SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

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,

Petitioner,

-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.

Index No. E2022-0116CV

McAllister, J.S.C.

Return Date:
March 3, 2022

The Governor and Lt. Governor's

Memorandum of Law Opposing Motion to Amend the Petition

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Cases Cited

Respondents Kathy Hochul, Governor of the State of New York, and Brian A. Benjamin, Lieutenant Governor and President of the Senate, respectfully submit this memorandum of law opposing Petitioners' motion, brought by Order to Show Cause on February 17, 2022, NYSCEF 30, for expedited discovery.

PRELIMINARY STATEMENT

This is a special proceeding brought under Article 4 of the Civil Practice Law and Rules ("CPLR"). Discovery in special proceedings is presumptively impermissible; and may only occur only with leave of the Court under CPLR 408.

Petitioners did not meet their burden for leave to amend the Petition. First, they failed to properly serve the Governor and Lt. Governor with the Order to Show Cause for leave to amend. Second, allowing this amendment would unduly interfere with the New York 2022 election cycle. Further, because the Petition and proposed Amended Petition both fail to allege sufficient facts against either the Governor or Lt. Governor to make them proper respondents, the proposed amendment is futile. The proposed amendment would also be futile because the Governor and Lt. Governor are entitled to immunity and this matter is not justiciable.

A. The Governor and Lt. Governor Were Not Properly Served

Petitioners did not serve Governor Hochul with the second Order to Show Cause seeking leave to file an Amended Petition and, while they served Lt. Governor Benjamin, they did not serve the office of the Attorney General in the county in which venue is located or the nearest such office as required by the CPLR to complete service on him.

Because this proceeding was commenced against State respondents, it is governed by CPLR §2214(d). Section 2214(d) expressly provides that:

> An order to show cause against a state body or officers *must* be served in addition to service upon the defendant or respondent state body or

> officers upon the attorney general by delivery to an assistant attorney general *at an office of the attorney general in the county in which venue of the action is designated or if there is no office of the attorney general in such county, at the office of the attorney general nearest such county.*

(emphasis supplied). This requirement is jurisdictional, *Gill v. Portuando*, 234 AD2d 547, 547 (2d Dept 1996), and "[t]he word 'must' is interpreted as mandatory," *Randall v. Toll*, 72 Misc.2d 305, 306 (Suffolk Co Sup Ct 1972); *see Gill*, 234 AD2d 547 (2d Dept 1996) ("[T]he proceeding should have been dismissed on jurisdictional grounds because the petitioner failed to serve his papers on the Attorney-General as required under CPLR 2214(d)."); *De Carlo v. De Carlo*, 110 AD2d 806, 806 (2d Dept 1985) (reversing and vacating decision below because "plaintiff failed to serve the Attorney-General, who represents the board, as required under CPLR 2214(d)"); *Randall v. Toll*, 72 Misc.2d 305, 306 (Suffolk Co Sup Ct 1972) (granting motion to dismiss petition). Here, Petitioners' failure to comply with §2214(d) compels the conclusion that Order to Show Cause for leave to file an Amended Petition must be dismissed and the motion for leave to file an amended petition must be denied.

Because service is not complete until an Assistant Attorney General at the Rochester Regional Office of the OAG is personally served with the Order, Petition, and other papers under §§2214(d) & 7804(c)—which, again, did not occur—it cannot be argued that Petitioners completed all components of service. Petitioner both failed to serve the Governor and failed to serve the office of the Attorney General nearest to where this matter is venued. Petitioners' motion for leave to amend the Petition must therefore dismissed. *See, e.g. Sorli*, 51 NY2d 713, 714 (1980) (reversing and dismissing petition because "[a]lthough the order required that service be effected on or before August 7, 1980, service was not completed until the next day at the earliest"); *Matter of Sharma v. New*, 87 AD3d 1070, 1070–71 (2d Dept 2011) (reversing and dismissing petition where the "record does not contain any evidence establishing that the father was . . . timely served in compliance with the provisions of the order to show cause"); *Matter of El Greco Socy. Of Visural Arts, Inc. v. Diamantidis*, 47 AD3d 929, 930 (2d

Dept 2008) (affirming dismissal of petition where the petitioner mailed a copy of the pleadings "five days after the court's deadline for completing service"); *Matter of Phillips v. Sanfilippo*, 306 AD2d 954, 955 (4th Dept 2003) (reversing and dismissing petition for lack of personal jurisdiction where "[i]t is undisputed that . . . petitioner failed to comply with the terms of the order to show cause" because papers were mailed one day after deadline in order to show cause); *Zaretski v. Tutunjian*, 133 AD2d 928, 929 (3d Dept 1987) (reversing and dismissing petition because where petitioners "failed to comply with the provisions for service specified in the order to show cause . . . the petition must be dismissed as untimely"); *see also U.S. Bank N.A. v. Feliciano*, 103 AD3d 791, 791 (2d Dep't 2013) (affirming denial of motion brought by order to show cause where movants "did not strictly comply with the time requirements set forth in the order to show cause").

Here, because the Order to Show Cause for leave to amend was not properly served on the Governor or Lt. Governor, it must be dismissed and the motion for leave to amend denied.

B. Allowing the Amendment Would Improperly Interfere with the Election Cycle

Because allowing Petitioners to amend their Petition would interfere with the New York 2022 election cycle, their motion for leave to amend the Petition should be denied.

An Article 78 proceeding is a special proceeding (CPLR 7804[a]), and neither CPLR Article 4 nor Article 78 permit a party to amend a petition as of right. *Arcamone-Makinano v. New York City Dep't of Bldgs.*, 39 Misc. 3d 1209(A) (Queens Co Sup Ct 2013)

Here, allowing Petitioners to amend their Petition will interfere with the New York 2022 election cycle (see Declaration of Matthew D. Brown, dated February 22, 2022, submitted herewith). Interfering with an election process on the eve of its commencement is improper. See *Purcell v. Gonzalez*, 549 U.S. 1 (2006) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls."); *In re*

Khanoyan, 65 Tex. Sup. Ct. J. 207, 2022 WL 58537 (Jan. 6, 2022) (denying challenge to redistricting for 2022 election because of the timing of the election and nature of the relief sought); *Alliance for Retired Americans v. Secretary of State*, 240 A.3d 45 (Maine 2020) (denying injunctive relief and holding that court should not alter rules on the eve of election).

Because allowing Petitioners to amend their Petition will interfere with the New York State 2022 election cycle, their motion to amend should be denied.

C. The Executive Respondents are entitled to Legislative Immunity

Because the Governor and Lt. Governor are entitled to legislative immunity amending the Petition will be futile and Petitioners' motion for leave to amend should be denied.

Petitioners' second theory is that the challenged maps "are substantively invalid because they [we]re . . . drawn 'for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.'" NYSCEF 48 p.6. However, neither the Governor or Lt. Governor was alleged to be involved with the creation of the challenged maps. Indeed, the Lt. Governor is mentioned nowhere in the body of the Petition.

To illustrate, the Governor and Lt. Governor note that the Petition and Proposed Amended Petition—spanning over 67 pages with over 226 paragraphs—are effectively *devoid* of allegations against them. This statement is literally true regarding Lt. Governor Benjamin, as his name only appears in the Petition at ¶25, identifying him as the Lieutenant Governor of the State of New York. *See also* NYSCEF 18 ¶27. And this statement is effectively true regarding Governor Hochul as well; other than alleging that she is the Governor, Petition ¶24, *see also* NYSCEF 18 ¶26, and that she signed certain legislation, Petition ¶¶57, 173, 193, 221, *see also* NYSCEF 18 ¶¶59, 217, 241, 267, 269, the Petition contains only *one* quasi-substantive allegation against her.

This allegation—found at ¶¶6 & 214—essentially asserts that Governor Hochul intended "'to

help Democrats' by way of 'the redistricting process,'" and that she "lived up to her promise." *See also* NYSCEF 18 ¶¶8 & 262. However, any factual inquiry into to why Governor Hochul may have signed certain legislation is irrelevant—and therefore improper and impermissible—because as Governor, she has the *unquestionable* right to sign or veto legislation put before her. *Chase-Hibbard Milling*, 207 NY at 467 ("If the public authorities were authorized to do what they did do," then "the reasons that moved them do not concern the plaintiff[.]"); *Waterloo Woolen*, 128 NY at 362 ("If the state has the right . . . then the motives that underlie the act are not material."). *See also infra* (discussing legislative privilege).

Yet even if Petitioners' characterization of the Governor's comments is accurate[1], the Petition and Proposed Amended Petition provide no factual allegations—or even claims based on information and belief—contending that Hochul *actually did* what they claim. The Petition is replete with allegations that the challenged maps—and any purportedly improper gerrymandering or motivations for the drafting of those maps—resulted from the *Legislature's actions*, rather than the Governor and/or Lt. Governor. *See e.g.* Petition ¶¶4, 8–9, 29, 53, 55–58, 77–78, 94–96, 100, 104–107, 109, 111 ("The Legislature created a congressional map[.]"), 112–117, 120, 123 ("[T]he Legislature has decreased competitiveness[.]"), 127, 129–130, 132, 134, 139 ("[T]he legislative Democracts . . ."), 148, 154, 156, 158, 165, 166 ("[T]he Legislative Democrats' specific goal . . ."), 167, 169–170, 172, 174–175 ("The Legislature's egregious attempt . . ."), 182–83, 213 ("The Legislature drew the 2022 congressional map[.]").

Instead, Petitioners conclusory and speculatively assert that because the challenged maps purportedly favor Democrats, that by signing the legislation the Governor must have "lived up" to

[1] Petitioners' characterizations of the Governor's statement are misleading. *See* https://www.nytimes.com/2021/08/25/nyregion/kathy-hochul-interviewww.htm

her promise.

"The concept of legislative privilege, and the parallel doctrine of legislative immunity, "developed in sixteenth- and seventeenth-century England as a means of curbing monarchical overreach, through judicial proceedings, in Parliamentary affairs." *Favors v. Cuomo*, 285 F.R.D. 187, 207 (EDNY 2012) ("*Favors I*") (citing *United States v. Johnson*, 383 U.S. 169, 177–80 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951))." *Citizens Union of City of New York v Attorney Gen. of New York,* 269 F Supp 3d 124, 149 (SDNY 2017). This concept is so pivotal to the function of government it was included in the United States Constitution as the Speech and Debate Clause, which holds that Senators and Representatives shall not be questioned in any other place for any speech or debate in either House. See, U. S. Constitution, Article I, Section 6, Clause 1.

The Clause provides broad protection. "'In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity 'should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.'" *Eastland v U. S. Servicemen's Fund*, 421 US 491, 503 (1975) (citing *Dombrowski v. Eastland, supra, at 85, 87 S.Ct., at 1427*). Further, "The Clause has been construed as providing Members of Congress with two distinct, but related, absolute protections: (1) immunity from suit for their legislative acts and (2) protection from being compelled to testify in court…" *Citizens Union of City of New York*, *supra* at 150.

The NY Constitution has a Speech or Debate Clause mirroring the U.S. Constitution's and provides broad legislative immunity to New York lawmakers. See, N.Y. CONST. art. III, §11 Indeed, "many states, including New York, recognize a privilege that provides immunity from suit and protection from being compelled to testify and produce information about legislative acts." *Citizens Union of City of New York, supra* at 152 (citing *People v. Ohrenstein*, 77 NY2d 38,

53–54 [1990]). Since the language in the NY Constitution mirrors the language in the U.S. Constitution, we can look to both state and federal caselaw to analyze legislative immunity.

Legislative immunity extends to the Governor. Petitioners allege that Governor Hochul took one action regarding the redistricting legislation, namely, she signed the bill into law. [NYSEC #1, ¶[173].

Governors and government officials in the executive branch receive immunity when engaged in legislative activities. *See Warden v. Pataki*, 35 F.Supp.2d 354, 358 (SDNY 1999) ("legislative immunity . . . bars actions against legislators or governors ... on the basis of their roles in enacting or signing legislation."), *aff'd sub nom. Chan v. Pataki*, 201 F.3d 430 (2d Cir. 1999). Therefore, the Governor's exercise of the veto power is entitled to legislative immunity. Further, although there are no factual allegations made against the Lt. Governor, any actions he may have taken pursuant to his role as President of the Senate are also quasi-legislative and therefore immune.

Those entitled to legislative immunity are protected not only from relief on the merits of a claim–they are also relieved of "'the burden of defending themselves in court.'" *Urbach v. Farrell*, 229 AD2d 275, 277 (3d Dept 1997) (quoting *Straniere*, 218 A.D.2d at 83). Legislative immunity from civil liability is absolute and bars actions for declaratory and injunctive relief. *See Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998) (absolute immunity); *Supreme Court of Va. v. Consumer Union*, 446 U.S. 719, 732 n.10 (1980); *N.Y. State Motor Truck Ass'n v. Pataki*, 2004 WL 2937803, at *11 (SDNY 2004) (where Governor entitled to legislative immunity, "he is immune from suit even though the remedy sought here is only injunctive and declaratory relief").

> The Governor's executive action of signing a bill into law does not establish jurisdiction. "A governor's "general executive power" is not a basis for jurisdiction in most circumstances. *See Harris v. Bush,* 106 F.Supp.2d 1272, 1276–77 (N.D.Fla.2000) (citing multiple cases supporting this principle). If a governor's general executive power provided a sufficient connection to a state law to permit jurisdiction

> over him, any state statute could be challenged simply by naming the governor as defendant. *Id.* at 1277. Where the enforcement of a statute is the responsibility of parties other than the governor (the cabinet in this case), the governor's general executive power is insufficient to confer jurisdiction. *Id"*

Women's Emergency Network v Bush, 323 F3d 937, 949-50 [11th Cir 2003]

Going further, the Court in *Women's Emergency Network* states, "Appellants further contend Governor Bush is a proper party because he signed Fla. Stat. §320.08058 into law. This argument, too, must fail. Under the doctrine of absolute legislative immunity, a governor cannot be sued for signing a bill into law." *Supra,* at 950 (citing *Supreme Ct. of Va. v. Consumers Union of United States, Inc.,* 446 U.S. 719, 731–34 [1980]).

The Supreme Court, in *Supreme Court of Virginia, supra*, relied on the intent of the concept of legislative immunity to hold it applied to judges in Virginia acting in a legislative capacity when they enacted the Virginia Code of Professional Responsibility for attorneys. The judiciary had statutory authority to enact the Code. Since they were taking on a legislative role, the Court held they were entitled to the same immunity afforded, by law, to state and federal representatives. "The purpose of this immunity is to ensure that the legislative function may be performed independently without fear of outside interference. *Ibid*. To preserve legislative independence, we have concluded that legislators engaged in the sphere of legitimate legislative activity, should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Supreme Ct. of Virginia, supra*, at 731-32 (citing *Tenney v. Brandhove,* 341 U.S. 367, 376 [1951] and *Dombrowski v. Eastland*, 387 U.S. 82, 85 [1967]) (internal quotation marks omitted).

The Governor acts in a legislative capacity when signing legislation into law. Accordingly, she is entitled to legislative immunity in this legislative capacity. She has absolute immunity from litigation arising from the action of signing a bill into law. The Court in *Women's Emergency Network* correctly concludes that to deny the Governor absolute immunity would allow for any state statute to

be challenged merely because she signed it. Such an outcome is nonsensical and counterproductive to the intent of the legislative process.

Based on the foregoing Petitioners' motion for leave to amend should be denied as futile.

D. Because the Issue is Nonjusticiable, Petitioners' Motion Should be Denied

It is the function of the Legislative branch, as conferred by Article III, §4 of the N.Y. Constitution, to adopt legislation implementing an election redistricting plan after the Federal decennial census and to submit that implementing legislation to the Executive for signature or veto. As such, the issue before this court is nonjusticiable and the Petition should be dismissed.

"Free government consists of three departments, each with distinct and independent powers, designed to operate as a check upon those of the other two co-ordinate branches. The legislative department makes the laws, while the executive executes, and the judiciary construes and applies, them. Each department is confined to its own functions and can neither encroach upon nor be made subordinate to those of another without violating the fundamental principle of a republican form of government." *In re Davies*, 168 NY 89, 101-02 (1901).

The way the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government. *Matter of New York State Inspection, Sec., & Law Enforcement Empls, Dist. Council 82, AFSCME, AFL-CIO v. Cuomo,* 64 NY2d 233, 239-40 (1984). Fundamentally, each department of government must be free from interference by either of the other branches in the lawful discharge of duties expressly conferred. *Id.* No concept has been "more universally received and cherished as a vital principle of freedom." *Id.* (citation omitted). The Court of Appeals consistently holds that "questions of broad legislative and administrative policy [are] beyond the scope of judicial correction." *Jones v. Beame,* 45 NY2d 402, 408 (1978); *Matter of Abrams v. New York City Tr. Auth.,* 39 NY2d 990, 992 (1976).

As the Supreme Court stated, "under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan." *Bell v. Wolfish,* 441 U.S. 520, 562 (1978). Thus, this Court has "…no more right to usurp the authority conferred upon a coordinate branch of government than to decline the exercise of jurisdiction which is granted". *Matter of New York State Inspection, supra*, 238-39. Accordingly, the Court must determine, as a threshold issue, whether Petitioners' claims are justiciable. It is undeniable that the authority to enact legislation implementing redistricting maps rests with the Legislative branch; therefore, the claims are not justiciable.

The Legislative branch, elected by the people of the State of New York, are entrusted by law with the duty to implement redistricting legislation. They, together with Governor, have fulfilled that duty. "New York's 2002 redistricting laws are well within the purview and political prerogative of the State Legislature." *Rodriguez v Pataki*, 308 F Supp 2d 346, 352 (SDNY 2004), affd, 543 US 997 (2004) (citing *Miller v. Johnson,* 515 U.S. 900, 915 [1995] ["Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions.... Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."]; *Georgia v. Ashcroft,* 123 S.Ct. 2498, 2511–12 [2003]; *Md. Comm. for Fair Representation v. Tawes,* 377 U.S. 656, 676 [1964]).

Respectfully, the Court would be in error to substitute its authority for that of the Legislature and Governor—who act as the voice of the people in our governmental system. The intent of the Constitution is the allow the branches of government elected by the people to perform the function of redistricting. To usurp the authority of the Legislature is to usurp the authority of the people. As the Court in *Rodriquez* wisely concluded, electoral redistricting is a very difficult subject for legislatures. Nevertheless, they performed that function for decades and have the knowledge, resources, and skill

to do so. If this subject is difficult for the legislature to tackle, it would be even more difficult for the Court to tackle.

However, the Court need not wade into this very difficult subject because the issue is nonjusticiable and Petitioners' motion for leave to amend should be denied as futile.

CONCLUSION

Respondents Governor Hochul and Lt. Governor Benjamin respectfully request an Order dismissing the Order to Show Cause for leave to amend, denying Petitioners' motion to amend the Petition, and granting such other relief as the Court deems proper.

February 22, 2022

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CERTIFICATION

In accordance with Rule 202.8-b of the Uniform Rules of Supreme and County Courts, the undersigned certifies that the word count in this memorandum of law (excluding the caption, table of contents, table of authorities, signature block, and this certification), as established using the word count on the word-processing system used to prepare it, is 3424 words. Pursuant to email correspondence with the Court, dated February 25, 2021, Respondents were granted permission to exceed the 7,000 limit by up to an additional 6,500 words.

February 22, 2022
Rochester, NY

/s/ ***Matthew D. Brown***
By: Matthew D. Brown
Assistant Attorney General