *In re Esworthy*, 77 N.Y.2d 280, 282 (1991), or express "preconceived opinions" about the matter, *Onondaga County v. Taylor*, 215 N.Y.S.3d 686, 688 (4th Dep't 2024). When a judge expresses preconceived opinions without full adversarial presentation, recusal is warranted. *See In re Anthony J. (Siobvan M.)*, 204 N.Y.S.3d 817, 819 (4th Dep't 2024).

Second, the appearance of impropriety arises when the judge "takes on either the function or appearance of an advocate at trial" or "decid[es] what evidence to present, and introduce[s] evidence that ha[s] the effect of corroborating [one party's] witnesses and discrediting [the other party] on a key issue." *People v. Arnold*, 98 N.Y.2d 63, 67–68 (2002). A court acts as an advocate when it expresses sympathy for a party's position or attempts "to point out the inconsistencies and unbelievablity of his theory of defense." *People v. Zamorano*, 754 N.Y.S.2d 645, 648 (2d Dep't 2003). Where a judge abandons his "function . . . to protect the record at trial," and instead attempts "to make it," "the line is crossed," and "recusal is appropriate." *Zyion B.*, 205 N.Y.S.3d at 602–03 (quoting *Arnold*, 98 N.Y.2d at 67). A judge steps out of his judicial role by "exerting

undue pressure on litigants to oblige them to settle their controversies without their day in court." *Wolff v. Laverne Inc.*, 233 N.Y.S.2d 555, 557 (1st Dep't 1962). The judicial objective should be a voluntary settlement reached by mutual consent and not one forced on a party to it or its attorney's detriment. *Id.*

Third, the appearance of impropriety arises where a judge engages in ex parte communications regarding a pending matter. *See, e.g.*, *Levine*, 74 N.Y.2d at 297; *Ayres*, 30 N.Y.3d at 63. A judge may not "initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except" in limited circumstances. 22 N.Y.C.R.R. § 100.3(B)(6). Judges may not engage in ex parte communications that "affect a substantial right of any party." *Id.* § 100.3(B)(6)(a). Such prohibited communications jeopardize public confidence in the judiciary's integrity and impartiality, which are essential to the administration of justice, and warrant removal from office. *Levine*, 74 N.Y.2d at 297.

A. The Court's Ex Parte Communication To Defendants' Counsel On December 20 Creates A Circumstance—Standing Alone—Where the Court's Impartiality Might Reasonably Be Questioned

The Court's December 20 ex parte communication with Defendants' trial counsel, DiRago Aff. ¶¶ 4–6, creates an appearance of impropriety requiring disqualification. In that communication, the Court expressed its conclusion that it was "pretty clear what went on," *id.* ¶ 6—that is, that Defendants had engaged in partisan gerrymandering—before Defendants had even begun presenting their case-in-chief. The Court also threatened to "blow the lid off this thing" if Defendants did not settle and instructed counsel to "get the case settled." *Id.* ¶¶ 5–6. The Court further chose to communicate these sentiments without opposing counsel present or even notifying opposing counsel of the interaction.

The Court's ex parte statements on December 20, 2024, create an appearance of impropriety requiring disqualification in several respects.

The Court's statement that it was "pretty clear what went on" creates the appearance of impropriety because it "presume[s] unproven allegations to be true." *Esworthy*, 77 N.Y.2d at 282. The Court made clear that it had determined "what went on"—that is, that Defendants had engaged in unlawful partisan gerrymandering—before Defendants had even begun to present their case-in-chief. This Court's expressed opinions about Defendants' conduct before Defendants have called a single witness warrants recusal. *Anthony J.*, 204 N.Y.S.3d at 819; *accord Onondaga Cnty.*, 215 N.Y.S.3d at 687–88.

Next, by threatening to "blow the lid off this thing" if Defendants did not settle, the ex parte statements created the appearance of impropriety. *Zyion B.*, 205 N.Y.S.3d at 602–03. These statements are improper ex parte communications, as the Court was not performing a judicial function. *See* 22 N.Y.C.R.R. § 100.3(B)(6); *Levine*, 74 N.Y.2d at 297 (explaining that where the court engages in improper ex parte communications, such conduct jeopardizes public confidence in the judiciary's integrity). Statements or "pressure tactics" "to coerce settlement by litigants and their counsel" are not within the judicial role, which promotes settlements by mutual consent. *Wolff*, 233 N.Y.S.2d at 557. Moreover, because the Court's ex parte comments concerning settlement "affect the substantial rights" of a party, those comments cannot be permissible ex parte communications. 22 N.Y.C.R.R. § 100.3(B)(6)(a).

Finally, the Court's ex parte statements to Defendants' counsel conveyed its preconceived judgment that Defendants had violated the law and, further, threatened to maximize the damage from any judgment by "blow[ing] the lid off this thing." Together with the Court's ex parte instruction to Defendants' counsel to "get the case settled" before hearing Defendants' case-in-

chief, this statement warrants recusal. The Court has "express[ed] a preconceived opinion of the case, [which] amounted to a threat that, should the [party] continue with the fact-finding hearing, the court would" make good on that threat and find against the party. *Anthony J.*, 204 N.Y.S.3d at 819. And by threatening to "blow the lid off this thing" if Defendants did not settle, the Court indicated it will increase the severity of its preconceived judgment based on whether Defendants compromise their rights. *See Esworthy*, 77 N.Y.2d at 282. Such conduct "jeopardizes the public confidence in the integrity and impartiality of the judiciary, indispensable to the administration of justice in our society." *Levine*, 74 N.Y.2d at 297.

B. This Court's December 19 And 20 Statements Relating To The Even Year Election Law Created An Appearance Of Impropriety

A key issue in the Actions is whether it was proper for Plaintiffs' experts to ignore even-year election data when conducing their partisanship and NYVRA analyses. *See supra* pp.5–7. Defendants intend to present evidence in their case-in-chief as to why even year election data should be used, as was done in *Harkenrider*. *Supra* p.5. One of several criticisms that Defendants have of the approach taken by Plaintiffs' experts is that the Even Year Election Law moves Nassau County's legislative elections to even years starting in 2026, depending on the outcome of a pending legal challenge to that Law, which Defendants believe undermines these experts' position that it was proper for them ignore even-year elections.

To effectively advance that argument—including setting up the contemplated testimony by Dr. Trende as part of Defendants' case in-chief—Defendants sought to cross-examine Plaintiffs' expert, Dr. Oskooii, over his failure to "examine statewide and federal elections held in even years." Moskowitz Aff., Ex. A, Dec. 19, 2024 Tr. 646:16–17. During this cross-examination, the Court interrupted to question Defendants' use of the Even Year Election Law as "a predicate upon which to base [the] cross-examination" because one of the Defendants "is challenging the even

year law." *Id.* at 650:14–19. Despite Plaintiffs' counsel not objecting to this line of questioning, the Court demanded that Defendants "stipulate that [the County's] challenge [to the even-year law] is without merit or . . . [Defendants are] going to stipulate that [the County] want[s] to withdraw [its] challenge to that law." *Id*. at 650:21–24.

A similar sequence—and more—occurred during Defendants' cross-examination of another of Plaintiffs' experts, Dr. Magleby. During Dr. Magleby's cross-examination about his failure to consider even-year election data, Moskowitz Aff., Ex. B, Dec. 20, 2024 Tr. 839:24–840:2, the Court warned Defendants' counsel that she could continue "but I think that this Court has greater interest in odd-year countywide elections since those would seem to be the most relevant, at least to me at the present time," *Id*. at 841:10–18. Shortly after this remark, the Court used what it believed was a "good point" that Dr. Magleby had made as to the Even Year Election Law to interrupt Defendants' counsel and ask a question about Defendants' knowledge *in the middle of Defendants' cross-examination of Dr. Magleby*. *Id.* at 844:20–21. As part of what appeared to morph into a judicial inquiry into Defendants' knowledge, the Court sought further factual information from Defendants' counsel, Mr. Tseytlin. *Id.* at 845:7–12. The Court asked whether counsel had "convey[ed]" the potential enactment of the Even Year Election Law to "anybody else within the legislature or on the TDAC" at the relevant time. *Id*. at 846:2–3. The Court then remarked that an upcoming deposition of Mr. Tseytlin that the Court hoped would touch on this issue would be "fun," and then asked if he could "do it." *Id*. at 845:19–21.[5] Plaintiffs' counsel quipped that the Court could "start now" with taking that deposition. *Id*. at 845:22. The Court ended this exchange by explaining that any reliance on the Even Year Election Law in

[5] Notably, during the six-hours spent deposing Mr. Tseytlin on Friday, January 3, 2025, Plaintiffs' counsel did not ask a single question related to this issue.

questioning Dr. Oskooii "makes no sense to me," and instructed the questioning attorney to "get to something relevant." *Id*. at 846:7–11; 17–18. All this occurred without Plaintiffs' counsel objecting to Defendants' questioning Dr. Magleby as to the impact of the Even Year Election Law on his analysis.

The Court's approach to Defendants' attempts to examine Plaintiffs' experts about the impact of the Even Year Election Law created an appearance of impropriety. *Arnold*, 98 N.Y.2d at 67–68; *Zyion B.*, 205 N.Y.S.3d at 600. By interrupting (without any objection from Plaintiffs) Dr. Magleby's cross-examination and directing the questioning attorney to "get to something relevant," the Court signaled its preconceived notion about the relevance and weight of such evidence before Defendants had even begun presenting their case and prevented Defendants from fully eliciting testimony related to that issue from Plaintiffs' expert (which is even more problematic because Defendants' experts are expected to provide multiple, independent reasons as to why even-year election data is relevant). *See supra* pp.5–7. When the Court "assumed control of [ ] counsel's cross-examination of [ ] witnesses," it "exacerbated the prejudice to the defendant," *People v. Melendez*, 643 N.Y.S.2d 607, 609 (2d Dep't 1996), by asking pointed questions of defense counsel which clearly evinced the Court's assessment of a key issue. "The line is crossed" when the Court attempts to "make" a record, *Zyion B.*, 205 N.Y.S.3d at 602–03, and attempts to strengthen one side's case, *In re Jacqulin M.*, 922 N.Y.S.2d 111, 112 (2d Dep't 2011), or discredit a party "on a key issue," *Arnold*, 98 N.Y.2d at 67–68. Here, the Court's remarks credit Plaintiffs' witnesses and disparage Defendants over a key issue.

Relatedly, the Court further exacerbated these issues by taking "on [] the function or appearance of an advocate at trial[,]" *Arnold*, 98 N.Y.2d at 67, when it attempted to engage in judicial fact-finding and probe into privileged conversations between Defendants and their counsel

in the middle of Defendants' cross-examination of Plaintiffs' expert and in open court. Moskowitz Aff., Ex. B, Dec. 20, 2024 Tr. 845:7–12, 846:2–3; *see Zamorano*, 754 N.Y.S.2d at 648. Where a judge abandons his "function . . . to protect the record at trial," and instead attempts "to make it," "the line is crossed," *Zyion B.*, 205 N.Y.S.3d at 603 (quoting *Arnold*, 98 N.Y.2d at 67), and "recusal is appropriate," *id.* During that same cross-examination of Plaintiffs' expert, the Court remarked that it would be "fun" for the Court to take Mr. Tseytlin's deposition, which had yet to take place, and asked if he could "do it." *Id.* at 845:19–21.

The Court's demand that Defendants abandon their claims *in a different case* pending before the Court of Appeals challenging a law—which challenge may or may not succeed—before being permitted to ask Plaintiffs' experts about whether it was appropriate for them to ignore that law in conducting their analysis also created an appearance of impropriety. *Zamorano*, N.Y.S.2d at 645; *Zyion B.*, N.Y.S.3d at 603; *Arnold*, 98 N.Y.2d at 67. By demanding that Defendants "stipulate that [the County's] challenge [to the even-year law] is without merit or . . . [Defendants are] going to stipulate that [the County] want[s] to withdraw [its] challenge to that law," the Court abandoned its neutral and impartial role. *Supra* pp.12–13. At a minimum, by seeking such an improper concession, the Court attempted "to point out" alleged "inconsistencies and unbelievability of" Defendants' legal theories in the middle of a cross-examination, which Defendants intended to set up the testimony of their own experts, in their own case-in-chief. *See Zamorano*, 754 N.Y.S.2d 645.

C. The Manner Of The Court's Appointment—Combined With The Above-Described Circumstances—Has Created A Situation Where The Court's Impartiality Might Reasonably Be Questioned

The unusual and unexplained circumstances of why the Actions were transferred to this Court are relevant to the appearance of impropriety inquiry. *Scott*, 462 N.Y.S.2d at 274 (courts consider all surrounding circumstances in appearance of impropriety inquiry). When

Administrative Judge St. George transferred these Actions to a justice sitting in Westchester County, Defendants immediately inquired as to the "basis and authority for assigning these cases to a Justice seated in Westchester County, thereby removing these cases from the jurisdiction of Nassau County jurists," who "may well be willing and fully capable of adjudicating" the Actions, and requested "clarification as to why a Nassau County Justice should not be permitted to adjudicate these cases." *Coads*, NYSCEF No.82. When Administrative Judge St. George offered no explanation in an abbreviated letter, *see Coads*, NYSCEF No.86, Defendants expressly requested "(1) the specific statutory, regulatory, or other lawful authority" for Administrative Order No. AO/87/2024, and "(2) the specific 'surrounding circumstances'" justifying that order. *Coads*, NYSCEF No.94. Administrative Judge St. George's vague response merely cited the general rule to "issue such directives" and made clear that "[n]o further reply will be forthcoming on this matter." *Coads*, NYSCEF No.95.

This lack of *any* explanation as to what "circumstances" justified transferring these cases out of Nassau County when it appears that a Nassau County justice was ready and willing to hear the case raises significant concerns about the fairness and objectivity of the judicial process, which circumstances have been exacerbated by the events occurring on December 19 and 20, as described above. As Defendants noted when they requested information from Administrative Judge St. George, *Coads*, NYSCEF No.82, within-county jurists were hearing numerous local- and county-level redistricting cases across the State. *See, e.g.*, *Desis Rising Up & Moving, et al. v. N.Y.C. Districting Comm'n, et al.*, Index No.151762/2023 (Sup. Ct. N.Y. Cnty.); *MacDonald v. County of Monroe*, Index No.E2023002165 (Sup. Ct. Monroe Cnty.); *Tokos, et al. v. County of Broome, et al.*, Index No.EFCA2022000981 (Sup. Ct. Broome Cnty.); *Ryan, et al. v. McMahon, et al.*, Index No.006581/2022 (Sup. Ct. Onondaga Cnty.); *Kruglinski, et al. v. Contreras, et al.*, Index

No.EF2022-2250 (Sup. Ct. Ulster Cnty.); *Clarke v. Town of Newburgh*, Index No.EF002460-2024 (Sup. Ct. Orange Cnty.); *Serrato v. Town of Mount Pleasant*, Index No.55442/2024 (Sup. Ct. Westchester Cnty.); *Young v. Town of Cheektowaga*, Index No.803989/2024 (Sup. Ct. Erie Cnty.). To Defendants' knowledge, only the present Actions—out of many challenging local redistricting in New York at this time—have been assigned to an out-of-county justice. And, to Defendants' knowledge, only here has the justice presiding over the case presumed that duly elected officials—who are supposed to be entitled under law to a "presumption of regularity," *People v. Dominique*, 90 N.Y.2d 880, 881 (1997)—violated the law (it is "pretty clear what went on," DiRago Aff. ¶ 6), before the Defendants have had the opportunity to present their case-in-chief.

II. Failure To Disqualify Would Violate The Due Process Clause Of The Fourteenth Amendment

A. The Due Process Clause of the U.S. Constitution ensures that the judiciary remains untainted by bias and prejudice. "A fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 U.S. 133, 136 (1955), and a fair tribunal requires an "unbiased judge," *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971). The United States Supreme Court has explained that due process "guarantees 'an absence of actual bias' on the part of a judge," because every litigant is entitled "to 'a proceeding in which he may present his case with assurance' that no member of the court is 'predisposed to find against him.'" *Williams v. Pennsylvania*, 579 U.S. 1, 8, 16 (2016) (quoting *Murchison*, 349 U.S. at 136; *Marshall v. Jericho, Inc.*, 446 U.S. 238, 242 (1980)). Judges must be "wholly disinterested," *id.* at 9 (quoting *Murchison*, 349 U.S. at 137), and "detached," *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972).

To uphold this fundamental guarantee, judges must recuse themselves whenever their involvement in a case creates a "risk of actual bias or prejudgment" "based on objective and reasonable perceptions." *Caperton v. A.T. Massey Coal. Co.*, 556 U.S. 868, 884 (2009) (quoting

Withrow v. Larkin, 421 U.S. 35, 47 (1975)). Due process "do[es] not require proof of actual bias," *Caperton*, 556 U.S. at 883, but courts must determine whether the "situation is one which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (citation omitted). Thus, "no judge 'can be . . . permitted to try cases where he has an interest in the outcome.'" *Id.* (quoting *Murchison*, 349 U.S. at 136). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Thus, a due process violation also "arises when the judge has prejudged the facts or the outcome of the dispute." *Franklin v. McCaughtry*, 398 F.3d 955, 962 (7th Cir. 2005); *accord Caperton*, 556 U.S. at 884 (citation omitted). Further, even the appearance of bias or prejudice can be constitutionally disqualifying because "our system of law has always endeavored to prevent *even the probability* of unfairness." *See Withrow*, 421 U.S. at 47 (emphasis added) (citation omitted); *see also Murchison*, 349 U.S. at 136 ("[J]ustice must satisfy the appearance of justice." (citation omitted)).

B. The circumstances described in detail above show that a "risk of actual bias or prejudgment" "based on objective and reasonable perceptions" exists. *Caperton*, 556 U.S. at 884.

The due process problems began from the start of this case, when Administrative Judge St. George assigned this case to an out-of-county judge without offering any explanation for his unusual actions. *See Ponte v. Real*, 471 U.S. 491, 497 (1985) (noting due process requires explaining the reason for a decision).

These due process problems then continued during trial on December 19 and 20, when the Court (1) suggested on the record that Defendants must withdraw a different case pending in the Court of Appeals, (2) made clear it had prejudged the validity of Defendants' experts' analyses,

and (3) sought to make a factual record against Defendants during their cross-examination of Plaintiffs' experts. The Court's demand during Dr. Oskooii's cross-examination that Defendants "stipulate that [the County's] challenge [to the even-year law] is without merit or" withdraw that other lawsuit, Moskowitz Aff., Ex. A, Dec. 19, 2024 Tr. 650:21–24, demonstrates bias against Defendants in attempting to influence a case in a different court. The Court's statement to "get to something relevant," Moskowitz Aff., Ex. B, Dec. 20, 2024 Tr. 841:10–18, 846:17–18, not only prevented Defendants from fully cross-examining Plaintiffs' witness on a key issue, but also shows that the Court has improperly prejudged Defendants' evidence and their experts' methodologies, before it has even heard from Defendants—depriving Defendants of their right to be heard in a "meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333. The Court further improperly used Defendants' cross-examination time to seek facts against Defendants, facts the witness could not testify about, Moskowitz Aff., Ex. B, Dec. 20, 2024 Tr. 844:20–21, illustrating that the Court will not provide a "fair trial in a fair tribunal." *Murchison*, 349 U.S. at 136. Similarly, the Court's comment from the bench that it would have "fun" deposing a witness that Plaintiffs were going to depose, *id.* at 845:19–21, infringes on Defendants' due process right to a judge who must remain "neutral and detached," *Ward*, 409 U.S. at 62. Taken together, these many remarks indicate that this Court has abandoned its duty to remain "wholly disinterested." *Williams*, 579 U.S. at 9 (quoting *Murchison*, 349 U.S. at 137).[6]

[6] The Court's Order that Defendants' counsel produce privileged materials and testify about privileged communications with their clients—including what counsel told his own clients when giving them legal advice during the legislative process, such as about the Even Year Election Law, *Coads*, NYSCEF No.204—further exacerbates the due process violations here. While Defendants appreciate that the Court's ruling was affirmed on a deferential standard by the Appellate Division, *Coads, et al. v. Nassau Cnty., et al.*, Index No.2024-07814 (2d Dep't), NYSCEF No.21, *Coads, et al. v. Nassau Cnty., et al.*, Index No. 2024-08410 (2d Dep't), NYSCEF No.18, Defendants reserve this issue for further challenge, including in federal court on federal due process grounds.

Finally, the Court's ex parte communications on December 20 make the violation of the Due Process Clause even clearer. After only hearing Plaintiffs' evidence, and before Defendants had begun their case-in-chief, the Court revealed that it had concluded that Defendants had engaged in unlawful partisan gerrymandering, stating that it was "pretty clear what went on." DiRago Aff. ¶ 6. Prejudging Defendants' liability before hearing from both sides undeniably creates a perception of bias that violates due process. *Franklin*, 398 F.3d at 961–62. The Court also threatened Defendants' counsel that it would "blow the lid off this thing" unless Defendants "get the case settled." DiRago Aff. ¶¶ 5–6. Because the Court has already determined that Defendants violated the law and must settle the case, these comments show any proceeding before the Court does not come with the constitutional guarantee that Defendants "may present [their] case with assurance that no member of the court is predisposed to find against [them]." *Williams*, 579 U.S. at 16.

Given "all the circumstances of this case," *Caperton*, 556 U.S. at 872, 884 (citation omitted), the Court must recuse itself under the Due Process Clause.

CONCLUSION AND RELIEF REQUESTED

The Court should grant Defendants' Motion for Disqualification.

Dated: New York, New York
January 5, 2025

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Memorandum complies with the word count limitations set forth in Uniform Rule 202.8-b for the Supreme Court. This Memorandum uses Times New Roman 12-point typeface and contains 6,362 words, excluding parts of the document exempted by Rule 202.8-b. As permitted, the undersigned has relied on the word count feature of this word-processing program.

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