

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF STEUBEN

-----X

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,

Index No. E2022-0116CV

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.

-----X

**MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION  
TO STRIKE PORTIONS OF THE KATZ EXPERT REPORT  
AND THE SECOND TAPP EXPERT REPORT**

TROUTMAN PEPPER HAMILTON  
SANDERS LLP

KEYSER MALONEY &  
WINNER LLP

Bennet J. Moskowitz, Reg. No. 4693842  
875 Third Avenue  
New York, New York 10022  
(212) 704-6000  
bennet.moskowitz@troutman.com

George H. Winner, Jr., Reg. No. 1539238  
150 Lake Street  
Elmira, New York 14901  
(607) 734-0990  
gwinner@kmw-law.com

Misha Tseytlin, Reg. No. 4642609  
227 W. Monroe St., Suite 3900  
Chicago, IL 60606  
(608) 999-1240  
misha.tseytlin@troutman.com

HOWARD HINMAN &  
KATTELL LLP

Richard C. Lewis  
700 Security Mutual Building  
80 Exchange Street  
Binghamton, NY 13901  
(607) 231-6605  
rlewis@hkh.com

**TABLE OF CONTENTS**

PRELIMINARY STATEMENT ..... 1  
ARGUMENT ..... 2  
CONCLUSION..... 4

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

*LaFurge v. Cohen*,  
61 A.D.3d 426 (1st Dep’t 2009) ..... 2, 4

*PB-36 Doe v. Niagara Falls City Sch. Dist.*,  
152 N.Y.S.3d 242 (Niagara Cnty. Sup. Ct. 2021) ..... 2, 4

**Statutes And Rules**

CPLR § 3012..... 2

CPLR § 3025..... 2, 4

CPLR § 402..... 2, 4

CPLR § 403..... 2

CPLR § 405..... 2, 4

Petitioners Tim Harkenrider, Guy C. Brought, Lawrence Canning, Patricia Clarino, George Doohar, Jr., Stephen Evans, Linda Fanton, Jerry Fishman, Jay Frantz, Lawrence Garvey, Alan Nephew, Susan Rowley, Josephine Thomas, and Marianne Violante (collectively, “Petitioners”) submit this Memorandum Of Law in support of their Order To Show Cause to strike portions of Respondents Senate Majority Leader Andrea Stewart-Cousins and the New York State Senate Majority’s LATFOR Appointees’ (collectively, “Senate Majority Respondents”) late-filed expert materials.

### **PRELIMINARY STATEMENT**

Despite already answering and presenting voluminous expert materials responding to Petitioners’ challenge to the 2022 Congressional Map *within the time allotted by New York law, this Court, and the parties’ explicit agreement*, NYSCEF Nos.24, 49, 71, 73, Senate Majority Respondents on Thursday, March 10—*two business days before this Court’s evidentiary hearing*—inexplicably submitted two more expert reports that deal in substantial part with the 2022 Congressional Map. This is obviously improper and flagrantly prejudicial to Petitioners. The time to submit expert reports dealing with Petitioners’ challenge to the 2022 Congressional Map has long passed, as has Petitioners’ opportunity to respond to those expert reports, including by submitting any rebuttal experts. This Court *only* permitted Respondents to respond by Thursday, March 10, to the Amended Petition’s addition of a challenge to the 2022 State Senate Map, and it was at least arguably fair game for them to submit expert reports with regard to the 2022 State Senate Map. But Respondents’ submission of additional expert materials as to the 2022 Congressional Map—*including an expert report that presents an entirely different methodology for evaluating that map from anything Respondents or their experts had ever referenced before*—must, with all respect, be struck in order to maintain a fundamentally fair proceeding.

## ARGUMENT

New York law allows defendants and respondents to answer a petition or complaint within a set timeframe. *See* CPLR § 3012; *see also* CPLR § 403. In Article 4 proceedings, like the case at hand, *the court* may adjust that timeframe within its own discretion, but a respondent cannot change it unilaterally. *See* CPLR § 402. Under New York law, defendants and respondents are not permitted a second answer to the same claims unless expressly permitted by a court or stipulated to by all parties. *See* CPLR § 402; CPLR § 3025. The timeframe for filing pleadings and evidence exists to prevent prejudice to the parties, and this Court can exclude untimely expert evidence and testimony when a party fails to “provide an adequate explanation for the delay.” *LaFurge v. Cohen*, 61 A.D.3d 426, 426 (1st Dep’t 2009). To that end, this Court has discretion to strike any prejudicial matter in Respondents’ answers and supporting affidavits and reports submitted after the set deadline has expired. CPLR § 405; *see PB-36 Doe v. Niagara Falls City Sch. Dist.*, 152 N.Y.S.3d 242, 247 (Niagara Cnty. Sup. Ct. 2021) (“[T]he appropriate vehicle to remove [ ] prejudicial [and duplicative] references from a pleading is a motion to strike . . .”).

On February 24, 2022, Respondents timely submitted to this Court multiple expert reports responding to Petitioners’ allegations regarding the unconstitutional partisan and incumbent-protection gerrymander of New York’s congressional districts, NYSCEF Nos.73, 86, 92, consistent with this Court’s order and the parties’ agreement, NYSCEF Nos.24, 49. Through these expert reports, Respondents submitted voluminous materials and arguments addressing the claims that Petitioners raised as to the 2022 Congressional Map. *See* NYSCEF Nos.73, 86, 92. Thereafter, on March 3, this Court granted Petitioners’ Motion For Leave To Amend, accepting as filed Petitioners’ Amended Petition. Mar. 3, 2022 Transcript of Special Proceedings (“Hr’g Tr.”) at 37:12–17. In their Amended Petition, Petitioners raise claims related to Respondents’ unconstitutional partisan and incumbent-protection gerrymander of the 2022 State Senate Map,

while simply reiterating the factual allegations and claims arising from Respondents' unconstitutional partisan and incumbent-protection gerrymander of New York's congressional districts. NYSCEF No. 33. This Court gave all Respondents until Thursday, March 10, to respond to Petitioners' claims related to Respondents' unconstitutional partisan and incumbent-protection gerrymander of the 2022 State Senate Map. Hr'g Tr. at 37:12–19.

Yet, on Thursday, March 10, Senate Majority Respondents blindsided Petitioners and the Court by submitting expert reports from Dr. Jonathan N. Katz and Dr. Kristopher R. Tapp that deal, remarkably, in substantial part with 2022 Congressional Map. In his Expert Report, Dr. Katz provided an entirely different analysis of the 2022 Congressional Map than any Respondent previously submitted, *making claims and reaching conclusions that Respondents did not discuss in their prior briefing, and which Petitioners never had an opportunity to rebut with their own expert report* (including, if they deemed it appropriate, to retain and present to this Court an expert dealing with Dr. Katz's entirely different methodology). NYSCEF No.156 at 6–7, 19–27. Put another way, Senate Majority Respondents cynically hired Dr. Katz to put in an untimely expert report on the 2022 Congressional Map, using an entirely different methodology the import of which they never briefed, *see id.*, and which is entirely outside of the schedule that this Court ordered and the parties agreed to, *see* NYSCEF Nos.24, 49. Further, Senate Majority Respondents submitted an additional expert report from Dr. Tapp responding to Petitioners' claims and supporting expert reports with regard to the 2022 Congressional Map. *See* NYSCEF No.153 at ¶¶ 7, 12–25, 37–49. The Second Tapp Report expands on Dr. Tapp's initial discussion of congressional districts and further addresses the Expert Report and Reply Report of Petitioners' expert, Sean Trende. NYSCEF No.153 at ¶¶ 7, 12–25, 37–49; *see* NYSCEF No.73 at ¶¶ 27–60.

The introduction of this belatedly submitted expert material is patently untimely, *see* CPLR § 402; CPLR § 3025, and unduly prejudicial. Respondents responded in full to Petitioners’ 2022 Congressional Map claims and accompanying expert reports when all Respondents submitted their answers and supporting expert materials on February 24. NYSCEF Nos.71, 73; *see* NYSCEF Nos.83, 85, 86, 92. Yet, Senate Majority Respondents now attempt to submit to two additional expert reports as to the 2022 Congressional Map. NYSCEF Nos.153, 156. Senate Majority Respondents have failed to provide any reason—let alone an “adequate explanation”—for this sandbagging of Petitioners and the Court. *See LaFurge*, 61 A.D.3d at 426. As noted above, admitting the 2022 Congressional Map portions of these reports would be unduly prejudicial Petitioners, who do not have time or opportunity to adequately respond at this late stage in the pleadings, including determining whether to retain an expert to address the different methodology that Dr. Katz has put forward, which bears no resemblance to Respondents’ arguments in their extant papers before this Court. Because substantial portions of the Katz Report and the Second Tapp Report discussing the 2022 Congressional Map are untimely, this Court should strike these expert reports to the extent that they discuss the 2022 Congressional Map. CPLR § 405; *see PB-36 Doe*, 152 N.Y.S.3d at 247.

### **CONCLUSION**

Petitioners respectfully request that this Court grant their Motion, striking the substantial portions of the Katz Report and the Second Tapp Report that discuss the 2022 Congressional Map and related opinions of Petitioners’ experts.

Dated: New York, New York

March 13, 2022

TROUTMAN PEPPER HAMILTON  
SANDERS LLP

By: 

---

Bennet J. Moskowitz, Reg. No. 4693842  
875 Third Avenue  
New York, New York 10022  
(212) 704-6000  
bennet.moskowitz@troutman.com

Misha Tseytlin, Reg. No. 4642609  
227 W. Monroe St.  
Suite 3900  
Chicago, IL 60606  
(608) 999-1240  
misha.tseytlin@troutman.com

Respectfully submitted,

KEYSER MALONEY &  
WINNER LLP

By: s/ George H. Winner, Jr.

---

George H. Winner, Jr., Reg. No. 1539238  
150 Lake Street  
Elmira, New York 14901  
(607) 734-0990  
gwinner@kmw-law.com

HOWARD HINMAN &  
KATTELL LLP

Richard C. Lewis  
700 Security Mutual Building  
80 Exchange Street  
Binghamton, NY 13901  
(607) 231-6605  
rlewis@hbk.com



**CERTIFICATION**

I hereby certify that the foregoing memorandum of law complies with the bookmarking requirement and word count limitations set forth in Rule 202.8-b of the Uniform Rules of Supreme and County Courts. *See* 22 NYCRR § 202.8-b. This memorandum of law contains 1,181 words, excluding parts of the document exempted by Rule 202.8-b(b).

Dated: New York, New York  
March 13, 2022

TROUTMAN PEPPER HAMILTON  
SANDERS LLP

By: *Is Bennet J. Moskowitz*

Bennet J. Moskowitz, Reg. No. 4693842  
875 Third Avenue  
New York, New York 10022  
(212) 704-6000  
bennet.moskowitz@troutman.com