New York Supreme Court

APPELLATE DIVISION – SECOND DEPARTMENT

ACTION NO. I

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, AMILVIRANI, MARY G. VOLOSEVICH, THE NASSAU COUNTY DEMOCRATIC COMMITTEE,

Plaintiffs-Respondents,

-against-

NASSAU COUNTY; THE NASSAU COUNTY LEGISLATURE,

Defendants-Appellants,

(Caption Continued on the Next Page)

JOINT BRIEF OF PLAINTIFFS-RESPONDENTS IN ACTION NOS. I AND II

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Dated: September 13, 2024
New York, N.Y.

Appellate Division, Second Department Docket Nos.
2024-07766, 2024-07814 and 2024-08410
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,

and

MISHA TSEYTLIN AND SEAN TRENDE,

Non-Party Appellants,

ACTION NO. II

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, THE NASSAU COUNTY BOARD OF ELECTIONS, 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,

THE NASSAU COUNTY BOARD OF ELECTIONS, JOSEPH J. KEARNY, in his official capacity as commissioner of the Nassau County Board of Election, and JAMES P. SCHEUERMAN, in his official capacity as commissioner of the Nassau County Board of Elections,

Defendants,

and

MISHA TSEYTLIN AND SEAN TRENDE,

Non-Party Appellants.

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QUESTIONS PRESENTED

Question 1: Whether Supreme Court abused its discretion when it ruled that the Presiding Officer waived his privileges when he authorized the disclosure of his redistricting consultants' work?

Answer 1: No.

Question 2: Whether Supreme Court abused its discretion when it ruled that map-drawing is nonlegal work that is not shielded from disclosure merely because it was performed by a lawyer?

Answer 2: No.

Question 3: Whether, as an alternative basis for affirming Supreme Court's disclosure orders, claims of legislative privilege should yield where, as here, objective evidence in the record shows that the challenged map was enacted with illicit partisan and discriminatory racial intent?[1]

Answer 3: Yes.

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[1] Supreme Court found that legislative privilege extended to consultants (R.100), but did not reach Plaintiffs' argument that evidence of intentional discrimination vitiated that privilege with respect to Mr. Tseytlin and Dr. Trende (R.98). As an alternative basis to affirm the orders on appeal, Plaintiffs raise this argument that Supreme Court did not reach. Plaintiffs disagree with but did not appeal from the ruling that legislative privilege can apply to Mr. Tseytlin and Dr. Trende.

Question 4: Whether Supreme Court clearly erred in finding that Mr. Tseytlin played a "key role" in drawing the challenged map and abused its discretion in ordering his deposition?

Answer 4: No.

PRELIMINARY STATEMENT

This Court should affirm Supreme Court's orders allowing discovery from two key consultants hired to redraw the challenged Nassau County legislative map and compelling disclosure of previously redacted documents created by these consultants.

Since the Legislature's creation in 1994, the Nassau County Legislature has intentionally drawn majority-minority districts in an effort to comply with laws prohibiting racial vote dilution. That changed in 2023. With the County's Black, Latino, and Asian populations increasing (and the population of white residents decreasing) over the last decade, the present map, at issue here, should have been drawn with districts to ensure the votes of these growing communities of color were not diluted. But, instead, for the first time in its history, the Legislature claimed it had no obligation to draw any majority-minority districts at all under either the John R. Lewis Voting Rights Act of New York (NYVRA) or the federal Voting Rights Act of 1965 (VRA). Rather, the Legislature insisted that it could—and, in fact, should—draw a "race blind" map.

The justification for the Nassau County Legislature's abrupt change in course was the say-so of the mapmakers—including the Non-Party Appellants, Misha Tseytlin, a lawyer at Troutman Sanders and Sean Trende, a consultant—who were retained by the Presiding Officer of the Legislature. In support of the map, Mr. Tseytlin testified before the Legislature for over two hours and the mapmakers publicly released two lengthy memoranda. These public statements extensively referenced the work of Dr. Trende in claiming that this proposed race-blind map—as well as prior iterations of the map—were fair from both a racial and partisan perspective. But, these public statements stopped conspicuously short. While sharing the conclusions of the mapmakers' analysis and some self-serving charts and memos, the Presiding Officer and Mr. Tseytlin denied the public and Democratic lawmakers access to critical information undergirding those memos, charts, testimony, and their various claims. And now e-mails and analyses obtained through discovery and other evidence in the record reveal these proposed maps, including the challenged map, to be racially discriminatory and a partisan gerrymander favoring Republicans.

For the reasons set forth below, the attorney-client privilege and legislative privilege cannot justify this lack of transparency. Indeed, the manner in which the legislature has abused the privileges here—using a law firm to shroud foundational information about the map in privilege while sharing with the public only what it

wanted to share—underscores the grave precedent the Presiding Officer, Mr. Tseytlin, and Dr. Trende seek to create here.

First, Supreme Court providently exercised its discretion to find a waiver of privilege concerning Mr. Tseytlin and Dr. Trende's work in the redistricting process. Supreme Court made its determination on the scope of waiver after a careful examination of the factual record. Second, Supreme Court providently exercised its discretion in finding that attorney-client privilege and work product protection do not apply to Mr. Tseytlin's work in the map-making. Third, as an additional or alternative ground to affirm, objective evidence that the challenged map was enacted with illicit intent—that is, evidence of partisan gerrymandering and racial discrimination in the record—vitiates the claims of legislative privilege over the materials at issue. Indeed, this type of discovery is often ordered in federal challenges to redistricting plans. Finally, Supreme Court providently exercised its discretion in denying Mr. Tseytlin's motion to quash. Mr. Tseytlin's positions as counsel and fact witness with discoverable information is a predicament of Defendants' own making.[2] The Presiding Officer chose to intimately involve Mr. Tseytlin in the map-making process in a role that does not require the unique skills

[2] To maintain consistency with Defendants-Appellants' brief (*see* App. Br. 6), "Plaintiffs" refers to the Plaintiffs-Respondents in both of the related, above-captioned actions and "Defendants" refers to the Defendants-Appellants Nassau County, the Nassau County Legislature, Bruce Blakeman, Michael C. Pulitzer, and Howard J. Kopel.

of a lawyer. The Defendants in this case then chose to retain him as their litigation counsel. A party may not shield material information from discovery simply by laundering it through the involvement of lawyers and consultants. This Court should affirm Supreme Court's orders in full.

COUNTERSTATMENT OF THE CASE

Plaintiffs in the two underlying actions challenge the redistricting plan for the Nassau County Legislature that Defendants enacted in February 2023. Plaintiffs allege that the map dilutes the voting strength of Black, Latinx, and Asian residents of Nassau County, intentionally discriminates against those communities of color, and confers impermissible partisan advantage on Republicans.[3] As Supreme Court found, Sean Trende and Misha Tseytlin played a key role in creating this allegedly unlawful map.

[3] Specifically, the *NYCC* Plaintiffs allege the map dilutes the voting strength of Black, Latinx, and Asian residents in violation of the NYVRA and intentionally discriminates against those communities of color in violation of Section 34 of the Municipal Home Rule Law ("MHRL") (R.246). Both sets of Plaintiffs allege the map is a partisan gerrymander that violates the MHRL (R.246, 203).

I. FACTUAL BACKGROUND

A. Before the Challenged Map, There Had Been a Longstanding Bipartisan Consensus that Nassau County's Map Must Include Majority-Minority Districts to Comply with Legal Protections Against Racial Vote Dilution.

Nassau County's legislative redistricting process takes place every ten years following the federal census (Nassau County Charter § 112 [2]). To facilitate the redistricting process, the County Charter provides that a "temporary districting advisory commission" ("TDAC") may "recommend one or more plans to the county Legislature for dividing the county into legislative districts" (*id.* § 113 [1]–[2]). The Legislature may then "reject, adopt, revise or amend the redistricting plan recommended by the [TDAC] or adopt any other redistricting plan," so long as the adopted plan "meet[s] all constitutional and statutory requirements" (*id.* § 114).

In every redistricting cycle since the Legislature was formed in 1994, Nassau County's legislative maps have included majority-minority districts drawn to comply with the protections against racial vote dilution in the VRA (R.267-68). In the 2012–13 cycle, the Republican-controlled Legislature drew three majority-minority districts, including a Black-Latino coalition district in which Black and Hispanic populations combined to constitute more than fifty percent of the eligible voter population (R.268).

The bipartisan consensus that Nassau County's legislative map must include majority-minority districts continued into the TDAC stage of the 2022–23

redistricting cycle (R.268). Both the Republican and Democratic Commissioners on the TDAC acknowledged the ongoing need for the County to draw districts to protect voters of color against racial vote dilution (R.269). Ultimately, the two sets of Commissioners submitted separate proposed maps to the Legislature (R.87). On January 17, 2023, the Rules Committee of the Legislature advanced both TDAC maps out of committee, with Presiding Officer Nicolello voting for both the Republican Commissioners' map and the Democratic Commissioners' map (R.270).

B. The Legislature Enacts a Map Created by the Presiding Officer, Sean Trende, and Misha Tseytlin, that Disclaimed the Need to Provide Any Majority-Minority Districts.

On February 9, 2023—less than three weeks before the Legislature's final vote—Mr. Nicolello abruptly discarded both TDAC maps and replaced them with his own map (R.88). As Defendants admit, this map did not include a single majority-minority district drawn to comply with legal protections against racial vote dilution (*see* R.712-13).

As Supreme Court found, Mr. Nicolello's map was drawn by a small team that included Mr. Tseytlin, Dr. Trende, and a "consultant" whose name and e-mail address Nassau County redacted from their document productions and privilege logs (R.88 ["Non-party Misha Tseytlin, Esq. of Troutman Pepper played a key role, working closely with a redistricting expert, Dr. Sean Trende, and another individual

whose identity has not been disclosed, to redraw the legislative map for the County"]; *see e.g.*, R.540).

The public record and the limited documents Plaintiffs have obtained thus far in discovery illuminate Mr. Tseytlin's and Dr. Trende's "key role" in creating the map (*id.*). As Mr. Tseytlin stated in his public testimony: "My law firm drew the map with consultation of the Presiding Officer" (R.656; *see also* R.664 ["LEGISLATOR ABRAHAMS: Mr. Tseytlin, let's back up. You drew this map with the with the Presiding Officer, correct? MR. TSEYTLIN: Yes"]).[4] Mr. Tseytlin and his law firm, Troutman Pepper Sanders LLP ("Troutman"), were retained in November 2022 "to help [Presiding Officer Nicolello] draw a new map" (R.88)—well before the Rules Committee even voted on the maps submitted by the TDAC. Dr. Trende was retained to help draw the map as well. As the e-mails and their attachments in the set of documents submitted for *in camera* review show, Dr. Trende conducted statistical and social science analyses of each iteration of the Presiding Officer's map as well as other proposed maps (*see e.g.* R.823-46). Dr. Trende and Mr. Tseytlin exchanged emails over the course of three months discussing those analyses (*id.*). Supreme Court determined that "Dr. Trende's analysis was not of a legal character" and that

[4] *See also* R.722-23 ["LEGISLATOR SOLAGES: . . . [T]here was a lot of discussion as to who drew the map. Are there any other persons who are responsible for drawing the map who are here tonight? MR. TSEYTLIN: Nobody from my law firm is here no. Just me"]).

"[t]he primary purpose of Trende's analysis was to draw a redistricting map that could be utilized to determine the legislative districts for the then upcoming election" (R.96-97). After examining the set of Dr. Trende's communications with Mr. Tseytlin submitted for *in camera* review, Supreme Court found that all of these communications were discoverable and ordered them produced in their entirety (R.25-26).

C. In Attempting to Promote the Presiding Officer's Map to the Public, Mr. Tseytlin Makes Substantial Yet Cherry-Picked Disclosures About the Map.

Mr. Tseytlin was also the face of Mr. Nicolello's efforts to persuade the public and the Legislature that his map should be adopted. At a February 16, 2023, hearing of the Legislature, Mr. Tseytlin testified at length—and at Mr. Nicolello's invitation—to provide justifications for the map (R.629). Accompanying Mr. Tseytlin's February 16, 2023 testimony was a 17-page, single-spaced memorandum printed on his law firm's letterhead that was made available only moments before Mr. Tseytlin's testimony and only in paper copies to those present in the chamber. (R.527-528, 762-777). A more extensive version of that memo (25 single-spaced pages) was published—again, only in paper copies available inside the legislative chamber—just before the final vote on February 27, 2023. (R.527-528, 778-802). Together with Mr. Tseytlin's testimony, those two memoranda (the "Troutman

Memos") were published "to provide the Legislature and the public with the factual and legal basis for the proposed maps" (R.88).

Over the course of almost two hours on February 16, 2023,[5] Mr. Tseytlin testified in defense of the proposed map, making extensive disclosures about the process of developing the map and Dr. Trende's analyses to argue that the map was lawful. Mr. Tseytlin was the sole witness who testified about the justifications for the map. For example, Mr. Tseytlin represented that Dr. Trende's analysis was the sole basis of their decision to draw no majority-minority districts drawn to protect voters of color against racial vote dilution: "Mr. Trende did a Section 2 [Voting Rights Act] analysis" and concluded that "there were no [majority-minority] districts that needed to be drawn to comply with Section 2 of the VRA" (R.712-13). But, under questioning, Mr. Tseytlin admitted that the map-makers had found "racially polarized voting in some parts of Nassau" (R.727-28)—a fact that would support a finding of liability on Plaintiffs' claim for racial vote dilution (*see* Election Law § 17-206 [2] [b] [ii] [A]). When pressed for details, Mr. Tseytlin refused to elaborate, stating, "I do not have those numbers in front of me" (R.728).

Mr. Tseytlin further testified that Mr. Nicolello's map was "a fair map" based on Dr. Trende's partisan-fairness analysis (R.645-47, 726). And Mr. Tseytlin

[5] *See* Nassau County Legislature, Feb. 16, 2023 Hearing at 0:47:49–2:37:32, https://nassaucountyny.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=2093&Format=None&MediaFileFormat=mpeg4.

represented that Mr. Nicolello rejected the map submitted by the Democratic TDAC Commissioners because it was a racial gerrymander and scored poorly on Dr. Trende's partisan-fairness analysis (R.636-37, 646).

But Mr. Tseytlin and Mr. Nicolello repeatedly shut down efforts by Democratic legislators and the public to understand the full scope of facts underlying his testimony (*see e.g.* R.731-34). One notable colloquy between Legislator Carrié Solages (D-Elmont), Presiding Officer Nicolello (R-New Hyde Park), and Mr. Tseytlin during the February 16, 2023 meeting of the Legislature exemplifies the extent of the Republicans' blockade of information concerning the analysis that justified the proposed map:

> LEGISLATOR SOLAGES: You made reference to Mr. Trende's analysis. Did Mr. Trende provide a racially polarized voting analysis?
>
> MR. TSEYTLIN: He conducted one,
>
> LEGISLATOR SOLAGES: Can you provide——is that part of your memo?
>
> MR. TSEYTLIN: No, he conducted one.
>
> LEGISLATOR SOLAGES: But are you relying upon that analysis?
>
> MR. TSEYTLIN: We are relying upon his conclusion that we did not have to draw any other districts to comply with Section 2 of the VRA, yes.
>
> LEGISLATOR SOLAGES: Can you please provide his analysis?
>
> MR. TSEYTLIN: That was the bottom line.

LEGISLATOR SOLAGES: You still considered his analysis, nevertheless. So, therefore, for your conclusion, can you please provide that to this Body?

MR. TSEYTLIN: I provided to this Body the bottom line conclusion that he analyzed it.

LEGISLATOR SOLAGES: So you're not providing the analysis from Mr. Trende?

MR. TSEYTLIN: I am providing his bottom-line conclusion. That is what I'm providing.

LEGISLATOR SOLAGES: Can you please provide his analysis?

PRESIDING OFFICER NICOLELLO: I think he's answered the question. He's providing the bottom line analysis, and that's --

LEGISLATOR SOLAGES: He's relying upon the conclusion, but not upon the analysis. But the analysis determines the conclusion; therefore, we are entitled to the analysis.

PRESIDING OFFICER NICOLELLO: Therefore, no, you're not. He's given you an answer, and that's the answer that you have.

LEGISLATOR SOLAGES: There was no answer, just to be clear.

PRESIDING OFFICER NICOLELLO: He was. He basically said that he's providing a bottom line analysis and that's all that he is providing.

LEGISLATOR SOLAGES: He's refusing to provide an analysis that he [is] relying on the conclusion that came from that analysis.

PRESIDING OFFICER NICOLELLO: It is what it is.

(R.732-734). Although Mr. Nicolello and Mr. Tseytlin publicly invoked Dr. Trende's name and described his work at every turn as justification for their map—the Troutman Memos mentioned him over 50 times and Mr. Tseytlin referenced him

dozens more times in his testimony—they refused repeated requests for any further information on his analyses (R.264-66, 271; *see e.g.* R.731-34).

Following the February 16, 2023 hearing, the Presiding Officer published two revised versions of his proposed map on February 17 and February 21, 2023 (Redistricting, Nassau County [last accessed Sept 11, 2024], https://www.nassaucountyny.gov/5455/Redistricting). "On February 27, 2023, the Legislature adopted the final iteration of the map through Local Law 1, which was signed into law on February 28, 2023" (R.883).

D. Defendants' Disclosures in this Litigation Contradict Mr. Tseytlin's Public Representations About the Map, Revealing Evidence of Illicit Partisan and Racial Intent.

Nassau County, Mr. Tseytlin, and Dr. Trende have insisted, both in the proceedings below and in this appeal, that Plaintiffs are only entitled to the information contained within the already-public disclosures about the challenged map and its prior iterations. Yet, there is evidence contradicting Mr. Tseytlin's public representations about the fairness of the challenged map and other proposed maps—undermining their proffered justifications and showing the illicit partisan and racial intent behind them. A primary source of that evidence available to Plaintiffs is the unredacted portions of Defendants' March 15, 2024 production that is the subject of this appeal. For example, emails between Mr. Tseytlin and Dr. Trende reveal that:

- Charts of Dr. Trende's analysis attached to these e-mails show that the enacted map cracks and packs Democratic voters in strategically important districts—in particular, cementing Republican control over the majority-making 10th district in the 19-seat legislature. (R.827-30).
- In contradiction of Mr. Tseytlin's repeated testimony on February 16, 2023 that the map-makers did not consider race after Dr. Trende told them the *Gingles* preconditions were not satisfied (R.668-69), charts attached to e-mails exchanged between Mr. Tseytlin and Dr. Trende show that the map-makers analyzed the share of minority voters and Black voters in proposed maps both before and after Mr. Tseytlin's testimony (*see* R.803; R.896 [showing Black and minority share for a map published on February 9, 2023]; R.838-839 [showing Black and minority share for a map published on February 17, 2023 and attached to e-mails dated February 17, 2023]).
- In contradiction of public statements condemning the Democratic TDAC Commissioners map as a racial and partisan gerrymander, Dr. Trende's December 26, 2022 e-mail to Mr. Tseytlin showed that the Democratic Commissioners' map was neither, but revealed that the Legislature was generating a pretext to reject it in favor of their own map. (R.847).

This evidence provides some insight into what was going behind the scenes in a one-sided process of drawing and enacting this map, which was dominated by the Legislature's Republican majority and excluded Democratic legislators. No Democratic members of the Legislature participated in drawing any of the proposed redistricting plans that were submitted to the Legislature for consideration (R.525-526). In fact, legislators only received the Troutman Memos "five minutes before the [February 16, 2023] meeting started". (R.653). The challenged map was ultimately adopted on a party line vote on February 27, 2023 with all eleven Republicans present voting in favor and all seven Democrats present voting against. (R.1113-14). Prior to that vote, Democratic legislators requested access to Dr. Trende's analyses that undergirded the charts and conclusions that Mr. Tseytlin had disclosed in his testimony and in the Troutman Memos (*e.g.* R.653-57, 701-08, 732-34, 739-40, 892). They were repeatedly denied access (*id*). In stark contrast, no Republican member of the Legislature even asked to see the analysis undergirding Mr. Tseytlin's testimony and memos (R.893).

II. PROCEDURAL HISTORY

On March 7, 2024, Supreme Court joined the *Coads* and *NYCC* actions for discovery (R.64). Supreme Court then ordered that fact discovery be completed by May 23, 2024 and expert discovery be completed by August 15, 2024 (R.68-69). Consistent with the NYVRA's mandate for expedited proceedings (*see* Election Law

§ 17-216), and in view of a likely February 2025 start to the candidate petitioning period for the 2025 Nassau County primary elections, Supreme Court set a deadline of October 21, 2024 for summary judgment motions and reserved trial dates in December 2024 (R.196, 19-20).

Despite the need for expeditious resolution, Defendants' efforts to obstruct producing material documents and testimony has caused significant discovery to remain outstanding. In particular, this appeal arises from Defendants' refusal to provide two categories of discovery ordered by Supreme Court.

First, Supreme Court ordered Defendants to produce in unredacted form documents that they initially produced with substantial redactions on March 15, 2024 (R.70). These documents reflect communications between Presiding Officer Nicolello's map-making team—Mr. Tseytlin, Dr. Trende, Sean Dutton (another Troutman attorney), and a member of the map-making team whose identity the Defendants redacted. When they produced these communications on March 15 pursuant to a court order (R.70), Defendants withheld numerous documents, redacted every communication written by any sender other than Dr. Trende and redacted key portions of communications sent by Dr. Trende (*see e.g.* R.823-47). As the privilege log submitted with the supplemental record for in camera review reflects, Defendants claimed the withheld and redacted information was subject to legislative privilege, attorney-client privilege, and work-product privilege.

Plaintiffs challenged Defendants' privilege assertion in a letter in which both sides briefed their positions (R.77-83). Supreme Court then ordered Defendants to submit unredacted copies of the communications for *in camera* review and to provide Plaintiffs with a privilege log (R.8, 140).

On August 7, after completing its *in camera* review, Supreme Court found that "all of the materials" in the March 15 production "were discoverable" and ordered Defendants to produce them in unredacted form to Plaintiffs (R.7-8). Supreme Court also specifically ordered Defendants to disclose the identity of the map-maker whose name Defendants had withheld (R.19).

Second, Supreme Court ordered Mr. Tseytlin and Dr. Trende to appear for depositions and produce documents. In light of the evidence that Mr. Tseytlin and Dr. Trende played an integral role in creating and promoting the challenged map, Plaintiffs served subpoenas *duces tecum* and *ad testificandum* on them on April 19 and April 26, 2024, respectively (R.321-28, 356-404). Mr. Tseytlin and Dr. Trende each moved to quash their subpoenas (R.440-61, 569-87).

Following briefing and argument, Supreme Court denied both motions to quash in a Decision and Order dated July 31, 2024 (R.86-106) and clarified on the record at an August 2, 2024 conference (195-196). On the question of whether Mr. Tseytlin was entitled to assert the attorney-client privilege, the court ruled that the privilege did not attach to Mr. Tseytlin's entirely non-legal work "involved in

drawing the proposed maps" (R.95). Supreme Court found Plaintiffs could depose Mr. Tseytlin despite his role as a lawyer because of his integral role in the map-drawing process and because of Mr. Tseytlin's February 16, 2023 testimony (R.88, 94-95, 103-04*)*. The court similarly declined to preclude Dr. Trende's deposition as a fact witnesses on the basis of the attorney-client privilege or work product doctrine, finding that Dr. Trende's social science and redistricting analysis for the Legislature, conducted well before these two actions were commenced, were "not prepared solely for litigation or in conjunction with a pending lawsuit" (R.97). The court recognized that "when Dr. Trende was retained, litigation was far from a certainty; it was only a remote possibility, if at all" (*id.*).

On the question of legislative privilege, Supreme Court accepted Defendants' argument that the privilege could be "extended to consultants and experts who are retained by a legislator to assist in their legislative functions" (R.100). However, Supreme Court found that any applicable privilege attaching to those consultants' work and analysis had been waived by Mr. Nicolello "by allowing the public disclosure of significant portions of those analyses to be made during the legislative hearing on February 16, 2024" (R.104). The court rejected Defendants' reading of cases such as *Empire Ch. of Associated Builders & Contractors, Inc. v N.Y. State Dept of Transp.* (211 AD3d 1155, 1158 [3d Dept 2022]) and *Loudon House LLC v Town of Colonie* (123 AD3d 1409, 1411 [3d Dept 2014]), and held that the selective

public disclosure of Dr. Trende's and Mr. Tseytlin's redistricting analysis provided enough information to waive any applicable privilege (R.103-04). Thus, the court ruled that Defendants' partial public disclosure of only self-serving testimony and memoranda necessitated the entire analysis (and any associated communications) be turned over.

During an August 2, 2024 conference, Defendants, Mr. Tseytlin, and Dr. Trende requested further clarity from Supreme Court on the scope of the July 31 order (R.160-61). The Court heard further argument on matters subject to claims of legislative privilege, including the identity of the individual whose name had been redacted from Defendants' production (R.172-80). At the close of the conference, Supreme Court addressed the request for clarification: "It's the Court's position 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 Mr. Trende, what information was considered by Mr. Trende, who he consulted with, if anyone, and the same would be with respect to Mr. Tseytlin" (R.195). Supreme Court further ruled: "The process has been essentially open for inquiry so that it's proper inquiry for plaintiffs to ask questions about the development of the maps, who participated, what was considered, what was rejected, and the like" (R.195).

Supreme Court subsequently granted motions to compel against Dr. Trende and Mr. Tseytlin, ordering them to produce documents and to sit for depositions.

(R.19, 49-50). Defendants noticed their appeals of Supreme Court's orders on August 13 and 19 and invoked the automatic stay pursuant to CPLR 5519 [a] [1]. Accordingly, Defendants have neither produced documents under Supreme Court's orders nor agreed to produce Mr. Tseytlin and Dr. Trende for their depositions.

STANDARD OF REVIEW

New York courts require the "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101). "A trial court is given broad discretion to oversee the discovery process. Thus, the supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed" (*Cioffi v S.M. Foods, Inc.*, 142 AD3d 520, 521-22 [2d Dept 2016] [internal quotations and citations omitted]; *see also Geary v Hunton & Williams*, 245 AD2d 936, 938 [3d Dept 1997] ["It is settled that a trial court has broad discretionary power in controlling discovery and disclosure, and only a clear abuse of discretion will prompt appellate action"]).

Supreme Court's ruling on applicability of privilege is reviewed for abuse of discretion (*see Cioffi*, 142 AD3d at 523 [holding "Supreme Court did not improvidently exercise its discretion in granting" a motion to compel disclosure, rejecting claims that the materials at issue were "privileged attorney work product"]). Defendants cite *Gulf Ins. Co. v Transatlantic Reins. Co.* for the

proposition that this Court reviews legal questions over the scope of privileges and waiver of privileges *de novo* (13 AD3d 278 [1st Dept 2004]). However, that case stands only for the proposition that appellate courts reviewing trial court interpretations of contractual terms—which was the basis for the waiver-of-privilege at issue in *Gulf Insurance*—should apply de novo review (*id.* at 279; *see also MPEG LA, LLC v Samsung Electronics Co, Ltd*, 166 AD3d 13, 17 [1st Dept 2018] ["When engaging in contract interpretation, the standard of review for this Court to examine the contract's language de novo" (internal quotations and citations omitted)]). Although this Court has the authority to substitute its own discretion (*see Cioffi*, 142 AD3d at 522), the applicability of privilege or scope of waiver at issue in this appeal are fact-intensive inquiries that this Court should review for abuse of discretion(*see NYAHSA Services, Inc., Self-Ins. Tr. v People Care Inc.*, 155 AD3d 1208, 1209-11 [3d Dept 2017] [applying abuse of discretion standard in affirming Supreme Court order finding waiver of privilege and inapplicability of attorney work product and trial preparation privileges]).

ARGUMENT

I. SUPREME COURT DID NOT ABUSE ITS DISCRETION IN FINDING A WAIVER AS A RESULT OF MR. TSEYTLIN'S EXTENSIVE TESTIMONY.

As Supreme Court correctly held, Mr. Nicolello waived any claimed privilege over the documents and deposition testimony subject to these appeals through Mr.

Tseytlin's repeated public disclosures about Dr. Trende's social science analyses and the role Mr. Tseytlin and Dr. Trende played in the redistricting process. The Presiding Officer, via Troutman, released two public memoranda justifying the proposed redistricting plan (R.88) and Mr. Tseytlin testified, at the invitation of the Presiding Officer, about the redistricting process at a public hearing of the full Legislature (R.629). Supreme Court thus correctly held that "the Presiding Officer waived any applicable privileges as to the analyses and work performed by Dr. Trende and Mr. Tseytlin on the redistricting maps by allowing public disclosure of significant portions of those analyses to be made during the legislative hearing on February 16, 2023" (R.104). After performing an *in camera* review, Supreme Court also correctly ruled that any documents withheld by Defendants in their March 15 production are discoverable (R.7-8). In reaching these conclusions, Supreme Court providently exercised its discretion over determinations about disclosure and waiver. On these factual findings and on waiver alone, this Court can affirm the entirety of Supreme Court's orders compelling discovery because "[t]he process has essentially been open for inquiry such that it's proper inquiry for plaintiffs to ask questions about the development of the maps, who participated, what was considered, what was rejected, and the like" (R.195).

A. Supreme Court Correctly Determined that Mr. Tseytlin's Testimony and the Troutman Memos "Opened the Door" to Inquiry About the Redistricting Process.

Supreme Court correctly found that "Mr. Tseytlin's testimony and the memoranda opened the door to inquiry about 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). "[S]elective disclosure is not permitted as a party may not rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications" (*Vil. Bd. of Vil. of Pleasantville v Rattner*, 130 AD2d 654, 655 [2d Dept 1987]). Supreme Court therefore providently exercised its discretion to hold that Defendants, Mr. Tseytlin, and Dr. Trende "cannot determine that Plaintiffs are limited to Troutman Pepper's selective disclosures and can probe no further" (R.104). Defendants' papers show that they intend to rely on the self-serving disclosures concerning Mr. Tseytlin's and Dr. Trende's work and to defend the challenged map against charges of partisan and racial gerrymandering, including by calling Dr. Trende as an expert witness (R.910-11, 913; *see also* App. Br. at 48-49).

Mr. Nicolello waived any privileges applicable to Mr. Tseytlin and Dr. Trende's work and analyses on redistricting maps when he authorized Troutman to make substantial, yet selective, public disclosures about this work (*see Loudon House LLC v Town of Colonie*, 123 AD3d 1409, 1411 [3d Dept 2014] [holding that

a client "who permits his or her attorney to testify regarding [a privileged] matter is deemed to have impliedly waived the attorney-client privilege" [quoting *Jakobleff v Cerrato, Sweeney and Cohn*, 97 AD2d 834, 835 [2d Dept 1983]]; *Gartner v New York State Attorney General's Off.*, 160 AD3d 1087, 1092 [3d Dept 2018] [holding that work product does "not retain [its] confidential status if copies were disclosed to . . . third parties" [citation omitted]]; *Favors v Cuomo*, 285 FRD 187, 211-12 [ED NY 2012] [noting that legislative privilege can be waived through public disclosure]).

Despite these public disclosures, Defendants, Mr. Tseytlin, and Dr. Trende have improperly sought to use privilege as both sword and shield. They revealed significant portions of Dr. Trende's analyses and Mr. Tseytlin's work via Mr. Tseytlin's testimony and the Troutman Memos but have consistently attempted to obscure facts that do not benefit their bottom-line defenses of the enacted map. The law does not allow Defendants, Mr. Trende, or Dr. Trende to claim privilege only when convenient, wielding it as a tool to selectively disclose information favorable to the map while withholding facts that may harm their public claims and legal defenses (*see Hudson Val. Mar., Inc. v Town of Cortlandt*, 30 AD3d 378, 379 [2d Dept 2006] [requiring a deposition to move forward because the plaintiff "waived the attorney-client privilege by voluntarily disclosing communications between its officers and its attorney, and placed the substance of those communications at

issue"]; *Levy v Arbor Commercial Funding, LLC*, 138 AD3d 561, 562 [1st Dept 2016] [holding that "the attorney client privilege is meant to operate as a shield or a sword, but not both at once"]; *Favors*, 285 FRD at 212 ["[C]ourts have been loath to allow a legislator to invoke [legislative] privilege at the discovery stage, only to selectively waive it thereafter in order to offer evidence to support the legislator's claims or defenses"]). By authorizing Troutman and Mr. Tseytlin to disclose self-serving aspects of Dr. Trende's work to garner public support for the proposed map and also by continuing to rely on these disclosures in their defense of this action, including through Dr. Trende's service as an expert witness in this action (R.910-11, 913), Mr. Nicolello, and now Defendants, put the subject matter of those disclosures—core facts in this case—at issue. Defendants, Mr. Tseytlin, and Dr. Trende thus cannot assert privilege to block testimony or document disclosure on that subject matter.

The Presiding Officer "allow[ed] the public disclosure of significant portions of [Dr. Trende and Mr. Tseytlin's] analyses to be made during the legislative hearing on February 16, 2023" (R.104). This factual finding anchors Supreme Court's holding that "the Presiding Officer waived any applicable privileges as to the analyses and work performed by Dr. Trende and Mr. Tseytlin on the redistricting maps . . . ." (*id*.).

B. Defendants' Assertions that Supreme Court Misinterprets Cases Discussing Waiver Are Unavailing.

In response to Supreme Court's well-reasoned findings on waiver, Defendants, Dr. Trende, and Mr. Tseytlin incorrectly argue that "[t]he only case that the Supreme Court cited to support its broad waiver conclusion—*Empire Chapter*—undermines the Court's expansive approach to waiver" (App. Br. at 57). But, as Supreme Court explained, they have the analysis of applicable cases they rely on backwards (R.101 [holding that "[e]xamination of the two decisions relied upon by Mr. Tseytlin, *Empire Chapter* . . . and *Loudon House* . . . show that they do not support [Defendants', Mr. Tseytlin's, and Dr. Trende's] position on waiver"]). Defendants however continue to incorrectly insist that *Empire Chapter* and *Loudon House* support their unworkable and narrow concept of waiver, asserting that "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" (App. Br. at 58).

On this point, Supreme Court was correct that "[Defendants, Mr. Tseytlin, and Dr. Trende] misread *Empire Chapter* and *Loudon*" (R.103). In *Loudon*, a town board denied a petitioner's Freedom of Information Law Request for a legal report prepared by outside counsel to investigate the town's legal options in responding to a stalled development project (*Loudon House LLC*, 123 AD3d at 1410). The town asserted the report was covered by attorney-client privilege, however "outside

counsel appeared at a . . . public meeting and made an extensive oral presentation—apparently at the Town Board's behest . . . ." (*id*. at 1411). The Third Department therefore remanded the issue to the trial court for an *in camera* review to determine "how much the report and the oral presentation overlap" because, "[t]o the extent that the oral presentation parrots the analysis set forth in the report, it may well constitute a waiver of the privilege protecting the contents of the report" (*id*.). Supreme Court in this matter has already read Mr. Tseytlin's testimony, reviewed the Troutman Memos, performed an *in camera* review of the March 15 Production, and examined significant portions of Dr. Trende's statistical analyses. As to the order compelling document production by Mr. Tseytlin and Dr. Trende, neither they nor Defendants have identified any alleged documents or communications responsive to Plaintiffs' requests that would fall outside the scope of waiver established by Supreme Court.

Supreme Court correctly held that "*Empire Chapter* actually supports the inverse proposition to the one which [Defendants] advance here" (R.103). In *Empire Chapter*, the court found that the Department of Transportation Commissioner's mere public disclosure of findings from a study prepared by an outside organization to support her final decision "virtually parroted the study's analysis and findings" such that the petitioners were entitled to disclosure of the entire study (*Empire Ch.*, 211 AD3d at 1158-59). Defendants, Mr. Tseytlin, and Dr. Trende thus cannot

maintain that Mr. Tseytlin's extensive testimony and the release of the Troutman Memos fall short of waiver on topics related to Mr. Tseytlin and Dr. Trende's roles in the map-drawing process. Supreme Court correctly recognized this flaw in their argument, holding that "[a]pplying the rationale from *Empire Chapter* to the instant circumstances results in the determination that, like the Commissioner, the Presiding Officer waived any applicable privileges as to the analyses and work performed by Dr. Trende and Mr. Tseytlin on the redistricting maps . . . ." (R.104).

C. Supreme Court's Order on Waiver is Supported by a Robust and Meticulously Reviewed Record.

Defendants, Mr. Tseytlin, and Dr. Trende erroneously argue that Supreme Court's waiver decision is contrary to its June 7, 2024 Decision and Order, addressing waiver with respect to the Presiding Officer (App. Br. at 58). As an initial matter, even if there were inconsistencies between the two orders, the later order, based on more information and further briefing, would modify the earlier order. But the orders are consistent. Supreme Court's references to its June 7, 2024 Decision and Order in its July 31 Decision and Order shows that Supreme Court was cognizant of that prior ruling in reaching its conclusions at issue here (*see e.g.* R.104 ["As the Court held in relation to Mr. Nicolello, Mr. Tseytlin may not be questioned as to Mr. Nicolello's motivations or deliberations"]).

Further, that Supreme Court has granted Plaintiffs more latitude to pursue discovery against Mr. Tseytlin and Dr. Trende than Mr. Nicolello makes good sense.

The scope of waiver derives from the Presiding Officer inviting Mr. Tseytlin's testimony and publishing the Troutman memoranda, both of which reveal significant details about Dr. Trende's analyses and Mr. Tseytlin's work in the map-drawing process. As Supreme Court explained on the record at the August 2, 2024 conference:

> It's the Court's position that by virtue of the testimony that was given before the legislative body, that that opens the door to full and proper inquiry as to what maps were considered by Mr. Trende, what information was considered by Mr. Trende, who he consulted with, if anyone, and the same would be with respect to Mr. Tseytlin.

(R.195). Supreme Court correctly found that the waiver extends to maps and information considered by, and conversations had with, Dr. Trende and Mr. Tseytlin because it is their acts, their analyses, and their communications to which Mr. Nicolello has waived his privilege through public disclosure. Cementing this distinction between Mr. Nicolello, Mr. Tseytlin, and Dr. Trende, in both orders Supreme Court held that Mr. Nicolello's internal motivations were shielded from inquiry (R.104).

Supreme Court extensively reviewed the record before determining that Mr. Nicolello had waived any applicable privileges such that Plaintiffs "are entitled to depose Dr. Trende about the social science analyses he performed . . . [and] Plaintiffs are entitled to depose Mr. Tseytlin and probe further into the information he disclosed during the public hearing, for which all otherwise applicable privileges have been

waived" (R.104). Supreme Court also ordered "that for the same reasons stated on the record and in the Court's July 31, 2024 order, that Sean Trende and Misha Tseytlin shall produce the documents requested by Plaintiffs in the subpoenas . . . ." (R.49 [internal citations omitted]). Finally, Supreme Court examined the withheld documents *in camera* and determined that these documents and communications are discoverable (R.8). Because Supreme Court's waiver ruling is well-reasoned and supported, this Court should affirm Supreme Court's discretionary disclosure orders.

II. SUPREME COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION ARE INAPPLICABLE TO THE REDISTRICTING WORK AT ISSUE HERE.

Supreme Court correctly concluded that "[t]o the extent that Mr. Tseytlin was involved in drawing the proposed maps, he cannot claim privilege for such non-legal work"; that "Dr. Trende's testimony about his redistricting work for Troutman Pepper is not covered by the attorney-client privilege or work product doctrine"; and that "[t]here is no question that Dr. Trende is a fact witness and should be deposed during fact discovery" (R.95-96, 105). Attorney-client privilege thus cannot shield the witnesses from depositions regarding the non-legal redistricting work they completed for Defendants, nor does it shield Defendants, Mr. Tseytlin, or Dr. Trende from producing documents and communications between the witnesses that concern their redistricting work.

Supreme Court's conclusions that attorney-client privilege cannot shield discovery into Mr. Tseytlin and Dr. Trende's roles in the map-drawing process are amply supported by its factual findings. Mr. Tseytlin and Dr. Trende played non-legal roles in the redistricting process, performing map-making, statistical analysis, and public advocacy (*see* R.94-97). Significantly, Justice Marx conducted *in camera* review of the subject documents that Defendants identified as protected by attorney-client privilege and found nothing to prevent disclosure (R.7-8). This Court should defer to the factual findings that underpin Supreme Court's orders compelling discovery and uphold Supreme Court's conclusion that attorney-client and work product privilege do not shield disclosures related to Mr. Tseytlin's role in the map-drawing process or Dr. Trende's statistical analyses of the proposed maps.

A. Supreme Court Correctly Found that Mr. Tseytlin and Dr. Trende Engaged in Non-Legal Work that Does Not Implicate Attorney-Client Privilege or the Attorney Work Product Doctrine.

Supreme Court providently exercised its discretion to hold that Mr. Tseytlin and Dr. Trende performed non-legal work that cannot be shielded by attorney-client privilege. As the party seeking to invoke attorney-client privilege, Defendants bear the burden of establishing that "the communication at issue was between an attorney and a client for the purpose of facilitating the rendition of legal advice or services" and that "the communication is predominantly of a legal character" (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 27 NY3d 616, 623 [2016] [quotations

omitted). Likewise, the work-product privilege "narrowly applie[s] to materials prepared by an attorney, acting as an attorney, which contain his or her analysis and trial strategy" (*NYAHSA*, 155 AD3d, 1211 [citation and emphasis omitted]). As Supreme Court observed, because the attorney-client privilege "is in 'obvious tension' with New York's liberal discovery rules . . . the Court of Appeals holds that the privilege 'must be narrowly construed.'" (R.92 [quoting *Ambac*, 27 NY3d at 624]). Neither the witnesses nor Defendants can meet this exacting standard.

Mr. Tseytlin's role as a map-drawer and Dr. Trende's role in providing statistical analyses to facilitate the drawing of the proposed maps do not implicate the attorney-client privilege because their work for Defendants was not predominantly legal and was not "uniquely the product of a lawyer's learning and professional skills" (*Cioffi*, 142 AD3d at 522 [quoting *Hoffman v Ro-San Manor*, 73 AD2d 207, 211 [1st Dept 1980]). Principally, Mr. Tseytlin and Dr. Trende performed non-legal work consisting of drafting and "scoring" iterations of redistricting maps and advocating for those maps before the Legislature and the public. For example, below is a copy of an email produced by Defendants with their redactions sent to Dr. Trende and Mr. Tseytlin by the third consultant—whose identity Defendants withheld—on February 3, 2023 with the subject "Nassau Plan 4A Scoring Request" (R.540; *see also* R.832-39 [containing examples of Dr. Trende's statistical replies to similar scoring requests of other proposed maps]).

From: REDACTED FOR PRIVILEGE
Sent: 2/3/2023 12:13:00 PM
To: Sean Trende [strende@realclearpolitics.com]; Tseytlin, Misha [/o=TroutmanSanders/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c0a3e527bcf14d079fad96d51931430f-Tseytlin]
Subject: Nassau Plan 4A Scoring Request
Attachments: NY_Nassau_4A.txt; Nassau_Large_Scale_4A.pdf

EXTERNAL SENDER

Good Morning Gentlemen,

REDACTED FOR PRIVILEGE

~

REDACTED FOR PRIVILEGE

Supreme Court correctly concluded that, as a matter of the factual record, Mr. Tseytlin helped create the legislative maps the Presiding Officer submitted to the Legislature (R.94 [finding that Mr. Tseytlin's "testimony at the February 16, 2023 hearing indicates that he and Mr. Nicolello created the maps that were submitted to the Legislature"]). In his own words, Mr. Tseytlin testified that "My law firm drew the map with consultation of the Presiding Officer" (R.656; *see also* R.664, 722-23). Legislators questioned Mr. Tseytlin on this point several times throughout the February 16 hearing and, as noted by Supreme Court, he gave "the same or similar response," offering no further comment to "clarify his role in drawing the proposed map at the hearing" (R.94-95; *see also* R.664 ["LEGISLATOR ABRAHAMS: Mr. Tseytlin, let's back up. You drew this map with the with the Presiding Officer, correct? MR. TSEYTLIN: Yes."]).

Likewise, Dr. Trende described his work as "social science analyses," (R.575, 580), consisting of statistical analyses, data tabulations, and factual findings (*see e.g.* R.804-06). His analysis, conducted well before any litigation commenced, "was not prepared solely for litigation or in conjunction with a pending lawsuit" (R.97). Supreme Court also found that "Dr. Trende's social science analysis and map drawing [was not] rendered solely to facilitate the rendition of legal advice or services . . . ." (*id.*). Accordingly, Supreme Court correctly concluded that, as a factual matter, "[t]he primary purpose of Trende's analysis was to draw a redistricting map that could be utilized to determine the legislative districts for the then upcoming election" (*id.*).

The documents Defendants have already produced confirm that Mr. Tseytlin worked extensively with Dr. Trende between November 2022 and February 2023 to conduct non-legal analysis of potential maps (*see e.g.* R.823-47). Dr. Trende shared documents with Mr. Tseytlin containing statistical analyses, tabulations of data, and factual findings (*see* R.804-06). That these documents clearly "could have been prepared by a [non-attorney] layperson" firmly establishes that they do not qualify for attorney-client or work-product privilege (*Bent-Anderson v Singh*, 209 AD3d 710, 711 [2d Dept 2022] [quoting *Salzer v Farm Family Life Ins. Co.*, 280 AD2d 844, 846 [3d Dept 2011]).

Dr. Trende's redistricting work for Troutman "is not covered by the attorney-client privilege or work product doctrine" (R.96) because his "analysis was 'not of legal character'" (R.97 [quoting *NYAHSA*, 155 AD3d at 1210]). In other words, the social science analyses in which Mr. Tseytlin and Dr. Trende engaged were to assist redistricting, not for purposes of pure litigation (*see NYAHSA*, 155 AD3d at 1211 [holding that the attorney-client privilege did not shield a report written by a consultant retained by counsel because the "report was prepared in connection with a billing dispute, not pending litigation"]).

Mr. Tseytlin and Dr. Trende also worked as public advocates on behalf of the proposed maps. Mr. Tseytlin testified in support of the proposed map for nearly two hours before the Legislature in February of 2023 (*see* R.629-759). Although Dr. Trende never testified himself, the Troutman Memos mentioned him over 50 times and asserted that his analyses established that Defendants' map was fair (*see* R.762-802 [the Troutman Memos]). Taken together, the map-making and public advocacy performed by Mr. Tseytlin and Dr. Trende constitute the bulk of their work for Defendants prior to the enactment of the map. Far from providing confidential legal advice to a client, Mr. Tseytlin and Dr. Trende worked as map-drawers and as public advocates on behalf of the Presiding Officer, lobbying the Legislature and the public to adopt their preferred maps. These functions plainly were not "of a legal character"

and should not be shielded by attorney-client or work product privilege (*Ambac*, 27 NY3d at 623).

B. The Presiding Officer Delegated Legislative Map-Drawing Duties to Mr. Tseytlin and Dr. Trende Separate from any Prospect of Litigation.

Supreme Court correctly rejected Defendants' contention that Mr. Tseytlin's and Dr. Trende's map-making work was conducted in anticipation of litigation. Both were retained months before the Presiding Officer publicized his proposed maps and even longer before this litigation commenced (R.88). Dr. Trende's own filings acknowledge that his role was to assist the Presiding Officer in discharging his regular legislative duty, not to prepare for litigation: "[A]ll materials considered and developed by Trende and his communications thereto were provided to the Presiding Officer and Troutman Pepper for the purpose of considering, passing, or rejecting proposed legislation – namely, the maps" (R.583). Likewise, Mr. Tseytlin recognized that his role was "to assist the Presiding Officer with developing draft legislation—namely, the maps" (R.459).

Defendants, Mr. Tseytlin, and Dr. Trende erroneously rely on *Appellate Advocates v New York State Dept of Corr. & Community Supervision* to argue that Mr. Tseytlin and Dr. Trende provided advice concerning the legal requirements that attach to redistricting (App. Br. 48-50). This assertion misreads *Appellate Advocates* and misstates the witnesses' roles in redistricting. The Court in *Appellate Advocates v New York State Dept of Corr. & Community Supervision* was clear that attorney-

client privilege attached because lawyers provided government actors with documents "prepared for and used during Board of Parole training" and that provided "counsel's legal analysis and advice on the statutory, regulatory, and decisional law that [the government actors] should consider during their decision-making process" (40 NY3d 547, 554 [2023]). *Appellate Advocates* does not bless Defendants', Mr. Tseytlin's, and Dr. Trende's novel and expansive view of attorney-client privilege. Unlike in *Appellate Advocates*, where attorneys provided parole officers with documents "for training and advising commissioners on how to dispatch their duties and obligations in deciding parole applications . . . . and advise on how to apply statutes, regulations, and case law to parole determinations" (*id.* at 552-53), Troutman did not merely provide the Presiding Officer with legal guidelines to follow in executing his map-making duties. Instead, the Presiding Officer hired Troutman and authorized them and their consultants to draw maps themselves. This would be as if in *Appellate Advocates* the lawyers were deputized as parole officers themselves. The routine functioning of government cannot be cloaked in attorney-client privilege simply because work is delegated to a lawyer.

Defendants incorrectly assert that Mr. Tseytlin and Dr. Trende's map-drawing work is covered by the attorney-client privilege "given the certainty of at least some legal challenges to the County's map" (App. Br. at 46). As Supreme Court correctly found, "[w]hen Dr. Trende was retained, litigation was far from a certainty; it was

only a remote possibility, if at all" (R.97). Mr. Nicolello could not have anticipated "the certainty" of litigation over a map the public had not seen (unless, perhaps, Defendants knew their map violated the law). And—as it does every decade—the Legislature had to review redistricting plans and propose a new map whether it anticipated litigation or not (Nassau County Charter § 113). That is the Presiding Officer's regular legislative duty, independent of hypothetical litigation (*see Bertalo's Rest. v Exch. Ins. Co.*, 240 AD2d 452, 455 [2d Dept 1997] [holding that "reports which aid [an entity] in the process of deciding which . . . action[] to pursue are made in the regular course of its business" and, even if "undertaken by attorneys," are "not cloak[ed] . . . with privilege"] [quotations omitted]). Redistricting is part of the ordinary business of the legislature and, like all legislation—regardless of how controversial it may be—faces the potential of litigation.

Mr. Tseytlin and Dr. Trende made contemporaneous statements during the redistricting process that confirm their work centered on legislation and not potential future litigation. Explaining his methodology to Mr. Tseytlin, Dr. Trende stated: "*For the purposes of pure litigation* I can splits [sic] the VTDs and estimate vote shares, but it shouldn't make that much of a difference *for our present purposes*" (R.847 [emphasis added] [image of full email attached below]).

From: Sean Trende [strende@realclearpolitics.com]
Sent: 12/26/2022 2:04:41 PM
To: Tseytlin, Misha [/o=TroutmanSanders/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=c0a3e527bcf14d079fad96d51931430f-Tseytlin]
Subject: Sims -- Nassau
Attachments: final_race_v2.png; final_gerrymandering_index.png; final_dotplots.png

EXTERNAL SENDER

Hey Misha,

So I ran 50k sims. There are some issues – I can't get things to strictly adhere to the CDP/village boundaries, which I suspect is due to the VTDs overlapping those boundaries. For purposes of pure litigation I can splits the VTDs and estimate vote shares, but it shouldn't make that much of a difference for our present purposes.

I also didn't do core retention. I thought that would be a waste of time, since the argument that the prior district is a political gerrymander is probably correct, and political fairness is a more important criteria than core retention.

On the sims: REDACTED FOR PRIVILEGE That said, five minority majority districts is not ***out*** of line with the sims. These are not broken down by individual racial categories.

Their gerrymandering index REDACTED FOR PRIVILEGE Still beyond the range of the sims, however. But it gives an idea what we are likely going to have to tell the legislature they are aiming for, like it or not.

On the dotplots, their maps actually look pretty good.

My guess is they had someone run the sims for them, decided that they liked what they saw, and drew with those in mind, subject to the provisions of the John Lewis Voting Rights Act.

Best,

Sean

Dr. Trende's statement demonstrates that his social-science work with Mr. Tseytlin was not solely for litigation purposes, but was done to inform "what we are likely to have to tell the legislature they are aiming for" in terms of drawing a redistricting plan (*id.*; *see Empire Ch.*, 211 AD3d at 1158 [concluding that attorney-client privilege did not apply to analysis prepared by a third party to assist a state agency because the analysis was "not prepared solely for litigation purposes"]). Further, Mr. Tseytlin testified, and the Troutman Memos stated, that Dr. Trende's work was intended to help "avoid even the perception of partisanship" (R.645, 790).

This Court should affirm Supreme Court's conclusion, based on extensive factual findings and Justice Marx's *in camera* review of the subject documents, that Dr. Trende and Mr. Tseytlin performed non-legal work for Defendants over which they cannot now claim attorney-client privilege. Accordingly, Plaintiffs should be allowed to proceed with depositions of the witnesses concerning their non-legal redistricting work. Additionally, this Court should affirm that attorney-client privilege does not shield Defendants, Mr. Tseytlin, and Dr. Trende from producing documents and correspondence between the witnesses concerning the same non-legal work. Both rulings reflect Supreme Court's provident exercise of discretion by this straightforward applications of established caselaw to a clear-cut record.

III. THIS COURT CAN AFFIRM ON THE ALTERNATIVE GROUND THAT DEFENDANTS' ILLICIT PARTISAN AND RACIAL INTENT IN ENACTING THE MAP VITIATES ANY LEGISLATIVE PRIVILEGE.

Although waiver alone provides sufficient basis to affirm Supreme Court's determination that legislative privilege does not bar the ordered disclosure, this Court can also affirm on an alternative ground: Legislative privilege does not shield disclosure of the documents and testimony at issue because the record contains evidence showing that Defendants enacted the challenged map with illicit partisan bias and the intent to deny equal political opportunity to racial groups. In the order on appeal, Supreme Court found that legislative privilege extended to consultants (R.100), but did not reach Plaintiffs' argument that evidence of intentional

discrimination vitiated that privilege with respect to Mr. Tseytlin and Dr. Trende (R.98). Plaintiffs disagree with but did not appeal from Supreme Court's ruling that legislative privilege can apply to Mr. Tseytlin and Dr. Trende, but again raise the argument that legislative "privilege must yield in the face of evidence which shows that the 2023 Map was created with intent to discriminate against voters of color and to entrench a Republican majority" (R.98).

"[A]n appellate court may affirm an order . . . if any of the grounds advanced in the court of original instance in fact support the relief granted in the order" (*Menorah Nursing Home, Inc. v Zukov*, 153 AD2d 13, 19 [2d Dept 1989]; *see e.g. Piroozian v Homapour*, 210 AD3d 709, 711 [2d Dept 2022] [affirming "on the alternate ground argued by [respondent] in the Supreme Court"]; *Ade v City of New York*, 164 AD3d 1198, 1200–01 [2d Dept 2018] [affirming "on a ground different from that stated by the Supreme Court"]). Section 34 of the Municipal Home Rule Law, which is the basis for a claim by both sets of Plaintiffs, provides that for county legislative redistricting "Districts shall not be drawn with the *intent* . . . of denying or abridging the equal opportunity of racial or language minority groups to participate in the political process . . . or for the purpose of favoring or disfavoring . . . political parties" (MHRL § 34 [4] [a] & [e]). The record reflects evidence that Defendants designed their map to favor Republicans and diminish the political

power of communities of color. That evidence provides this Court with an independent basis to affirm Supreme Court's disclosure orders.

Evidence of illicit intent supports the piercing of legislative privilege (*see Rodriguez v Pataki*, 280 F Supp 2d 89, 102 [SD NY 2003], *affd*, 293 F Supp 2d 302 [SD NY 2003] [reasoning that where voting-rights plaintiffs "raise[d] serious charges about the fairness and impartiality" of a redistricting process, including regarding "discriminatory animus," "legislative . . . privilege should be accorded only limited deference"]; *Bethune-Hill v Virginia State Bd. of Elections*, 114 F Supp 3d 323, 337 [ED Va 2015] [holding that "[r]edistricting litigation presents a particularly appropriate circumstance for qualifying the state legislative privilege because judicial inquiry into legislative intent is specifically contemplated as part of the resolution of the core issue that such cases present"]; *see also Humane Socy of New York v City of New York*, 188 Misc 2d 735, 741 [Sup Ct, NY County 2001] [holding that legislative privilege does not apply where there is "some objective evidence tending to show the impetus for the legislation was illicit bias or prejudice" [emphasis omitted]).

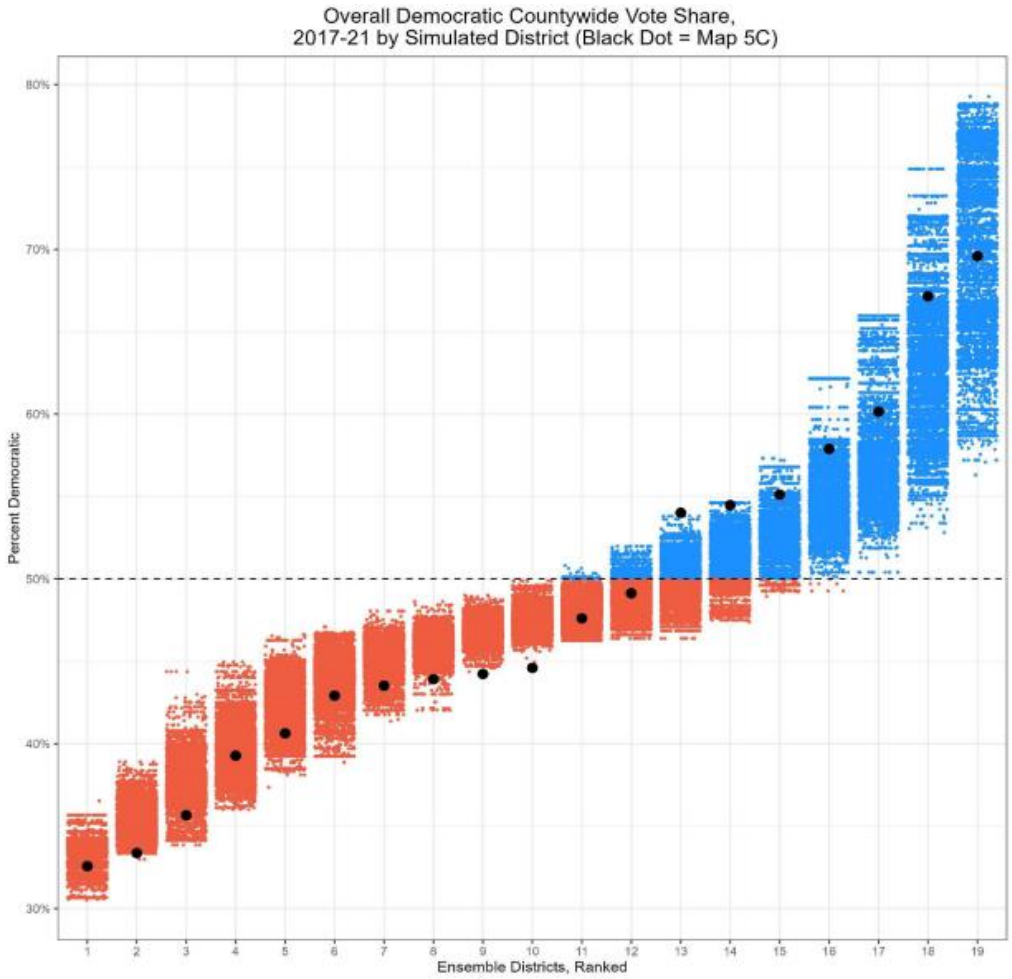
Limited discovery that Plaintiffs have obtained so far reveals evidence that partisan bias and discriminatory intent drove Defendants' redistricting decisions. Much of this evidence comes from the unredacted portions of the March 15

production, highlighting the significance of the communications that Defendants are fighting to keep redacted.

In *Harkenrider v Hochul*, the Court of Appeals held that in a partisan gerrymandering case "invidious intent could be demonstrated . . . circumstantially through proof of a partisan process excluding participation by the minority party and evidence of discriminatory results (i.e., lines that impactfully and unduly favor or disfavor a political party or reduce competition)" (38 NY3d 494, 519 [2022]). Here, the record contains such evidence of invidious intent.

The Presiding Officer hired Troutman to draw the legislative map out of public view and without input by the minority party (*see e.g.* R.525 [Defendants admitting in response to Requests for Admission that "only the Presiding Officer, Troutman, or consultants retained by the Presiding Officer or Troutman participated in Drawing the Redistricting Plan"]; R.892-93 [Defendants admitting in response to Requests for Admission that despite their requests, no member of the Legislature's Democratic caucus received access to Dr. Trende's analyses beyond what was disclosed at the February 16, 2023 hearing and in the Troutman memos prior to the Legislature's voting to adopt the enacted map; R.734 ["LEGISLATOR SOLAGES: [Mr. Tseytlin]'s refusing to provide an analysis that he relying on the conclusion that came from that analysis. PRESIDING OFFICER NICOLELLO: It is what it is"]).

Away from public scrutiny, e-mails exchanged between Dr. Trende and Mr. Tseytlin reveal that the map was drawn to favor Republican control of the Nassau County Legislature. For example, attached to February 22, 2023 e-mail exchanges are charts Dr. Trende generated showing the adopted map to be an extreme partisan gerrymander (R.823-30, 840-46)—including charts conspicuously omitted from the Troutman Memos (R.762-97). One chart (R.845) is reprinted below. The black dots on this chart indicate how the challenged map compares to an ensemble featuring thousands of "neutral" computer-generated maps in terms of the percentage of Democratic voters in each district.



This chart shows that in the adopted map, the median tenth district—the district that would guarantee a party a majority of the Legislature's nineteen districts—has fewer Democratic voters than all of the thousands of computer-generated maps in Dr. Trende's ensemble (*id.*). The eighth and ninth districts are also outliers compared to the ensemble in that they register conspicuously low shares of Democratic votes. At the same time, the thirteenth through sixteenth district are outliers in terms of showing a conspicuously high number of Democratic votes. In other words, this chart shows a pattern of cracking and packing in strategically valuable districts so

stark that it was virtually impossible that Defendants could have drawn a map to so favor Republican control over the legislature absent the intent to do so. This is precisely the kind of evidence that supported a finding of impermissible partisan intent in *Harkenrider v Hochul* (204 AD3d 1366, 1372-73, *appeal dismissed, lv to appeal denied*, 38 NY3d 1168 [2022], and *affd as mod*, 38 NY3d 494 [2022] [finding evidence that a redistricting plan was enacted with partisan intent where the enacted map "was such an outlier . . . only in the districts where the legislative majority party had the most strategic value to gain through gerrymandering"]). That Defendants used the same law firm and expert as in the *Harkenrider* case only makes their possession of this evidence *while* they were drawing redistricting plans for Nassau County Republicans even more damning.

Defendants' redactions also reveal their consciousness of bad intent. For example, Defendants attempted to withhold the very identity of a central figure on their map-making team as protected by legislative privilege despite lacking any colorable basis for doing so. As Supreme Court pointed out: "THE COURT: I am not aware of any cases in which the name of an individual who may have been consulted or with the facts retained as a consultant constituted privileged information" (R.177). Defendants have cited no such cases. Nor have they provided any explanation as to why, of all the members of their map-making team, they insisted on shielding the identity of only one person.

The record also includes evidence that Defendants drew the map to intentionally deny racial groups equal access to the political process. Their defense rests on the premise that no conditions existed in Nassau County that would "require *or permit*" the drawing of districts to protect the voting power of minority communities (*see* R.786 ["Nassau County contains *no districts* meeting the *Gingles* preconditions that would require or permit the creation of any race-focused districts, for purposes of compliance with Section 2 of the VRA"] [emphasis added]; R.786 [same]; *see* R.310-11 [stating affirmative defenses]). To this point, Mr. Tseytlin testified on February 16, 2023, that "we did not analyze race of the map [sic] after Mr. Trende concluded that there was no VRA Section 2 district" and that he "f[elt] quite uncomfortable" even "speaking about the racial makeup of districts" (R.668-69).

But emails belie Mr. Tseytlin's testimony of a race-blind redistricting process. Both before and after the February 16 hearing, Dr. Trende, Mr. Tseytlin, and the unidentified consultant analyzed several iterations of potential maps to see how the shares of minority voters and Black voters in each district of the potential maps compared to those in Dr. Trende's computer-generated map ensemble (*see* R.838-39 [charts for "Black Share by Simultated [sic] District" and "Minority Share by Simultated [sic] District" for February 17 proposed map titled "Plan 5b" attached to February 17 e-mail]; R.803, 896 [charts for "Minority Share by Simultated [sic]

District" and "Black Share by Simultated [sic] District" for the February 9 proposed map titled "Plan 4A"]). The problem is not that Mr. Tseytlin and Dr. Trende were considering race in drafting redistricting plans. Indeed, they should have been all along. The problem is that these mapmakers were considering race in drawing their maps while telling the public it was improper to do so.

Collectively, this evidence indicates that Mr. Tseytlin and Dr. Trende participated in a redistricting process tainted by illicit partisan bias and intentional racial discrimination. They cannot use legislative privilege as a shield to block their depositions or production of their communications regarding their map-making work. This is especially so given that no individuals—including Mr. Nicollelo, Mr. Tseytlin, and Dr. Trende—face any threat of *personal* liability in this action. As federal cases challenging intentional discrimination in redistricting have held "the legislative independence interest and the risk of chilling legislative functions 'is significantly reduced, if not eliminated, when the threat of personal liability is removed'" (*S.C. State Conference of NAACP v McMaster*, 584 F Supp 3d 152, 165 [DSC 2022] [quoting *Owen v City of Indep., Mo.*, 445 US 622, 656 [1980]]).

In sum, this Court can alternatively affirm Supreme Court's determination that legislative privilege does not bar the ordered disclosure based on the evidence that Defendants enacted the challenged map with the intent to confer partisan advantage on Republicans and to dilute the voting strength of communities of color.

IV. SUPREME COURT CORRECTLY FOUND THAT MR. TSEYTLIN CANNOT INVOKE HIS ROLE AS DEFENDANTS' COUNSEL TO QUASH THE SUBPOENA ISSUED TO HIM AS A FACT WITNESS FOR HIS "KEY ROLE" DRAWING THE MAP.

Defendants incorrectly insist that—even if privilege cannot shield Mr. Tseytlin from fact discovery—his current role as lead trial counsel should insulate him from disclosure (*see* App. Br. at 61-65). This position runs contrary to the law, to Supreme Court's findings of fact, and is a problem of Defendants' own making. New York courts require the "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101). Therefore, "[a]n application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry" (*Kapon v Koch*, 23 NY3d 32, 38 [2014] [alterations and citations omitted]).

When a party seeks to depose opposing counsel, they may do so when the subpoenaing party "possess[es] a good faith basis for seeking to depose the defendants' attorney, and that the information sought is both relevant and necessary" (*Kim v Bae*, 198 AD2d 206, 207 [2d Dept 1993]). The First Department additionally requires a showing that "the deposition is necessary because the information is not available from another source," the Second Department, however, does not (*Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164 AD3d 401, 406 [1st Dept 2018] [noting the First Department was "add[ing] another factor" to the Second Department's

standard]). Defendants and Mr. Tseytlin incorrectly insist Plaintiffs must also satisfy this factor. Nevertheless, Plaintiffs' subpoena to Mr. Tseytlin satisfies both standards.

A. Plaintiffs Are Entitled to Depose Mr. Tseytlin Under Any Applicable Standard.

Plaintiffs have good-faith reasons for seeking Mr. Tseytlin's testimony: to develop the factual record with respect to his public testimony and "key role" in the map-making process. Notably, Mr. Tseytlin was the sole witness invited by the Presiding Officer to testify before the Legislature concerning the justifications for the proposed map. Recognizing the centrality of Mr. Tseytlin's role in the map-drawing process, Supreme Court providently found that "Plaintiffs are entitled to depose Mr. Tseytlin and probe further into the information he disclosed during the public hearing" (R.104). Plaintiffs seek to develop the factual record on these points in good faith and do not intend to seek Mr. Tseytlin's disqualification from this case. Defendants and Mr. Tseytlin point to no specific "illegitimate purpose" motivating Plaintiffs' request (*see* App. Br. at 61-64; *Liberty Petroleum*, 164 AD3d at 406 [holding that a good-faith basis to depose opposing counsel exists when the subpoenaing party is not seeking the deposition "as a tactic intended solely to disqualify counsel or for some other illegitimate purpose"]; *Frybergh v Kouffman*, 119 AD2d 541, 541 [2d Dept 1986]) [permitting deposition of opposing counsel where "plaintiff has a good-faith basis for seeking [the deposition]"]). For these reasons alone, Supreme Court's order should be affirmed.

Defendants and Mr. Tseytlin incorrectly insist that "the information and testimony that Plaintiffs' [sic] seek from Mr. Tseytlin are available from another source" and that as a result, under *Liberty Petroleum* Plaintiffs lack a good faith basis to subpoena Mr. Tseytlin (App. Br. at 63 [quotation omitted]). But *Liberty Petroleum* explains that a good-faith basis exists when the deposition is not intended to force opposing counsel's disqualification; whether the information is available elsewhere is a separate inquiry (164 AD3d at 406).

As found by Supreme Court, Mr. Tseytlin possesses relevant and necessary information due to his integral role in the development and justification of the challenged map. His deposition is plainly not intended to force his disqualification. Defendants and Mr. Tseytlin have also admitted that he participated in the drawing of the enacted map (R.656, 524-25). Throughout the map-drawing process, Mr. Tseytlin communicated with Dr. Trende and the unnamed third party about statistical analyses of the proposed maps (*see e.g.* R.823-47), and publicly testified to material facts about the map and map-making process (*see* R.629-759). Mr. Tseytlin's deposition testimony and document production on these topics will reveal non-privileged facts at the heart of this controversy.

When counsel is enmeshed in the factual circumstances giving rise to litigation, courts have permitted their depositions. For example, in *305-7 W. 128th St. Corp. v Gold*, the First Department held that "[p]laintiff's evidence that

defendant's assistant general counsel participated in the negotiations of the lease, suffices to demonstrate the need for her deposition" (178 AD2d 251, 251 [1st Dept 1991]). In fact, this Court has a record of permitting depositions of attorneys who possess relevant non-privileged evidence (*see e.g. Hudson Val. Mar.*, 30 AD3d at 379–80 [permitting attorney's deposition because plaintiff had waived attorney-client privilege through voluntarily disclosure and placed the substance of communications with the attorney at issue]; *Town of Brookhaven v Liere*, 24 AD3d 431, 431–32 [2d Dept 2005] [compelling deposition of attorney where it concerned "material and necessary" information]; *Matter of Winston*, 238 AD2d 345, 346 [2d Dept 1997] [permitting deposition of opposing counsel where "respondents established both a good faith basis for the deposition and that the information sought was relevant and necessary"]; *Planned Indus. Centers, Inc. v Eric Builders, Inc.*, 51 AD2d 586, 586 [2d Dept 1976] [permitting deposition of attorney who "possesses material and necessary information"]). This caselaw is consistent with New York's liberal disclosure rules, which command "full disclosure of all matter material and necessary in the prosecution" of an action (CPLR 3101; *see also Kapon*, 23 NY3d at 38 ["[S]o long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty"]).

Tellingly, Defendants and Mr. Tseytlin cite no case barring the deposition of an attorney as deeply entangled in the underlying facts as Mr. Tseytlin is here (*see*

App. Br. at 61-65). Instead, Defendants and Mr. Tseytlin can only point to a single Supreme Court case in which the subpoenaing party's intended inquiry was founded on "speculation" and thus lacked "a good faith basis" (*Ajax Mortg. Loan Tr. 2019-C v Seneca Mgmt. Corp.*, Order, 723696/2021, NYSCEF Doc No. 97 at *3 [Sup Ct, Queens County November 22, 2022]).[6] Not so here.

Even under the more stringent First Department standard, Plaintiffs are entitled to depose Mr. Tseytlin because they seek information from him that cannot be obtained from another source. As a result of his integral role in the redistricting process, Mr. Tseytlin possesses unique knowledge of facts relevant to this case, including: the actions he took in the map-drawing process; the basis for statements made in his February 16, 2023 testimony; and his retention of and communications with Dr. Trende and the unnamed third party in the map-making team.

Further underscoring Plaintiffs' need to depose Mr. Tseytlin, Defendants' limited disclosures thus far have repeatedly contradicted public statements Mr. Tseytlin made in his February 16, 2023 testimony and representations in the Troutman Memos (*see* discussion of contradictions, *supra* at 13-15). These

[6] For good measure in the appealed order below, Supreme Court "decline[d] to follow *Ajax* to the extent it adopted an additional requirement to show that the party seeking to depose counsel must show that the information cannot be obtained elsewhere" because "The defendant in *Ajax* sought to depose the plaintiff's counsel about" topics "deemed to be irrelevant to the defense and prosecution of the action" (R.93).

contradictions pertain to Mr. Tseytlin's role as a map-maker, the map-drawing team's consideration of race in drawing the maps, and the partisan fairness of the enacted map. Deposing Mr. Tseytlin is necessary to clarify these discrepancies.

Mr. Tseytlin's position as a person with discoverable information is a problem of Defendants' own making. Mr. Tseytlin is undoubtedly a fact witness who Supreme Court correctly found "played a key role, working closely with a redistricting expert, Dr. Sean Trende, and another individual whose identity has not been disclosed, to redraw the legislative map for the County" (R.88). Defendants chose to intimately involve Mr. Tseytlin and Troutman in the map-drawing process—a role that does not require the unique skills of a lawyer. Defendants then chose to retain the same firm in this litigation. Accordingly, Plaintiffs are entitled to depose Mr. Tseytlin and he must comply with document requests issued by Plaintiffs and ordered by Supreme Court.

B. Mr. Tseytlin's Wholesale Objection to All Deposition Topics on the Basis of Privilege is Improper.

Supreme Court correctly held that "the attorney-client privilege does not provide a blanket prohibition against deposition testimony" (R.95). The "general rule governing subpoenas ad testificandum . . . is that a claim of privilege cannot be asserted until the witness appears . . . and is presented with a question that implicates protected information" (*Holmes v Winter*, 22 NY3d 300, 319 [2013]). A deposition of an attorney is no different. Thus, the attempt to preemptively quash Mr. Tseytlin's

deposition in its entirety is improper. The correct course is for him to sit for the deposition and "take an appropriate [privilege] objection at that time" in response to specific questions (*Town of Brookhaven*, 24 AD3d at 432; *In re Macku's Estate*, 29 AD2d 539, 539 [2d Dept 1967] [same]). That is especially true here, given that any assertion of privilege would turn on fact-specific details regarding Mr. Tseytlin's role in the redistricting process. Further, there are broad categories of information already in the public domain or obtained through disclosure on which Plaintiffs are entitled to question Mr. Tseytlin—including his legislative testimony and the Troutman Memos. Supreme Court's order specifically contemplates that the parties "may seek rulings from the Court on any objections which are made during the depositions by calling [] chambers" (R.106). That is the proper way forward on these issues.

C. Mr. Tseytlin Must Produce the Documents Requested by Plaintiffs and Ordered by Supreme Court.

Mr. Tseytlin must produce documents requested in the subpoena and ordered by Supreme Court. Mr. Tseytlin has not made a prima facie showing required to quash the subpoena because he do not dispute that Plaintiffs seek relevant information (*see* App. Br. 61-65; *Liberty Petroleum*, 164 AD3d at 405 [holding that when counsel for a party moves to quash a subpoena issued to them as a fact witness, they must meet an initial burden to show that the requested discovery is "not relevant to plaintiffs' claims"]). Moreover, as detailed above, Mr. Tseytlin's privilege arguments are meritless, and Plaintiffs expressly limited their document requests to

the time period prior to the enactment of the challenged map on February 28, 2023—long before this litigation commenced (R.327-28).

Even assuming Mr. Tseytlin made a prima facie showing, he must respond to Plaintiffs' document requests because they seek material, necessary, and non-privileged documents in his personal possession that have not been produced elsewhere (*see Hudson Val. Mar.* 30 AD3d at, 379–80 [ordering production of documents and deposition of opposing counsel relating to material communications]). Unlike the document requests issued to Defendants, the three requests issued to Mr. Tseytlin narrowly focus on his personal preparation for his February 16, 2023 testimony, Troutman's creation of the Troutman Memos, and his and Troutman's role in creating the map (R.327-28). These documents are undisputedly material. They are also necessary because Mr. Tseytlin refused to elaborate on the basis for factual elements of his testimony and the Troutman Memos (*see e.g.* R.669-70, 727-28, 731-34), and because the documents Defendants have produced concerning Mr. Tseytlin's role are glaringly inadequate. For example, Defendants' March 15 production includes only emails to which Sean Trende is a party and therefore may omit other communications about map-drawing involving Mr. Tseytlin. Defendants, Mr. Tseytlin, and Dr. Trende fail to contend with any of these points on the material and relevant nature of Plaintiffs' document requests to Mr. Tseytlin.

Thus, Supreme Court providently exercised its discretion in ordering Mr. Tseytlin to produce the documents and communications requested by Plaintiffs which all relate to his map-making work, his public testimony, and the Troutman Memos.

CONCLUSION

For the foregoing reasons, this Court should affirm the orders on appeal because Supreme Court providently exercised its discretion in allowing Plaintiffs the discovery at issue.

Dated: September 13, 2024
New York, N.Y.

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