SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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Anthony S. Hoffmann; Marco Carrión; Courtney Gibbons; Lauren Foley; Mary Kain; Kevin Meggett; Clinton Miller; Seth Pearce; Verity Van Tassel Richard; and Nancy Van Tassel,

Index No. 904972-22

Petitioners,

-against-

The New York State Independent Redistricting Commission; Independent Redistricting Commission Chairperson David Imamura; Independent Redistricting Commissioner Ross Brady; Independent Redistricting Commissioner John Conway III; Independent Redistricting Commissioner Ivelisse Cuevas-Molina; Independent Redistricting Commissioner Elaine Frazier; Independent Redistricting Commissioner Lisa Harris; Independent Redistricting Commissioner Charles Nesbitt; and Independent Redistricting Commissioner Willis H. Stephens,

Respondents.

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REPLY MEMORANDUM OF LAW IN SUPPORT OF PROPOSED INTERVENORS' MOTION FOR LEAVE TO INTERVENE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes And Rules

Constitutional Provisions

PRELIMINARY STATEMENT

Petitioners' opposition to Proposed Intervenors' motion to intervene is without any merit. While Petitioners argue that Proposed Intervenors' motion is somehow untimely, they are unable to cite any case in the history of New York where an intervention filed before the return date was deemed untimely. Indeed, given that Proposed Intervenors filed their motion to dismiss before any Respondents filed their motion to dismiss, the assertion that allowing Proposed Intervenors to intervene would somehow delay these proceedings makes no sense. Turning to Proposed Intervenors' interests in this litigation, Petitioners waived any argument that Proposed Intervenors lack an interest in this case as voters and those who campaign for congressional candidates, which waiver makes sense given that this is the very basis for Petitioners' own claimed interest in this lawsuit. Proposed Intervenors' interest as voters who support the *Harkenrider* map applying for the remainder of the decade is a sufficient basis to grant intervention here, standing alone, including on the basis of waiver. But, in addition, Proposed Intervenors also have a further powerful basis for intervention as the parties who secured the remedial map in *Harkenrider*, given that this lawsuit includes a request to turn that map into an interim map for only one election. And, of course, no current party represents Proposed Intervenors' interests as either voters or as those who secured the remedial map in *Harkenrider*.

In all, this Court should grant Proposed Intervenors' Motion To Intervene as of right under CPLR 1012, or permissively under CPLR 7802(d).

ARGUMENT

I. Petitioners' Position that This Court Should Deny Intervention As Of Right To Voters Who Secured The Landmark *Harkenrider* Judgment And Remedial Map Is Wrong

Proposed Intervenors satisfy all three elements of intervention as of right under CPLR 1012. Mem. Of Law In Supp. Of Proposed Intervenors' Mot. For Leave To Intervene

("Mot."), NYSCEF No.66 at 10. Proposed Intervenors' Motion is clearly timely, as they filed only 20 days after Petitioners filed their Amended Petition, and before Respondents filed their responsive papers to that petition. Mot.10–11. Any judgment entered here would bind Proposed Intervenors and jeopardize their interests, as Petitioners' explicit purpose in this lawsuit is to render the congressional map that Proposed Intervenors obtained in *Harkenrider* a mere interim map, applicable only to one election, thereby also changing the map that Proposed Intervenors vote and campaign under. Mot.11. Finally, none of the existing parties represent Proposed Intervenors' real and substantial interests in the protection of their hard-earned *Harkenrider* judgment or their rights as voters who support the *Harkenrider* map, as Petitioners are diametrically opposed and Respondents, who were not parties in *Harkenrider* and are sued only in their official capacities here, have no interests in defending that map as *Harkenrider* litigants or voters. Mot.12–13.

Petitioners' arguments to the contrary are all meritless.

First, Proposed Intervenors' intervention request is clearly timely. *Contra* Pets.' Opp. To Harkenrider Pets.' Mot. To Intervene ("Pets.' Opp."), NYSCEF No.131 at 9–11. Proposed Intervenors filed their intervention papers only 20 days after Petitioners filed their Amended Petition, and Petitioners cite no case in New York history where such an intervention, filed before even the return date on the relevant petition, was deemed untimely. Tellingly, the cases that Petitioners cite found timely a motion filed after summary judgment briefing and several years after initiation of the case, *Jones v. Town of Carroll*, 158 A.D.3d 1325, 1327–28 (4th Dep't 2018), and only untimely when filed "four months after a default judgment was entered against the named defendants," *Vacco v. Herrera*, 247 A.D.2d 608, 608 (2d Dep't 1998). And, of course, Petitioners face no prejudice given the timing of Proposed Intervenors' filing. Proposed Intervenors filed their proposed Motion To Dismiss before certain of the Respondent Commissioners filed their

Motion To Dismiss, *compare* NYSCEF Nos.69–70, *with* NYSCEF Nos.106, 109, so Petitioners can respond to both motions at the same time, including because they claim that these Commissioners' Motion To Dismiss "mirrors many of the same arguments made in Proposed Intervenors' proposed motion to dismiss," Pets.' Opp.9.

Nor do Petitioners' belatedly raised arguments about a 60-day deadline for this Court's consideration of the petition carry any weight. *Contra* Pets.' Opp.9–11. While Petitioners now claim for the first time that this Court must decide the petition within 60 days, *see* Pets.' Opp.9–11, they filed an Article 78 petition, *see* Amended Petition ("Amend. Pet.") NYSCEF No.47, ¶¶ 14, 21, not a petition under Article III, Section 5 of the New York Constitution as Proposed Intervenors did in *Harkenrider*, *see* N.Y. Const. art. III, § 5, and so the 60-day deadline does not apply, *accord* *Harkenrider* No.15, ¶ 30 (noting that the Steuben County Supreme Court had jurisdiction in *Harkenrider* under "Article III, Section 5 of the New York Constitution, CPLR § 3001, and Unconsolidated Laws § 4221"). Indeed, if Article III, Section 5's 60-day deadline applied here, Petitioners' suit would need to be dismissed for this additional reason, as the Court must "render its decision within sixty days after *a petition* is filed," N.Y. Const. art. III, § 5 (emphasis added), and Petitioners filed their original Petition on June 28, 2022, NYSCEF No.1, meaning more than 60 days have already passed since the filing of a petition initiating this lawsuit.

It is also worth noting that any delays in resolving Petitioners' claims are entirely their own fault. *Contra* Pets.' Opp.10–11. As explained in Proposed Intervenors' Memorandum Of Law In Support Of Motion To Dismiss, *see* NYSCEF No.70, Petitioners should have brought their lawsuit immediately after the IRC announced that it would not complete its duties on January 24, so Petitioners inexplicably decided to file six months too late. *Id.* at 18. Further, even after filing this almost-six-months-too-late lawsuit, Petitioners requested that any briefing on their claims "be

adjourned pending resolution of Petitioners' motion for leave to file an amended petition," NYSCEF No.39 at 2, thereby delaying resolution of their belated claims yet further.

Second, as to whether Proposed Intervenors have sufficient interests jeopardized by this litigation, Petitioners completely ignore that Proposed Intervenors sought intervention ***both*** as the litigants in *Harkenrider* ***and*** as voters/those who campaign for congressional candidates who will "suffer the consequences of having to vote under [a] new congressional map." Mot.13. Petitioners have waived any arguments about Proposed Intervenors' real and substantial interests in this case as New York voters and as those who campaign for congressional candidates by failing to respond on this point. *See Scudera v. Mahbubur*, 299 A.D.2d 535, 535 (2d Dep't 2002). In any event, Petitioners have no argument against these interests because if Proposed Intervenors have no such interests in this case, it would be extremely unclear how Petitioners would have any interests of their own to bring this lawsuit, as this case is based upon their "specific[ ] invest[ment] in their congressional representation" and "inten[tion] to vote for congressional candidates in the primary and general elections in 2024, 2026, 2028, and 2030," Amend. Pet., NYSCEF No.47, ¶ 15, just as Proposed Intervenors' interests as voters. Thus, this Court can decide this element of intervention of right purely on waiver grounds. *Scudera*, 299 A.D.2d at 535.

Turning to Proposed Intervenors' additional interests as the victorious parties in *Harkenrider*, while Petitioners claim that this lawsuit neither seeks to "undo the outcome in *Harkenrider*" nor involves a "collateral attack on the map approved by the Steuben County Supreme Court for the 2022 election," Pets.' Opp.6, the specific legal arguments about collateral attack are largely beside the point insofar as intervention is concerned. Absent this or another lawsuit, there would be no doubt that the Steuben County Supreme Court's judgment and map would continue until the next decennial census. *See* Amend. Pet. ¶ 1 (seeking a new map to replace

the Steuben County map to "be used for subsequent elections this decade"). Thus, Proposed Intervenors clearly have "a real and substantial interest," *Wells Fargo Bank, Nat'l Ass'n v. McLean*, 70 A.D.3d 676, 677 (2d Dep't 2010), in defending the continued applicability of that map.

In any event, Petitioners' Amended Petition clearly is a collateral attack on the Steuben County Supreme Court's judgment and map, for all of the reasons explained in Proposed Intervenors' Memorandum Of Law In Support Of Motion To Dismiss. *See* NYSCEF No.70 at 11–13; *contra* Pets.' Opp.6–8. The Court of Appeals in *Harkenrider v. Hochul*, ___ N.Y.3d ___, 2022 WL 1236822 (N.Y. Apr. 27, 2022), explained that the Steuben County Supreme Court's "judicial oversight" of the "remedial action in the wake of [the Court of Appeals'] determination of unconstitutionality" was the only constitutionally permitted remedy, as the "procedural unconstitutionality of the congressional . . . map[ ] is, at this juncture, incapable of a legislative cure" and the "deadline in the Constitution for the IRC to submit a second set of maps has long since passed." *Id.* at *12; *see also* Second Affirmation of Bennet J. Moskowitz In Support Of Intervention, Ex.A at 3–4 (Common Cause New York explaining that it would be unconstitutional to use the IRC to redraw the Assembly districts, while noting that "the Court of Appeals refused a role for the Commission or the Legislature in redrawing congressional and state senate maps found to violate the law"). The Steuben County Supreme Court's subsequent "final enacted [congressional] redistricting map[ ]" without any temporal limitation, *Harkenrider*, No.696 at 1,[*] applies to the entire decade, and Petitioners' contrary request implicates and attempts to undermine that judgment. Petitioners' claim that the Steuben County Supreme Court's map was intended

[*] All citations to filings in *Harkenrider v. Hochul*, Index No.E2022-0116CV (Steuben Cnty. Sup. Ct.), may be found at https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=kmywkTvfcaoSsQ66zseQsg==&display=all. Such documents will be cited as "*Harkenrider* No.XX."

only to apply to this year's elections because that court referred to it as the "2022 Congressional Map" is also patently untrue. *Contra* Pets.' Opp.7 (citing *Harkenrider* No.696). In fact, that court there explained that it was making minor "changes . . . to the Congressional . . . Map[ ] *enacted on May 20, 2022*," with no time limitation on the applicability of this "final enacted redistricting map[ ]." *Harkenrider* No.696 at 1 (emphasis added). In any event, even in other orders where that court used "2022 Congressional map" it was as shorthand for the map it was adopting to govern elections *beginning* in 2022. *See Harkenrider* No.670 at 5. Indeed, in such orders that court also referred to the federal-court-adopted "2012 Congressional map[ ]," *id.* at 3, and that 2012 map governed New York's elections for the entirety of the prior decennial census.

Third, Respondents do not adequately represent Proposed Intervenors' interests in this litigation. *Contra* Pets.' Opp.9. Even assuming *some* Respondents have raised arguments in support of a motion to dismiss similar to those raised by Proposed Intervenors, those Respondents do not represent Proposed Intervenors' particular interests in this litigation. *See* CPLR 1012(a)(2). Proposed Intervenors were the litigants that secured the landmark victory in *Harkenrider*, including the remedial map that they seek to defend here. This point is further underscored by the fact that only Proposed Intervenors have raised the argument that this lawsuit is a collateral attack on the *Harkenrider* judgment, NYSCEF No.70 at 11–13, which makes sense given that none of the IRC Commissioners who comprise Respondents here was a party in *Harkenrider*, *see Harkenrider* No.15, ¶¶ 10–29. Furthermore, only Proposed Intervenors support the substantive aspects of the *Harkenrider* map, as Proposed Intervenors are individual voters and Respondents are all sued in their official capacities. *Supra* pp.2, 4.

II. Alternatively, Petitioners' Provide No Sound Basis For Why This Court Should Deny Permissive Intervention To Proposed Intervenors

Alternatively, the Court should grant Proposed Intervenors permissive intervention under CPLR 7802, as Proposed Intervenors meet both of the requirements for such intervention. Mot.13–16. Proposed Intervenors easily qualify as "interested persons" under CPLR 7802, and permitting their intervention will cause no delay or prejudice in these proceedings. Mot.15–16.

Petitioners' contrary arguments, largely reiterating their incorrect assertions pertaining to intervention as of right, all fail to persuade. Petitioners first claim that intervention will delay the proceedings and prejudice Petitioners' ability to obtain relief within the expedited, sixty-day timeframe. Pets.' Opp.11. Not so. There is nothing precluding Petitioners from addressing Proposed Intervenors' arguments in support of dismissal in their responsive briefing and within this Court's existing briefing schedule, including because Petitioners themselves claim that Respondents' motion to dismiss "mirrors many of the same arguments made in Proposed Intervenors' proposed motion to dismiss." Pets.' Opp.9. There is no 60-day deadline for this Court's consideration of Petitioners' Article 78 petition. *Supra* p.3. Nor are Petitioners correct that Proposed Intervenors seek to raise questions not relevant to the issues in this case. Pets.' Opp.11–12. Only entirely "new issues may not be interposed on intervention," *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), which applies to issues that are "neither relevant nor material to the resolution of the issues posed in the . . . action," *E. Side Car Wash, Inc. v. K.R.K. Capitol, Inc.*, 102 A.D.2d 157, 160 (1st Dep't 1984). Here, the propriety of turning the *Harkenrider* map into an interim map is clearly before the Court in this action, and so Proposed Intervenors' arguments that doing so would be improper for multiple reasons—including because it would involve a collateral attack on the Steuben County Supreme Court's judgment—are plainly not new or "[ir]relevant" issues. *Id.*

CONCLUSION

This Court should grant Proposed Intervenors' Motion To Intervene as of right under CPLR 1012, or permissively under CPLR 7802(d).

Dated: New York, New York
August 31, 2022

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CERTIFICATION

I hereby certify that the foregoing memorandum of law complies with the word count limitations set forth in 22 NYCRR § 202.8-b(a). According to the word-processing system used to prepare this memorandum of law, it contains 2,265 words, excluding parts of the document exempted by Rule 202.8-b(b).

Dated: New York, New York
August 31, 2022

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