To Be Argued By
Misha Tseytlin
Time Requested: 15 Minutes

New York Supreme Court

APPELLATE DIVISION — SECOND DEPARTMENT

Action No. I

Index No. 611872/2023

Docket No. 2024-07814

HAZEL COADS; STEPHANIE M. CHASE; MARVIN AMAZAN; SUSAN E. COOLS; SUZANNE A. FREIER; CARL R. GERRATO; ESTHER HERNANDEZ-KRAMER; JOHN HEWLETT JARVIS; SANJEEV KUMAN JINDAL; HERMOINE MIMI PIERRE JOHNSON; NEERAJ KUMAR; KAREN M. MONTALBANO; EILEEN M. NAPOLITANO; OLENA NICKS; DEBORAH M. PASTERNAK, CARMEN J. PINEYRO; DANNY S. QIAO; LAURIE SCOTT; RAJA KANWAR SINGH; AMIL VIRANI, MARY G. VOLOSEVICH, the NASSAU COUNTY DEMOCRATIC COMMITTEE,

Plaintiffs-Respondents,

against

NASSAU COUNTY; THE NASSAU COUNTY LEGISLATURE,

Defendants-Appellants,

(Caption Continued on the Reverse)

BRIEF FOR DEFENDANTS-APPELLANTS AND NON-PARTY APPELLANTS IN ACTION NOS. I AND II

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Nassau County Clerk's Index Nos. 611872/2023 and 602316/2024

and

THE NASSAU COUNTY BOARD OF ELECTIONS; JOSEPH J. KEARNY, In his official capacity as a Commissioner of the Nassau County Board of Elections; and JAMES P. SCHEUERMAN, In his official capacity as a Commissioner of the Nassau County Board of Elections,

Defendants.

MISHA TSEYTLIN and SEAN TRENDE,

Non-Party Appellants.

Action No. II

Index No. 602316/2024

NEW YORK COMMUNITIES FOR CHANGE, MARIA JORDAN AWALOM, MONICA DIAZ, LISA ORTIZ and GUILLERMO VANETTEN,

Plaintiffs-Respondents,

against

COUNTY OF NASSAU, THE NASSAU COUNTY LEGISLATURE, BRUCE BLAKEMAN, In his official capacity as Nassau County Executive, MICHAEL C. PULITZER, in his official capacity as Clerk of the Nassau County Legislature, HOWARD J. KOPEL, in his capacity as Presiding Officer of the Nassau County Legislature,

Defendants-Appellants,

and

THE NASSAU COUNTY BOARD OF ELECTIONS and JOSEPH J. KEARNY and JAMES P. SCHEUERMAN, in their official capacity as Commissioners of THE NASSAU COUNTY BOARD OF ELECTIONS,

Defendants.

MISHA TSEYTLIN and SEAN TRENDE,

Non-Party Appellants.

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QUESTIONS PRESENTED

Question 1: Whether legislative privilege, attorney-client privilege, and/or the work-product doctrine apply to certain documents, information, and testimony sought by Plaintiffs' subpoena to Appellant Non-Party Mr. Misha Tseytlin, Esq. ("Mr. Tseytlin"), their subpoena to Appellant Non-Party Dr. Sean D. Trende ("Dr. Trende"), and certain of their document requests to Defendants-Appellants themselves.

Answer 1: Yes. The Supreme Court correctly concluded that legislative privilege applies to these documents, information, and testimony. Respectfully, however, the Supreme Court incorrectly concluded that attorney-client privilege and the work-product doctrine do not apply to these documents, information, and testimony.

Question 2: Whether Defendants have waived the legislative privilege, attorney-client privilege, and/or the work-product doctrine that applies to certain documents, information, and testimony sought by Plaintiffs' subpoena to Mr. Tseytlin, their subpoena to Dr. Trende, and certain of their document requests to Defendants-Appellants themselves.

Answer 2: No. Respectfully, the Supreme Court's contrary conclusion was legally incorrect.

Question 3: Whether, at a minimum, Plaintiffs' subpoena to Mr. Tseytlin must be quashed because Plaintiffs did not meet the heightened burden to seek discovery from counsel of record.

Answer 3: Yes. Respectfully, the Supreme Court's contrary conclusion was legally incorrect.

Defendants-Appellants Nassau County; the Nassau County Legislature; Bruce Blakeman, in his official capacity as Nassau County Executive; Michael C. Pulitzer, in his official capacity as Clerk of the Nassau County Legislature; and Howard J. Kopel, in his capacity as Presiding Officer of the Nassau County Legislature (collectively, "Defendants-Appellants"), by their attorneys, Troutman Pepper Hamilton Sanders LLP ("Troutman Pepper"), submit this Opening Brief in support of their appeal from: (1) the Decision And Order of Hon. Paul I. Marx, J.S.C. of the Supreme Court of the State of New York, Westchester County ("the Supreme Court"), dated August 7, 2024, and entered in the office of the Nassau County Clerk ("Clerk") on August 7, 2024, in Action I, wherein the Supreme Court ordered Defendants-Appellants to produce certain documents; (2) the identical Decision And Order of the Supreme Court, dated August 7, 2024, and entered in the Clerk's office on August 13, 2024, in Action II, wherein the Supreme Court ordered Defendants-Appellants to produce certain documents; (3) the Decision And Order of the Supreme Court, dated August 7, 2024, and entered in the Clerk's office on August 13, 2024, wherein the Supreme Court ordered Mr. Tseytlin to appear for deposition; (4) the

Order of the Supreme Court, dated August 15, 2024, and entered in the Clerk's office on August 15, 2024, wherein the Supreme Court ordered Mr. Tseytlin to produce certain documents (collectively with the prior order, the "Tseytlin Orders"); (5) the Decision And Order of the Supreme Court, dated August 7, 2024, and entered in the Clerk's office on August 13, 2024, wherein the Supreme Court ordered Dr. Trende to appear for deposition; and (6) the Order of the Supreme Court, dated August 15, 2024, and entered in the Clerk's office on August 15, 2024, wherein the Supreme Court ordered Dr. Trende to produce certain documents (collectively with the prior order, the "Trende Orders"). Defendants-Appellants appeal from each and every portion of the preceding orders from which Defendants-Appellants are aggrieved.

Appellant Non-Party Mr. Tseytlin, by his attorneys, Troutman Pepper, also submits this Opening Brief in support of his appeal from the Tseytlin Orders. Mr. Tseytlin appeals from each and every portion of the Tseytlin Orders from which he is aggrieved.

Finally, Appellant Non-Party Dr. Trende, by his attorneys, Troutman Pepper, also submits this Opening Brief in support of his

appeal from the Trende Orders. Dr. Trende appeals from each and every portion of the Trende Orders from which Dr. Trende is aggrieved.[1]

[1] Pursuant to directions from the Clerk of this Court, Defendants-Appellants and Appellants Non-parties have submitted an identical Opening Brief and Record on Appeal in each of the three dockets here: 2024-07766, 2024-07814, and 2024-08410.

PRELIMINARY STATEMENT

Plaintiffs in the actions here claim that the redistricting map that the Nassau County Legislature ("Legislature") adopted for Nassau County ("County") is unlawful in various respects. Not content with attempting to prove their claims with admissible, non-privileged evidence, Plaintiffs have engaged in extraordinary discovery tactics seeking to probe into the County's legislative process of drafting and enacting its redistricting map. As relevant here, Plaintiffs have subpoenaed Defendants' lead counsel—Mr. Tseytlin, of Troutman Pepper—as well as their litigation and consulting expert—Dr. Trende—in an effort to obtain privileged documents, information, and testimony that Mr. Tseytlin and Dr. Trende provided to the Presiding Officer of the Legislature, as he worked with Mr. Tseytlin and Dr. Trende to design proposed redistricting maps.

Although the Supreme Court correctly held that the documents, information, and testimony sought by Plaintiffs were protected by legislative privilege, the Court proceeded to conclude that the Presiding Officer had broadly waived this privilege as to all of that material—and much more—by offering at a public hearing of the Legislature

memoranda prepared by Troutman Pepper and related testimony of Mr. Tseytlin that analyzed certain proposed maps then pending before the Legislature. The Court held that the Presiding Officer's release of those memoranda and testimony to the public "open[ed] the door to full and proper inquiry" into, among other things, any and all proposed redistricting maps (that is, draft legislation) "considered by [Dr.] Trende, what information was considered by [Dr.] Trende, who he consulted with, if anyone, and the same would be with respect to Mr. Tseytlin." R.195–96. So, unless this Court reverses the Supreme Court's legally erroneous discovery orders below, Defendants, their lead counsel, and their litigation and consulting expert will now—in the Supreme Court's own words—be "essentially [ ] open for inquiry . . . for [P]laintiffs to ask questions about the development of the maps, who participated, what was considered, what was rejected, and the like." R.195–96.

This Court should reverse the orders of the Supreme Court and remand with instructions for the Supreme Court to: (1) issue a protective order as to the material submitted by Defendants-Appellants for the Supreme Court's in camera review; (2) quash the subpoena to

Mr. Tseytlin and issue an appropriate protective order; and (3) quash the subpoena to Dr. Trende and issue an appropriate protective order.

STATEMENT OF THE CASE

A. The Nassau County Legislature Enacts A Redistricting Map, After The Presiding Officer Retained Mr. Tseytlin And Troutman Pepper, Who Then Retained Dr. Trende

The Nassau County Legislature is the legislative body of Nassau County's government, and it comprises a single representative from each of Nassau County's 19 districts. *See* Nassau Cnty. Charter, §§ 102–04.[2] The Legislature has the responsibility to adopt local laws for the County including, as relevant here, laws related to redistricting. *See id.* §§ 102–03, 112. The Legislature also selects a Presiding Officer from its own members, who presides over the Legislature and carries out various other official functions assigned to him. *Id.* § 106.1.

After the 2020 federal decennial census, the Legislature began the process of redistricting the County for the next decade. Once the County received the population statistics from the 2020 federal decennial census, the Legislature created the Temporary Districting Advisory Commission

[2] Available at https://www.nassaucountyny.gov/DocumentCenter/View/37579/Charter-1124?bidId= (all websites lasted visited Sept. 5, 2024).

("Commission")—composed of members selected by the County Executive, the Presiding Officer, and the minority leader—to assist the Legislature with redrawing the County's legislative districts. *Id.* § 113(1)(a). The Commission's duty was to "recommend one or more [redistricting] plans to the [C]ounty Legislature for dividing the [C]ounty into legislative districts for the election of county legislators," *id.* § 113(2), with the requirement that any recommended plan receive six affirmative votes of the commissioners, *id.* § 113(3). The Legislature, for its part, maintained the authority to "reject, adopt, revise or amend the redistricting plan recommended by the [T]emporary [D]istricting [A]dvisory [C]ommission or adopt any other redistricting plan, provided that any plan adopted by the Legislature shall meet all constitutional and statutory requirements." *Id.* § 114.

The Commission ultimately failed to recommend a single redistricting plan to the Nassau County Legislature. Instead, the Republican commissioners and the Democratic commissioners each prepared separate redistricting proposals. *See* Nassau Cnty., *TDAC*

Republican Commissioners Proposed Maps (Nov. 21, 2022);[3] Nassau Cnty., *TDAC Democrat Commissioners Proposed Maps* (Nov. 10, 2022).[4] Both of these maps had legal defects, and further, neither received the required six votes from the Commission. *See* Nassau Cnty. Charter, § 113(3); *see also* R.1179–80; *infra* pp.11–13. Given these failings, the Presiding Officer decided to propose his own redistricting map for the Legislature's consideration. *See* R.1179–80.

The Presiding Officer retained the law firm Troutman Pepper—including partner Mr. Tseytlin, the lead attorney for the prevailing petitioners in the landmark redistricting case of *Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022)—as legal counsel to ensure that the Presiding Officer's proposed redistricting map satisfied the numerous legal requirements for such maps, R.316, 629–30, 643–44. To name just a few of these legal requirements, a redistricting map must comply with Section 2 of the Voting Rights Act of 1965, 52 U.S.C. § 10301; must satisfy the John R. Lewis Voting Rights Act of New York, N.Y. Elec. Law § 17-200, *et seq.*; must avoid political gerrymandering, *see, e.g.*, N.Y. Mun.

[3] Available at https://www.nassaucountyny.gov/5457/RepubPropMaps.

[4] Available at https://www.nassaucountyny.gov/5458/DemProposedMaps.

Home R. L. §§ 10(1)(a)(13)(a), 34(4); and must satisfy one-person-one-vote principles, *id.* § 10(1)(a)(13)(a)(i). A map must also satisfy compactness requirements and must consider communities of interests. *Id.* § 10(1)(a)(iv)-(v).

Many of the legal requirements with which the Legislature had to comply require complicated social-science analysis to analyze properly. R.316. Troutman Pepper thus retained Dr. Trende, a leading redistricting expert and the lead expert for the petitioners in *Harkenrider,* 38 N.Y.3d at 506, to make possible Troutman Pepper's provision of legal advice to the Presiding Officer, R.316, 630. Among other things, Dr. Trende has expertise performing the complicated social-science analyses required to comply with all legal requirements applicable to the redistricting process. R.316.

On February 9, 2023, the Presiding Officer, in consultation with Troutman Pepper, publicly proposed a new redistricting map for the Legislature's consideration. R.317. After presenting this proposed map to the public, the Legislature held a meeting on February 16, 2023, to review and discuss all proposed maps received by the Legislature, including the Presiding Officer's proposed map. R.317. At that meeting,

the Presiding Officer presented a memorandum prepared by Troutman Pepper that explained why his proposed map complied with all applicable laws—including, as relevant, by citing certain social-science analysis by Dr. Trende—while the proposed maps from the Republican and Democratic commissioners failed certain of those requirements. R.1179; R.762 (copy of February 16, 2023 memorandum). Mr. Tseytlin also testified at this meeting at the Presiding Officer's direction, summarizing the conclusions reached in the February 16, 2023 memorandum. R.629–30.

As the February 16, 2023 memorandum and associated testimony from Mr. Tseytlin explained, the Presiding Officer's proposed map complied with all applicable legal requirements, such as the federal Equal Protection Clause, U.S. Const. amend. XIV, § 1, the federal Voting Rights Act, New York's Home Rule Law (including its prohibition on partisan gerrymandering), and the John R. Lewis New York Voting Rights Act, R.629–36, 639–52, 762–73. In contrast, the Republican and Democratic commissioners' proposals were each partisan outliers—unlike the Presiding Officer's proposed map, which was neutral—according to the methodology that Dr. Trende used in *Harkenrider*.

R.643–49, 770–72. The Republican and Democratic commissioners' proposed maps also impermissibly drew districts based on race in certain respects, in violation of the federal Equal Protection Clause, unlike the Presiding Officer's proposed map. R.636–39, 765.

Further, at this February 16, 2023 meeting, Legislators from both sides of the political aisle praised the Presiding Officer's proposed map for incorporating many of their proposals. *See* R.719–20. Nevertheless, other Legislators and lawyers promised an immediate lawsuit challenging the proposed map, should the Legislature adopt it, because they believed that the Legislature had not sufficiently accommodated their concerns. *See, e.g.*, R.737; *accord* R.1101. For example, one Legislator warned that adoption of the proposed map "will lead to litigation" that "Nassau taxpayers can't afford." R.737.

The Presiding Officer then released two subsequent versions of his map in response to the feedback from Legislators and the public. First, the day after the February 16, 2023 meeting, the Presiding Officer publicly released an amended version of his proposed map incorporating some of the feedback received at the meeting. R.317; Nassau Cnty.,

Redistricting.[5] Then, on February 21, 2023, the Presiding Officer publicly released his proposed revised map, making more revisions to incorporate additional feedback and input from Legislators and the public on that amended version of his proposed map. R.317; Nassau Cnty., *Redistricting*, *supra*. Troutman Pepper then presented a memorandum on February 27, 2023, that discussed the proposed revised map in detail and explained how it complies with all applicable legal requirements, including, as relevant, by citing certain social-science analysis by Dr. Trende. R.317; R.778 (copy of February 27, 2023 memorandum). Nevertheless, certain Legislators still believed that the proposed map was unlawful and threatened that a lawsuit challenging the map would occur immediately. R.448, 576.

Finally, also on February 27, 2023, the Legislature adopted the proposed revised map as Nassau County's current redistricting map through Local Law 1. *See* Local Law 1-2023.[6] The Nassau County

[5] Available at https://www.nassaucountyny.gov/5455/Redistricting.

[6] Available at https://www.nassaucountyny.gov/DocumentCenter/View/40335/Local-Law-1-2023.

Executive signed Local Law 1 into law the following day, February 28, 2023. *Id.*

B. Plaintiffs Collectively File These Two Separate Lawsuits Challenging The Redistricting Map

This appeal involves two separate lawsuits challenging Local Law 1, on separate grounds. Despite the repeated guarantees of immediate challenges to Local Law 1, Plaintiffs in Action I did not file their challenge until nearly five months after the County enacted Local Law 1 in February 2023, while Plaintiffs in Action II waited *nearly a year* after that date to file their case.

Plaintiffs in Action I—*Coads v. Nassau County* No.611872/2023—sued in July 2023, seeking a declaratory judgment that Local Law 1 is an impermissible partisan gerrymander under Section 34 of the New York Municipal Home Rule Law and requesting an injunction prohibiting the Legislature from using this redistricting map in future elections. *See* R.203, 221–22. The County and Legislature filed a motion to dismiss the complaint in Action I under the doctrine of laches, arguing that the Action I Plaintiffs had impermissibly delayed filing their lawsuit. R.73. The Supreme Court denied that motion in March 2024. R.73.

Plaintiffs in Action II—*New York Communities For Change v. County of Nassau,* No.602316/2024—filed their complaint in February 2024, seeking a declaratory judgment that Local Law 1 violates both the John R. Lewis Voting Rights Act of New York, N.Y. Elec. Law § 17-200, *et seq.*, and Section 34 of the N.Y. Municipal Home Rule Law, *see* R.245. Like Plaintiffs in Action I, Plaintiffs in Action II requested an injunction prohibiting the Legislature from using this redistricting map in future elections and forcing mid-decade redistricting. *See* R.278. The County and Legislature also filed a motion to dismiss the complaint in Action II on laches grounds, which the Supreme Court denied. R.84–85.

On March 1, 2024, the Court ordered that Action I and Action II be joined for purposes of conducting discovery, *see* R.63.

C. Plaintiffs Seek Privileged Materials And Information From Defendants, Mr. Tseytlin, And Dr. Trende

To probe into the County's legislative process in drafting and enacting Local Law 1, Plaintiffs attempted to obtain privileged documents and information from Defendants; from the former Presiding Officer of the Legislature; from Defendants' lead trial counsel, Mr. Tseytlin; and from Defendants' counsel's litigation consultant and expert witness, Dr. Trende.

1. *Defendants and Presiding Officer Nicolello*. The Action II Plaintiffs first served broad discovery requests on Defendants and former Presiding Officer Richard Nicolello, who was the Presiding Officer during the redistricting process at issue here.

To begin, the Action II Plaintiffs served expansive document requests on Defendants. *See* R.329. For example, Document Request No. 2 to Defendants sought "[a]ll documents and communications concerning any hearings conducted in connection with the Redistricting Process or the Redistricting Plan, including but not limited to any transcripts of such hearings and any notes and memoranda relating to such hearings." R.334. Document Request No. 3 sought "[a]ll documents and communications reflecting information considered by the Presiding Officer and/or his agents or consultants, including without limitation Troutman and Sean Trende, in evaluating or proposing any redistricting plan." R.335. And Document Request No. 4 sought documents "reflecting the role of Troutman or its agents or consultants in drawing any proposed or adopted redistricting plan for the" Legislature. R.335.

In response to these Document Requests, Defendants agreed to—and did, R.318—"conduct a reasonable search for and produce non-

privileged and responsive documents and communications [as to each particular Document Request]," R.345–46. Those good-faith efforts from Defendants resulted in the production of 1,009 documents—spanning 14,952 pages—including non-privileged, responsive materials, documents, and communications in the possession, custody, and control of the County and the Legislature regarding the "Redistricting Process or the Redistricting Plan." R.318, 345. Additionally, Defendants produced 78 documents and emails of Mr. Tseytlin's in response to these Action II Plaintiffs' requests. R.318, 341. Defendants' also produced versions of documents with privileged portions redacted, while withholding certain other privileged documents, comprising discussions between Mr. Tseytlin and Dr. Trende. *See, e.g.*, R.77.

The Action II Plaintiffs also served subpoenas *duces tecum* and *ad testifcandum* on the Presiding Officer during the events described above. Those subpoenas sought, among other things, the Presiding Officer's deposition testimony and "[a]ll documents and communications exchanged between" the Presiding Officer "and any Defendant concerning the Redistricting Process or any other redistricting plan proposed or considered during the Redistricting Process," as well as "[a]ll

documents and communications concerning whether and/or to what extent the Redistricting Plan or any other redistricting plan proposed or considered" was required to include districts comprised of majority "racial, ethnic, or language-minority groups." R.1180 (brackets in original; citations omitted).

2. *Mr. Tseytlin*. As for Mr. Tseytlin—Defendants' lead counsel—the Plaintiffs in Action II served a subpoena *duces tecum* on him on April 19, 2024, seeking both his deposition testimony and documents and communications related to his provision of legal services to his client the Presiding Officer. R.316, 321. Notably, the subpoena to Mr. Tseytlin includes requests for information duplicative of the discovery Plaintiffs served on Defendants themselves, *see supra* p.17, as well as on Dr. Trende, *see infra* p.20. For example, Document Request No. 1 to Mr. Tseytlin seeks "[a]ll documents and communications concerning [Mr. Tseytlin's] February 16, 2023 testimony before the Nassau County Legislature, including any documents [Mr. Tseytlin] referenced during, relied upon in preparation for or during, or reviewed in preparation for [his] February 16, 2023 testimony before the Nassau County Legislature or other documents related to that testimony." R.327. Document

Request No. 2 to Mr. Tseytlin seeks "[a]ll documents and communications referenced in or relied upon by the Troutman Memos." R.327. Document Request No. 3 to Mr. Tseytlin demands "[a]ll documents and communications concerning or reflecting the extent to which [Mr. Tseytlin] or any member of Troutman, or agent, consultant, or contractor of Troutman, 'drew the map' with respect to any redistricting proposal during the Redistricting Process, including the Redistricting Plan." R.328.

3. *Dr. Trende*. Finally, as for Dr. Trende, Plaintiffs in Action II served a cumulative subpoena *duces tecum* and *ad testificandum* on him on April 29, 2024. R.318, 356. That subpoena commands Dr. Trende both to appear for a fact deposition and to produce documents and information, including "[a]ll documents and communications concerning the Redistricting Process or the Redistricting Plan" as well as "[a]ll documents and communications containing or reflecting the facts, data, methodology, analyses, computer code, or other [*sic*] any other materials considered, generated, or relied upon in connection with" Dr. Trende's expert reports submitted in *Harkenrider v. Hochul*, No.E2022-0116CV (Sup. Ct. Steuben Cnty.). R.366–67.

Dr. Trende (1) agreed to "conduct a reasonable search for and produce non-privileged and responsive documents and communications concerning the Redistricting Process or the Redistricting Plan, if any are located pursuant to such reasonable search," R.413; and (2) agreed to "conduct a reasonable search for and produce non-privileged and responsive documents and communications containing or reflecting the facts, data[,] methodology[,] analyses, computer code, or [ ] any other materials considered, generated, or relied upon in connection with the Expert Report of Sean T. Trende or the Reply Expert Report of Sean P. Trende in *Harkenrider v. Hochul*, Index No. E2022- 0116CV (Sup. Ct. Steuben Cnty.), if any are located pursuant to such reasonable search," R.414.[7]

D. The Supreme Court Blocks Plaintiffs' Discovery Into The Presiding Officer's Processes And Reasons For Proposing Maps To The Legislature, While At That Time Taking A Properly Narrow View Of Any Waiver

On June 7, 2024, the Supreme Court entered a Decision & Order granting in large part Defendants' motion to quash the Action II

[7] The Action II Plaintiffs also requested that Dr. Trende produce a copy of the dissertation that he submitted to receive his Ph.D. from the Ohio State University. R.367. Dr. Trende agreed to produce such a copy. R.414.

Plaintiffs' subpoena for the Presiding Officer's deposition testimony, on legislative-privilege grounds. R.1177.

In this June 7, 2024 Decision & Order, the Supreme Court held that Plaintiffs' subpoena for the Presiding Officer's deposition testimony sought testimony protected by legislative privilege. The Court explained that "legislative privilege" has a "broad application" that protects legislators like the Presiding Officer "against production of documentary evidence and deposition testimony aimed at inquiry into acts which are within the sphere of legitimate legislative activity," such as the act of legislative redistricting. R.1194–201. The Court then held that Plaintiffs' subpoena for the Presiding Officer's deposition testimony fell within the scope of this legislative privilege, as it "only seeks testimony about internal deliberations and legislative information" regarding the redistricting process. R.1195, 1201 (summarizing and then agreeing with the Presiding Officer's position).

The Court then held that the Presiding Officer had narrowly waived this legislative privilege "to the extent of the information contain in Troutman's memoranda and Mr. Tseytlin's testimony" at the Legislature's February 16, 2023 meeting. R.1203. That is, because the

Presiding Officer "authorized" the public release of the Troutman Pepper memoranda and the public testimony of Mr. Tseytlin, R.1202, the Court concluded that the Presiding Officer "can be questioned during deposition solely limited to the publicly disclosed information," R.1203. Yet, the Supreme Court carefully limited its waiver conclusion: the Presiding Officer could not "be questioned as to his motivations or deliberations concerning creation of the 2023 Map, any iterations thereof, or any prior maps that were presented to him"; the waiver did not "extend . . . to other facets of the redistricting process which were not discussed in the Troutman memoranda or at the hearing"; and the deposition "shall be strictly limited to the information that has already been publicly disclosed through those means." R.1203; *see infra* pp.28–29 (explaining that this narrow waiver order is unreconcilable with the broad waiver orders on appeal here, although they involved the exact same waiver).

E. The Supreme Court Then—Remarkably—Permits Discovery Into The Analyses And Advice That Mr. Tseytlin and Dr. Trende Provided To The Same Presiding Officer And Then Took A Wildly Inconsistent Position As To The Scope Of The Same Waiver

Despite its decision to quash on legislative privilege grounds much of the subpoena for the Presiding Officer's deposition testimony, while

also taking its narrow view of waiver there, the Supreme Court refused to quash certain of Plaintiffs' document requests to Defendants themselves or the subpoenas to Mr. Tseytlin or Dr. Trende, thus empowering Plaintiffs to obtain discovery into the analyses and advice that Mr. Tseytlin and Dr. Trende provided to the Presiding Officer at his request.

1. The Supreme Court largely provided its reasoning for allowing Plaintiffs to pursue their remarkable discovery tactics in its July 31, 2024 Decision And Order addressing the motions to quash the subpoenas of Mr. Tseytlin and Dr. Trende. R.86.

The Supreme Court first rejected Defendants', Mr. Tseytlin's, and Dr. Trende's claims of attorney-client privilege and work-product privilege. R.92–97. As for Mr. Tseytlin, the Supreme Court stated that "[u]nquestionably, the Troutman memoranda evidence that Mr. Tseytlin provided legal advice to [the Presiding Officer] about the proposed redistricting map." R.94. However, the Court then concluded that, "[t]o the extent that Mr. Tseytlin was involved in drawing the proposed maps" that the Presiding Officer submitted to the Legislature, Mr. Tseytlin cannot invoke attorney-client privilege or the work-product doctrine, as

"involve[ment] in drawing the proposed maps" is "non-legal work." R.94–95. As for Dr. Trende, the Court concluded that his work "was not of a legal character," although it "may have been instrumental to Troutman Pepper in advising the Presiding Officer about the legality of the proposed maps." R.96–97 (citations omitted). Thus, the Court concluded that Dr. Trende could not invoke attorney-client privilege or the work-product doctrine to quash his subpoena to any extent. R.96–97.

The Supreme Court then held in this Decision And Order that legislative privilege *did* apply to information and material sought by Plaintiffs' subpoenas to Mr. Tseytlin and Dr. Trende. The Court concluded "that legislative privilege should be extended to [include] consultants and experts who are retained by a legislator to assist in their legislative functions," not just a legislator himself or herself. R.100. The Court then explained that Mr. Tseytlin and Dr. Trende "are entitled to common law legislative privilege in connection with the legislative activity they performed at the behest of, and for, [the Presiding Officer]." R.99–100. In this way, the Supreme Court's July 31, 2024 Decision And Order builds upon its prior June 7, 2024 Decision & Order affirming the Presiding Officer's legislative-privilege claims. R.91–105.

Nevertheless, the Supreme Court then held that Defendants had broadly waived the legislative privilege that did apply to Mr. Tseytlin and Dr. Trende, taking an entirely inconsistent view of the scope of the same waiver as it had with regard to the Presiding Officer himself just a couple of months earlier. R.100–04. The Court explained that because the memoranda prepared by Troutman Pepper had been publicly released and because Mr. Tseytlin had provided public testimony at the Presiding Officer's request at the full Legislature meeting, this "waived any applicable privileges as to the analysis and work performed by Dr. Trende and Mr. Tseytlin on the redistricting maps." R.104. That waiver, in the Supreme Court's view, was not limited to the extent of the public disclosure made in the memoranda and the testimony, contrary to what the Court had held with regard to the Presiding Officer. R.100. Instead, the Supreme Court now held that this waiver extended beyond "the underlying data and analyses Dr. Trende conducted of the three publicly disclosed maps presented to the Legislature by the Presiding Officer"; the "communications conveying [Dr. Trende's] analyses of the maps discussed in the Troutman Pepper memoranda and all relevant legal analyses by Troutman Pepper"—all of which "have already been

disclosed to Plaintiffs." R.100. The upshot of the Court's broad waiver holding is that, among other things, Plaintiffs may now pursue discovery into all of the *proposed* maps (that, is draft legislation) that the Presiding Officer considered and had Troutman Pepper and Dr. Trende analyze, not just the proposed maps discussed in the Troutman Pepper memoranda and Mr. Tseytlin testimony. *See* R.100.

In an August 2, 2024 oral ruling, the Supreme Court explained the breadth of its waiver conclusion in its July 31, 2024 Decision And Order. R.195–96. There, the Court stated that, "by virtue of the testimony that was given before the legislative body, that opens the door to full and proper inquiry as to what maps were considered by [Dr.] Trende, what information was considered by [Dr.] Trende, who he consulted with, if anyone, and the same would be with respect to Mr. Tseytlin." R.195–96. "The process has essentially been open for inquiry so that it's proper inquiry for [P]laintiffs to ask questions about the development of the maps, who participated, what was considered, what was rejected, and the like." R.195–96. So, again, the Court is allowing Plaintiffs to probe into *every* proposed map (which are, again, variants of draft legislation) considered by the Presiding Officer that Troutman Pepper and Dr.

Trende analyzed, not just the proposed maps discussed specifically in the Troutman Pepper memoranda and Mr. Tseytlin testimony. R.195–96.

Notably, the scope of the Supreme Court's waiver decision here is unreconcilable with the scope of the waiver discussed in Court's June 7, 2024 Decision & Order with respect to the Presiding Officer, although these decisions involved the exact same memoranda and public testimony. As explained more fully above, in that prior decision the Court held that the Presiding Officer's own waiver of legislative privilege was "strictly limited to the information that has already been publicly disclosed through [the memoranda and testimony]." R.1203; *supra* pp.22–23. Thus, unlike with Mr. Tseytlin and Dr. Trende here, Plaintiffs could not question the Presiding Officer with respect to "any [other] prior maps that were presented to him" or "other facets of the redistricting process which were not discussed in the Troutman memoranda or at the hearing." R.1203.[8] Nowhere in these orders did the Court explain why

[8] With respect to Dr. Trende's request that the Supreme Court limit Plaintiffs to deposing him as an expert witness and not also as a fact witness, the Supreme Court concluded that "[t]here is no question that Dr. Trende is a fact witness who should be deposed during fact discovery." R.105. However, the Supreme Court ordered that "Plaintiffs shall limit their inquiry during his [fact] deposition to facts and shall not inquire into his expert opinions." R.105.

the release of the memoranda and testimony triggered a narrow waiver as to the Presiding Officer, but a broad waiver as to Mr. Tseytlin and Dr. Trende.

2. The Supreme Court then issued two orders that formally compelled Mr. Tseytlin and Dr. Trende to comply with their subpoenas.

First, in an August 7, 2024 Decision And Order, the Court ordered that "for the reasons stated on the record . . . Dr. Trende and Mr. Tseytlin shall appear for their depositions." R.19, 37. This August 7, 2024 Decision And Order then reiterated the Supreme Court's conclusion that "Troutman Pepper waived the legislative privilege through the testimony of Mr. Tseytlin during the Legislature's public hearings in February, 2023, and through the legal memoranda which were publicly disclosed." R.19, 37. Thus, in the Supreme Court's view, "Mr. Tseytlin's testimony and the memoranda opened the door to inquiry into the redistricting process, including who participated and what was considered by the team assembled by Troutman Pepper to draw legislative redistricting maps for Nassau County." R.19, 37.

Second, in an August 15, 2024 Order, the Supreme Court ordered that "for the reasons stated on the record and in the Court's July 31, 2024

Order . . . Sean Trende and Misha Tseytlin shall produce the documents requested by Plaintiffs in the subpoenas *duces tecum* and *ad testificandum* issued to each witness." R.49, 61.

3. Finally, in an August 7, 2024 Decision And Order, the Supreme Court ordered Defendants to produce in response to Plaintiffs' document requests the material and documents that Defendants had previously withheld on privilege grounds, after the Court finished its in camera review. R.7–8, 25-26. The Court explained that it "found that all of the materials submitted for in camera review by Defendants . . . were discoverable," notwithstanding Defendants' claims of privilege. R.7–8, 25–26. Thus, the Court formally ordered Defendants to produce this material to Plaintiffs. R.7–8, 25–26.

* * *

Defendants, Mr. Tseytlin, and Dr. Trende have now appealed to this Court the Supreme Court's orders compelling Defendants to produce their privileged material and documents in response to Plaintiffs' Document Requests, compelling Mr. Tseytlin to comply with his subpoena, and compelling Dr. Trende to comply with his subpoena. The filing of these appeals triggered the automatic stay under CPLR

§ 5519(a)(1), thereby prohibiting enforcement of the Supreme Court's judgments while this Court considers this appeal.

STANDARD OF REVIEW

Under CPLR § 2304, the Supreme Court may quash an improper subpoena, fix conditions, or modify its scope. Similarly, under CPLR § 3103(a), the Supreme Court may issue a protective order denying, limiting, conditioning or regulating the use of any disclosure device in order to prevent "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person." CPLR § 3103(a). The Supreme Court must grant a motion to quash a subpoena when the movant establishes that the discovery sought is "utterly irrelevant" to the action or that the "futility of the process to uncover anything legitimate is inevitable or obvious," *Kapon v. Koch*, 23 N.Y.3d 32, 38–39 (2014) (citation omitted), because a party may only demand discovery that is "material and necessary in the prosecution or defense of an action," CPLR § 3101(a). Further, "the court may issue a protective order where a discovery demand seeks privileged or irrelevant material," as "unlimited disclosure is not permitted." *Tower Ins. Co. of N.Y. v. Murello*, 68 A.D.3d 977, 977 (2d Dep't 2009) (citations omitted).

This Court, in turn, reviews the Supreme Court's "[d]iscovery determinations," such as its orders on a motion to quash or a motion for a protective order, for an abuse of discretion. *Slapo v. Winthrop Univ. Hosp.*, 186 A.D.3d 1281, 1283 (2d Dep't 2020). This Court may reverse a Supreme Court's discovery order where the Supreme Court has made "an error of law or an improvident exercise of discretion." *Id.* (citation omitted); *see also Vargas v. Lee*, 170 A.D.3d 1073, 1076 (2d Dep't 2019); *accord State v. Post Integrations, Inc.*, 168 A.D.3d 647, 647 (1st Dep't 2019). The Court reviews the Supreme Court's legal conclusions within a discovery order, such as its resolution of legal questions over the scope of privileges and waiver of privileges, de novo. *Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 13 A.D.3d 278, 279 (1st Dep't 2004). Further, "[w]hile the Supreme Court has broad discretion in supervising disclosure, the Appellate Division may [nevertheless] substitute its own discretion for that of the trial court in such matters," *Gonzalo v. Fragomeni*, 221 A.D.3d 586, 587 (2d Dep't 2023), "even in the absence of abuse," *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 11 N.Y.3d 843, 845 (2008).

ARGUMENT

I. Multiple Privilege Doctrines Protect From Disclosure The Testimony And Documents Sought By The Subpoenas And Document Requests

A. Legislative Privilege Protects The Testimony And Documents Sought By The Subpoenas And Document Requests, As The Supreme Court Correctly Held

As an initial matter, the Supreme Court below correctly held that legislative privilege protects the documents and testimony sought by Plaintiffs' subpoena to Mr. Tseytlin, documents and testimony sought by Plaintiffs' subpoena to Dr. Trende, and—by necessary extension of the same reasoning—the material redacted or withheld by Defendants sought by certain document requests from Plaintiffs to Defendants.

1.a. The Speech or Debate Clause of the New York Constitution provides that, "[f]or any speech or debate in either house of the legislature, the members shall not be questioned in any other place." N.Y. Const. art. III, § 11. This Clause gives "at least as much protection [to legislators] as the immunity granted by the comparable provision of the Federal Constitution." *People v. Ohrenstein*, 77 N.Y.2d 38, 53 (1990). Legislators enjoy both "absolute immunity from suit" and "a testimonial privilege for all legitimate legislative activities." *Campaign for Fiscal*

Equity v. State, 687 N.Y.S.2d 227, 231 (Sup. Ct. N.Y. Cnty. 1999), *aff'd*, 265 A.D.2d 277 (1st Dep't 1999); *Campaign for Fiscal Equity, Inc. v. State*, 265 A.D.2d 277, 278 (1st Dep't 1999).

"[T]he sphere of legitimate legislative activity" protected by the Speech or Debate Clause is broad. *Larabee v. Governor of State*, 65 A.D.3d 74, 89 (1st Dep't 2009) (citation omitted), *aff'd as modified sub nom.*, *Maron v. Silver*, 14 N.Y.3d 230 (2010). The protected, legitimate legislative activity includes both utterances "made within the four walls of either Chamber" as well as any "committee hearings . . . even if held outside the Chambers." *Oates v. Marino*, 106 A.D.2d 289, 290 (1st Dep't 1984) (citations omitted). Further, legitimate legislative activity "includes other legislative functions such as voting and committee work and even investigations." *Larabee*, 65 A.D.3d at 89 (citations omitted). Indeed, all "acts that are an integral part of the deliberative and communicative processes by which [legislators] participate in . . . proceedings with respect to the consideration and passage or rejection of proposed legislation," including their underlying motivations, fall within the legislative immunity and privilege recognized by the Speech or Debate Clause. *Straniere v. Silver*, 218 A.D.2d 80, 83 (3d Dep't 1996)

(citation omitted); *Maron v. Silver*, 871 N.Y.S.2d 404, 418 (3d Dep't 2008), *aff'd as modified*, 14 N.Y.3d 230 (2010); *accord Ohrenstein*, 77 N.Y.2d at 54; R.1182–87 (summarizing relevant Court of Appeals' and Appellate Division precedent).

The Speech or Debate Clause's legislative immunity and legislative privilege extend to third parties that a legislator engages to assist in the legislator's legitimate legislative activity. *See Campaign for Fiscal Equity*, 687 N.Y.S.2d at 231–32. A legislator may, for example, relying upon aides, consultants, and experts to craft and evaluate proposed legislation is "an integral part of the deliberative and communicative process" of "consider[ing]" and voting upon such legislation, *Straniere*, 218 A.D.2d at 83 (citation omitted)—especially when considering legislation in complex areas of the law, *see Gravel v. United States*, 408 U.S. 606, 616 (1972). Accordingly, "[a]n aide may assert the [legislative] privilege on behalf of a state official acting in a legislative capacity. *Campaign for Fiscal Equity*, 687 N.Y.S.2d at 231–32 (citing *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967)); *accord Gravel*, 408 U.S. at 616 ("[T]he day-to-day work of such aides is so critical to the [legislators'] performance that they must be treated as the latter's alter egos [for

purposes of legislative privilege].”). Thus, as the Supreme Court correctly held below, “legislative privilege should be extended to consultants and experts who are retained by a legislator to assist in their legislative functions.” R.100.

b. As the Supreme Court also correctly held, *see* R.100; *see also* R.1196, the same legislative immunity and privilege applies to county legislators—and, by extension, their aides, consultants, or experts—under New York’s well-established common-law principles, *see Felder v. Foster*, 71 A.D.2d 71 (4th Dep’t 1979); *Humane Soc’y of N.Y. v. City of New York*, 729 N.Y.S.2d 360, 363 (Sup. Ct. N.Y. Cnty. 2001).

In New York, “[t]he scope of the legislative privilege . . . turns upon *the legislative nature of the activity* sought to be protected from inquiry or disclosure under the privilege.” R.1196–97 (emphasis added). County legislatures operate as legislative bodies for county government and exercise the same deliberative lawmaking functions and member oversight as the New York Legislature does for the State as a whole. *See, e.g.*, Nassau Cnty. Charter, *supra*, §§ 102–03. So, because state-level legislators enjoy legislative privilege under New York law, county-level

officials like members of the Nassau County Legislator enjoy this privilege as well. R.1196–97.

Similarly, "the rationales for providing absolute immunity to legislators at other levels of government are fully applicable to local legislators," R.1197, as both exercise "legislative discretion" that "should not be inhibited by judicial interference or distorted by the fear of personal liability," R.1188 (quoting *Bogan v. Scott-Harris*, 523 U.S. 44, 49–50 (1998)) (also calling this proposition "well established").

Thus, the Supreme Court was entirely correct to conclude that the "broad protection" of legislative privilege and immunity also applies to county-level lawmakers—and, by extension, their aides, consultants, or experts—guarding them too "against production of documentary evidence and deposition testimony aimed at inquiry into acts which are within the sphere of legitimate legislative activity." R.1194; R.100.

Applying the same legislative privilege and immunity to county legislators that applies to state legislators also makes sense, as a practical matter. Consider just the subject matter of this lawsuit: redistricting. Like the New York State Legislature, county legislatures like Nassau County have the duty to adopt redistricting maps for their

jurisdictions every decade. *Compare* N.Y. Const. art. III, § 4(b), *with* Nassau Cnty. Charter, *supra*, § 112. So, like their state-level counterparts, Nassau County legislators must navigate the many legal requirements for such maps—including the complex social-science analysis required by some of those legal mandates—while still incorporating other legitimate considerations from the community. *See supra* pp.10–11. These county legislators, like their state-level counterparts, may only faithfully complete this difficult obligation if they can exercise their "legislative discretion" free from the "judicial interference" or "fear of personal liability" that comes from contempt-backed discovery requests into their legislative processes and reasoning. R.1188 (citations omitted).

Case law strongly supports the Supreme Court's conclusion. In *Felder*, 71 A.D.2d 71, the Fourth Department analyzed whether the Monroe County Legislature was immune from punitive damages with respect to a Section 1983 claim. *Id.* at 75. The court recognized an "absolute immunity for the county legislators" while "acting in their legislative capacities" and analogized to federal precedent recognizing that "immunity extends to regional legislators" with underpinnings in

the Speech or Debate Clause, historical legislative immunity predating the constitution, and the fact that legislatures maintain internal procedures to punish members. *Id.* at 75–76. Similarly, in *Humane Society*, 729 N.Y.S.2d 360, the New York County Supreme Court applied a "similar common law legislative privilege" as the protection of the Speech or Debate Clause to a local executive branch board that was "engaged in legislative activities." *Id.* at 363. In doing so, the court noted that the common law privilege "functions as an evidentiary and testimonial privilege." *Id.*

2. Here, the Supreme Court correctly concluded that the protections of legislative privilege apply to the materials and testimony sought by Plaintiffs' subpoena to Mr. Tseytlin, materials and testimony sought by Plaintiffs' subpoena to Dr. Trende, and, by necessary extension, the material redacted or withheld by Defendants themselves in response to certain document requests from Plaintiffs. Most prominently, that decision correctly includes within the sphere of legislative privilege all of the advice and analysis that Troutman Pepper and Dr. Trende provided to the Presiding Officer on each of the draft maps submitted to him, including those not publicly considered by the Legislature.

Beginning with Mr. Tseytlin, his work for the Presiding Officer falls within the scope of legislative privilege because the Presiding Officer engaged him and Troutman Pepper to assist the Presiding Officer with developing draft legislation—namely, the redistricting maps that the Presiding Officer proposed to the Legislature for its consideration. *Straniere*, 218 A.D.2d at 83; *Campaign for Fiscal Equity*, 687 N.Y.S.2d at 231–32 (aides of legislator covered); *accord Gravel*, 408 U.S. at 616 (same). Mr. Tseytlin provided legal advice to the Presiding Officer as the Presiding Officer "participate[d] in . . . proceedings with respect to the consideration and passage or rejection of proposed legislation," *Straniere*, 218 A.D.2d at 83, including by providing advice and analysis on draft maps—which are simply draft legislation—that the Presiding Officer was considering submitting to the Legislature, for its consideration. Thus, Mr. Tseytlin's activities here fall within "the sphere of legitimate legislative activity." *Larabee*, 65 A.D.3d at 89. And this is especially so considering the number and complexity of the legal requirements for the County's redistricting map, necessitating reliance on the advice of legal counsel like Mr. Tseytlin. *Gravel*, 408 U.S. at 616.

The analysis for Dr. Trende is the same. Dr. Trende's work consisted of considering and analyzing draft redistricting maps—again, draft legislation—that the Presiding Officer was considering submitting to the Legislature, for its consideration. Thus, Dr. Trende's work for the Presiding Officer was "an integral part" of the Presiding Officer's considering "proposed legislation." *Straniere*, 218 A.D.2d at 83. Accordingly, Dr.'s Trende's consideration of draft maps, analyses of draft maps, and his communications with Troutman Pepper regarding such draft maps, for example, all fall within "the sphere of legitimate legislative activity" protected by legislative privilege. *Larabee*, 65 A.D.3d at 89; *Straniere*, 218 A.D.2d at 83

The material redacted or withheld by Defendants themselves in response to certain document requests from Plaintiffs also falls within the sphere of legislative privilege, for the same reasons. All of these materials relate to actions underlying the legislative process of drawing either Local Law 1, the other redistricting maps that the Presiding Officer proposed but the Legislature did not adopt, and/or other draft maps considered by the Presiding Officer. *See, e.g.*, R.80–82. Thus, this material is plainly "an integral part of the deliberative and

communicative processes by which [legislators] participate in . . . proceedings with respect to the consideration and passage or rejection of proposed legislation," and so is protected by legislative privilege. *Straniere*, 218 A.D.2d at 83 (citation omitted).

B. Attorney-Client Privilege And The Work-Product Doctrine Also Protect The Testimony And Documents Sought By The Subpoenas And Document Requests, Contrary To The Supreme Court's Conclusions Below

Attorney-client privilege and the work-product doctrine also protect the documents and testimony sought by Plaintiffs' subpoena to Mr. Tseytlin, documents and testimony sought by their subpoena to Dr. Trende, and the material redacted or withheld by Defendants sought by certain document requests from Plaintiffs to Defendants themselves.

1. Attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Stock v. Schnader Harrison Segal & Lewis LLP*, 142 A.D.3d 210, 215 (1st Dep't 2016) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). New York has codified the attorney-client privilege at CPLR § 4503, providing that, "[u]nless the client waives the privilege," attorneys "shall not disclose" confidential communications with the client. CPLR § 4503(a)(1). The New York Legislature designed CPLR § 4503 to

"foster[ ] uninhibited dialogue between lawyers and clients in their professional engagements, thereby ultimately promoting the administration of justice." *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 592 (1989). As the Court of Appeals has recently explained, the communications protected by the attorney-client privilege include "those communications made in anticipation of litigation or an exchange of confidential information during a pending action," as well as "legal advice to assist the client in deciding how best to order their affairs in compliance with legal mandates, including what action, if any, to take in order to avoid litigation." *App. Advocs. v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 40 N.Y.3d 547, 553 (2023).

The work-product doctrine—enshrined in CPLR § 3101(c)—is separate, but related to, attorney-client privilege. Under CPLR § 3101(c), "[t]he work product of an attorney shall not be obtainable" through discovery "in the prosecution or defense of an action." CPLR § 3101(a)–(c). The work product protected by the work-product doctrine comes in "countless [ ] tangible and intangible ways." *Charter One Bank, F.S.B. v. Midtown Rochester, L.L.C.*, 738 N.Y.S.2d 179, 185 (Sup. Ct. Monroe Cnty. 2002) (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)). At its core,

however, materials that are "adjunct to the lawyer's strategic thought processes" are completely exempt from disclosure via discovery under this doctrine. *Oakwood Realty Corp. v. HRH Constr. Corp.*, 51 A.D.3d 747, 749 (2d Dep't 2008) (citation omitted).

Attorney-client privilege and work-product doctrine extend beyond attorneys themselves to include materials produced by consultants and experts that attorneys retain in the course of representing a client. The privilege extends to communications with "one serving as an agent of either attorney or client," such as a litigation consultant. *Hudson Ins. Co. v. Oppenheim*, 72 A.D.3d 489, 489–90 (1st Dep't 2010) (citation omitted). And courts in New York have held that "an expert who is retained as a consultant to assist in analyzing or preparing the case . . . [is] generally seen as an adjunct to the lawyer's strategic thought processes, thus qualifying for complete exemption from disclosure under" CPLR § 3101(c). *Santariga v. McCann*, 161 A.D.2d 320, 321 (1st Dep't 1990) (citation omitted); *see Oakwood Realty Corp.*, 51 A.D.3d at 749 (adopting and applying *Santariga*'s holding on this issue). Therefore, documents created by a litigation consultant for purposes of the litigation for which the consultant was retained are exempt from disclosure

through discovery, as such documents "would not have existed but for the litigation consultancy." *Delta Fin. Corp. v. Morrison*, 827 N.Y.S.2d 601, 607 (Sup. Ct. Nassau Cnty. 2006).

2. Here, the attorney-client privilege and the work-product doctrine protect the materials and testimony sought by Plaintiffs' subpoena to Mr. Tseytlin, materials and testimony sought by Plaintiffs' subpoena to Dr. Trende, and the material redacted or withheld by Defendants themselves in response to certain document requests from Plaintiffs.

As for Mr. Tseytlin, his subpoena from Plaintiffs seeks materials central to his provision of legal services to the Presiding Officer, thus attorney-client privilege and the work-product doctrine straightforwardly apply. Mr. Tseytlin's work for the Presiding Officer was an attorney advising on the legal requirements for the Legislature's redistricting efforts, R.316, 629–30, triggering the protections of both attorney-client privilege, *see* CPLR § 4503; *Rossi*, 73 N.Y.2d 592; *App. Advocs.*, 40 N.Y.3d at 553, and the work-product doctrine, CPLR § 3101(c); *Charter One Bank*, 738 N.Y.S.2d at 185; *Oakwood Realty Corp.*, 51 A.D.3d at 749. Indeed, Mr. Tseytlin's communications with the Presiding Officer and the materials that Mr. Tseytlin—at times, in

conjunction with Dr. Trende—prepared for the Presiding Officer were both "in anticipation of litigation" over the County's redistricting map and "in order to avoid [additional] litigation" over that map, *App. Advocs.*, 40 N.Y.3d at 553, given the certainty of at least some legal challenges to the County's map, *see* R.737; *accord* R.1101.

As for Dr. Trende, his subpoena from Plaintiffs also seeks materials protected by attorney-client privilege and the work-product doctrine. Troutman Pepper retained Dr. Trende to make possible its own provision of legal advice to the Presiding Officer, given that some of the legal requirements for redistricting maps require the performance of complicated social-science analyses—analyses that is the expertise of Dr. Trende. R.316. That is, Troutman Pepper engaged Dr. Trende to assist it with providing legal advice to the Presiding Officer as he navigated the redistricting process with the Legislature, all in the shadow of continual threats of litigation. Dr. Trende thus qualifies as the "agent" or litigation "consultant" of Troutman Pepper, *Hudson Ins. Co.*, 72 A.D.3d at 489–90, who likewise receives the protections of attorney-client privilege, *id.*, and the work-product doctrine, *Santariga*, 161 A.D.2d at 321; *Oakwood Realty Corp.*, 51 A.D.3d at 749. So, to the extent that Plaintiffs' subpoena

to Dr. Trende seeks Dr. Trende's communications, documents, social science analyses, or discussions with Troutman Pepper regarding the Legislature's redistricting process, the subpoena would seek testimony and material falling under the attorney-client privilege and work-product doctrine, as they were prepared *because of* Dr. Trende's engagement by Troutman Pepper, *Delta Fin. Corp.*, 827 N.Y.S.2d at 607, so that Troutman Pepper could provide legal counsel to the Presiding Officer, *Hudson Ins. Co.*, 72 A.D.3d at 489–90.

Finally, and for the same reasons, the material redacted or withheld by Defendants themselves in response to certain document requests from Plaintiffs is also protected by attorney-client privilege and the work-product doctrine. As explained, this redacted or withheld material comprises discussions between Defendants' counsel, Mr. Tseytlin, and Defendants' litigation and consulted expert, Dr. Trende, regarding the Legislature's redistricting process. *See, e.g.*, R.82–83. Thus, this material either constitutes or otherwise concerns Troutman Pepper's legal advice and work-product provided to the Presiding Officer in advance of, and in consideration of, legal challenges to the enacted redistricting map. *See, e.g.*, R.82–83. That is material

that is core to the protections of the attorney-client privilege, *see* CPLR § 4503; *Rossi*, 73 N.Y.2d 592; *App. Advocs.*, 40 N.Y.3d at 553, and the work-product doctrine, CPLR § 3101(c); *Charter One Bank*, 738 N.Y.S.2d at 185; *Oakwood Realty Corp.*, 51 A.D.3d at 749.

3. The Supreme Court's conclusion in its July 31, 2024 Decision And Order that attorney-client privilege and the work-product doctrine do not apply appeared to turn upon its (mistaken) classification of "drawing the proposed maps" as "non-legal work." R.94–95 (addressing Mr. Tseytlin); *see* R.96–97 (addressing Dr. Trende). That is, the Supreme Court apparently considered "draw[ing] a redistricting map that could be utilized to determine the legislative districts for the then upcoming election" to be "not of a legal character" and so outside of attorney-client privilege and the work-product doctrine. R.94–97.

The Supreme Court was simply mistaken regarding the nature of Mr. Tseytlin's and Dr. Trende's role in the Legislature's redistricting process here. Mr. Tseytlin provided the Presiding Officer with legal advice during the map-drawing process to ensure that the Legislature's map complies with all applicable legal requirements, while mitigating the certain threats of litigation against the map as much as possible. *See*

App. Advocs., 40 N.Y.3d at 553. Dr. Trende, in turn, considered and analyzed proposed maps by performing the complicated social-science analyses required to comply with certain legal requirements for redistricting—work that likewise ensured that the Legislature's map was lawful and reduced the threat of litigation where possible. *See id.*

While the Supreme Court pointed to testimony from Mr. Tseytlin at the Legislature's February 16, 2023 meeting apparently to speculate that Mr. Tseytlin "dr[e]w the maps," R.94–95, that reliance was misplaced and would not support the Supreme Court's broad conclusion in any event. Mr. Tseytlin testified at this hearing that "*Troutman Pepper*[,] working together with the Presiding Officer, put together the map," R.657 (emphasis added)—by which Mr. Tseytlin meant that he gave the Presiding Officer legal advice on proposed maps, while the Presiding Officer provided input regarding communities of interest in Nassau County. So, while Mr. Tseytlin did not perform the technical steps of drawing the lines in the Presiding Officer's proposed map (just as Dr. Trende did not perform that work), R.456–57; *see also* R.580–81, at the absolute minimum, the Supreme Court clearly legally erred in extending its mistaken conclusion about map-drawing to cover the

entirety of Mr. Tseytlin's and Dr. Trende's work for the Presiding Officer. At most, and putting aside the protections of legislative privilege, *but see supra* Part I.A, Plaintiffs could ask Mr. Tseytlin and Dr. Trende whether they performed the technical act of drawing the lines for the Presiding Officer's proposed maps: that would be a short deposition indeed, as the answer would be that they did not do this work.

Finally, the Supreme Court also briefly supported its attorney-client-privilege decision by noting that "[w]hen Dr. Trende was retained, litigation [over the redistricting map] was far from a certainty; it was only a remote possibility, if at all." R.97. While this too is factually incorrect—given the threat of immediate lawsuits during the redistricting process here, *see* R.623; *accord* R.1101—it is also legally erroneous, as the protections of attorney-client privilege also apply to advice designed "to *avoid* litigation," *App. Advocs.*, 40 N.Y.3d at 553.

II. To The Extent Any Waiver Of Any Privilege Occurred, Such Waiver Was Limited Only To The Specific Items Discussed In The Two Public Memoranda And The Related Testimony, As The Supreme Court Had Previously Held In Its Order Relating To The Presiding Officer's Deposition

The Supreme Court held that, although legislative privilege protected all of the material and testimony sought by Plaintiffs' subpoena

to Mr. Tseytlin, their subpoena to Dr. Trende, and certain of their document requests to Defendants themselves, the Presiding Officer had comprehensively waived that privilege by offering the Troutman Pepper memoranda to the public the related public testimony of his counsel Mr. Tseytlin. This was clear legal error. The Presiding Officer's offering of this memoranda and testimony to the public at most only narrowly waived privilege to the specific items in the memoranda and testimony.

A. The holder of a privilege like legislative privilege, attorney-client privilege, or the work-product doctrine, may waive that privilege through disclosures to the public or a third party. *See, e.g.*, CPLR § 4503(a)(1) (attorney-client privilege; *Loudon House LLC v. Town of Colonie*, 123 A.D.3d 1409, 1411 (3d Dep't 2014) (same); *Charter One Bank,* 738 N.Y.S.2d at 186 (work-product doctrine); *Campaign for Fiscal Equity*, 687 N.Y.S.2d at 230 (legislative privilege). When confronted with a question of the waiver of a privilege, courts must carefully consider the scope of a privilege waiver to determine what previously privileged information is now discoverable. *See Geary v. Hunton & Williams*, 245 A.D.2d 936, 939 (3d Dep't 1997).

Importantly, waiver of a privilege may proceed on a document-by-document or communication-by-communication basis. So, a privilege protecting a "communication or [ ] underlying factual information" may be waived if that "communication or [ ] underlying factual information is publicly disclosed or made to third parties." *Empire Chapter of Associated Builders & Contractors, Inc. v. N.Y. State Dep't of Transp.*, 211 A.D.3d 1155, 1158 (3d Dep't 2022); *see also Charter One*, 738 N.Y.S.2d at 186 ("The disclosure of a document protected by the work-product rule does not result in a waiver of the privilege as to other documents." (citation omitted)). This means that, for example, the disclosure of a portion of a privileged report does not necessarily trigger the waiver of the privilege that may attach to other portions of that report. *See Empire Chapter*, 211 A.D.3d at 1158; *Loudon House LLC*, 123 A.D.3d at 1411; *accord Parnes v. Parnes*, 80 A.D.3d 948, 950 (3d Dep't 2011) (finding privilege waived as to "a single printed page of a five-page e-mail"). Thus, a public disclosure that "virtually parroted [a privileged] study's analysis and findings" will result in the "waive[r] [of] the privilege *with respect to this information*." *Empire Chapter*, 211 A.D.3d at 1158 (emphasis added). A public disclosure will "constitute a waiver of the privilege

protection the contents of [a] report" "[t]o the extent that the [public disclosure] parrots the analysis set forth in the report." *Loudon House LLC*, 123 A.D.3d at 1411.

B. Here, the Presiding Officer's release of the two Troutman Pepper memoranda and authorization of the testimony of Mr. Tseytlin did not result in any waiver of privilege beyond, at most, the materials that Defendants have already disclosed. The Presiding Officer's release of the two Troutman Pepper memoranda and the testimony of Mr. Tseytlin waived, at the very most, the privilege that attached to those memoranda and testimony themselves as well as other material that "virtually parrot[ ]" the "analysis and findings" in the memoranda and testimony. *Empire Chapter*, 211 A.D.3d at 1158; *Loudon House LLC*, 123 A.D.3d at 1411. So, for example, any even arguable waiver here would apply only Troutman Pepper's and Dr. Trende's analyses and conclusions regarding the proposed redistricting maps discussed in the memoranda and testimony, as well as other material that virtually parroted those same analyses and conclusions with respect to those maps. *See Empire Chapter*, 211 A.D.3d at 1158; *Loudon House LLC*, 123 A.D.3d at 1411. Such waiver would *not* cover, *inter alia*, Troutman Pepper's and

Dr. Trende's analyses or conclusions regarding other proposed redistricting maps not discussed in the memoranda and testimony. *See Empire Chapter*, 211 A.D.3d at 1158; *Loudon House LLC*, 123 A.D.3d at 1411.

The limited scope of any waiver here is precisely the same as the scope of the waiver that the Supreme Court found in its June 7, 2024 Order with respect to the Presiding Officer himself—*based on the public release of the exact same memoranda and testimony here*. Both there and here, the waiver is " strictly limited to the information that has already been publicly disclosed through [the memoranda and testimony]," R.1203, consistent with the rule that waiver may proceed on a document-by-document or communication-by-communication basis, *Empire Chapter*, 211 A.D.3d at 1158; *Charter One*, 738 N.Y.S.2d at 186; *Loudon House*, 123 A.D.3d at 1411; *accord Parnes*, 80 A.D.3d at 950. And, both there and here, the waiver does *not* extend to "motivations or deliberations concerning creation of the 2023 Map, any iterations thereof, or any prior maps that were presented to [Mr. Tseytlin or Dr. Trende]," or to "other facets of the redistricting process which were not discussed

in the Troutman memoranda or at the hearing," R.1203—again consistent with the document-by-document rule.

Finally, Defendants have already disclosed all of the material and more that would fall within any waiver here. The Presiding Officer shared the memoranda and the testimony itself with the public. *See supra* pp.11–15. Further, Defendants have also shared the underlying data and analyses relating to the three publicly disclosed maps that the Presiding Officer proposed to the Legislature for its consideration, as well as Dr. Trende's communications conveying his analysis of the maps discussed in the memoranda. *See supra* pp.17–18. Thus, even if a waiver did apply to some limited extent, Defendants have already released all previously privileged information within the scope of that waiver.

C. The Supreme Court concluded that the release of the Troutman Pepper memoranda and the offering of the testimony of Mr. Tseytlin resulted in a comprehensive waiver of legislative privilege "that opens the door to full and proper inquiry as to what maps were considered by [Dr.] Trende, what information was considered by [Dr.] Trende, who he consulted with, if anyone, and the same would be with respect to Mr. Tseytlin." R.195–96; *see also* R.19, 37, 100 ("Mr. Tseytlin's testimony

and the memoranda opened the door to inquiry into the redistricting process, including who participated and what was considered by the team assembled by Troutman Pepper to draw legislative redistricting maps for Nassau County.") The Supreme Court's broad waiver conclusion is incorrect and would gut the protections of the privilege doctrines, as a practical matter.

To begin, the Supreme Court's broad waiver holding is wrong as a matter of waiver legal principles. As explained above, analyzing the scope of waiver requires a careful consideration into precisely what privileged information was waived, *see Geary*, 245 A.D.2d at 939, and may proceed on a document-by-document or communication-by-communication basis, *Empire Chapter*, 211 A.D.3d at 1158; *Charter One*, 738 N.Y.S.2d at 186; *Loudon House*, 123 A.D.3d at 1411; *accord Parnes*, 80 A.D.3d at 950. Thus, waiver principles provide that the public disclosure of a piece of privileged information only results in "waive[r] [of] the privilege *with respect to this information*." *Empire Chapter*, 211 A.D.3d at 1158 (emphasis added). Yet here, the Supreme Court concluded that the Presiding Officer's disclosure of a few parts of the redistricting process via the memoranda and testimony "open[s] the door"

to a freer-ranging inquiry into any and all privileged material about the redistricting process, R.19, 37—directly contrary to the legal principles of waiver.

The only case that the Supreme Court cited to support its broad waiver conclusion—*Empire Chapter*—undermines the Court's expansive approach to waiver. *See* R.100. The Supreme Court understood *Empire Chapter* to hold that a "more limited oral presentation [of privileged study] provided enough information from the study to waive the privilege and require that the entire study be turned over." R.103–04. But *Empire Chapter* made clear that the public disclosure at issue "*virtually parroted* the study's analysis and findings," so as to trigger waiver of the privilege over the study itself. 211 A.D.3d at 1158 (emphasis added). So, where there is no "virtual[ ] parrot[ing]" of privileged material by a public disclosure, that public disclosure does not waive the privilege as to that other privileged material. *See id.* *Loudon House LLC* reaffirms that point, as there the court explained that a public disclosure "may well constitute a waiver of the privilege protecting the contents of [a] report" "*[t]o the extent that* the oral presentation parrots the analysis set forth in the report." 123 A.3d at 1411 (emphasis added); *contra* R.103–04.

Here, nothing in the Troutman Pepper memoranda or in Mr. Tseytlin's testimony "virtually parroted" the wide swathe of privileged information that the Supreme Court ordered disclosed. *Empire Chapter*, 211 A.D.3d at 1158; *Loudon House LLC*, 123 A.D.3d at 1411. For example, nothing in the memoranda or testimony disclosed "who [Dr. Trende or Mr. Tseytlin] consulted with" or "what [draft] maps" they considered, beyond the proposed maps publicly presented to the Legislature. R.195–96. Thus, all of that undisclosed information remains protected by the multiple privileges discussed above notwithstanding the release of the memoranda and testimony—rather than, as the Supreme Court held, becoming the object of a "full and proper inquiry" via adversarial litigation, R.195–96.

The Supreme Court's capacious waiver decision here is again contrary to its June 7, 2024 Decision And Order, addressing waiver with respect to the Presiding Officer himself. R.1201–03. There, the Court rightly held that—despite its finding that the Presiding Officer had waived legislative privilege through the release of the memoranda and the testimony of Mr. Tseytlin—Plaintiffs could not question the Presiding Officer "as to his motivations or deliberations concerning

creation of the 2023 Map, any iterations therefor, or any prior maps that were presented to him." R.1203. Instead, waiver was "*strictly limited* to the information that has already been publicly disclosed through" the memoranda and the testimony, lest the Court's decision "completely gut the legislative privilege." R.1203 (emphasis added).

Notably, the Supreme Court's broad waiver conclusion here subverts its prior order addressing the Presiding Officer, as it allows Plaintiffs to inquire into the very material that the Court found protected with respect to the Presiding Officer. For example, in that prior order, the Supreme Court held that the Presiding Officer could not "be questioned" as to "any iterations" of the "2023 Map" or "any prior maps that were presented to him" that "were not discussed in the Troutman memoranda or at the hearing." R.1203. Yet under the decisions here, Plaintiffs may question Mr. Tseytlin and Dr. Trende over what draft maps were presented to the Presiding Officer and what legal advice Mr. Tseytlin—with the assistance of Dr. Trende's social-science analyses—gave to the Presiding Officer on these draft maps, *although the drafts were not included in the publicly disclosed memoranda or testimony*. *See* R.195–96.

Finally, as a practical matter, the Supreme Court's aggressive view of waiver—that a limited disclosure of an attorney's legal or factual analysis broadly waives privilege as to an entire field of material and the entire scope of legal advice provided—would lead to unacceptable results. Lawyers often appear and testify at official public hearings on behalf of their clients to advocate for their clients' particular causes—including legislative hearings over proposed legislation, *see, e.g.*, N.Y. C.L. Union, *Testimony Regarding the How Many Stops Act and Other Proposed Legislation* (Mar. 31, 2023);[9] legislative-committee sessions designed to study particular subjects that may be ripe for regulation, *see, e.g.*, Am. C.L. Union, *Testimony of Robin Dahlberg, Senior Staff Attorney with the ACLU Racial Justice Program, Before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security* (Mar. 26, 2009),[10] or proceedings before local government bodies considering more local issues, like a zoning board, *see, e.g.*, Township of Montclair, NJ, *Attend a Public*

[9] Available at https://www.nyclu.org/resources/policy/testimonies/testimony-regarding-how-many-stops-act-and-other-proposed-legislation.

[10] Available at https://www.aclu.org/documents/testimony-robin-dahlberg-senior-staff-attorney-aclu-racial-justice-program-house-judiciary?redirect=cpredirect/39154.

Hearing.[11] In each of these circumstances—and many others—the lawyer will surely provide at least some legal and/or factual analysis germane to the topic at hand at the behest of his client, so as to further his client's interests. Yet, under the Supreme Court's view here, even those limited disclosures would trigger a waiver of privilege as to the entire subject matter, "open[ing] the door" in future litigation to a "full and proper inquiry" into "what information" the lawyer and his consultants considered, "who he consulted with," "who participated, what was considered, what was rejected, and the like." R.195–96.

III. At A Minimum, The Court Should Order The Quashing Of The Subpoena To Mr. Tseytlin, As Plaintiffs Did Not Meet The Heightened Burden To Seek Discovery From Counsel Of Record

A. New York law requires parties who issue subpoenas to their adversary's counsel of record to carry a heightened burden before those subpoenas will be enforced by the court. Thus, as this Court has held, a party seeking to depose its adversary's counsel must, in addition to showing that the sought-after information is material and necessary, also

[11] Available at https://www.montclairnjusa.org/Government/Departments/Planning-Community-Development/Land-Use-Boards-Commissions/Attend-a-Public-Hearing.

demonstrate a "good faith basis" for the subpoena. *Kim v. Bae*, 198 A.D.2d 206, 207 (2d Dep't 1993); *Frybergh v. Kouffman*, 119 A.D.2d 541, 541 (2d Dep't 1986). The First Department has reached the same conclusion, while further holding that such a heightened burden is necessary to avoid "the mischief that can be caused by noticing the deposition of an attorney who has appeared in the litigation." *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401, 406 (1st Dep't 2018). "[I]n the unusual situation where a party seeks to depose opposing counsel . . . the party seeking the deposition must show that the deposition is necessary because the information is not available from another source." *Id.* Lower courts within this Department have followed *Liberty Petroleum*, including by finding that the availability of the sought-after information from other sources shows a lack of a party's good-faith basis for a subpoena to its adversary's counsel of record. *See Ajax Mortg. Loan Tr. 2019-C v. Seneca Mgmt. Corp.*, No. 723696/2021, 2022 N.Y. Misc. LEXIS 22495, at *3 (Sup. Ct. Queens Cnty. Nov. 30, 2022) ("Defendant [ ], however, failed to demonstrate a good faith basis in seeking to subpoena [the] attorney[ ], particularly since this

information was not in the exclusive control of [the] attorney.") (citing *Liberty Petroleum*, 164 A.D.3d at 401)).

B. Here, at a minimum, this Court should quash Plaintiffs' subpoena to Mr. Tseytlin because Plaintiffs cannot meet their heightened burden to show a "good faith" basis to subpoena Mr. Tseytlin—the counsel of record for Plaintiffs' adversaries in this very case—that would justify the highly irregular step of taking his deposition and obtaining other discovery from him. To begin, the information and testimony that Plaintiffs' seek from Mr. Tseytlin are "available from another source," *Liberty Petroleum*, 164 A.D.3d at 406—namely Defendants themselves and/or Dr. Trende—and either have been, or will be, produced in due course in response to Plaintiffs' other discovery requests (with the scope of Dr. Trende's disclosure determined by the disposition of this appeal). So, for this reason alone, Plaintiffs cannot satisfy their heightened burden necessary to take the "usual" tactic of "seek[ing] to depose" and obtain other discovery from "opposing counsel." *Liberty Petroleum*, 164 A.D.3d at 406.

And, more generally, there is no "good faith basis" for Plaintiffs' "mischief" of issuing this subpoena against Mr. Tseytlin,

notwithstanding its flagrant violations of attorney-client privilege. *Id.* Any value of the information that might arise from pursuing this subpoena of Mr. Tseytlin—whatever that may be—is not "worth the substantial costs associated with" deposing opposing counsel, *id.* at 406–07—costs like the revealing of privileged information and the associated chilling effect that such disclosure will have on legislators' ability to receive complete and candid advice from counsel. Further, while Plaintiffs properly committed not to move for Mr. Tseytlin's disqualification based upon their attempt to take discovery from him, R.478–79; *compare Liberty Petroleum*, 164 A.D.3d at 406–07, the deposition of Mr. Tseytlin itself would still serve as a needless distraction as Defendants prepare for fast-approaching expert-deposition deadlines of September 30, 2024; multiple, fast-moving summary-judgment deadlines beginning October 21, 2024; and trial dates of December 9–20, 2024, *see* R.180, 196.

C. The Supreme Court declined to apply the heightened-burden requirement in its July 31, 2024 Decision And Order, but, respectfully, the Court did not adequately engage with the authorities Defendants and Appellants Non-Parties' marshalled in support of this requirement. *See*

generally R.93. Rather, the Court recounted the argument that Defendants and Appellants Non-Parties made below and then—in a footnote only—briefly attempted to distinguish *Ajax*, a case from a Supreme Court in this Division that had applied *Liberty Petroleum*'s good-faith-basis requirement to quash a subpoena issued by one party against the counsel of its adversary. *See* R.93. Even that attempt to distinguish *Ajax* is unpersuasive, however, as the court there applied *Liberty Petroleum*, *see Ajax Mortg.*, 2022 N.Y. Misc. LEXIS 22495, at *3, even as the court also concluded that the subpoena sought irrelevant information, *compare id.*, *with* R.93.

CONCLUSION

This Court should reverse the orders of the Supreme Court and remand with instructions for the Supreme Court to: (1) issue a protective order as to the material submitted by Defendants for the Supreme Court's in camera review; (2) quash the subpoena to Mr. Tseytlin and issue an appropriate protective order; and (3) quash the subpoena to Dr. Trende and issue an appropriate protective order.

Dated: September 5, 2024

Respectfully submitted,

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