New York Supreme Court

Appellate Division—Fourth Department

Docket No.: CAE 22-00506

IN THE MATTER OF TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEVEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS AND MARIANNE VOLANTE,

Petitioners-Respondents,

– 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 AND NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents-Appellants.

ORDER TO SHOW CAUSE FOR EXPEDITED LEAVE TO INTERVENE

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Steuben County Clerk's Index Nos. E2022-0116CV

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

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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,

No. CAE 22-00506

Petitioners-Respondents,

ORDER TO SHOW CAUSE FOR EXPEDITED LEAVE TO INTERVENE AS RESPONDENTS-APPELLANTS

-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 CAR HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, and THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents-Appellants.

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UPON reading of the Affirmation of Matthew D. Brinckerhoff, dated April

13, 2022, and the exhibits annexed thereto, and Proposed Intervenors' Memorandum of Law in support of their intervention, under CPLR 401, 1012, and 1013, which together set forth the grounds for seeking leave to intervene on an expedited basis:

LET Petitioners-Respondents and Respondents-Appellants or their counsel appear and show cause before this Court at the Courthouse located at 50 East Avenue, Rochester, New York 14604, on April __, 2022 at __ o'clock, or as soon thereafter as counsel can be heard, why an Order should not be issued granting Proposed Intervenors leave to intervene as Respondents-Appellants in this action; and it is

ORDERED that service of a copy of this order to show cause, and the papers upon which it was made, be made upon counsel of record for Petitioners-Respondents and Respondents-Appellants by electronic mail, on or before __ day of April, 2022, shall be deemed good and sufficient service; and it is further

ORDERED that the motion brought on by this order to show cause shall not be orally argued unless counsel are notified to the contrary by the Clerk of the Court.

Dated: Rochester, New York
April __, 2022

_____
Hon. Stephen K. Lindley

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

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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,

No. CAE 22-00506

Petitioners-Respondents,

AFFIRMATION OF MATTHEW D. BRINCKERHOFF IN SUPPORT OF EXPEDITED INTERVENTION

-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 CAR HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, and THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents-Appellants.

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MATTHEW D. BRINCKERHOFF, ESQ., under penalties of perjury, affirms and states:

1. I am an attorney at law duly admitted to practice before the Courts of the State of New York. I am a member of the law firm of Emery Celli Brinckerhoff Abady Ward & Maazel LLP, counsel for Proposed Intervenors-Respondents-Appellants Representatives Jamaal Bowman, Yvette Clarke, Adriano Espaillat, Hakeem Jeffries, Sean Patrick Maloney, Gregory Meeks, Grace Meng, Jerrold Nadler, Paul Tonko, and Ritchie Torres; candidates Vanessa Fajans-Turner, Laura Gillen, Jackie Gordon, and Josh Lafazan; and voters Abigail S. Bradford, Andrae Evans, Lauren Foley, Lauren Furst, Courtney Gibbons, Judith Jerome, Eric Levine, Mark Lieberman, Daniel Lloyd, Jacob McNamara, Seth Pearce, Leah Rosen, E. Paul Smith, Steve Spicer, Gayle L. Syposs, Nancy Van Tassel, Verity Van Tassel Richards, and Ronnie White Jr. (collectively, "Proposed Intervenors") in the above-entitled action. I am familiar with the facts and circumstances recited herein based upon my review of the file and my own personal knowledge.

2. I submit this affirmation in support of the Proposed Intervenors' motion to intervene as Respondents-Appellants in this action pursuant to CPLR 1012(a)(2) and 1013, and to thus file the proposed Brief of Intervenors-Respondents-Appellants attached as Ex. 1.

3. Proposed Intervenors bring this motion by Order to Show Cause and seek a highly expedited schedule for a hearing and determination of the motion

because of the expedited Scheduling Order for hearing this appeal. That Order requires Respondents-Appellants to file their opening briefs by no later than April 13, followed two days later by briefs for Petitioners-Respondents on April 15, with Reply Briefs on April 18 and oral argument on April 20, 2022.

4. Proposed Intervenors are New York congressional candidates ("Proposed Intervenor Candidates") and voters ("Proposed Intervenor Voters") from newly created congressional districts 1, 3, 4, 5, 6, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 22, 23, 25, and 26 under the congressional map adopted by the New York State Legislature following decennial redistricting (the "Congressional Plan"), Senate Districts 3, 6, 13, 20, 24, 27, 30, 31, 33, 35, 36, 37, 43, 45, 47, 49, 51, 52, 53, 54, 56, 57, 61, and 63 under the State Senate map adopted by the Legislature (the "Senate Plan"), and Assembly Districts 10, 11, 19, 21, 26, 33, 43, 44, 51, 67, 72, 78, 90, 91, 92, 94, 95, 103, 111, 122, 125, 129, 136, 140, and 148 under the General Assembly plan adopted by the Legislature (the "Assembly Plan").

5. The circumstances prompting this expedited motion to intervene appeal are extraordinary. Beginning on March 1, 2022, New York law authorizes congressional candidates to begin collecting signatures from their constituents to qualify for the 2022 primary election. *See* N.Y. Elec. Law §§ 6-134(4), 6-158(1). Two days later, the court below assured the parties and the public that it would "permit the current election process to proceed" under the challenged Congressional

Plan, explaining that it was too close to the primary election date for new maps to be drawn even if the court found the Congressional Plan invalid. *See* Mem. in Opp. to Pet'rs' Mot. for Suppl. Briefing on Remedy at 2, NYSCEF Doc. No. 229 (quoting Mar. 3 Hr'g Tr. 69:9-70:15). Proposed Intervenors refrained from seeking intervention in the trial court and proceeded to gather signatures from and campaign to voters living in the districts in which they are running under the Congressional Plan.

6. The court below necessitated intervention on appeal when it nonetheless enjoined the Congressional Plan and the Senate Plan—along with the Assembly Plan that was not even challenged in the litigation. In doing so it has thrown New York's primary election into disarray, sparking confusion among candidates and voters alike. It is so late in the election calendar that even on the extremely expedited schedule this Court has set, a decision will come no earlier than 13 days *after* the close of the nominating petition window.

7. State and federal courts in New York routinely grant intervention to incumbent elected officials and voters in challenges to their districts—even where, as here, the existing defendants include New York state officials like the Governor, Lieutenant Governor, and legislative leaders.[1] These courts have recognized that

[1] *See, e.g.*, *Diaz v. Silver*, 932 F. Supp. 462, 463 (E.D.N.Y. 1996) (acknowledging intervention of voters to defend challenged congressional districts); *Morris v. Bd. of Estimate*, 592 F. Supp. 1462, 1464 (E.D.N.Y. 1984) (same); *Flateau v. Anderson*, 537 F. Supp. 257, 258 n.1 (S.D.N.Y. 1982)

candidates have personal interests in the communities they represent that government defendants do not and could not share. And they have similarly recognized the substantial and unique interests of voters that entitle them to intervene in challenges to the districts in which they cast their votes. Undoubtedly sufficient to warrant intervention in the ordinary course, these interests are so substantial that they have facilitated intervention even where, as here, it is sought for the first time on appeal. *See, e.g.*, *Bates v. Jones*, 127 F.3d 870, 873-74 (9th Cir. 1997) (granting motion to intervene on appeal by legislators and voters in challenge to state initiative imposing term limits).

8. A court "shall" permit a person to intervene as a matter of right: (1) "upon timely motion," (2) "when the representation of the person's interest by the parties is or may be inadequate," and (3) when "the person is or may be bound by the judgment." CPLR 1012(a)(2). Separately, a court "may" in its discretion permit

(allowing member of state assembly to intervene as a defendant in challenge to congressional, senate, and assembly maps); *Wright v. Rockefeller*, 211 F. Supp. 460, 461 (S.D.N.Y. 1962) (allowing several "district leaders of the area comprising" four majority-minority assembly districts and former congressman Adam Clayton Powell to intervene in challenge to congressional lines); *Blaikie v. Wagner*, 258 F. Supp. 364, 366 (S.D.N.Y. 1965) (councilmen permitted to intervene to defend map for their districts); *Fund for Accurate & Informed Representation, Inc. v. Weprin*, No. 92-CV-0593, 1992 WL 512410 (N.D.N.Y. Dec. 23, 1992) (acknowledging grant of intervention to two incumbent lawmakers in challenge to New York's legislative districts following 1990 census); *Honig v. Bd. of Supervisors of Rensseleaer Cnty.*, 31 A.D.2d 989, 989 (3d. Dep't 1969), *aff'd sub nom. Honig v. Bd. of Supervisors of Rensseleaer Cnty.*, 248 N.E.2d 922 (N.Y. 1969) (allowing member of Rensseleaer County Board of Supervisors to intervene to defend maps draw for his county's board); *Ambro v. Bd. of Supervisors of Suffolk Cnty.*, 287 N.Y.S. 2d 458, 459 (Sup. Ct., Suffolk Cnty. 1968) (acknowledging intervention in challenge to maps of Board of Supervisors of Suffolk County).

a party to intervene "when the person's claim or defense and the main action have a common question of law or fact." CPLR 1013.

I. Proposed Intervenors are entitled to intervention as a matter of right.

9. Proposed Intervenors' motion satisfies the first element of intervention as a matter of right: it is timely. "In examining the timeliness of the motion, courts do not engage in mere mechanical measurements of time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party." *Jones v. Town of Carroll*, 158 A.D.3d 1325, 1328 (4th Dep't 2018). Indeed, New York courts have held that "[i]ntervention can occur at any time, even after judgment for the purpose of taking and perfecting an appeal." *Romeo v. N.Y. State Dep't of Educ.*, 39 A.D.3d 916, 917 (3d. Dep't 2007).

10. Proposed Intervenors moved to intervene shortly after the initial notices of appeal, on April 13, 2022. As the appeal must be perfected by today, Proposed Intervenors have also included their proposed merits brief, attached as Ex. 1. Proposed Intervenors will abide by the briefing schedule ordered by the Court, and as such intervention would not prejudice the existing parties or delay the proceedings in any way.

11. Denial of intervention, on other hand, would cause prejudice to Proposed Intervenors. The trial court obviated the need of Proposed Intervenor Candidates to intervene earlier in these proceedings when it asserted—as candidates

began preparing their campaigns under the current district lines—that it would "permit the current election process to proceed" under those lines. Mar. 3 Hr'g Tr. 69:9-70:15. That assertion, combined with any subsequent denial of intervention, would severely prejudice Proposed Intervenor Candidates, who—as candidates running for a two-year position in Congress—are principally concerned with how the districts are constituted for the 2022 election. And it would prejudice Proposed Intervenor Voters as well, who inarguably have an interest in each electoral district in which they reside but had no notice that their assembly districts were at risk until the order on appeal issued. *See* Amend. Pet. at ¶ 10 n.7 (disclaiming any challenge to the Assembly Plan).

12. As to the second element of intervention as of right, Proposed Intervenors have a direct and substantial interest in the outcome of this proceeding that will not be adequately represented by Respondents-Appellants. Courts grant intervention for voters in redistricting cases because they recognize that voters generally have substantial and direct interests that are distinct from public officials in the context of redistricting litigation. *See, e.g.*, *Nash v. Blunt*, 140 F.R.D. 400, 403 (W.D. Mo. 1992) (holding that despite the general rule that state defendants can adequately defend official enactments, "[t]here are rare instances . . . where intervention is allowed when it is contended that otherwise there may be an

inadequate representation of intervenor interests" and that "[r]edistricting cases seem typically to follow the exception rather than the general rule.").

13. State and federal courts across the country, including federal courts in New York, regularly grant intervention to candidates and voters in redistricting cases. *See Hunter v. Bostelmann*, Order Granting Mots. to Intervene, 2021 WL 4206654, at *2 (W.D. Wis. Sept. 16, 2021) (granting intervention to congressman and noting that "as the Congressmen point out, other courts have concluded that incumbents and prospective candidates have a substantial interest in the redistricting process"); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5 (Pa. 2018) (noting the trial court "permitted to intervene certain registered Republican voters from each district, including announced or potential candidates for Congress and other active members of the Republican Party" to defend against a state constitutional challenge to Pennsylvania's congressional map); *Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11-CV-562 JPS-DPW, 2011 WL 5834275, at *2 (E.D. Wis. Nov. 21, 2011) (granting intervention to Members of Congress because they "are much more likely to run for congressional election and thus have a substantial interest in establishing the boundaries of their congressional districts"); *Nash*, 140 F.R.D. at 402 ("[I]t is normal practice in reapportionment controversies to allow intervention of voters, party officials and the like, supporting a position that could theoretically be adequately represented by public officials."); *see also Diaz*,

932 F. Supp. at 463 (acknowledging defensive intervention of, among others, several voters from impacted district); *Diaz v. Silver*, 978 F. Supp. 96, 98 (E.D.N.Y. 1997) (same); *Morris*, 592 F. Supp. at 1464 (same); *Johnson v. Mortham*, 915 F. Supp. 1529, 1536 (N.D. Fla. 1995) (granting intervention as of right).

14. The Court should reach the same conclusion here. Both Proposed Intervenor Voters and Proposed Intervenor Candidates have substantial interests in ensuring that they can run and vote in properly constituted districts that reflect their communities. And if Petitioners-Respondents succeed in defending the erroneous decision on appeal, New York voters may be unable to elect candidates who are responsive to their local needs for the next decade.

15. As described above, this appeal will determine the districts in which Proposed Intervenors live, vote, represent, and/or run for office, and it will determine the representatives they are able to elect to represent them and their communities. If affirmed, the order below will void New York's lawfully enacted redistricting plans and result in the enactment of new districts—leaving Proposed Intervenors with no recourse to revive the districts at issue in this case.

16. Although Respondents-Appellants seek to defend the challenged maps, Proposed Intervenors have unique interests. Proposed Intervenors' interests may very well diverge from those of Respondents-Appellants, including on potential issues concerning remedy that might emerge during this or future appeals, or on

remand—such as the districting of communities of interest or subsequent alterations to election deadlines. In light of the many permutations in which Respondents-Appellants' representation could prove to be inadequate as this action proceeds, intervention is the only form of participation that will safeguard Proposed Intervenors' interests.

17. Since all three elements has been satisfied, the Court should grant Proposed Intervenors' motion to intervene as a matter of right under CPLR 1012(a)(2).

II. Alternatively, the Court should grant Proposed Intervenors permissive intervention.

18. If the Court determines not to grant Proposed Intervenors intervention as a matter of right, the Court should grant Proposed Intervenors permissive intervention under CPLR 1013.

19. On a motion seeking permissive intervention, the key question is again whether Proposed Intervenors possess a "real and substantial interest in the outcome of [the] action." *St. Joseph's Hosp. Health Ctr. v. Dep't of Health of State of N.Y.*, 224 A.D.2d 1008, 1008 (4th Dep't 1996).

20. Under CPLR 1013, a "court may properly balance the benefit to be gained by intervention, and the extent to which the proposed intervenor may be harmed if it is refused, against other factors, such as the degree to which the proposed intervention will delay and unduly complicate the litigation" but crucially,

considerations of delay and complications "are more likely to be outweighed, and intervention therefore warranted, when the intervenor has a direct and substantial interest in the outcome of the proceeding." *Pier v. Bd. of Assessment Rev. of Town of Niskayuna*, 209 A.D.2d 788, 789 (3d. Dep't 1994). This requirement is to be liberally construed. *Bay State Heating & Air Conditioning Co. v. Am. Ins. Co.*, 78 A.D.2d 147, 149 (4th Dep't 1980).

21. Here, Proposed Intervenors have a real and substantial interest in the outcome of this litigation as they are New York voters who seek to work with their communities of interest to elect congressional representatives of their choice. These voters are best positioned to explain why the Congressional Plan reflects their communities of interest and why keeping those communities together is critical to ensuring that they are fairly represented in Congress.

22. Moreover, these candidates are best positioned to explain why the order on appeal—which enjoined New York's lawfully enacted Congressional, Senate, and Assembly Plans and ordered the enactment of a new plans on the eve of the candidate filing period—is unworkable and contrary to the public interest.

23. For all the reasons stated above, Proposed Intervenors respectfully request that this Court grant their motion to intervene as Respondents-Appellants in this case as a matter of right, or, in the alternative, in this Court's discretion.

24. A copy of the proposed Brief of Intervenors-Respondents-Appellants is attached as Ex. 1.

25. A true and correct copy of an Order, dated October 14, 2021, from the action captioned *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis.), is annexed hereto as Ex. 2.

26. A true and correct copy of an Order, dated February 11, 2022, from the action captioned *Banerian v. Benson*, No. 1:22-CV-54 (W.D. Mich.), is annexed hereto as Ex. 3.

27. A true and correct copy of an Order, dated August 4, 2011, from the action captioned *Little v. LATFOR*, No. 2310-2011 (Sup. Ct. Albany Cnty.), is annexed hereto as Ex. 4.

Dated: April 13, 2022
New York, New York

By: 
Matthew D. Brinckerhoff

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

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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,

No. CAE 22-00506

Petitioners-Respondents,

BRIEF FOR PROPOSED INTERVENORS-RESPONDENTS-APPELLANTS

-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 CAR HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, and THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents-Appellants, and

REPRESENTATIVE JAMAAL BOWMAN, REPRESENTATIVE YVETTE CLARKE, REPRESENTATIVE ADRIANO ESPAILLAT, REPRESENTATIVE HAKEEM JEFFRIES, REPRESENTATIVE SEAN PATRICK MALONEY, REPRESENTATIVE GREGORY MEEKS, REPRESENTATIVE GRACE MENG, REPRESENTATIVE JERROLD NADLER, REPRESENTATIVE PAUL TONKO, REPRESENTATIVE RITCHIE TORRES, VANESSA FAJANS-TURNER, LAURA GILLEN, JACKIE GORDON, JOSH LAFAZAN, ABIGAIL S. BRADFORD, ANDRAE EVANS, LAUREN FOLEY, LAUREN FURST, COURTNEY GIBBONS, JUDITH JEROME, ERIC LEVINE, MARK LIEBERMAN, DANIEL LLOYD, JACOB MCNAMARA, SETH PEARCE, LEAH ROSEN, E. PAUL SMITH, STEVE SPICER, GAYLE L. SYPOSS, NANCY VAN TASSEL, VERITY VAN TASSEL RICHARDS, and RONNIE WHITE, JR.

Proposed Intervenors-Respondents-Appellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

The circumstances giving rise to this appeal are as problematic as they are extraordinary. One month after candidates began collecting signatures to get on the ballot, and after the trial court stated that it would not order changes to New York's redistricting maps in 2022, the court abruptly reversed course and issued an Order invalidating New York's congressional, State Senate, and State Assembly Plans for this upcoming election cycle. That Order, which contains serious defects as a matter of both law and fact, has since sown chaos and confusion amongst candidates and voters alike.

In holding New York's redistricting plans void *ab initio*, the trial court gravely overstepped its constitutional role. Rather than applying the well-established presumption of constitutionality of duly enacted statutes, the trial court ran headlong into a constitutional conflict by concluding that New York's 2021 law concerning the Independent Redistricting Commission ("IRC" or the "Commission") was unconstitutional. Based on that mistaken holding, it then reached the unprecedented conclusion that the New York Legislature was powerless to enact new redistricting maps in response to population changes in the decennial Census when the Commission failed to send the Legislature a second set of proposed maps.

Moreover, in holding that the enacted 2022 Congressional Plan ("Congressional Plan") was drawn with unconstitutional partisan intent, the trial

court relied entirely on an expert report so methodologically flawed that it revealed virtually nothing about any partisan bias in the Congressional Plan—much less any partisan intent on the part of the map-drawers. And despite acknowledging that Petitioners-Respondents were required to prove their case beyond a reasonable doubt, the trial court failed to consider any of the credible, contrary evidence in the record. That evidence demonstrates not that the Congressional Plan was motivated by partisan intent, but that the Congressional Plan is consistent with the New York Constitution and traditional redistricting criteria: The Plan reflects the significant population loss in Upstate New York, maintains the cores of existing districts, respects existing communities of interest, and protects minority voting rights.

At bottom, Petitioner-Respondents' procedural claims fail as a matter of law. And they have not presented any credible evidence to support their substantive partisan intent claims—much less proven those claims beyond a reasonable doubt. This Court, which must reach its own conclusions based on the law and the entire factual record, should not continue to give credence to these misplaced arguments, but should move swiftly to re-instill confidence in the upcoming election by declaring that the maps already passed by the New York Legislature are indeed constitutionally sound. This Court should reverse the Order of the trial court in its entirety.

STATEMENT OF QUESTIONS INVOLVED

1. Did the Supreme Court err in holding that New York's legislatively enacted congressional, State Senate, and State Assembly redistricting plans were void *ab initio*, based on its findings that L.2021, c. 633, § 1 was unconstitutional and that the failure of the New York State Independent Redistricting Commission to submit second-round maps rendered the Legislature powerless to enact new maps? Yes.

2. Did the Supreme Court err in striking down New York's legislatively enacted Congressional Plan as a violation of Article III, § 4(c)(5) of the New York Constitution, finding that Petitioners met their burden to prove beyond a reasonable doubt that the districts were drawn with unconstitutional partisan intent? Yes.

3. Did the Supreme Court err in ordering a remedy that enjoins the congressional, State Senate, and State Assembly Plans for the 2022 election while directing the Legislature to enact new "bipartisan maps?" Yes.

STATEMENT OF FACTS

I. Redistricting in New York

Every ten years, the political district lines for New York's Congressional, Senate, and Assembly representative seats are redrawn to adjust for population variances in accordance with the results of the U.S. decennial census. *See* N.Y. Const. art. III, § 4(a). Newly drawn maps must be approved by the Legislature and signed by the Governor before they become effective. *See* N.Y. Const., art. III, § 4(b). Prior to the 2020 redistricting cycle, the process of drawing the district lines in New York was managed exclusively by the New York Legislature, subject to certain Constitutional substantive requirements. In 2014, however, New Yorkers amended

the state Constitution, establishing certain new procedural and substantive requirements for redistricting (the "2014 Amendment").

a. The Procedural Changes of the 2014 Amendment

New Yorkers adopted procedural changes by creating a bipartisan IRC with authority to draw redistricting plans and submit those plans to the Legislature for its approval, rejection, or amendment. N.Y. Const. art. III, §§ 4(b), 5(b). The IRC is comprised of ten commissioners who are appointed in bipartisan fashion. Each party's legislative leaders must appoint four commissioners. N.Y. Const art. III § 5(b). A bipartisan majority of the resulting eight commissioners must then appoint the remaining two. *Id.* When both houses of the Legislature are controlled by the same political party, a seven-vote majority in the IRC is required to approve of a redistricting plan and send it to the Legislature, with one exception. *Id.* If the IRC "is unable to obtain seven votes to approve a redistricting plan on or before January first . . . or as soon as practicable thereafter," it must submit to the Legislature the plan or plans that received the most votes. *See id.*, § 5-b(g).

The IRC must submit its approved plans to the Legislature for a vote "on or before January first or as soon as practicable thereafter but no later than January fifteenth." N.Y. Const. art. III, § 4(b). Each house of the Legislature must then vote on the IRC's submissions "without amendment." *Id.* If the Legislature does not approve the IRC's proposed maps, however, then the IRC repeats the process again,

drawing new maps for IRC approval and submission to the Legislature within 15 days of the rejection of the initial proposal. *Id.* Upon receipt of the second round of IRC maps, the Legislature is to vote on the maps "without amendment." *Id.* Should that vote fail, the IRC process is complete, and the Legislature takes back the pen to draw its own plans "with any amendments each house of the legislature deems necessary." *Id.* The process set forth in the 2014 Amendment is silent, however, on what should occur if the IRC fails to submit a second set of maps to the Legislature.

b. The Substantive Changes of the 2014 Amendment

The 2014 Amendment included several new substantive requirements that map-drawers must consider when drawing district lines. First, districts shall not result "in the denial or abridgement" of minority voting rights. Second, districts "shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or particular parties." N.Y. Const. art. III, §§ 4(c)(1), (5). Additionally, map-drawers must consider "the maintenance of cores of existing districts," "pre-existing political subdivisions," and "communities of interest." *Id.* at § 4(c)(5).

II. The 2020 Census

In 2020, the United States Census Bureau conducted the decennial census. Although New York experienced population growth during the last decade, its growth rate was slower than that of other states, resulting in New York's loss of one

seat in the United States House of Representatives. Given the population changes of the last decade and the need to comply with the one-person, one-vote principle, New York was required to draw a new district in response to the 2020 Census.

III. The 2021 Legislation

By the fall of 2021, the IRC's partisan divide was evident. While the IRC was due to vote on an initial set of maps for the Legislature in September, the commissioners were split along party lines and announced that they would proceed with partisan proposals. *See* Mem. of Law in Opp., NYSCEF Doc. No. 74 at 6–7 (Sup. Ct. Steuben Cnty. Feb. 24, 2022). In response, and in the absence of direction from the 2014 Amendment regarding a deadlocked IRC, the Legislature passed legislation clarifying the procedures should the IRC fail to submit redistricting maps to the Legislature (the "2021 Legislation"). The 2021 Legislation provides: "[I]f the commission does not vote on any redistricting plan or plans, for any reason, by the date required for submission," then the IRC shall provide the Legislature with "all plans in its possession, both completed and in draft form, and the data upon which such plans are based," and the Legislature "shall introduce such implementing legislation with any amendments each house deems necessary." The Senate's justification for the bill was, at least in part, to ensure that the Legislature could receive draft plans and data from which to work in the event the Legislature was required to continue the redistricting process without a proposal from the IRC. *See*

S7150 (2021). Governor Hochul signed the 2021 Legislation into law on November 24, 2021.

IV. The Enacted Maps

Pursuant to the 2014 Amendments, the newly established IRC convened in the Spring of 2021. On January 3, 2022, following months of meetings, hearings, and work, the IRC voted on which maps to submit to the Legislature. No map garnered the seven required votes, and, consistent with the New York Constitution, the IRC submitted the plans that received the most votes—a Republican-proposed plan and a Democratic-proposed plan, each of which received five votes.[1] On January 10, 2022, the Legislature rejected both plans.

Following the Legislature's rejection of the first round of maps, the IRC failed to submit a second set of maps within 15 days, as required by the Constitution. In fact, on January 24, 2022, the IRC announced that it was deadlocked and would not be able to reach agreement on maps to submit to the Legislature for the second round.

In accordance with the 2021 Legislation, and following the IRC's failure to vote on or submit a second round of maps, the Legislature assumed control over the redistricting process and passed new state Senate, Assembly, and Congressional

[1] Mem. to Legislative Leaders from Karen Blatt, Co-Executive Dir. of N.Y. State Indep. Redistricting Comm'n (Jan. 3, 2022) ("Plan A Cover Letter"), https://www.nyirc.gov/storage/plans/20220103/planA_cover_letter.pdf; Mem. from Commr's Martins, Brady, Conway, Nesbitt & Stephens (Jan. 3, 2022), https://www.nyirc.gov/storage/plans/20220103/planB_cover_letter.pdf ("Plan B Cover Letter").

Plans on February 3, 2022. Governor Hochul signed all three plans into law later that day.

V. Proceedings Below

A. The Petition and Amended Petition

On February 3, 2022, a group of Republican New York voters initiated this action by filing a petition in the New York Supreme Court in Steuben County, alleging that the congressional redistricting plan enacted earlier that day was unconstitutional. *See* Pet., NYSCEF Doc. No. 1 (Feb. 3, 2022). First, the Petitioners alleged that the Congressional Plan was procedurally defective because the Legislature lacked the authority to enact it after the IRC failed to send a second proposal to the Legislature. *Id.* at 58. Second, the Petitioners alleged that the state's congressional plan from the previous cycle had become unconstitutionally malapportioned in violation of the population equality requirements the New York Constitution. *Id.* at 60. Third, and finally, Petitioners asserted that the enacted Congressional Plan was a partisan gerrymander that intentionally favored Democrats in violation of the New York Constitution. *Id.* at 62.

On February 8, Petitioners moved for and were later granted leave to file an Amended Petition, adding claims that the enacted Senate Plan violated the New York Constitution on the same grounds. *See* Am. Pet., NYSCEF Doc. No. 18 (Feb. 8, 2022). The Amended Petition sought to enjoin the enacted Congressional and

Senate Plans in the upcoming 2022 election. The Petition also made clear, however, that Petitioners were not challenging the newly enacted redistricting plan for the New York Assembly. *Id.* at 5 n.7 ("Petitioners do not challenge [the Assembly] map or ask for its invalidation. Therefore, the Court need not consider any procedural failures related to enactment of the 2022 state assembly map.").

B. Trial

From March 14 to 16, the trial court heard testimony from the parties' competing experts concerning whether 2022 Congressional and Senate Plans were drawn with unlawful partisan intent. The trial court also had before it nine expert reports that the Parties had submitted in advance of trial. Because the trial court did not find that the Senate Plan was drawn with unconstitutional partisan intent, and the Respondent-Petitioners have not cross-appealed that ruling, the Intervenor-Respondents recount below only the experts' findings and testimony concerning the Congressional Plan.

The trial court first received reports and testimony from Petitioners' two experts: Sean Trende, a graduate student and journalist, and Claude LaVigna, a campaign strategist, both of whom attempted to demonstrate that the Congressional Plan was drawn with the intent to favor Democrats. In broad terms, Mr. Trende's report and testimony focused on various computer simulations that showed how New York's congressional districts could have been drawn, while Mr. LaVigna's

report and testimony concerned his interpretation of the political consequences of the enacted Congressional Plan.

The trial court also received reports and testimony from Respondents' experts: Dr. Stephen Ansolabehere, a Professor of Government at Harvard University; Dr. Michael Barber, a Professor of Political Science at Brigham Young University; Dr. Kristopher Tapp, a Professor of Mathematics at Saint Joseph's University; and Dr. Jonathan Katz, a Professor of Social Sciences and Statistics at Caltech.

Petitioners' primary piece of evidence of partisan intent in the enacted Congressional Plan was Mr. Trende's computer simulation analysis, which attempted to show that the enacted Congressional Plan was drawn with intent to favor Democrats. As Mr. Trende explained in his report, simulations can produce thousands of possible maps to show what kinds of maps could have been drawn. *See* Trende Rep., NYSCEF Doc. No. 26, at 7 (Feb. 14, 2022). In creating his simulation, Mr. Trende instructed his algorithm to produce "reasonably compact" districts and to avoid county splits. *Id.* at 10. Mr. Trende did not instruct his simulation to account for any other factor, including those mandated by the New York Constitution and federal law, such as complying with the Voting Rights Act, maintaining the current cores of districts, maintaining communities of interest, or respecting other political or geographic boundaries other than county lines. *See id.* Mr. Trende's simulation ultimately created 5,000 possible maps, three Republican-leaning districts. *Id.* at 15.

From these results, Mr. Trende concluded there was a "vanishingly small" chance that the enacted Congressional Plan could have been drawn "by map drawers who cared only about the constitutional mandates for compactness and avoiding undue partisan influence." *See Id*. at 14.

Respondents' experts confronted the numerous shortcomings in Mr. Trende's analysis. The first and most obvious flaw was that while Mr. Trende's simulation produced an average of three expected Republican congressional districts, the enacted Congressional Plan created four such districts, making it clear that Mr. Trende's own analysis did not support a conclusion that the enacted Plan intentionally favored Democrats. *See, e.g*., Ansolabehere Rep., NYSCEF Doc. No. 92, ¶¶ 42-43 (Feb. 24, 2022); Tapp Rep., NYSCEF Doc. No. 73, ¶ 15(a) (Feb. 24, 2022) (reaching same conclusion). Indeed, under Mr. Trende's own assumptions, a map yielding four Republican-leaning districts, as the enacted Congressional Plan creates, would demonstrate a slight bias *towards* Republicans. Ansolabehere Rep. ¶¶ 42-43; *see also* Barber Rep., NYSCEF Doc. No. 86, ¶ 33 (Feb. 24, 2022) (explaining, "[i]f anything, the Enacted plan generates fewer Democratic-leaning districts than the typical simulation").

As Dr. Ansolabehere further explained, Mr. Trende's conclusions were unreliable because "[t]he results of simulations depend crucially on their inputs," and Mr. Trende's inputs were flawed. Ansolabehere Rep. ¶ 45; *see also* Barber Rep.

¶ 16 (agreeing that "[g]enerating a representative sample of maps requires ensuring that the algorithm drawing the maps is following the legal criteria that govern the redistricting process."). As Dr. Tapp explained, "Mr. Trende's methodology is so deeply flawed that the ensemble he created is not a representative sample of maps that could be drawn without partisan considerations, and the results he produced have no meaningful statistical value. Among other significant flaws in Mr. Trende's methodology, his model fails to account for a number of the redistricting criteria that are required by New York law." Tapp Rep. ¶ 15(b).

For example, although reducing county splits is not the sole constitutional mandate in drawing congressional districts in New York, Mr. Trende's simulation was specifically instructed to prioritize that factor. *See* Ansolabehere Rep. ¶ 45. Mr. Trende's simulations also did not account for the Legislature's attempt to maintain communities of interest, or follow core areas of prior congressional district boundaries, two factors that are required to be considered in the New York Constitution. *Id*. ¶¶ 45-46; *see also* Barber Report ¶¶ 24-25, 36. In contrast, as Dr. Ansolabehere demonstrated, the enacted Congressional Plan did those things quite well. The enacted Congressional Plan, for example, contains 75% of the population of prior districts from the 2012 Congressional Plan, which "is a high level of core population retention, especially considering that one district had to be eliminated." Ansolabehere Rep. ¶ 35. For the reasons Dr. Ansolabehere explained, core retention

of existing districts is widely seen as beneficial to voters; brand-new district lines can "lower voter information and turnout." *Id*. ¶ 28. And considering core retention is also quite common in redistricting. As Dr. Ansolabehere explained, "[i]n my experience, legislatures and commissions almost always begin the redistricting process with the existing district map and make adjustments to that map to address specific problems, such as population deficits and surpluses." *Id.*

Finally, Dr. Ansolabehere also explained that Mr. Trende's simulations did not meaningfully consider what districts might have been required under the VRA—an analysis that would have required considering not only the percentage of minority population in a district (the sole consideration by Mr. Trende), but also more nuanced factors such as racial polarization in a district or minority electoral performance and turnout (none of which Mr. Trende considered). *Id.* ¶¶ 62-64.

Petitioners' second expert at trial, campaign strategist Claude LaVigna, attempted to show there was no "coherent explanation" for the enacted Congressional Plan "except for seeking partisan and incumbent protection advantage." LaVigna Rep., NYSCEF Doc. No. 27, at 3 (Feb. 14, 2022). But as Respondents' experts demonstrated, Mr. LaVigna's analysis "offer[ed] no statistical evidence to support his claims concerning the voting behavior of districts and communities, and these claims repeatedly prove false." Ansolabehere Rep. ¶ 12; *see also id.* ¶¶ 48-62 (describing provably false or misleading assumptions in Mr.

LaVigna's analysis across twelve congressional districts). Crucially, although Mr. LaVigna repeatedly asserted that there was no explanation for the enacted Congressional Plan other than partisanship, Mr. LaVigna, like Mr. Trende, offered no analysis of other traditional redistricting principles to support that assertion. *Id.* ¶ 13.

Overall, Respondents' experts showed that the evidence introduced at trial demonstrated that the enacted Congressional Plan was driven by four guiding principles: (1) uneven population growth resulting in the loss of one congressional district in Upstate New York, which had suffered population loss, (2) maintenance of the cores of existing districts, (3) maintenance of communities of interest, and (4) preservation of minority voting rights. *See generally Id.* ¶¶ 14-17 (summary), ¶¶ 18-26 (population findings); ¶¶ 27-38 (core retention of districts); ¶¶ 65-82 (communities of interest); ¶ 54 (minority voting protection). Ultimately, Dr. Ansolabehere concluded "[t]he 2022 New York Congressional District Map is a fair map" and "[t]he State Legislature appears to have followed traditional redistricting principles in creating this map." *Id.* ¶¶ 83-84. Dr. Ansolabehere's findings matched those of other experts, including Dr. Katz, who concluded after conducting a statistical analysis of the partisan bias of the enacted Congressional Plan that "I find that the enacted 2022 Congressional plan shows no statistically significant partisan

bias in favor of either party." Katz Rep., NYSCEF Doc. No. 156, at 1 (Mar. 10, 2022).

C. The Order on Appeal

On March 31, just a few hours after closing arguments, the trial court issued its decision on the merits. After holding that the Petitioners had standing to pursue their appeal, the trial court held that the Legislature violated the New York Constitution by enacting redistricting legislation when the IRC failed to submit a second round of proposed maps to the Legislature. *See* Order at 10, NYSCEF Doc. No. 243 (Mar. 31, 2022). Despite Petitioners' insistence that they were not challenging the Assembly Plan and that the court "need not consider any procedural failures related to enactment of the 2022 state assembly map," Amend. Pet., ¶ 10 n.7, Ex. 3, NYSCEF Doc. No. 1 (Feb. 14, 2022), the trial court held *sua sponte* that the Assembly Plan was also unconstitutional and void on this ground as well. Order at 10.

Next, the trial court held that the enacted Congressional Plan was drawn with unconstitutional partisan intent under Article III, §4(c)(5) of the New York Constitution. *Id.* at 14. In reaching this conclusion, the trial court relied exclusively on the computer simulations from Petitioner's expert Sean Trende, despite finding that Mr. Trende's simulations "do not include every constitutional consideration." *Id.* at 13. The trial court criticized Respondents' experts for not producing a

simulation that addressed the relevant constitutional considerations, *Id.* at 14, and concluded that it would rely on Mr. Trende's simulations because those were the only ones before the court. *Id.* at 14. In concluding that the enacted Congressional Plan was drawn with unconstitutional partisan intent, the trial court did not make any express findings that Mr. Trende's simulations were reliable. In rendering its decision, the trial court did not consider or address the reports or testimony of Dr. Ansolabehere or Dr. Tapp.

The court briefly considered whether the Senate Plan was also drawn with unconstitutional intent, ultimately concluding it could not find impermissible intent "beyond a reasonable doubt." *Id.* at 14. The trial court did not consider whether the Assembly Plan was drawn with unconstitutional partisan intent, as the parties presented no evidence or testimony on the Assembly Plan's constitutionality.

Although the trial court had previously explained it would not enjoin the current districts from being used in the 2022 elections, and despite recognizing that by the time it issued its decision, "candidates have been collecting signatures for over a month" under the now-invalidated districts, *id.* at 14-15, the trial court did a sudden about-face and ordered that "the Legislature shall have until April 11, 2022 to submit bipartisanly supported maps to this court for review." *Id.* at 18. The trial court further ordered that it would appoint a neutral expert to draw new maps if the Legislature failed to produce bipartisan maps by its April 11 deadline. *Id.* The trial

court did not explain what it would mean for a map to be passed with a "reasonable amount of bipartisan support" to receive the trial court's approval. *Id.* at 16.

The Legislative Appellants filed notices of appeal on March 31, and the Executive Appellants filed notices of appeal the following day. By order of this Court, the lower court decision was temporarily stayed on April 4, 2022. This Court then held briefing and heard oral argument on whether to extend the stay, which it did in part in its Order dated April 8. Order, CAE 22-00506 (4th Dep't Apr. 8, 2022) (order granting stay in part).

LEGAL STANDARD

This Court reviews legal conclusions of lower courts *de novo*. *See Erie Cnty. Dep't of Soc. Servs. On Behalf of Striker v. Bower*, 177 A.D.3d 1387, 1388 (4th Dep't 2019). As to questions of fact, this Court must ultimately review the entire record to determine whether it supports the outcome in the case. "For more than 50 years . . . the rule has been . . . that [the Appellate Division's] authority is as broad as that of the trial court . . . and that as to a bench trial it may render the judgment it finds warranted by the facts." *N. Westchester Pro. Park Assocs. v. Town of Bedford*, 458 N.E.2d 809, 812-13 (1983); *see also Split Rock Devs., LLC v. Zartab, Inc.*, 135 A.D.3d 845, 846 (2d Dep't 2016) (internal quotation marks omitted) (reiterating broad discretion of Appellate Division in reviewing factual findings from a bench trial).

"Legislative enactments are entitled to 'a strong presumption of constitutionality.'" *Dalton v. Pataki*, 835 N.E.2d 1180, 1186 (N.Y. 2005) (quotation omitted). "While the presumption is not irrefutable, parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt." *Id.* (internal quotation marks omitted); *see also Baldwin Union Free Sch. Dist. v. Cnty. of Nassau*, 84 N.Y.S.3d 699, 716 (Nassau Cnty. Sup. Ct. 2018) ("[L]egislative enactments are presumed valid and the one who challenges a statute bears the burden of proving the legislation unconstitutional beyond a reasonable doubt"). This presumption applies to redistricting enactments. *See Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992) (holding court will find a redistricting plan violates the state constitution "only when it can be shown beyond reasonable doubt that [the plan] conflicts with the fundamental law"). Given this presumption, "[c]ourts strike [legislative enactments] down only as a last unavoidable result." *Matter of Van Berkel v. Power*, 209 N.E.2d 539, 541 (1965).

ARGUMENT

I. The enacted maps are procedurally valid.

The enacted maps are the result of adherence to a lawful process. There is no dispute that, every ten years, New York's district maps must be redrawn to account for population shifts reflected in the Census. *See Wesberry v. Sanders*, 376 U.S. 1, 9 (1964); *see also* N.Y. Const. art. III § 1 (requiring legislation to enact any proposed

map), *see also id.* ("The legislative power of this state shall be vested in the senate and assembly."). There is also no dispute that New York amended its Constitution in 2014 to create the IRC, but that the amendment is entirely silent on how the Legislature shall comply with its duty if the IRC fails to send maps to the Legislature for a vote. *See* N.Y. Const. art. III, § 4(b). The trial court itself found that the 2014 Amendment "had a flaw" in that it "lacked a way to handle the contingency" of the committee failing to advance a plan—the very contingency that occurred here. Order at 7. Nonetheless, the trial court proceeded to conclude that the "2021 legislation which purported to authorize the legislature to act in the event the IRC failed to act was not a mere enactment of legislation to help clarify or implement the Constitution, but in fact substantially altered the Constitution...[causing] the recently enacted Congressional and Senate maps [to be] unconstitutional." *Id.* at 10. Going further, the trial court declared the enacted maps—including the unchallenged Assembly map—to be "void *ab initio*" precisely because the 2014 Amendment is silent about how the Legislature should fulfill its duty to enact maps where the IRC fails to propose them. *Id.* This holding is plain error.

"It is well settled that legislative enactments are entitled to a strong presumption of constitutionality and courts strike them down only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible."

White v. Cuomo, No. 12, 2022 WL 837573, at *3 (N.Y. Mar. 22, 2022) (internal citations and quotation marks omitted). "Particularly in cases involving the constitutionality of a state statute—a law adopted by the duly-elected representatives of the people—the development of fixed objective standards is imperative, as judges may not arbitrarily supplant the legislature's reasoned determinations with their own judgments or notions of commonsense under the guise of constitutional interpretation." *Id.* at *10. The opinion of the trial court is replete with subjective speculation about the purpose of the 2021 Amendment that stands in direct contrast to the objective facts that were before it.

The Legislature's enactment of the 2021 Legislation is reconcilable and fully compliant with the New York Constitution. Prior to the 2014 Amendment, the first opportunity to draw new redistricting maps after a Census rested with the Legislature. *See* N.Y. Const. art. III (eff. Jan. 1, 2002). The 2014 Amendment changed this insofar as it created the IRC and a new scheme for mapdrawing, which involves the IRC proposing maps to the Legislature, and the Legislature then approving or rejecting those maps. Importantly, however, the Constitution does not give the IRC power to enact maps under any scenario; that power remains solely with the Legislature. *See* Art. III, §4(b) (requiring IRC proposals to be approved by the Legislature and signed by the Governor). And nothing in the 2014 Amendment or the New York Constitution purports to limit the authority of the Legislature to

pass legislation for the purpose of enacting maps where the IRC has failed to act. *See* N.Y. Const. art. III § 1 (requiring legislation to enact any proposed map), 1 ("The legislative power of this state shall be vested in the senate and assembly."). It follows, therefore, that circumstances not addressed by the 2014 Amendment remain fully within the unimpeded purview of the Legislature. This purview includes the ability to pass legislation enacting maps where the IRC has failed to propose maps. The 2021 Legislation thus does not conflict with or alter the Constitution; it merely fills in the remaining parts of the process that the 2014 Amendment did not address.

Rather than seeking to reconcile the 2021 Legislation with the silence of the 2014 Amendment and underlying broad authority granted to the Legislature, the trial court's opinion improperly and "arbitrarily supplant[s] the legislature's reasoned determinations with [its] own judgments." *White*, 2022 WL 837573, at *10. First, the trial court concluded that "the intent of the 2014 constitutional amendment is to have bipartisan maps drawn by the IRC commission submitted and passed by the legislature." Order at 9. The 2014 Amendment, however, gives the Legislature authority to reject or alter whatever plan the IRC passes, with or without bipartisan support. *See* Art. III, §4(b). It further expressly highlights the Legislature's power to create their own redistricting maps if it chooses to reject a second round of maps proposed by the IRC. The trial court's opinion supplants these facts with a subjective and speculative judgment that "the wrath of the electorate" would dissuade the

Legislature's use of this power. Order at 5; *see* N.Y. Const. art. III, § 4(b). There is simply no factual support for such a conclusion, especially not here, where the IRC submitted *partisan* maps—not bipartisan maps—in advance of the January deadline.

Second, in furtherance of its determination that the 2021 Legislation is invalid, the trial court incorrectly found that enacted maps ran afoul of the Redistricting Reform Act of 2012 because the population deviated by more than 2% from the plans submitted by the IRC. Order at 8. But that statute was inapplicable here. By its plain language, the 2% rule applies only to "amendments by the senate or assembly to a redistricting plan submitted by the independent redistricting commission." Redistricting Reform Act of 2012 N.Y. Sess, Laws 17 § 3. Here, the Legislature did not make an amendment to an IRC proposal because the IRC failed to submit maps to the Legislature for amendment in the first place. Thus, the 2% rule did not apply when the Legislature drew the redistricting plans, and the trial court erred in attempting to apply it.

Third, the trial court found that the 2021 Legislation was an improper attempt to revive a failed 2021 proposed constitutional amendment through legislation. Order at 8–9. Not so. The proposed 2021 Amendment contained far more expansive changes than the 2021 Legislation. *See generally* S. 8833 (2019-2020). Indeed, the 2021 proposed constitutional amendment could not have been enacted by legislation because it would have altered express portions of the 2014 Amendment. *See id.*

(eliminating, for example, most of N.Y. Const. Article III, 5(h)(1), the process for appointing members of the IRC). By contrast, the 2021 Legislation did not change the redistricting process set forth in the 2014 Amendment; it merely clarified the process that would govern in circumstances left unaddressed by the 2014 Amendment.

The Constitution gives the Legislature the power to enact maps. The 2014 Amendment changed the process, but it did not override the Legislature's authority where the IRC fails. The trial court's opinion, on the other hand, would give the minority an incentive to usurp the Legislature's power to engage in redistricting. For that reason and the others expressed herein, the trial court erred when finding that the enacted maps are procedurally invalid.

II. The trial court did not have a sufficient basis to find that the Congressional Plan was enacted with unlawful partisan intent.

A. A violation of Article III, § 4(c)(5) requires sufficient evidence of unlawful intent.

The New York Constitution instructs that "[d]istricts shall not be drawn 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) (emphasis added). In their briefing at the trial court, Petitioners acknowledged that this standard required them to demonstrate that the state acted with unlawful intent. *See* Pet. ¶ 219 (alleging that "[t]he 2014 amendments to the New York Constitution

prohibit the Legislature and Governor from reapportioning seats for Congress in a manner that . . . creates a partisan gerrymander *with the intent to* favor of [sic] any political party) (emphasis added).

The method for determining unlawful partisan intent in a redistricting plan is an issue of first impression in New York. But New York is not the first state to encounter such a standard. Like the New York Constitution, the Florida Constitution provides that "[n]o apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent." Fla. Const. art. 3, § 20(a). Oregon similarly prohibits drawing districts "for the purpose of favoring any political party, incumbent legislator or other person." Or. Rev. Stat. § 188.010(e)(2). These intent-focused provisions stand in stark contrast to states which prohibit the drawing of districts that provide any disproportionate advantage to a particular party, regardless of the intent of the map drawers. *See, e.g.*, Mich. Const. art. IV, § 6(13)(d) ("Districts shall not provide a disproportionate advantage to any political party"); Ohio Const. art. XI, § 6(B) ("The statewide proportion of districts whose voters, based on statewide state and federal partisan general election results during the last ten years, favor each political party shall correspond closely to the statewide preferences of the voters of Ohio."). In such states, the partisan effects of a redistricting plan alone are typically sufficient to find a violation of the state constitution.

In a state like New York, however, demonstrating a violation of the constitution requires sufficient direct or circumstantial evidence of unlawful intent. Direct evidence, of course, would include statements from legislators explaining their motivation for enacting a plan. Circumstantial evidence might include whether the map drawers adhered to, or subordinated in favor of partisanship, other required or legitimate redistricting considerations. *See, e.g.*, *In re Senate Joint Resol. of Legis. Apportionment 1176*, 83 So. 3d 597, 618 (Fla. 2012) (Florida Supreme Court applying similar standard to New York's and explaining, "where the shape of a district in relation to the demographics is so highly irregular and without justification that it cannot be rationally understood as anything other than an effort to favor or disfavor a political party, improper intent may be inferred").

The partisan gerrymandering litigation that occurred in Florida following the 2010 Census provides a good example of the kind of evidence that would be sufficient to prove an intent to favor a political party in a redistricting plan. In 2015, the Florida Supreme Court found that Florida Republicans had unlawfully favored the Republican Party and disfavored the Democratic Party in drawing its congressional plan and required eight congressional districts to be redrawn. *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015). In finding that unconstitutional partisan intent had infected the map-drawing process, the Florida Supreme Court considered that (1) Florida's legislative leaders met with Republican

political consultants to discuss redistricting and were in regular communication with them; (2) legislative staffers sent proposed maps to Republican consultants before they were released to the public; (3) some of those consultants' recommendations were ultimately incorporated into the final maps; and (4) the consultants used third party proxies to testify in favor of their preferred maps in public hearings, all of which the court likened to "a conspiracy" to influence the maps for partisan gain. *Id.* at 382.

Recent litigation in Oregon, on the other hand, is a good example of where the evidence was insufficient to demonstrate unlawful partisan intent. During this redistricting cycle, voters filed a complaint alleging that Oregon's 2021 congressional plan was unlawfully drawn to benefit the Democratic Party. *See Clarno v. Fagan*, No. 21CV40180, 2021 WL 5632371, at *3 (Or. Cir. Ct. Nov. 24, 2021). Although the plaintiffs demonstrated that the redistricting plan was passed on a party-line vote and had a disproportionate partisan effect, the court found that there were "logical reasons for drawing district lines in the manner that [the Legislature] did" outside of partisan intent, including a desire to "keep specific communities of interest together" and to honor the historic boundaries of prior districts. *Id*. at *3-6.

Although the opinions of Florida and Oregon courts are not binding on this court, they are instructive of the kind of evidence that courts have found sufficient to find that a Legislature acted with unlawful partisan intent in enacting a

congressional plan. As demonstrated below, the Petitioners' evidence in this case comes nowhere near what the record established in Florida indicating unlawful partisan intent, and is even less probative of partisan intent than in Oregon, where the evidence failed to establish partisan intent.

B. The record below does not show that the Legislature acted with partisan intent.

The record below contained ample evidence demonstrating that the Legislature's enacted Congressional Plan was not the result of improper partisan intent, but was instead consistent with the New York Constitution and traditional redistricting criteria. The trial court erred by not considering this evidence.

First, the evidence showed that the enacted Congressional Plan was consistent with a redistricting plan which needed to shed one congressional district due to population loss in Upstate New York. Ansolabehere Report ¶ 18. The Legislature's first task in redrawing any congressional plan after a decennial census is, of course, to achieve population equality. As Dr. Ansolabehere explained, shrinking population in Upstate New York meant "one of the rural Upstate [congressional districts] had to be eliminated in order to achieve population equality across all [congressional districts]." *Id.* That is precisely what the enacted Congressional Plan did, which inevitably had ripple effects across the state, requiring the Legislature to adjust all congressional district boundaries. *Id.*

Second, the evidence demonstrated that the enacted Congressional Plan was consistent with a redistricting plan that aimed to keep voters within the cores of their existing districts, a value the New York Constitution expressly encourages. *See* N.Y. Const. art. III, § 4(c)(6) (ordering map makers to "consider the maintenance of cores of existing districts" in drawing congressional districts). The enacted Congressional Plan did just that: it maintained 75% of New Yorkers in their existing congressional districts, which, as Dr. Ansolabehere explained, "is a high level of core population retention, especially considering that one district had to be eliminated." Ansolabehere Report ¶ 35. Notably, in drawing the enacted Congressional Plan, the Legislature was not working off an existing plan from the 2010 cycle that it drew, but instead a court-drawn plan, created by Special Master Nathaniel Persily. *See Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928216, at *20 (E.D.N.Y. Mar. 12, 2012), *report and recommendation adopted as modified*, No. 11-CV-5632 RR GEL, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012) ("For the reasons detailed above, and in the accompanying Persily Affidavit, it is the recommendation of this Court that the Three–Judge Panel adopt the Recommended Plan as the congressional redistricting plan for the State of New York."). That congressional plan expressly did not favor any particular political party: When that court drew New York's congressional maps, the court explicitly disavowed consideration of incumbency and partisanship. In fact, as the Special Master explained, the new map "deliberately

ignore[d] political data, such as voter registration or election return data, as well as incumbent residence." Aff. of Professor Nathaniel Persily, *Favors v. Cuomo*, No. 1:11-cv-05632, (E.D.N.Y Mar. 12, 2012) ECF Nos. 223-1 at 20. The fact that the enacted Congressional Plan "exhibits a high degree of core retention," with respect to a neutral, court-drawn map, Ansolabehere Report ¶ 38, alone serves as important evidence that the enacted Congressional Plan was not drawn for the purpose of favoring or disfavoring one political party.

Third, the evidence demonstrates the enacted Congressional Plan was consistent with a redistricting plan which attempted to unite communities of interest, which, like maintaining the cores of prior districts, is explicitly encouraged in the New York Constitution. *See* N.Y. Const. art. III, § 4(c)(5) (ordering map makers to "consider the maintenance of. . . communities of interest" in drawing congressional districts). As Dr. Ansolabehere explained, "the configuration of congressional districts by the state legislature clearly follows the need to respect communities of interest." Ansolabehere Report ¶ 16. As one example, Dr. Ansolabehere found "the configuration of the 2022 Map in Upstate New York follows the same communities of interest as were reflected in the 2012 Map, creating four urban upstate districts to represent Albany, Buffalo, Rochester and Syracuse and four upstate rural districts." *Id.* ¶ 71. Dr. Ansolabehere also found the enacted Congressional Plan maintained

communities of interest in Long Island, New York City, and Mid-Hudson. *Id.* ¶¶ 72-82.

Fourth, and finally, the evidence demonstrates that the enacted Congressional Plan was consistent with a desire to safeguard minority voting rights, which is similarly required by the New York Constitution. *See* N.Y. Const. art. III, § 4(c)(1) (ordering map makers to respect the voting rights of language and racial minorities). The Legislature, of course, was also constrained by the federal VRA. Compliance with the VRA is not an afterthought in New York. Indeed, the state has a long history of VRA litigation in its congressional districts. *See, e.g.*, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 442 (S.D.N.Y.), *aff'd*, 543 U.S. 997 (2004) (VRA claim to congressional districts); *Puerto Rican Legal Def. and Educ. Fund v. Gantt*, 796 F. Supp. 698, 700 (E.D.N.Y. 1992) (same). As Dr. Ansolabehere found, the Congressional Plan is consistent with a plan that sought to protect minority voting rights by "maintain[ing] nine congressional districts in which minorities are the majority of the population and would be able to elect their preferred candidates." Ansolabehere Report ¶ 17.

Ultimately, after reviewing the Congressional Plan against this backdrop, Dr. Ansolabehere concluded "[t]he 2022 New York Congressional District Map is a fair map" and "[t]he State Legislature appears to have followed traditional redistricting principles in creating this map." *Id.* ¶¶ 83-84.

Remarkably, the trial court's opinion did not discuss *any* of this evidence. It did not even acknowledge the existence of Dr. Ansolabehere or his testimony in the courtroom. Failing to do so is reversible error. *See, e.g.*, *Capizola v. Vantage Int'l, Ltd.*, 2 A.D.3d 843, 844 (2d Dep't 2003) (overturning a New York Supreme Court decision which "erred in ignoring or relegating to insignificance the overwhelming proof" that contradicted the court's conclusion); *Gran Dev., LLC v. Town of Davenport Bd. of Assessors*, 124 A.D.3d 1042, 1046 (3d Dep't 2015) (finding reversible error where the court below failed to "give to conflicting evidence the relative weight which it should have").

C. The trial court's ruling relied exclusively on unreliable simulations.

Rather than grapple with the Respondents' experts' reports and corresponding testimony, the trial court instead relied on a single piece of unreliable evidence to determine that the enacted Congressional Plan was enacted with unconstitutional partisan intent: the computer simulations of Mr. Trende. But Mr. Trende's methods, analysis, and conclusions were significantly flawed. It was error to rely on this single piece of evidence to reach such a weighty conclusion.

First, and most importantly, Mr. Trende did not consider all the factors that the Legislature was constitutionally required to consider in creating a congressional plan when producing his simulated maps. By his own admission, Mr. Trende's simulations prioritized not splitting county lines, but gave no regard to maintaining

the cores of districts or keeping communities of interest together. *See* Trende Report at 10; Ansolabehere Report ¶ 45–46. Core retention and keeping communities of interest whole, however, are not only legitimate redistricting criteria the Legislature *can* consider; the Legislature is required to take them into account. *See* N.Y. Const. art. III, § 4(c)(5). Further, Mr. Trende failed to engage in any analysis required by the VRA to determine where majority-minority districts are required. *See* Ansolabehere Report ¶ 17. The New York Constitution also expressly requires such consideration. N.Y. Const. art. III, § 4(c)(1) ("Districts shall be drawn so that, based on the totality of the circumstances, racial or minority language groups do not have less opportunity to participate in the political process than other members of the electorate and to elect representatives of their choice.").

As multiple experts explained to the trial court, these errors rendered Mr. Trende's simulations fatally flawed. *See* Dr. Ansolabehere Report ¶¶ 41-46; Dr. Barber Report ¶¶ 15, 25-36. As Dr. Tapp explained, "Mr. Trende's methodology is so deeply flawed that the ensemble he created is not a representative sample of maps that could be drawn without partisan considerations, and the results he produced have no meaningful statistical value." Dr. Tapp Report ¶ 15(b). Notably, the trial court did not expressly disagree with these conclusions. *See* Order at 13 ("The court finds that Trende's maps . . . do not include every constitutional consideration.").

Faced with this evidence, the trial court did not decide, as one might otherwise expect, to give Mr. Trende's simulations little weight. Instead, the trial court chastised the Respondents for not affirmatively creating simulations that did account for *every* constitutional consideration, even though Mr. Trende's did not, *see id.* at 14, thus reversing the burden of proof and implying that Respondents were required to disprove the existence of a partisan gerrymander. Although the trial court ultimately concluded that it would consider Mr. Trende's simulations because "the court must use the evidence before it," *id.* at 14, no court is required to rely on patently unreliable evidence.

Nor did the trial court adequately grapple with the fact that Mr. Trende's own simulations predicted that a neutral map under his simulations would result in three expected Republican congressional districts, while the enacted Congressional Plan created four, as multiple experts independently found. *See, e.g.*, Dr. Ansolabehere Report ¶¶ 42-43; Dr. Tapp Report ¶ 15(a); Dr. Barber Report ¶ 33. The trial court did not credit this expert testimony, writing, "it strains credulity that a Democrat Assembly, Democrat Senate, and Democrat Governor would knowingly pass maps favoring Republicans." Order at 12. Here, the trial court misunderstood the testimony of Respondents' experts. None of Respondents' experts testified that the enacted Congressional Plan was enacted for the *purpose* of advantaging Republicans. Instead, all Respondents' experts demonstrated is that, under Mr.

Trende's supposedly neutral simulations, the enacted Congressional Plan was more pro-Republican than one would expect, thereby demonstrating why Mr. Trende's conclusions are unreliable. The point of this testimony was not to suggest, as the trial court inferred, that the enacted Congressional Plan exhibited unconstitutional partisan intent for *Republicans*. It was to suggest that Mr. Trende's own conclusions were unreliable.

Ultimately, after the trial court spent almost two pages of its decision discussing the ambiguities in the expert evidence, and discussing at length the possibility that Mr. Trende's simulations might not be an accurate representation of the partisan bias in the map, the trial court inexplicably concluded, "by clear evidence and beyond a reasonable doubt that the congressional map was unconstitutionally drawn with political bias in violation of Art. III, § 4(c)(5)." Order 12–14. To the contrary, a reasonable decisionmaker would have concluded that one cannot use Mr. Trende's simulations to infer *anything* about the Legislature's intent or the partisan bias in the resulting maps, much less that it constituted clear evidence beyond a reasonable doubt.

In short, the trial court relied exclusively on non-credible expert testimony that explicitly failed to consider required constitutional redistricting criteria, while ignoring contrary expert evidence. Under any standard, and particularly under a "beyond a reasonable doubt" standard, this constitutes reversible error.

III. This Court should vacate the trial court's remedy.

A. The trial court abused its discretion by ordering an unconstitutional remedy.

The trial court's order is *ultra vires* because the trial court had no authority to order the remedy it imposed: a requirement that the Legislature enact redistricting plans that "receive bipartisan support among both Democrats and Republicans in both the senate and the assembly." Order at 16; *see also id.* at 17-18. It is axiomatic that reapportionment is a quintessential legislative function, subject, of course, "to constitutional regulation and limitation." *See Matter of Orans*, 15 N.Y.2d 339, 352 (1965). And the judiciary may declare acts of reapportionment invalid as contrary to these constitutional constraints. *See* N.Y. Const., art. III § 5. But it has no power to impose requirements not found in the Constitution. *See Matter of Orans*, 15 N.Y.2d at 352.

Nothing in the Constitution requires the Legislature to consider or pass maps that have "bipartisan" support. Though the IRC is structured to operate in bipartisan fashion, the Constitution envisions that it could become mired in partisan gridlock and fail to advance a plan with a bipartisan seven-vote majority. Under such circumstances, the Constitution instructs the IRC to submit for the Legislature's consideration whichever plan has garnered the most votes—bipartisan or not. *See* N.Y. Const. Art. III, § 5-b(f). And that is precisely what happened here: The IRC failed to advance a bipartisan plan in January and as such sent the Legislature two

partisan plans (each of which received five votes). The Constitution, moreover, affords the Legislature plenary authority to reject whatever plan the IRC passes. If the Legislature rejects the IRC's proposal, it may pass its own plan "with any amendments each house of the legislature deems necessary." *See* N.Y. Const. art. III, § 4(b). As such, the ultimate decision of whether to pass a plan with bipartisan support is left to the Legislature's unfettered discretion; the Constitution contains no bipartisan requirement.

It is therefore no answer that the Legislature "cannot correct the constructional failure to have IRC present bipartisan maps of Congressional, State Senate, and State Assembly Districts." Order at 16. Even if the IRC submitted a second set of plans to the Legislature, those plans could have (and based on the record below, probably would have) once again lacked bipartisan support. And either way, the Constitution allows the Legislature to reject those plans and pass its own redistricting legislation on partisan lines. The trial court thus fundamentally erred in its assessment that the "intent of the 2014 constitutional amendment is to have bipartisan maps drawn by the IRC commission submitted and passed by the legislature." *Id.* at 9. No doubt the 2014 Amendment envisioned the IRC would try to act in a bipartisan fashion; its plain text, however, also envisions that bipartisan agreement may not be possible and that the Legislature may, in any event and for any reason, reject the IRC's submissions, even if they are bipartisan. Far from enforcing the 2014 Amendment's

requirements, the trial court's order infringes on the Legislature's discretion as provided in the Constitution and therefore must be vacated.

B. The trial court abused its discretion by enjoining the redistricting plans one month after the petitioning period had begun and so close to New York's primary election date.

The trial court issued the order striking down the enacted Congressional, State Senate, and State Assembly Plans on March 31, 2022, nearly one month after candidates began collecting signatures from their districts to qualify for the June primary, and just a week before the candidate qualifying period closed and signatures were due to boards of elections. As Proposed Intervenors explained in their accompanying intervention papers, the trial court's decision has led to massive confusion because it was contrary to the court's earlier assurances that no relief would impact the 2022 election. *See* Mem. in Opp. to Pet'rs' Mot. for Suppl. Briefing on Remedy at 2, NYSCEF Doc. No. 229 (quoting Mar. 3 Hr'g Tr. 69:9-70:15). Moreover, as the trial court recognized, its Order was "only the beginning of the process and not the end of the process." Order at 15. As that trial court's process plays out, more election deadlines continue to pass. As of the date of this filing, the deadline for candidates to submit nominating petitions has already passed. The June primary is, as of the date of this filing, a mere 76 days away. Nonetheless, candidates remain in limbo, unsure whether to campaign in the districts set forth under the enacted map or wait until a date uncertain for some potential new map. This Court

can, and should, remedy that confusion by reversing the trial court and clarifying that elections will be held under the enacted 2022 Congressional, Senate, and Assembly Plans.

Such a decision would be consistent with precedent establishing that courts are generally reluctant to make drastic changes to an election regime in the period close to an election. *See, e.g.*, *Quinn v. Cuomo*, 69 Misc. 3d 171, 177-78 (N.Y. Sup. Ct. Queens Cnty. 2020); *In re Khanoyan*, 637 S.W. 3d 762, 764 (Tex. 2022); *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 215-16 (Iowa 2020) (per curiam); *In re Hotze*, 627 S.W. 3d 642, 645 n.18 (Tex. 2020); *All. for Retired Ams. v. Sec' of State*, 240 A.3d 45, 54 (Me. 2020); *Jones v. Sec'y of State*, 239 A.3d 628, 631 (Me. 2020); *see also Fay v. Merrill*, 256 A.3d 622 (Conn. 2021); *Ohio Democratic Party v. Larose*, 159 N.E.3d 852 (Oh. Ct. App. 10th Dist. 2020); *Singh v. Murphy*, No. A-0323-20T4, 2020 WL 6154223, at *14-15 (N.J. Super. Ct. App. Div. Oct. 21, 2020); *League of Women Voters of Fla.*, 172 So.3d at 387; *Liddy v. Lamone*, 919 A.2d 1276, 1287-88 (Md. 2007); *Chi. Bar Ass'n v. White*, 386 Ill. App. 3d 955, 961 (1st Dist. 2008). In this particular case, the specifics of the New York election calendar demonstrate that the time for enjoining the Legislature's redistricting plan—at least prior to the 2022 elections—has already passed. Indeed, courts have declined to revise redistricting plans affecting elections set to occur even later in the calendar. *See Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (holding

that it was too late for relief where the primary election was 106 days away); *see also Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 1:21-CV-5337-SCJ, 2022 WL 633312, at *74 (N.D. Ga. Feb. 28, 2022) (holding that it was too late for relief where the primary election was 85 days away). The trial court in this case abused its discretion by ordering new maps to be drawn for the swiftly upcoming primary.

CONCLUSION

For the reasons stated above, Proposed Intervenors respectfully request that this Court reverse, in its entirety, the decision below.

Date: April 13, 2022

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**Pro hac vice applications to be submitted.*

PRINTING SPECIFICATION STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8G) that the foregoing brief was prepared on a computer using Microsoft Word.

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October 14, 2021

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You are hereby notified that the Court has entered the following order:

No. 2021AP1450-OA Johnson v. Wisconsin Elections Commission

On September 22, 2021, this court granted the petition for leave to commence an original action filed by petitioners Billie Johnson, et al., and invited intervention motions to be filed no later than October 6, 2021.

On September 24, 2021, the court received a notice of motion and unopposed motion to intervene as petitioners filed by Black Leaders Organizing for Communities, et al. (plaintiffs in Black Leaders Organizing for Communities v. Spindell, No. 21-CV-534 (W.D. Wis. Aug. 23, 2021), consolidated with Case No. 21-CV-512) together with a supporting brief.

On October 6, 2021, the court received additional intervention motions and supporting documents from proposed-intervenor-petitioners Congressmen Glenn Grothman, Mike Gallagher, Brian Steil, Tom Tiffany, and Scott Fitzgerald ("Congressmen"); proposed-intervenor-petitioners Gary Krenz, Sarah J. Hamilton, Stephen Joseph Wright, Jean-Luc Thiffeault, and Somesh Jha (a group of Wisconsin voters who identify themselves as the "Citizen Mathematicians and

Scientists"); proposed-intervenor-petitioners Lisa Hunter, Jacob Zabel, Jennifer Oh, John Persa, Geraldine Schertz, and Kathleen Qualheim (plaintiffs in Hunter v. Bostelmann, No. 21-CV-512 (W.D. Wis. Aug. 13, 2021)); proposed-intervenor-respondent the Wisconsin Legislature; proposed-intervenor-respondent Governor Tony Evers, in his official capacity; and proposed-intervenor-respondent Janet Bewley, Senate Democratic Minority Leader, on behalf of the Senate Democratic Caucus.

On October 13, 2021, the court received responses pertaining to the intervention motions from the petitioners Billie Johnson, et al.; proposed-intervenor-petitioners Congressmen; proposed-intervenor-petitioners Citizen Mathematicians and Scientists; proposed-intervenor-petitioners Lisa Hunter, et al.; and proposed-intervenor-respondent the Wisconsin Legislature.[1]

Wisconsin courts view intervention favorably as a tool for "disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." See Helgeland v. Wis. Municipalities, 2008 WI 9, ¶38, 307 Wis. 2d 1, 9, ¶44, 745 N.W.2d 1 (quoting State ex rel. Bilder v. Delavan Twp., 112 Wis. 2d 539, 548-49, 334 N.W.2d 252 (1983)). We have evaluated each intervention motion and determined that all are timely; each movant claims an interest relating to the subject of this redistricting action; each is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest; and that each movant has demonstrated that its interest is not adequately represented by existing parties. See Wis. Stat. § 803.09. Therefore,

IT IS ORDERED that each of the pending motions to intervene is granted;

The intervenor-petitioners have each submitted with their motions to intervene a proposed complaint for declaratory and injunctive relief/petition for original action. The court wishes to have one controlling petition, rather than multiple petitions in this action. Therefore, no later than 12:00 noon on October 21, 2021, the petitioners and the intervenor-petitioners shall file a single omnibus amended petition that, in numbered paragraph form, restates the previously asserted allegations and claims advanced by petitioners Billie Johnson, et al., and states the allegations and claims of each intervening petitioner as provided in its proposed complaints/petition, with those claims and allegations consolidated to the extent possible. No additional memorandum of law shall accompany the omnibus amended petition. This omnibus amended petition shall supersede the previously filed petition in this action;

IT IS FURTHER ORDERED that no later than 12:00 noon on October 28, 2021, the respondents and intervenor-respondents shall each file an answer to the omnibus amended petition;

[1] The court also received letter briefs responding to the question of the timing of a new redistricting plan from the petitioners Billie Johnson, et al.; respondents Wisconsin Elections Commission, et al.; proposed-intervenor-petitioners Congressmen; proposed-intervenor-petitioners Black Leaders Organizing for Communities, et al.; proposed-intervenor-petitioners Citizen Mathematicians and Scientists; proposed-intervenor-petitioners Lisa Hunter, et al.; and proposed-intervenor-respondent the Wisconsin Legislature.

IT IS FURTHER ORDERED that no later than 12:00 noon on November 4, 2021, the petitioners, intervenor-petitioners, respondents, and intervenor-respondents shall prepare and submit a joint stipulation of facts and law; and shall identify and list disputed facts, if any, and suggest a procedure for resolving them; and

IT IS FURTHER ORDERED that all filings in this matter shall be filed as an attachment in pdf format to an email addressed to clerk@wicourts.gov. See, Wis. Stat. §§ 809.14, 809.70, 809.80, and 809.81. A paper original and 10 copies of each filed document must be received by the clerk of this court by 12:00 p.m. of the business day following submission by email, with the document bearing the following notation on the top of the first page: "This document was previously filed via email;" and

IT IS FURTHER ORDERED that requests for additional briefing or extensions will be viewed with disfavor.

Sheila T. Reiff
Clerk of Supreme Court

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL BANERIAN, *et al.*, Plaintiffs,	)	
	)	No. 1:22-cv-54
V.	)	
	)	Three-Judge Court
JOCELYN BENSON, in her official capacity as the Secretary of State of Michigan, *et al.*, Defendants.	)	

ORDER

Seventeen Michigan voters, appearing collectively ("the movant voters"), and a Michigan non-profit corporation, Voters Not Politicians, have separately moved to intervene in this lawsuit. The movant voters and the nonprofit corporation alike are eligible for permissive intervention: their motions are timely, and the proposed intervenors have "a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). The decision whether to allow intervention thus turns largely on whether intervention would delay the proceedings or cause "prejudice to the original parties[.]" *United States v. Michigan*, 424 F.3d 438, 445 (6th Cir. 2005).

The plaintiffs oppose intervention on several grounds. First, they say that the movant voters lack any interest in this litigation "other than an abstract concern with voting in congressional districts that they believe to be fair and constitutional." (Internal quotation marks omitted.) But the same is true of the plaintiffs themselves. *See* Complaint ¶¶19-28. Second, the plaintiffs speculate that the intervenors' arguments would duplicate those of the named defendants in this case. But that would be our problem more than the plaintiffs'; and meanwhile the

intervenors might just as easily help to clarify the issues before the court. The plaintiffs finally emphasize the expedited nature of this litigation, and argue that intervention would slow down the work of the parties and the court. That too is speculation, and ill-founded speculation at that: the same briefing schedule will bind named parties and intervenors alike. The plaintiffs should remember that case management is our task, not theirs.

Accordingly,

IT IS HEREBY ORDERED that the motions to intervene (ECF Nos. 16, 22) are **GRANTED**.

IT IS SO ORDERED.

Date: February 11, 2022

/s/ Raymond M. Kethledge
Raymond M. Kethledge
United States Circuit Judge

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

/s/ Janet T. Neff
Janet T. Neff
United States District Judge

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

SENATOR ELIZABETH O'C. LITTLE, SENATOR PATRICK GALLIVAN; SENATOR PATRICIA RITCHIE; SENATOR JAMES SEWARD; SENATOR GEORGE MAZIARZ; SENATOR CATHARINE YOUNG; SENATOR JOSEPH GRIFFO; SENATOR STEPHEN M. SALAND; SENATOR THOMAS O'MARA; JAMES PATTERSON; JOHN MILLS; WILLIAM NELSON; ROBERT FERRIS; WAYNE SPEENBURGH; DAVID CALLARD; WAYNE MCMASTER; BRIAN SCALA; and PETER TORTORICI,

Plaintiffs,

-against-

NEW YORK STATE TASK FORCE ON DEMOGRAPHIC RESEARCH and REAPPORTIONMENT, and NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Defendants,

-and-

NAACP NEW YORK STATE CONFERENCE; VOICE OF COMMUNITY ACTIVISTS AND LEADERS - NEW YORK; COMMON CAUSE OF NEW YORK; MICHAEL BAILEY; ROBERT BALLAN; JUDITH BRINK; TEDRA COBB; FREDERICK A. EDMOND III; MELVIN FAULKNER; DANIEL JENKINS; ROBERT KESSLER; STEVEN MANGUAL; EDWARD MULRAINE; CHRISTOPHER PARKER; PAMELA PAYNE; DIVINE PRYOR; TABITHA SIELOFF; and GRETCHEN STEVENS,

Proposed-Intervenor-Defendants.

DECISION/ORDER
Index No. 2310-2011

(Eugene P. Devine, J.S.C., presiding)

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DEVINE, J.:

In this action for declaratory and injunctive relief, proposed intervenor-defendants (proposed intervenors) move pursuant to CPLR 1012 (a) (2) for leave to intervene in this action

as of right or, in the alternative, pursuant to CPLR 1013 for permissive intervention. Plaintiffs oppose the motion. Defendant New York State Department of Corrections and Community Supervision (DOCCS)[1] appears by letter to note their lack of opposition to this application. Defendant New York State Legislative Task Force on Democratic Research and Reapportionment (LATFOR) indicates in a letter to the Court that it will not appear in this action, noting that counsel appearing for defendant can adequately address the merits of the case.[2]

On April 4, 2011, plaintiffs commenced this action, seeking, among other things, a declaration that Part XX of Chapter 57 of the Laws of 2010 (Part XX) is unconstitutional under the State Constitution. As relevant here, Part XX provides that, upon receiving certain data from DOCCS regarding the pre-incarceration residential addresses of inmates,[3] LATFOR

> shall use such data to develop a database in which all incarcerated persons shall be, where possible, allocated for redistricting purposes, such that each geographic unit reflects incarcerated populations at their respective residential addresses prior to incarceration rather than at the address of such correctional facility. . . . the assembly and senate districts shall be drawn using such amended population data set.[4]

Plaintiffs in this action are State Senators representing Districts in which correctional facilities are located and resident/voters of Senate Districts affected by Part XX.

Specifically, plaintiffs allege, *inter alia*, that Part XX "illegally diminishes the number of inhabitants required to be counted by the Constitution by declaring certain inhabitants of state

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[1] This defendant is sued here as the New York State Department of Corrections.

[2] *See* Letter of Senator Michael F. Nozzolio and Assemblyman John J. McEneny to the Court dated May 11, 2011.

[3] Now codified as Correction Law § 71 (8).

[4] Now codified as Legislative Law § 83-m (13).

prisons, who have long been counted, not to be counted."[5] The Verified Complaint alleges that the current Federal census "treats all incarcerated persons as inhabitants of their places of incarceration,"[6] and that the State Constitution requires that the Federal Census "'shall be controlling as to the number of inhabitants in the state or any part thereof for the purpose of apportionment of members of the assembly and adjustment or alteration of senate and assembly Districts.'"[7] Accordingly, plaintiffs allege the State Constitution has been violated by the passage of Part XX, seeking, *inter alia*, a declaration to that effect and that LATFOR be enjoined from using "amended data subsets regarding incarcerated persons in any other manner than counting them as inhabitants of their place of incarceration as enumerated by the Federal Decennial Census."[8]

Against this backdrop, proposed intervenors seek to intervene either as of right or, alternatively, by permission in this action. The proposed intervenors consist of the following organizations: NAACP New York State Conference, Voices of Community Activists, and Leaders, and Common Cause of New York (collectively, organizational intervenors). The organizational intervenors assert that they are interested in voting rights, and at least two of them have strong interests in voting rights in minority communities. In addition, the following individuals seek to intervene: Michael Bailey, Robert Ballan, Judith Brink, Tedra Cob, Frederick A. Edmond III, Melvin Faulkner, Daniel Jenkins, Robert Kessler, Steven Mangual, Edward

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[5] Verified Complaint at ¶ 7, Lewis Affirmation, Exhibit A.

[6] *Id.* at ¶ 37.

[7] *Id.* at ¶ 42, quoting NY Const art III, sec 4.

[8] *Id.* at Wherefore Clause.

Mulraine, Christine Parker, Pamela Payne, Divine Pryor, Tabitha Sieloff, and Gretchen Stevens (collectively, individual intervenors). All of the individual intervenors, who live in different communities across the state, aver that they are voters and have a personal interest in the outcome of this litigation. Uniformly, they aver that, should Part XX be invalidated, their individual voting rights would be diluted. They assert that such dilution would be in contravention of the one person, one vote rule, which they assert Part XX upholds.

Upon a timely motion, "[a] nonparty may intervene as of right 'when the representation of the person's interest by the parties is *or may be* inadequate and the person is or may be bound by the judgment.'"[9] First, the Court notes that the proposed intervenors' application is timely. They moved just shortly after DOCCS interposed its answer and prior to any discovery in this matter.[10]

Next, the Court must consider whether the proposed intervenors' interest is adequately represented by DOCCS – the only appearing defendant in this matter. As the proposed intervenors aptly note, DOCCS "is responsible for the confinement and rehabilitation of approximately 57,000 offenders held at 67 state facilities; its mission is not to ensure the protection of minority voting or to help create a more equitable districting system."[11] Furthermore, since LATFOR has not appeared, it cannot represent the proposed intervenors' interests.

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[9] *Matter of Romeo v New York State Dept. of Educ.*, 39 AD3d 916, 917 (3d Dept 2007), quoting CPLR 1012 (a) (2) (emphasis in original); *see Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 200 (1st Dept 2010).

[10] *See Yuppie Puppy Pet Prods., Inc.*, 77 AD3d at 201.; *Matter of Romeo*, 39 AD3d at 917.

[11] Affidavit of Hazel Dukes at ¶ 28; *see* Affirmation of Peter Surdel, Esq., Exhibits 2-18 (containing affidavits of representatives of organizational intervenors and individual intervenors noting that their interests are different than those of DOCCS).

In opposition, plaintiffs argue that Attorney General is in the best position to defend the constitutionality and legality of Part XX. Plaintiffs contend, "[a]s the chief legal officer of the state it is his constitutional and statutory duty to defend the constitutionality of statutes."[12] While this proposition may be generally true, here the Attorney General is appearing to represent DOCCS, which does not have a genuine stake in whether any one person's voting interest is upheld or not. Thus, based on a review of the record, the proposed intervenors have demonstrated that their interests may not be truly represented by DOCCS.

The final issue with regard to intervention as a right is whether the proposed intervenors will be bound by any judgment stemming from this action. Plaintiffs argue that the proposed intervenors would not be so affected since any continuing claim of voter dilution could still be litigated in an action involving reapportionment after LATFOR draws the actual new district lines. While plaintiffs correctly contend that this right would still exist, this argument does not squarely address one of the central issues in this action – the constitutionality of Part XX.

In asserting that they would be bound by any judgment, proposed intervenors suggest that this statutory phrase has been interpreted to require only a showing that they have a real and substantial interest in the outcome of the proceedings. This interpretation is at odds with settled case law. As to whether the proposed intervenors will be bound by the judgment within the meaning of CPLR 1012 (a) (2), the Court of Appeals has explained that this "is determined by its *res judicata* effect."[13] Thus, here, the issue is whether any resultant judgment declaring Part XX

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[12] Affidavit of David L. Lewis, Esq., at ¶12.

[13] *Vantage Petroleum, Bay Isle Oil Co. v Board of Assessment Review of the Town of Babylon*, 61 NY2d 695, 698 (1984); *see Subdivisions, Inc. v Town of Sullivan*, 75 AD3d 978, 979 (3d Dept 2010).

invalid would have a binding effect on the proposed intervenors.

Generally, "[t]he interpretation of a statute presents a pure question of law."[14] Furthermore, where such a question is presented, neither principles of collateral estoppel nor res judicata will bar relitigation of that issue.[15] Thus, here, where the interpretation of a statute is at issue, res judicata will not come into play. Proposed intervenors contend that, while res judicata may not bar future litigation on this issue, they will be effectively barred by the doctrine of *stare decisis*. While this could occur, proposed intervenors would be in no different position than any other citizen when Courts determine questions of law in this State. Simply stated, proposed intervenors have not shown the type of privity needed to, as a matter of right, be allowed to intervene as parties in this matter.[16]

However, the individual intervenors have demonstrated their entitlement to permissive intervention. "CPLR 1013 provides that upon timely motion, a court may, in its discretion, permit intervention when, *inter alia*, the person's claim or defense and the main action have a common question of law or fact, provided the intervention does not unduly delay determination

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[14] *Matter of Held v New York State Workers' Comp. Bd.*, 58 AD3d 971, 973 (3d Dept 2009).

[15] *See American Home Assur. Co. v International Ins. Co.*, 90 NY2d 433, 440 (1997); *Matter of Held*, 58 AD3d at 973; *Brown v State*, 9 AD3d 23, 27n2 (3d Dept 2004).

[16] *See Matter of Unitarian Universalist Church of Central Nassau v Shorten*, 64 Misc 2d 851, 854 (Sup Ct, Nassau County, 1970), *vacated on other grounds* 64 Misc 2d 1027 (noting: "The *stare decisis* effect of the judgement is not enough."); s*ee generally* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1012:3 (noting: "It is not enough, in order words, that the practical effect of the judgment may prejudice the proposed intervenor").

of the action or prejudice the rights of any party."[17] Generally, "[i]ntervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in the action."[18]

Here, the individual intervenors have shown that there is a common question of law – namely the validity of Part XX. While plaintiffs strongly urge the Court to deny intervention, arguing, in part, that these voters do not have a bona fide interest in this suit, the Court rejects this position. Several plaintiffs appearing in this action are similarly situated to the individual intervenors – both groups are voters that may be affected by inmate residential status under Part XX. Furthermore, nothing in the record or arguments demonstrate that intervention by these individuals will unduly delay any determination,[19] especially where the essential question is one of pure law. Thus, the Court exercises its discretion to grant the individual intervenors permission to intervene in this action,[20] noting that they have presented a proposed answer to the Court.[21]

As to the organizational intervenors, the Court denies that branch of their motion of permissive intervention. These intervenors have not demonstrated they have a real and

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[17] *Yuppie Puppy Pet Prods., Inc.*, 77 AD3d at 200-201; *see* CPLR 1013.

[18] *Yuppie Puppy Pet Prods., Inc.*, 77 AD3d at 201; *see Berkoski v Board of Trustees of Inc. Vill. of Southampton*, 67 AD3d 840, 843 (2d Dept 2009).

[19] The Court notes that while several attorneys have appeared for proposed intervenors, they have submitted joint papers. Nothing to date that is before the Court indicates that by allowing intervention the process of resolving this action will be unduly delayed.

[20] *Berkoski*, 67 AD3d at 843-844.

[21] *See* CPLR 1014; *cf Farfan v Rivera*, 33 AD3d 755, 755 (2d Dept 2006).

substantial interest in the outcome of this proceeding.[22] While representatives to these organizations have averred that these organizations have interest in voting rights and two of them are especially concerned with minority voting rights, the outcome of this action will have no direct impact on the ability of these organizations to advocate on behalf of voters and minority voters.[23] Accordingly, the Court exercises its discretion to deny the organizational intervenors permission to intervene in this action.

Therefore, it is

ORDERED that the branch of the Proposed Intervenor-Defendants' motion pursuant to CPLR 1012 (a) (2) is denied in its entirety; and it is further

ORDERED that the branch of the Proposed Intervenor-Defendants' motion pursuant to CPLR 1013 is granted to the extent that the individual intervenors are granted permission to intervene and denied to the extend that the organizational intervenors are denied permission to intervene; and it is further

ORDERED that the individual intervenors are to serve an Amended Answer on all parties within 20 days of this Court's decision and order.

The remaining contentions not addressed herein have been found to be unpersuasive

This Memorandum shall constitute both the Decision and Order of the Court. This Original **DECISION/ORDER** is being sent to counsel for Proposed Intervenor-Defendants. The signing of this **DECISION/ORDER** shall not constitute entry or filing under CPLR 2220.

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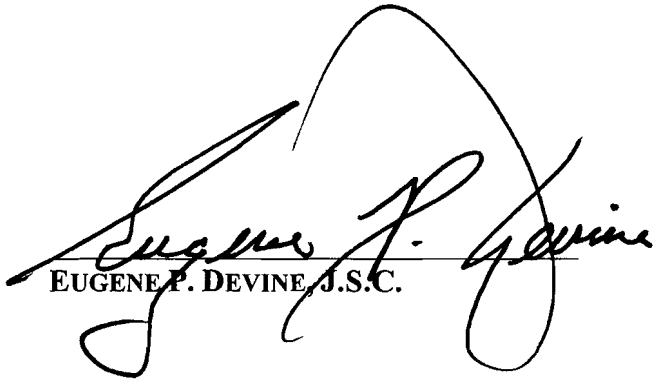
[22] *Berkoski*, 67 AD3d at 844; *cf Matter of Bernstein v Feiner*, 43 AD3d 1161, 1162 (2d Dept 2007).

[23] *Berkoski*, 67 AD3d at 844

Counsel for the defendant is not relieved from the applicable provisions of that section with respect to filing, entry and notice of entry.

SO ORDERED
ENTER

Date: 8/4/11
Albany, New York



EUGENE P. DEVINE, J.S.C.

cc: David L. Lewis, Esq.
Stephen M. Kerwin, Esq.

Papers Considered:

1. Notice of Motion to Intervene dated May 17, 2011;
2. Affirmation of Peter Surdel, Esq., affirmed May 16, 2011, with Exhibits 1-9 annexed;
3. Proposed Answer verified May 16, 2011;
4. Memorandum in Support of Motion to Intervene dated May 17, 2011;
5. Affirmation of David L. Lewis, Esq., affirmed June 1, 2011, with Exhibits A-C annexed;
6. Memorandum of Law in Opposition to the Motion to Intervene dated June 1, 2011;
7. Copy of Letter of Sen. Michael F. Nozzolio and Assemblyman John J. McEneny dated May 11, 2011;
8. Copy of Letter of Stephen M. Kerwin, Esq., dated May 26, 2011.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

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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,

No. CAE 22-00506

Petitioners-Respondents,

-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 CAR HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, and THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents-Appellants.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

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** Pro Hac Vice Application to be submitted.*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Other Authorities:

Under section 1012(a)(2) of the Civil Practice Law and Rules ("CPLR"), Proposed Intervenors-Respondents-Appellants Representatives, Jamaal Bowman, Yvette Clarke, Adriano Espaillat, Hakeem Jeffries, Sean Patrick Maloney, Gregory Meeks, Grace Meng, Jerrold Nadler, Paul Tonko, and Ritchie Torres; candidates Vanessa Fajans-Turner, Laura Gillen, Jackie Gordon, and Josh Lafazan; and voters Abigail S. Bradford, Andrae Evans, Lauren Foley, Lauren Furst, Courtney Gibbons, Judith Jerome, Eric Levine, Mark Lieberman, Daniel Lloyd, Jacob McNamara, Seth Pearce, Leah Rosen, E. Paul Smith, Steve Spicer, Gayle L. Syposs, Nancy Van Tassel, Verity Van Tassel Richards, and Ronnie White Jr. (collectively, "Proposed Intervenors") move to intervene as a matter of right as Respondents-Appellants in the above-titled action. Alternatively, Proposed Intervenors move to intervene by permission of this Court pursuant to CPLR 1013.

INTRODUCTION

One month ago, at the start of the five-week period in which congressional campaigns barnstorm their districts collecting signatures to qualify for the June primary, the court below asserted that this challenge to New York's Congressional and State Senate redistricting plans (the "Congressional Plan" and the "Senate Plan") would not affect the 2022 election. It assured the parties and the public that it was too late in the election cycle to draw new district lines. And as the parties spent the next several weeks engaged in discovery and preparing for trial, candidates for

Congress—including many of the Proposed Intervenors—spent that time campaigning or preparing to launch their campaigns in the districts enacted by the Legislature earlier this year. Their campaigns spent countless hours collecting signatures from voters in the district in which they are running under the Congressional Plan.

The decision below has upended candidates' expectations and preparations, necessitating this intervention on appeal. Despite its earlier assurances, the trial court issued an extraordinary ruling immediately enjoining the Congressional and Senate Plans. In fact, the trial court even enjoined the General Assembly restricting plan (the "Assembly Plan"), despite the fact that the Assembly Plan was not even challenged in the litigation. In doing so, it has thrown New York's primary election into disarray. It has sparked confusion among candidates and voters alike. It is so late in the election calendar that even on the extremely expedited schedule this Court has set, a decision will come no earlier than 13 days *after* the close of the nominating petition window. And all of this avoidable and unnecessary uncertainty and chaos stems from a decision that is rooted in an erroneous view of the law and facts.

Proposed Intervenors are members of Congress running for re-election and non-incumbent candidates running for Congress (collectively, "Proposed Intervenor Candidates") and New York voters from around the state ("Proposed Intervenor Voters"). They reside in the newly created congressional districts 1, 3, 4, 5, 6, 8, 9,

10, 11, 13, 15, 16, 17, 18, 19, 20, 22, 23, 25, and 26 under the Congressional Plan, Senate Districts 3, 6, 13, 20, 24, 27, 30, 31, 33, 35, 36, 37, 43, 45, 47, 49, 51, 52, 53, 54, 56, 57, 61, and 63 under the Senate Plan, and Assembly Districts 10, 11, 19, 21, 26, 33, 43, 44, 51, 67, 72, 78, 90, 91, 92, 94, 95, 103, 111, 122, 125, 129, 136, 140, and 148 under the Assembly Plan. State and federal courts in New York routinely grant intervention to elected officials and voters in redistricting cases that include challenges to their districts—even where, as here, the existing defendants include New York state officials like the Governor, Lieutenant Governor, and legislative leaders.[1] These courts have recognized that candidates have personal interests in the communities they represent that government defendants do not and could not share. And they have similarly recognized the substantial and unique interests of voters that entitle them to intervene in challenges to the districts in which they cast their votes.

[1] *See, e.g.*, *Diaz v. Silver*, 932 F. Supp. 462, 463 (E.D.N.Y. 1996) (acknowledging intervention of voters to defend challenged congressional districts); *Morris v. Bd. of Estimate*, 592 F. Supp. 1462, 1464 (E.D.N.Y. 1984) (same); *Flateau v. Anderson*, 537 F. Supp. 257, 258 n.1 (S.D.N.Y. 1982) (allowing member of state assembly to intervene as a defendant in challenge to congressional, senate, and assembly maps); *Wright v. Rockefeller*, 211 F. Supp. 460, 461 (S.D.N.Y. 1962) (allowing several "district leaders of the area comprising" four majority-minority assembly districts and former congressman Adam Clayton Powell to intervene in challenge to congressional lines); *Blaikie v. Wagner*, 258 F. Supp. 364, 366 (S.D.N.Y. 1965) (councilmen permitted to intervene to defend map for their districts); *Fund for Accurate & Informed Representation, Inc. v. Weprin*, No. 92-CV-0593, 1992 WL 512410 (N.D.N.Y. Dec. 23, 1992) (acknowledging grant of intervention to two incumbent lawmakers in challenge to New York's legislative districts following 1990 census); *Honig v. Bd. of Supervisors of Rensseleaer Cnty.*, 31 A.D.2d 989, 989 (3d. Dep't 1969), *aff'd sub nom. Honig v. Bd. of Supervisors of Rensseleaer Cnty.*, 248 N.E.2d 922 (N.Y. 1969) (allowing member of Rensseleaer County Board of Supervisors to intervene to defend maps draw for his county's board); *Ambro v. Bd. of Sup'rs of Suffolk Cnty.*, 287 N.Y.S. 2d 458, 459 (Sup. Ct., Suffolk Cnty. 1968) (acknowledging intervention in challenge to maps of Board of Supervisors of Suffolk County).

Undoubtedly sufficient to warrant intervention in the ordinary course, these interests are so substantial that they have facilitated intervention even where, as here, it is sought for the first time on appeal. *See*, *e.g.*, *Bates v. Jones*, 127 F.3d 870, 873-74 (9th Cir. 1997) (granting motion to intervene on appeal by legislators and voters in challenge to state initiative imposing term limits).

Intervenor status is necessary to safeguard these interests. Although Respondents-Appellants seek to defend the challenged maps, they do not share Proposed Intervenors' unique perspective as candidates and voters who must campaign, live, and vote within these districts. These interests may very well conflict with those of Respondents-Appellants at any stage of this litigation, including future appeals or remand proceedings. As such, amicus participation will not suffice. Proposed Intervenors, like the countless candidates and voters who have been granted intervention to defend redistricting maps in New York over the past half century, are entitled to intervene as a party.

BACKGROUND

A. New York Redistricting

In 2020, the United States Census Bureau conducted the decennial census. Although New York experienced population growth during the last decade, its growth rate was slower than that of other states, resulting in New York losing one seat in the United States House of Representatives. New York had to draw a new

congressional map accounting for both the population changes of the past decade, as well as the resulting reduction of its congressional delegation. The changes also required revisions to the State Senate and State Assembly districts.

The duty to draw new maps first fell to the New York Independent Redistricting Commission ("NYIRC"), a bipartisan commission charged with selecting maps for the Legislature's approval and enactment. N.Y. Const. art. III, § 5-b. On January 3, 2022, however, the NYIRC deadlocked and instead of sending one congressional, one State Senate, and one State Assembly map to the Legislature, it sent two of each: a Democratic proposed map and a Republican proposed map. One week later, on January 10, the Legislature rejected all maps, and the Commission tried again.[2] On January 24, 2021, the Commission deadlocked for a second time and as a result, it did not send any new maps for consideration to the Legislature. At that point, the Legislature took over the drawing of all three maps. On February 3, 2022, the Legislature passed and Governor Hochul signed into law all of the maps at issue in this appeal.

B. Procedural Background

A group of New York voters initiated the action below by filing a petition in the New York Supreme Court in Steuben County on February 3, 2022, alleging that

[2] Mark Weiner, *New York lawmakers reject redistricting plans from bipartisan commission*, Syracuse.com (Jan. 10, 2022), https://www.syracuse.com/politics/2022/01/new-york-lawmakers-reject-redistricting-plans-from-bipartisan-commission.html.

the congressional redistricting plan enacted earlier that day was unconstitutional. *See* Pet., NYSCEF Doc. No. 1 (Feb. 3, 2022). Petitioners-Respondents alleged that the Congressional Plan was procedurally and substantively defective: They alleged that the Congressional Plan was void due to alleged procedural districts, was unconstitutionally malapportioned, and amounted to a prohibited partisan gerrymander. *Id.* at ¶¶ 186–215.

On February 8, Petitioners-Respondents moved for leave to file an Amended Petition. The Amended Petition added a challenge to New York's Senate plan. *See* Order to Show Cause for Leave to File Amend. Pet., NYSCEF Doc. No. 18 (Feb. 8, 2022). Like their challenge to the Congressional Plan, Petitioners-Respondents contended that the Senate Plan violated the New York Constitution's procedural and substantive redistricting requirements. *See* Amend. Pet., NYSCEF Doc. No. 33, at ¶¶ 9-11 (Feb. 14, 2022). The Amended Petition sought to enjoin the use of both maps in the upcoming 2022 election. It also made clear that Petitioners-Respondents were *not* challenging the redistricting plan for the New York Assembly. *Id.* at ¶ 10 n.7 ("Petitioners do not challenge [the Assembly] map or ask for its invalidation. Therefore, the Court need not consider any procedural failures related to enactment of the 2022 state assembly map.").

The trial court heard oral argument on March 3 and stated that it did not plan to enjoin the Congressional and Senate Plans prior to the 2022 election. The court explained:

> [E]ven if [it] find[s] the maps violated the Constitution and must be redrawn, it is highly unlikely that a new viable map could be drawn in be in place within a few weeks or even a couple of months; therefore, striking these maps would more likely than not leave New York State without any duly elected Congressional delegates.
>
> I believe the more prudent course would appear to be to permit the current election process to proceed and then, if necessary, to require new elections next year (i.e., in 2023) if the new maps need to be drawn.

Mem. in Opp. to Pet'rs' Mot. for Suppl. Briefing on Remedy at 2, NYSCEF Doc. No. 229 (quoting Mar. 3 Hr'g Tr. 69:9-70:15). At the conclusion of the March 3 hearing, the Court granted Petitioners-Respondents' motion for leave to file an amended petition, thus allowing Petitioners-Respondents to proceed with a challenge to both the Congressional and Senate Plans. The court reserved a decision on the merits, however, determining that "a hearing will be necessary to be conducted to determine where the truth lies between the Petitioners' experts and the Respondents' experts." Mar. 3 Hr'g Tr. 69:17-19.

Two days before the court's March 3 hearing, candidates for the New York Senate, Assembly, and for Congress—including many of the Proposed Intervenors—began collecting signatures to qualify for primary elections for district boundaries under the Congressional Plan. N.Y. Elec. Law §§ 6-134(4), 6-158(1).

That process continued in full force over the next four weeks due in no small part to the trial court's representations that the challenged Congressional and Senate Plans would stay in effect for 2022. The window for candidates to file their petitions opened on April 4, 2022 and closed three days later, on April 7.

The court held a three-day trial from March 14 to March 16. It waited until March 31 to hear closing arguments, and in the interim candidates continued to gather signatures and campaign to voters living in districts drawn under the enacted Congressional, Senate, and Assembly maps.

C. The Order on Appeal

The trial court issued its decision on the merits on March 31, less than two hours after oral argument concluded. It held that the Legislature violated the New York Constitution's procedural redistricting requirements and that the Congressional and Senate Plans were therefore void. Decision & Order at 10, NYSCEF Doc. No. 243 (Mar. 31, 2022). But it went a step further and held, *sua sponte*, that the Assembly Plan was also unconstitutional because of these same alleged procedural flaws—despite Petitioners-Respondents' insistence that they were not challenging the Assembly Plan and that the court "need not consider any procedural failures related to enactment of the 2022 state assembly map." Amend. Pet. at ¶ 10 n.7.

Turning to Petitioners-Respondents' substantive challenges, the trial court held the Congressional Plan was drawn with partisan bias in violation of the New York Constitution. Decision & Order at 14. The court reached the opposite conclusion regarding the Senate Plan, holding that "Petitioners could not show that the enacted 2022 senate map was drawn with political bias beyond a reasonable doubt," but reiterated that a new Senate Plan was needed due to the purported procedural deficiencies discussed above. *Id.* The court did not consider whether the Assembly Plan was drawn with political bias, as the Petitioners-Respondents did not challenge the Assembly Plan, and thus, the parties presented no evidence or testimony on the Assembly Plan's legality.

The trial court enjoined the use of all three maps in the 2022 election and ordered that "the Legislature shall have until April 11, 2022 to submit bipartisanly supported maps to this court for review." *Id.* at 18. The court further ordered that it would appoint a neutral expert to draw new maps if the Legislature failed to produce bipartisan maps by the April 11 deadline. *Id.*

Legislative Appellants filed notices of appeal later that day, and Executive Appellants filed notices of appeal the following day. Proposed Intervenors moved to intervene shortly after the initial notices of appeal, on April 13, 2022. As the appeal must be perfected by today, Proposed Intervenors have also included their proposed

merits brief. *See* Brinckerhoff Affirmation, Ex. 1, Proposed Brief of Proposed Intervenors-Respondents-Appellants.

LEGAL STANDARD

New York courts have long authorized motions to intervene on appeal. *See, e.g.*, *Long Island R.R. Co. v. Public Serv. Comm'n*, 30 A.D.2d 409 (2d. Dep't 1968) (granting motion to intervene on appeal), *aff'd* 245 N.E.2d 799 (N.Y. 1969); David D. Siegel, N.Y. Prac. § 183 (6th ed. 2021) ("[I]ntervention can be allowed at the appellate stage."). So too have federal courts. *See, e.g.*, *Drywall Tapers and Pointers of Greater N.Y., Local Union 1974 v. Nastasi & Assocs., Inc.*, 488 F.3d 88, 94 (2d. Cir. 2007) ("[T]here is authority for granting a motion to intervene in the Court of Appeals."); *Int'l Union, United Auto. Aerospace & Agric. Implement Workers of Am. v. Scofield*, 382 U.S. 205, 217 n.10 (1965) ("[T]he policies underlying intervention may be applicable in appellate courts. Under Rule 24(a)(2) or Rule 24(b)(2), we think the charged party would be entitled to intervene."); *see also Solow v. Wellner*, 618 N.Y.S.2d 845, 847 (App. Term, 1st Dep't 1994) (federal procedural rules are "instructive" in interpreting analogous New York procedural rules).

Although the CPLR is silent on intervention at the appellate stage specifically, the CPLR discusses interventions generally. It says court "shall" permit a person to intervene as a matter of right: 1) "upon timely motion," 2) "when the representation of the person's interest by the parties is or may be inadequate," and 3) when "the

person is or may be bound by the judgment." CPLR 1012(a)(2). Separately, a court "may" in its discretion permit a party to intervene "when the person's claim or defense and the main action have a common question of law or fact." CPLR 1013. "In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." *Id.*

New York courts liberally construe these statutes in favor of granting intervention. *See, e.g.*, *Bay State Heating & Air Conditioning Co. v. Am. Ins. Co.*, 78 A.D.2d 147, 149 (4th Dep't 1980) (holding New York's intervention provisions "should be liberally construed"); *Yuppie Puppy Pet Prod., Inc. v. St. Smart Realty, LLC*, 77 A.D.3d 197, 201 (1st Dep't 2010) ("Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action."); *Plantech Hous., Inc. v. Conlan*, 74 A.D.2d 920, 920 (2d. Dep't 1980), *appeal dismissed* 414 N.E.2d 398 ("[U]nder liberal principles of intervention under the CPLR, it was an abuse of discretion to deny intervention in the present case.").

The core consideration in determining if intervention is warranted is whether the proposed intervenor has a "direct and substantial interest in the outcome of the proceeding." *Pier v. Bd. of Assessment Rev. of Town of Niskayuna*, 209 A.D.2d 788, 789 (3d. Dep't 1994). If "intervention is sought as a matter of right under CPLR

1012 (a), or as a matter of discretion under CPLR 1013," a proposed intervenor with a "real and substantial interest in the outcome of the proceedings" should be granted intervention under either analysis. *Wells Fargo Bank, Nat'l Ass'n v. McLean*, 70 A.D.3d 676, 677 (2d. Dep't 2010) (quoting *Berkoski v. Bd. of Trs. of Inc. Vill. of Southampton*, 67 A.D.3d 840, 843 (2d. Dep't 2009)); *see also Cnty. of Westchester v. Dep't of Health of State of N.Y.*, 229 A.D.2d 460, 461 (2d. Dep't 1996) ("Generally, intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings."); *Norstar Apartments, Inc. v. Town of Clay*, 112 A.D.2d 750, 751 (4th Dep't 1985). Concerns "of judicial efficiency and fairness to the original litigants, are more likely to be outweighed, and intervention therefore warranted, when the intervenor has a direct and substantial interest in the outcome of the proceeding." *Id.* at 789.[3]

ARGUMENT

I. Proposed Intervenors are entitled to intervention as a matter of right.

A. Proposed Intervenors' motion is timely.

[3] Under CPLR 401, in a special proceeding such as this, "no party shall be joined or interpleaded and no third-party practice or intervention shall be allowed, *except by leave of court*." CPLR. 401 (emphasis added). New York courts have merely applied the requirements CPLR 1012 and CPLR 1013 in special proceedings. *See In re UBS Fin. Servs., Inc.*, 851 N.Y.S.2d 75 (Table) (Sup. Ct., New York Cnty. 2007) (applying the intervention standards in CPLR 1012 and 1013 to grant intervention in a special proceeding and cross-referencing the requirement to grant leave in CPLR 401).

Proposed Intervenors' motion satisfies the first element of intervention as a matter of right: it is timely. "In examining the timeliness of the motion, courts do not engage in mere mechanical measurements of time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party." *Jones v. Town of Carroll*, 158 A.D.3d 1325, 1328 (4th Dep't 2018). Indeed, New York courts have held that "[i]ntervention can occur at any time, even after judgment for the purpose of taking and perfecting an appeal," *Romeo v. N.Y. State Dep't of Educ.*, 39 A.D.3d 916, 917 (3d. Dept 2007), and at least one court granted intervention even where the intervenor's motion to intervene was made more than one year after an Amended Complaint was filed. *See Jeffer v. Jeffer*, 958 N.Y.S.2d 61 (Table) (Sup. Ct., Kings Cnty. 2010). Moreover, in *Bates v. Jones*, a federal appellate court allowed candidates and voters to intervene on appeal after the conclusion of oral argument. *See* 127 F.3d at 873-74 (granting intervention on appeal to candidates and voters in appeal involving the constitutionality of a California initiative imposing legislative term limits).

Proposed Intervenors filed this motion shortly after the initial notices of appeal were filed, alongside their proposed merits brief. *See* Ex. 1. Proposed Intervenors will abide by the briefing schedule ordered by the Court, and as such intervention would not prejudice the existing parties or delay the proceedings in any way.

Denial of intervention, on other hand, would cause prejudice to Proposed Intervenors. The trial court obviated the need of Proposed Intervenor Candidates to intervene earlier in these proceedings when it asserted—as candidates began collecting signatures from and were campaigning to voters who live in the current district lines—that it would "permit the current election process to proceed" under those lines. Mar. 3 Hr'g Tr. 69:9-70:15. That assertion, combined with any subsequent denial of intervention, would severely prejudice Proposed Intervenor Candidates, who—as candidates running for a two-year position in Congress—are principally concerned with how the districts are constituted for the 2022 election. And it would prejudice Proposed Intervenor Voters as well, who inarguably have an interest in each electoral district in which they reside but had no notice that their assembly districts were at risk until the order on appeal issued. *See* Amend. Pet. at ¶ 10 n.7 (disclaiming any challenge to the Assembly Plan).

B. Proposed Intervenors have a direct and substantial interest that will not be adequately represented by the other appellants in this litigation.

It is black-letter law that candidates and voters have direct, substantial interests in their congressional districts that entitle them to intervene as of right in a challenge to those districts. Courts in New York have a long history of granting intervention to candidates and voters under these circumstances.[4] And the same is

[4] *See supra* n.1.

true of courts across the country.[5] This case is no different: Proposed Intervenors include congressional candidates who have already spent significant time and resources campaigning for re-election under the districts in the enacted Congressional Plan after the court's assurances that this litigation would not alter the district lines for the 2022 election. They also include voters who will reside and vote under whatever map is ordered by the court for the next decade.

Courts have repeatedly granted intervention so that candidates and voters could defend challenges to their districts even where the existing parties are government officials.[6] Indeed, "it is normal practice in reapportionment controversies to allow intervention of voters, party officials and the like, supporting a position that could theoretically be adequately represented by public officials." *Nash v. Blunt*, 140 F.R.D. 400, 402 (W.D. Mo. 1992). That is because candidates

[5] *See Hunter v. Bostelmann*, Order Granting Mots. to Intervene, 2021 WL 4206654, at *2 (W.D. Wis. Sept. 16, 2021) (granting intervention to congressmen and noting that "as the Congressmen point out, other courts have concluded that incumbents and prospective candidates have a substantial interest in the redistricting process"); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5 (Pa. 2018) (noting the trial court "permitted to intervene certain registered Republican voters from each district, including announced or potential candidates for Congress and other active members of the Republican Party" to defend against a state constitutional challenge to Pennsylvania's congressional map); *Baldus v. Members of Wis. Gov't Accountability Bd.*, No. 11-CV-562 JPS-DPW, 2011 WL 5834275, at *2 (E.D. Wis. Nov. 21, 2011) (granting intervention to Members of Congress because they "are much more likely to run for congressional election and thus have a substantial interest in establishing the boundaries of their congressional districts"); *Johnson v. Mortham*, 915 F. Supp. 1529, 1536 (N.D. Fla. 1995) (granting intervention as of right); Brinckerhoff Affirmation, Ex. 2, Order Granting Mots. to Intervene, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Oct. 14, 2021) (order granting intervention to all parties, including Members of Congress and individual voters).

[6] *See supra* n.1.

have "a personal interest in [their] office that goes beyond the more general interest that [they] and the Government have in keeping [their districts] intact." *Johnson*, 915 F. Supp. at 1538. The "rights of voters" have even been found to be so "fundamental" as to justify intervention *for the first time on appeal*, even when the existing defendants include state officials. *Bates*, 127 F.3d at 874.

The same is true of the interests at stake in this case. To be sure, Proposed Intervenors share Respondents-Appellants' interest in defending the constitutionality of the challenged maps. But Proposed Intervenors have unique interests in their districts and their campaigns that state officials do not share. These interests may very well diverge from those of Respondents-Appellants', including on potential issues concerning remedy that might emerge during this or future appeals, or on remand—such as the districting of communities of interest or subsequent alterations to election deadlines. In light of the many permutations in which Respondents-Appellants' representation could prove to be inadequate as this action proceeds, intervention is the only form of participation that will safeguard Proposed Intervenors' interests.

C. Proposed Intervenors will be bound by the judgment.

Finally, the judgment in this action will unquestionably bind Proposed Intervenors. The "is or may be bound" element of intervention is generally understood by examining the "potentially binding nature of the judgment" on the

Proposed Intervenors. *Yuppie Puppy*, 77 A.D.3d at 202; *see also Vantage Petroleum v. Bd. of Assessment Rev. of Town of Babylon*, 460 N.E.2d 1088, 1089 (N.Y. 1984) (holding that whether an intervenor "will be bound by the judgment within the meaning of that subdivision is determined by its *res judicata* effect"). If affirmed, the order below will void New York's lawfully enacted redistricting plans and result in the enactment of new districts—leaving Proposed Intervenors with no recourse to revive the districts at issue in this case.

II. Alternatively, the Court should grant Proposed Intervenors permissive intervention.

Should this Court decline to grant intervention as of right, Proposed Intervenors respectfully request that the Court exercise its discretion to grant permissive intervention under CPLR 1013. As with CPLR 1012(a)(2), the key question for this Court is again whether Proposed Intervenors possess a "real and substantial interest in the outcome of [the] action." *St. Joseph's Hosp. Health Ctr. v. Dep't of Health of State of N.Y.*, 224 A.D.2d 1008, 1008 (4th Dep't 1996); *Berkoski*, 67 A.D.3d at 843; *United Servs. Auto. Ass'n v. Graham*, 21 A.D.2d 657, 657 (1st Dep't 1964). In determining whether to grant permissive intervention, a "court may properly balance the benefit to be gained by intervention, and the extent to which the proposed intervenor may be harmed if it is refused, against other factors, such as the degree to which the proposed intervention will delay and unduly complicate the litigation" but crucially, considerations of delay and complications "are more likely

to be outweighed and intervention therefore warranted, when the intervenor has a direct and substantial interest in the outcome of the proceeding." *Pier*, 209 A.D.2d at 789. *Cf.* Brinckerhoff Affirmation, Ex. 3, Order Granting Mot. to Intervene, *Banerian v. Benson*, No. 1:22-CV-54 (W.D. Mich. Feb. 11, 2022), ECF No. 31 (granting permissive intervention to seventeen Michigan voters to defend Michigan's congressional map and noting that their asserted interest in living under maps they believed to be fair and constitutional was similar to plaintiffs' interests).

As with intervention as of right under CPLR 1012, courts should liberally construe CPLR 1013 to permit intervention. *Bay State Heating*, 78 A.D.2d at 149. Indeed, the Fourth Department has previously reversed a denial of permissive intervention where, as here:

> [P]roposed intervenors [had a] real and substantial interest in outcome of [the] action and their proposed pleading and existing pleadings present[ed] common issues of fact and law; plaintiffs ha[d] failed to show that intervention would delay action or that they would suffer substantial prejudice if intervention were granted, and defendants ha[d] not opposed intervention; [and the] record [did] not support court's conclusion that proposed intervenors seek to introduce extraneous factual issues into action.

St. Joseph's Hosp. Health Ctr., 224 A.D.2d at 1008.

As previously discussed, Proposed Intervenors—as candidates and voters who seek to work with their communities of interest to elect government officials who properly represent them—have a real and substantial interest in the outcome of this litigation that is not adequately represented by the current parties. The benefit of

intervention in this litigation is highly significant, as it will allow the Court to hear a defense of the enacted districts directly from those most impacted by the decision below.

These voters are best positioned to explain why the enacted Congressional, Senate, and Assembly Plans reflect their communities of interest and why keeping those communities together is critical to ensuring that they are fairly represented both federal and state government. That is precisely why, last redistricting cycle, the Albany County Supreme Court granted permissive intervention to individual voters in a state legislative redistricting case. Brinckerhoff Affirmation, Ex. 4, Order at 9, *Little v. LATFOR*, No. 2310-2011 (Sup. Ct. Albany Cnty. Aug. 4, 2011) (granting permissive intervention in part because "[s]everal plaintiffs appearing in this action are similarly situated to the individual intervenors—both groups are voters that may be affected by [the redistricting litigation]"). Proposed Intervenors here are similarly situated to the plaintiffs in *Little*: "both groups are voters that may be affected" by the redistricting litigation. *Id.* As such, just as in *Little*, this Court should grant Proposed Intervenors permissive intervention to participate as Appellants-Respondents in this case.

And these candidates are best positioned to explain why the order on appeal—which enjoined New York's lawfully enacted Congressional, Senate, and Assembly Plans and ordered the enactment of a new plans on the eve of the candidate filing

period—is unworkable, contrary to the public interest, and would inflict harm on candidates and voters alike. Indeed, "[c]ourts often allow the permissive intervention" of those who "bring[ ] a unique perspective on the election laws being challenged and how those laws affect . . . candidates and voters." *Democratic Party of Va. v. Brink*, No. 3:21-CV-756-HEH, 2022 WL 330183, at *2 (E.D. Va. Feb. 3, 2022). That is the case here, as Proposed Intervenors include the very candidates who have spent the last several months preparing to launch their campaigns under the enacted plan only to have those preparations thrown into disarray by the trial court.

Finally, granting intervention here would be consistent with grants of intervention in other special proceedings. Proposed Intervenors share a "common many questions of law in fact" with the relief sought in the case. *In re UBS Fin. Servs., Inc.*, 851 N.Y.S.2d 75. "This is not a case where the presence of the intervenor will complicate a lengthy discovery or trial process, as neither discovery nor trial is contemplated in this special proceeding." *Id.* Instead, "the presence of [intervenors] will simply insure that both sides of the novel and complex legal issues are presented in this proceeding." *Id.*; *cf. B. Bros. Broadway Realty LLC v. Universal Fabric, Inc.*, 899 N.Y.S.2d 57 (Table) (Civ. Ct. 2009) (internal quotation marks omitted) ("[T]his Court is . . . of the opinion that third-party practice is appropriate due to the common questions of fact that exists and the need to litigate all issues in a single forum to

provide complete relief to the parties. Permitting impleader herein will expedite disposition of the entire controversy, avoid multiplicity of other lawsuits between the parties to accomplish the same result and, at the same time, do speedy justice for all.").

CONCLUSION

For all the reasons stated above, Proposed Intervenors respectfully request that this Court grant their motion to intervene as Respondents-Appellants in this case as a matter of right, or, in the alternative, in this Court's discretion, and permit Proposed Intervenors to file briefs on the schedule set out by this Court.

Dated: April 13, 2022
New York, New York

Respectfully submitted,

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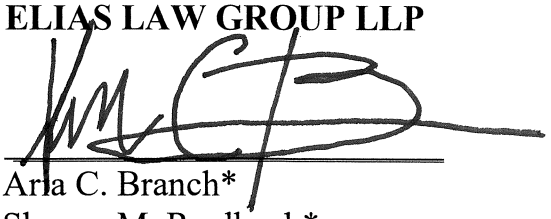
By: 

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** Pro Hac Vice Application to be submitted.*