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 VOLANTE,

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.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO AMEND

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Petitioners 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 (collectively, "Petitioners") submit this Memorandum Of Law in support of their Order To Show Cause for leave to file an Amended Petition.

PRELIMINARY STATEMENT

On February 3, 2022, Petitioners initiated this Action against Respondents 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, the New York State Board of Elections, and the New York State Legislative Task Force on Demographic Research and Reapportionment (collectively "Respondents"), under Article III, Section 4 of the New York Constitution and New York Legislative Laws § 93. *See generally* Petition, NYSCEF Doc. No. 1. That Petition generally raised the following claims: (1) challenging Respondents' and the New York State Legislature's ("Legislature") failure to follow the exclusive process for redistricting embodied in Article III, Section 4 of the New York Constitution; (2) claiming that the only validly enacted map for Congress was the 2012 federal-court-adopted map that is now unconstitutionally malapportioned given subsequent population changes, and therefore invalid; (3) arguing that Respondents' and the Legislature's 2022 congressional map is clearly gerrymandered to favor the Democratic Party and Democratic incumbents, contrary to Article III, Section 4 of the New York Constitution; and (4) seeking a declaratory judgment on all of those issues, all arising out of the 2022 redistricting process following the 2020 decennial census, as well as seeking other related relief, such as invalidating 2021 legislation, L.2021, c. 633, § 7150, as unconstitutional and suspending any other state laws necessary for the Court to provide effective and complete relief. *Id.* On February 7,

2022, this Court entered an Order to Show Cause on that Petition. *See* Order to Show Cause, NYSCEF Doc. No. 11.

Now, Petitioners ask this Court for leave to amend the Petition to add allegations that Respondents' same constitutional violations of the procedural and substantive protections enacted by voters in the 2014 amendments to Article III, Section 4, also infected the 2022 state Senate map that the Legislature enacted and the Governor signed on February 3, 2022, and that the 2012 state Senate map is also now unconstitutionally malapportioned, while also making some wording changes throughout. In other words, Petitioners seek leave to amend the Petition to extend their existing claims—against the same Respondents—to one additional map, without at all altering Petitioners' theories of recovery. Because these amended claims are all valid, this case is still in its infancy, and no discovery has even begun, Petitioners respectfully request that this Court grant them leave to file the proposed Amended Petition, attached as Exhibit D to the contemporaneously filed Affirmation of Bennet J. Moskowitz ("Moskowitz Aff.").

STANDARD OF REVIEW

The decision whether to grant leave to amend a pleading falls within the "sound discretion of the court," and reviewing courts give the court considering such motions "the widest possible latitude" to grant amendment, even when it would "substantially alter[ ] the theory of recovery." *Kimso Apartments, LLC v. Gandhi*, 24 N.Y.3d 403, 411, 23 N.E.3d 1008 (2014) (citations omitted). A court must freely grant leave to amend a pleading so long as the amendment is not "palpably insufficient or patently devoid of merit . . . on its face," *Putrelo Constr. Co. v. Town of Marcy*, 137 A.D.3d 1591, 1593, 27 N.Y.S.3d 760 (4th Dep't 2016) (citations omitted), and there is no prejudice or surprise to the non-moving party, *see McCaskey, Davies & Assocs., Inc. v. N.Y.C. Health & Hosps. Corp.*, 59 N.Y.2d 755, 757, 450 N.E.2d 240 (1983). A party opposing leave to amend "must overcome a heavy presumption of validity in favor of permitting amendment."

McGhee v. Odell, 96 A.D.3d 449, 450, 946 N.Y.S.2d 134 (1st Dep't 2012) (citation omitted). Indeed, the opposing party has the mandatory burden of establishing prejudice. *Kimso Apartments*, 24 N.Y.3d at 411. These rules apply equally to requests for leave to amend in special proceedings. *See, e.g.*, *In the Matter of Greece Town Mall, L.P. v. New York*, 105 A.D.3d 1298, 1299–1300, 964 N.Y.S.2d 277 (3d Dep't 2013).

ARGUMENT

I. The Court Should Grant Petitioners Leave To Amend

Petitioners seek leave to amend to add allegations regarding the contemporaneously enacted 2022 state Senate map and prior 2012 state Senate map, consistent with the allegations raised against the 2022 congressional map and 2012 congressional map, as well as making some wording changes to existing claims. The Court should grant leave and accept the contemporaneously filed, proposed Amended Petition, as no claims within it are palpably insufficient or devoid of merit and Respondents will suffer no prejudice from amendment.

A. The Proposed Amended Petition Is Not Palpably Insufficient Or Patently Devoid Of Merit, As Petitioners' Claims Regarding The State Senate Map Are Just As Strong As Those On The Congressional Map

In "determin[ing] whether the proposed amendment is 'palpably insufficient' to state a cause of action or defense, or is patently devoid of merit," the Court "shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt." *Favia v. Harley-Davidson Motor Co.*, 119 A.D.3d 836, 836, 990 N.Y.S.2d 540 (2d Dep't 2014) (citation omitted). So long as a petitioner states "a claim that is valid upon its face," that suffices for leave to amend. *Wallace v. Parks Corp.*, 212 A.D.2d 132, 141, 629 N.Y.S.2d 570 (4th Dep't 1995). In other words, the Court should only reject a "proposed amendment that cannot survive a motion to dismiss," *Scott v. Bell Atl. Corp.*, 282 A.D.2d 180, 185, 726 N.Y.S.2d 60 (1st Dep't 2001), and "[o]nce a prima facie basis for the amendment has been established, that should

end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment," *Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 40 A.D.3d 363, 366, 836 N.Y.S.2d 68 (1st Dep't 2007) (citation omitted). Amendments meet this "devoid of merit" standard when they have true legal failings such as, among other things, raising claims that "would be barred by the applicable statute of limitations." *Belair Care Ctr., Inc. v. Cool Insuring Agency, Inc.*, 161 A.D.3d 1263, 1266, 77 N.Y.S.3d 171 (3d Dep't 2018).

Here, Petitioners' request easily clears the low sufficiency bar established for amendments. First, as shown in the proposed Amended Petition (Moskowitz Aff. Ex. D, at First Cause of Action), Petitioners make more than a colorable showing that Respondents ignored and violated the mandatory process for redistricting established in the 2014 amendments to Article III, Section 4 of the New York Constitution. As Petitioners explain in both their original and amended Petitions, Article III, Section 4 now establishes "*[t]he process*" for redistricting, and requires the New York Independent Redistricting Commission ("IRC") to propose at least two rounds of maps to the Legislature (which maps the Legislature must consider and either approve or reject) before the Legislature can "introduce" its own "implementing legislation" along with "any amendments" that comply with Article III, Section 4. N.Y. Const. art. III, § 4(b), (e) (emphasis added); *see also* N.Y. Legis. Law § 93(1), (3). This requirement applies *equally* to congressional and state Senate maps, N.Y. Const. art. III, § 4(b), and so the Legislature's failure to receive any second state Senate maps identically precludes their enactment of their own state Senate maps. (Moskowitz Aff. Ex. D, at First Cause of Action). Thus, because Petitioners request leave to amend the Petition to add claims relating to the 2022 state Senate map that are just as "valid upon [their] face" as the existing allegations pertaining to the 2022 congressional map, this Court should grant such request. *Wallace*, 212 A.D.2d at 141.

Second, Petitioners' proposed new allegations about the now-malapportioned 2012 state Senate map similarly pass the minimal requirements for amendment. As Petitioners explain in their proposed Amended Petition, the New York Constitution requires that *all* "districts shall contain as nearly as may be an equal number of inhabitants," and that the government must provide "a specific public explanation" for any deviation from that equality requirement. N.Y. Const. art. III, § 4(c)(2). As Petitioners further note in their proposed Amended Petition (Moskowitz Aff. Ex. D, at ¶¶ 61–79 & Second Cause of Action), population changes throughout the State of New York have rendered the 2012 state Senate map no less malapportioned than the 2012 congressional map, even accounting for some permissible level of variance among state legislative districts, *Schneider v. Rockefeller*, 31 N.Y.2d 420, 428–29, 293 N.E.2d 67 (1972). Thus, Respondents cannot contend that this proposed amendment is in any way "devoid of merit," "palpably insufficient," *Favia,* 119 A.D.3d at 836, or otherwise not worthy of this Court freely granting leave to amend, *Putrelo Constr. Co.*, 137 A.D.3d at 1593.

Third, Petitioners' specific allegations in the proposed Amended Petition about the Legislature's gerrymandering of the 2022 state Senate map also suffice to show that the Legislature drew districts "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). Petitioners provide numerous specific examples from the 2022 state Senate map of districts drawn to advance the interests of the Democratic Party or to favor or disfavor incumbent Senators. (Moskowitz Aff. Ex. D, at ¶¶ 114–212 & Third Cause of Action). No less so than the 2022 congressional map, the 2022 state Senate map combines unconnected communities, packs and cracks Republican voters, and otherwise attempts to provide Democratic politicians and candidates advantages in numerous Senate districts, so as to give the Democratic Party an outsized number of seats in the state Senate

compared to their level of statewide support, all in violation of the Article III, Section 4 of the New York Constitution. N.Y. Const. art. III, § 4(c)(5); (Moskowitz Aff. Ex. D, at ¶¶ 114–212 & Third Cause of Action). Petitioners' allegations are materially similar to those on which other States have recently *granted ultimate relief* against partisan gerrymandering. *See*, *e.g.*, *Harper v. Hall*, ___ S.E.2d ___, 2022 WL 343025 (N.C. Feb. 4, 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, ___N.E.3d ___, 2022 WL 110261 (Ohio Jan. 12, 2022). Therefore, these allegations are "valid upon [their] face" and sufficient for leave to amend. *Wallace*, 212 A.D.2d at 141.

Fourth, and given the above, Petitioners' amendment to the final Cause of Action—requesting a declaratory judgment—to include claims related to the 2022 state Senate map also suffices. Each of Petitioners' requests for a declaratory judgment relates to well-pleaded allegations about the Respondents' and the Legislature's gerrymandering and failure to follow the mandatory redistricting process such that this Court can and should declare the law and rights of the parties related to those claims. (Moskowitz Aff. Ex. D, at Fourth Cause of Action).

Fifth, Petitioners' remaining wording changes and certain additional citations in their proposed Amended Petition do not impact or alter any of their claims or theories.

For these reasons, Petitioners' proposed Amended Petition is more than sufficient to extend its various causes of action to the 2022 state Senate map, in addition to the 2022 congressional map, and this Court should freely grant Petitioners leave to amend.

B. Respondents Will Suffer No Prejudice Or Surprise At All From Amendment

Prejudice in this context means "more than the mere exposure of the [opposing parties] to greater liability." *Kimso Apartments*, 24 N.Y.3d at 411 (citation omitted). Instead, prejudice requires the opposing party to show that it "has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position." *Id.* (citation

omitted). A court may consider the length of delay, i.e., "how long the party seeking the amendment was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered," but such considerations are most relevant when amendment is sought very late in the case, such as on the eve of trial. *NYAHSA Servs., Inc. Self-Ins. Tr. v. People Care Inc.*, 156 A.D.3d 99, 103, 64 N.Y.S. 3d 730 (3d Dep't 2017) (citation omitted).

Here, Petitioners seek leave to amend the Petition only five days after initial filing, after taking a requisite amount of time to review the quickly released and enacted 2022 state Senate map—enacted by the Legislature after the 2022 congressional—to determine if it suffered from the same constitutional infirmities as the Legislature's congressional map. Thus, Petitioners moved to amend less than a week after commencing the case, with no unexplainable delay at all, meriting leave to amend.

Given the promptness with which Petitioners have filed for leave to amend, Respondents plainly cannot establish the prejudice necessary for this Court to deny leave. Respondents have not even entered an appearance in this case. Discovery has yet to begin and Respondents have only recently received service of the initial Petition, with the parties planning to meet and confer to negotiate scheduling and next steps. All of these steps will continue with great haste regardless of whether the Court grants Petitioners' leave to amend to merely add state Senate map considerations to the existing causes of action, and no amendment could "hinder[ ]" Respondents "in the preparation of [their] case." *Kimso Apartments*, 24 N.Y.3d at 411; *see also Joel v. Weber*, 166 A.D.2d 130, 138, 569 N.Y.S.2d 955 (1st Dep't 1991) ("In view of the fact that the parties are in the early stages of litigation, and discovery has not yet commenced, it is not surprising that defendants do not claim either prejudice or surprise by the instant motion for leave to amend.").

All Respondents are well aware of the sequence of events that occurred in the sprint up to the Governor signing the unconstitutional congressional and state Senate maps into law, so none of the new factual allegations underlying the proposed Amended Petition can, in any way, prejudice or surprise Respondents. Therefore, Respondents cannot show any prejudice beyond "the mere exposure of . . . greater liability," *Kimso Apartments*, 24 N.Y.3d at 411, which is insufficient to contest amendment.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court grant them leave to file the contemporaneously provided Amended Petition.

Dated: New York, New York
February 8, 2022

Respectfully submitted,

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