SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN
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TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, AND MARIANNE VIOLANTE,

Petitioners,

-against-

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

Respondents.

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Steuben County Index No. E2022-0116CV

Motion Sequence No. 7

AFFIRMATION OF ERIC HECKER IN OPPOSITION TO PETITIONERS' MOTION TO STRIKE PORTIONS OF THE TAPP AND KATZ REPORTS

ERIC HECKER, ESQ., hereby affirms under penalty of perjury that the following is true and correct:

1. I am an attorney duly licensed to practice law in New York State, and a member of Cuti Hecker Wang LLP, counsel for Respondents Senate Majority Leader and President *Pro Tempore* of the Senate Andrea Stewart-Cousins and the New York State Senate Majority's appointees to the New York State Legislative Task Force on Demographic Research and

Reapportionment (collectively, the "Senate Respondents"). I submit this Affirmation in opposition to Petitioners' motion to strike portions of expert reports, filed on March 13, 2022. (Dkt. Nos. 169-173).

2. Petitioners say that they were "blindsided" and "sandbagg[ed]" by the use of an "entirely different methodology" in Dr. Tapp's Second Affidavit. *See* Petitioners' Memorandum of Law in Support of Petitioners' Motion to Strike Portions of the Katz Expert Report and the Second Tapp Expert Report, Dkt. No. 170 ("Pet. Motion to Strike MOL"), at 3-4. That is the proverbial pot calling the kettle black. In Mr. Trende's first report, he very clearly "calculate[d] [the] partisanship" of the districts in his simulations by using a standard index of recent statewide results for the precincts in those districts. Dkt. No. 26 at 7-13 and n.2. Then, in his reply report, Mr. Trende did a sudden about-face, contending for the first time that it supposedly makes sense to calculate the partisanship of his simulated districts an entirely different way. Mr. Trende's reply report even purports to use a brand-new regression methodology that was never mentioned in his initial report. Dkt. No. 103 at 10-11.

3. Mr. Trende's "simple regression" (as he called it), which he revealed for the first time in his reply report, is unreliable for a variety of reasons, including, as Dr. Tapp explains in his second affidavit, that Mr. Trende's "simple regression" does not account for incumbency.

4. Petitioners cannot credibly contend that it was prejudicial or otherwise improper for Respondents to respond to the "simple regression" methodology that Mr. Trende unveiled for the first time in his reply affidavit. If Mr. Trende had included this methodology in his initial report, Respondents would have exposed it as statistically invalid in their opposition papers. Petitioners cannot insulate their expert's analysis from scrutiny and challenge by

springing it on Respondents for this first time in reply papers. If anything, it is Mr. Trende's reply report that should be stricken, not Dr. Tapp's Second Affidavit.

5. When Respondents submitted their papers in opposition to the original Petition, they did not have an opportunity to respond to Mr. Trende's second ensemble model, or to the second, brand-new proposed partisanship measures Mr. Trende proposed, because Petitioners did not include that purported expert analysis in their filings in support of the Petition, but only in their reply papers submitted less than 36 hours before argument. Accordingly, it was appropriate and fair – and not remotely prejudicial – for the Senate Respondents to address Mr. Trende's new ensemble model, and his new proposed measure of analysis, for the Congressional map when we timely filed our papers on the March 10, 2022 deadline the Court set.

6. With respect to Dr. Katz's report, Petitioners conceded, as they obviously must, that Dr. Katz's report was timely filed with respect to the Senate plan, and therefore must be considered at least with respect to the Senate plan. *See* Pet. Motion to Strike MOL at 1. The Court therefore will have the benefit of hearing Dr. Katz's testimony regarding his methodology, at least with respect to the Senate plan, and Petitioners will have ample opportunity to cross-examine him. By the time that Dr. Katz testifies (presumably on Wednesday), Petitioners will have had his report for more than five days. That is more than ample time to prepare to cross-examine him. To the extent the schedule is more compressed than in a typical case, we are where we are because of the extraordinary nature of Petitioners' claims and the extraordinary relief they are seeking, and because they inexplicably failed to challenge the Senate plan when they first commenced this special proceeding.

7. We respectfully submit that once the Court hears Dr. Katz's testimony explaining the manner in which his methodology shows that the Senate plan is not in any way unfair to Republicans, and once Petitioners have been afforded the opportunity to cross-examine him – both of which are certainties – it simply would not make any sense for the Court to decline to receive what is essentially the exact same argument, using the exact same methodology, and that will be subject to the exact same cross-examination, with respect to the congressional plan as well. At a minimum, the Court should defer ruling on this motion, listen to Dr. Katz's direct testimony and cross-examination about his methodology and conclusions with respect to both the Senate plan and the congressional plan, and then decide whether there is any fairness-related basis to consider his methodology and conclusions with respect to the Senate plan (which Petitioners concede the Court must do) but not the congressional plan.

8. Petitioners rely on CPLR 405 to support their assertion that "this Court has discretion to strike any prejudicial matter in Respondents' answers and supporting affidavits and reports submitted after the set deadline has expired." Pet. Motion to Strike MOL at 2. But that provision entitles a party in a special proceeding to move "to strike scandalous or prejudicial matter unnecessarily inserted in a *pleading*." CPLR 405 (emphasis added). An expert report obviously is not a pleading.

9. Petitioners cite no authority that supports their motion. In *PB-36 Doe v. Niagara Falls City Sch. Dist.*, 152 N.Y.S.3d 242, 247 (Sup. Ct. Niagara Cnty. 2021), the court struck

prejudicial matter from a pleading in a child sex abuse case. Because that case involved a pleading, not an expert report, it is irrelevant.[1]

10. Moreover, this proceeding is not a personal injury case. This is a reapportionment case in which Petitioners are seeking to overturn a duly enacted reapportionment plan by proving beyond reasonable doubt that it violates the New York State Constitution. In an effort to meet that formidable burden, Petitioners made the choice to rely primarily on extremely complicated, highly technical computer simulation "technology." To the extent this trial is complicated, it is complicated because Petitioners made it so. There is nothing "prejudicial" about the fact that a widely respected Caltech professor who regularly testifies on behalf of Republicans and Democrats alike engaged in a rigorous technical statistical analysis and concluded that there is nothing unfair about either redistricting plan at issue. There is also nothing "prejudicial" about giving Petitioners the opportunity to cross-examine Dr. Katz about both his conclusions about the Senate plan (which they concede is proper) and the conclusions he drew about the congressional plan using the very same methodology.

11. I affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

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[1] The other case Petitioners cite, *LaFurge v. Cohen*, 61 A.D.3d 426 (1st Dep't 2009), is also inapposite. *See* Pet. Motion to Strike MOL at 4. In that personal injury case, the court precluded the Plaintiff's expert from testifying about "a new theory of liability" because Plaintiff had failed to provide defendant any notice. *Id*. This case is entirely different. The Senate Respondents are proffering expert testimony to *rebut* evidence the Petitioners already have submitted. Moreover, the expert in *LaFurge* was called to testify after having failed to disclose the subject of the testimony in any expert report. Here, by contrast, each expert submitted written analysis prior to offering testimony in this proceeding. Therefore, unlike in *LaFurge*, there is no unfair surprise here.

Dated: March 15, 2022
New York, New York

/s/ Eric Hecker

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