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)

REPLY 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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PRELIMINARY STATEMENT

While Plaintiffs attempt to construct a cloak-and-dagger conspiracy theory about how Nassau County and the Presiding Officer conducted the redistricting process, the process here followed how jurisdictions typically complete modern redistricting. The person or entity drawing the proposed maps—be it a legislative leader, as here, or an independent commission, or another body—typically retains lawyers like Mr. Misha Tseytlin, Esq., and social-science experts like Dr. Sean Trende to help guide it through the complex task of drawing a redistricting map that complies with all applicable legal requirements. The only difference here is that Plaintiffs have undertaken extraordinary—and entirely inappropriate—discovery efforts to interject themselves deep into the legislative process and the attorney-client relationship.

Before this Court, Plaintiffs no longer dispute that their discovery requests seek information that is entirely covered by legislative privilege, contrary to their lead argument below. Instead, Plaintiffs invoke two alleged exceptions to legislative privilege that (as they now concede) would otherwise bar all of this discovery. Neither of those claimed exceptions has any applicability here.

Plaintiffs' first claimed exception is that the Presiding Officer waived all protections of legislative privilege for the entire legislative process of redistricting by publicly introducing the memoranda prepared by Troutman Pepper Hamilton Sanders LLP and the testimony of Mr. Tseytlin, but Plaintiffs' position goes far beyond any plausible notion of waiver. As Plaintiffs would have it, a legislator (or an independent commission, as the case may be) presenting a public defense of a publicly proposed redistricting map (which is a commonplace occurrence, *see, e.g.* 2020 Cal. Citizens Redistricting Comm'n, *Report On Final Maps* (Dec. 26, 2021))[1] waives legislative privilege as to the *entire* redistricting process of developing that map, including as to any legal analyses of proposed maps never submitted to the legislature. Nothing in the well-established law of waiver supports Plaintiffs' unprecedented approach, which approach is also contrary to the Supreme Court's own waiver conclusions in this very case with respect to the Presiding Officer himself.

Plaintiffs' second claimed exception is based upon their argument that there was "illicit partisan and racial intent" at play here. Plaintiffs'

[1] Available at https://wedrawthelines.ca.gov/wp-content/uploads/sites/64/2023/01/Final-Maps-Report-with-Appendices-12.26.21-230-PM-1.pdf (all websites last visited Sept. 19, 2024).

illicit-intent-means-waiver-of-privilege theory has no grounding in New York law, which applies regardless of any claimed legislative motives. And Plaintiffs' claims of improper motive are baseless, in any event. That is why the Supreme Court already rejected this same argument from Plaintiffs below when dealing with discovery requests against the Presiding Officer, in a decision that Plaintiffs did not appeal, even as they falsely criticize the Supreme Court for "ignoring" this issue.

Finally, while Plaintiffs' remaining arguments are irrelevant in light of their failure to rebut the applicability of legislative privilege, those arguments are wrong regardless. Plaintiffs assert that the attorney-client privilege and the work-product doctrine do not apply to Mr. Tseytlin's and Dr. Trende's roles here, but Mr. Tseytlin and Dr. Trende provided the Presiding Officer with advice and analyses on proposed redistricting maps' compliance with the law, all in the shadow of threatened litigation. Further, with respect to the sought-after discovery of Mr. Tseytlin, in particular, Plaintiffs offer no justification for their unprecedented position that counsel providing a legislator with standard advice on the legality of a proposed redistricting map opens that counsel up to discovery in subsequent litigation over that map.

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.

REPLY ARGUMENT

I. Plaintiffs No Longer Dispute That *All* Of The Disputed Discovery Is Protected By Legislative Privilege, And No Exception To That Now-Concededly-Applicable Privilege Permits The Discovery Here

Plaintiffs do not challenge on appeal here the "Supreme Court's ruling that legislative privilege can apply to Mr. Tseytlin and Dr. Trende," Resp.41, and thus Plaintiffs now concede that all of the disputed documents and testimony sought by their subpoenas, as well as the materials that Defendants redacted or withheld in response to Plaintiffs' document requests are privileged, absent a basis for finding waiver. Instead, Plaintiffs mount two arguments attempting to overcome the legislative privilege's protections. *See* Resp.21–30, 40–48. But, as explained below, both arguments misstate New York law and are insufficient to defeat application of legislative privilege in this case.

A. A Legislator Releasing Analysis And Related Testimony Arguing That His Proposed Legislation Is Lawful Does Not Waive Legislative Privilege Protecting The Creation Of That Proposed Legislation

1. As Defendants explained, New York's doctrine of legislative privilege broadly protects from disclosure the documents and testimony that Plaintiffs seek here, Br.33–42, which Plaintiffs no longer dispute, Resp.41. Both the work of Mr. Tseytlin and Dr. Trende falls within the scope of legislative privilege, as the Presiding Officer engaged Mr. Tseytlin and Dr. Trende to provide advice and analysis to assist him in developing draft legislation—that is, proposed maps for the County's redistricting plan. Br.39–41. Similarly, the material that Defendants redacted or withheld in response to Plaintiffs' document requests also fit comfortably withing the protections of legislative privilege, as this material relates to actions underling the legislative process of drafting Local Law 1, additional redistricting maps proposed to the Legislature, or various draft maps that the Presiding Officer considered. Br.41–42. Further, any possible waiver of this legislative privilege here due to the Presiding Officer's offering of the memoranda or the legislative-hearing testimony from Mr. Tseytlin is narrow, extending only to those documents and that testimony themselves—as opposed to undisclosed

discussions, analyses, or conclusions related to other proposed redistricting maps not discussed in those memoranda or that testimony. Br.50–55. Defendants have already fully disclosed that material (and more), thus there is nothing more that Plaintiffs could obtain from Defendants, even if a limited waiver occurred here. Br.55.

2. Plaintiffs' arguments that the Presiding Officer waived the protections of legislative privilege here all fail. Resp.21–30.

To begin, Plaintiffs argue that Defendants "have improperly sought to use privilege as both sword and shield" by "*selectively disclos[ing]* information favorable to the map while withholding facts that may harm their public clams and legal defenses." Resp.24 (emphasis added). There was no "selective disclosure" in any legally relevant sense. The two Troutman Pepper memoranda and Mr. Tseytlin's testimony all discuss Troutman Pepper's and Dr. Trende's analyses and conclusions regarding proposed redistricting maps publicly submitted to the Legislature for its consideration, including the proposed maps from the Presiding Officer himself. Br.11–15; *see* R.762, 778. Plaintiffs already have the entirety of those public memoranda and that public testimony. *See id.*; R.317, 762, 778. Further, Defendants have also produced over 1,000 documents

(spanning just under 15,000 pages) and dozens of emails related to Dr. Trende's analyses and conclusions concerning the same maps discussed in the memoranda and testimony. Br.17–19; R.77, 318, 341, 345. So, Plaintiffs already possess the entire universe of the otherwise-protected material at issue in the memoranda and testimony, as well as any material that may have "virtually parrot[ed]" that memoranda and testimony. Br.17–18, 53–55 (quoting *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)).

What Plaintiffs seek here is additional, unrelated analyses, data, and conclusions about other draft redistricting maps that were not discussed in either the public memoranda or testimony, and that were never publicly released or introduced in the Legislature. *See* Resp.29 (claiming entitlement to a "full and proper inquiry as to what maps were considered" (quoting R.195)); *see also* Resp.25 ("work performed . . . on the redistricting maps" (quoting R.104)). But nothing in the law of waiver entitles Plaintiffs to receive that additional, privileged information, *see, e.g.*, *Empire Chapter*, 211 A.D.3d at 1158; *Loudon House LLC v. Town of Colonie,* 123 A.D.3d 1409, 1411 (3d Dep't 2014), and for good reason. All

of it comprises "an integral part of the deliberative and communicative process" of "consider[ing]" and voting upon potential legislation in a complex area of the law—namely, draft maps for redistricting. *Straniere v. Silver*, 218 A.D.2d 80, 83 (3d Dep't 1996) (citation omitted); *see Gravel v. United States*, 408 U.S. 606, 616 (1972); Br.35–36.

While Plaintiffs' theory is that the release of the memoranda and testimony broadly entitles them to *all* documents, testimony, and communications related to the entire "subject matter" of "the redistricting process," Resp.24–25, they cannot square that assertion with the well-established principle that courts evaluate the scope of any privilege waiver on a document-by-document or communication-by-communication basis, *compare* Br.56–58, *with* Resp.22–25. Again, Defendants have already provided Plaintiffs with all of the analyses and data underlying the proposed maps discussed in the Troutman Pepper memoranda and Mr. Tseytlin's testimony, as well as other material that pay have parroted those analyses and data. *Supra* pp.6–7. What Defendants object to here, however, is disclosing additional privileged information not discussed in those publicly disclosed materials—including material relating to draft legislation never introduced to the

Legislature, the Presiding Officer's deliberations concerning that draft legislation, and the process of how the consideration of that draft legislation ultimately resulted in the three maps that the Presiding Officer did propose to the Legislature. *See supra* pp.5–6. All of this is far outside of the limited memoranda and public testimony that Plaintiffs claim form the basis of the waiver they seek to invoke.

Plaintiffs argue that *Empire Chapter* and *Loudon House*—cases upon which Defendants have relied—support the conclusion that Defendants have "waive[d] on [all] topics related to Mr. Tseytlin and Dr. Trende's roles in the map-drawing process." Resp.26–28. Yet, Plaintiffs misunderstand both of those cases.

In *Loudon House LLC*, a Town Board retained outside counsel to prepare a written report regarding the Town's legal zoning options related to facilitating the development of a condominium. 123 A.D.3d at 1410. At the Town's request, its outside counsel made "an extensive oral presentation" at a public meeting "set[ting] forth his legal analysis of the zoning issues involved." *Id.* at 1411. The court held that "to 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.* (citations omitted) (emphases added). Similarly, *Empire Chapter* explained that "privilege is waived if the communication or the underlying factual information is publicly disclosed," and held that the public disclosure there "virtually parroted the [underlying] study's analysis and findings, and, as such, [ ] waived the privilege *with respect to this information*." 211 A.D.3d at 1158 (emphasis added).

Applying these cases here, the Presiding Officer's presentation of the Troutman Pepper memoranda and Mr. Tseytlin's testimony could only waive legislative privilege over "the contents" of the underlying "analys[es]" that they "set forth," *Loudon House LLC*, 123 A.D.3d at 1411—*i.e.*, the redistricting maps proposed to the Legislature, including by the Presiding Officer himself—and only "with respect to th[e] information" in those analyses that the memoranda and testimony "virtually parroted," *Empire Chapter*, 211 A.D.3d at 1158. Again, Defendants have already produced the memoranda, the testimony, the three proposed maps, and all analyses and data concerning those maps. *Supra* pp.6–7. And while Plaintiffs assert that Defendants have not "identified any alleged documents or communications . . . that would fall

outside the scope of waiver," Resp.27, Defendants specifically argued that the requested information concerning "'who [Dr. Trende or Mr. Tseytlin] consulted with' or 'what [draft] maps' they considered, beyond the proposed maps publicly presented to the Legislature . . . remains protected . . . notwithstanding the release of the memoranda and testimony," Br.58.

Finally, Plaintiffs' attempt to reconcile the Supreme Court's broad waiver decision with respect to Mr. Tseytlin and Dr. Trende here with its narrow decision with respect to the Presiding Officer fails. Resp.28–30.

As Defendants explained, in its June 7, 2024, Decision and Order, the Supreme Court correctly held that the Presiding Officer had only waived legislative privilege "to the extent of the information contained in Troutman's memoranda and Mr. Tseytlin's testimony," such that he could only "be questioned during deposition solely limited to the publicly disclosed information." R.1202–03. That 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 Supreme Court "strictly limited" the deposition "to the information that has already been publicly disclosed through those means," meaning 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." R.1203. This proper interpretation of waiver is irreconcilable with the Supreme Court's subsequent decision at issue here allowing Plaintiffs to question Mr. Tseytlin and Dr. Trende regarding draft maps presented to the Presiding Officer and the legal advice and analyses they provided on those maps, although those maps were never publicly disclosed or discussed in the Troutman Pepper memoranda or Mr. Tseytlin's testimony. Br.59; R.195–96.

Plaintiffs contend that it "makes good sense" to allow "more latitude to pursue discovery against Mr. Tseytlin and Dr. Trende than [the Presiding Officer]," Resp.28, but it makes no sense to apply a broader scope of waiver to Mr. Tseytlin and Dr. Trende than to the Presiding Officer. The legislative privilege protections applicable to the work of Mr. Tseytlin and Dr. Trende derive entirely from the Presiding Officer, Br.25; R.99–100, and the Presiding Officer's waiver is based on the exact same public release of the identical memoranda and testimony at issue here, Br.54. Indeed, applying different standards here creates an end-run around the legislative privilege of the Presiding Officer, allowing

Plaintiffs to obtain the very information concerning the Presiding Officer's "iterative process of creating legislation" and "involvement with particular pieces of legislation," *Campaign for Fiscal Equity, Inc. v. State*, N.Y.S.2d 227, 231 (1st Dep't 1999), that the Supreme Court properly shielded from discovery in its order dealing with discovery against the Presiding Officer, *see* R.1202–03; *contra* Resp.29. This Court should reverse the Supreme Court's inconsistent, broad waiver decision, as it threatens to "completely gut the legislative privilege," R.1203, and "chill [a] legislator's activities," *Campaign for Fiscal Equity*, 687 N.Y.S.2d at 231 (citation omitted).

B. New York Law Does Not Recognize An "Illicit Purpose" Exception To Legislative Privilege And Plaintiffs Have No Evidence Of Such Purpose In Any Event

1. Plaintiffs argue, in the alternative, that Defendants' "illicit partisan and racial intent in enacting the map vitiates any legislative privilege" applicable here, Resp.40, but New York law recognizes no such exception and Plaintiffs offer no evidence of ill intent regardless.

a. New York's legislative privilege is incompatible with an exception based on legislators' motives in conducting legislative activities. "The scope of the legislative privilege . . . turns upon the

legislative nature of the activity sought to be protected from inquiry or disclosure under the privilege," not the underlying motives for engaging in such activity. R.1196–97; *see Campaign for Fiscal Equity*, 687 N.Y.S.2d at 232; *see also Bogan v. Scott-Harris*¸ 523 U.S. 44, 54 (1998). The privilege is designed "to protect the integrity of the legislative process," *People v. Ohrenstein*, 153 A.D.2d 342, 355 (1st Dep't 1989), by providing legislators "with 'breathing room' to debate and decide on policy and mold it into legislation" without fear of "being dragged into court," *Campaign for Fiscal Equity*, 687 N.Y.S.2d at 232. Accordingly, the privilege does not permit discovery that would "reveal a legislator's thought processes or the iterative process of creating legislation," *id.* at 231, and broadly "precludes disclosure as to the legislators' deliberations" in conducting legislative activities "as well as the underlying motivations for these activities," *Humane Soc'y of N.Y. v. City of New York*, 729 N.Y.S.2d 360, 364 (Sup. Ct. N.Y. Cnty. 2001) (citations omitted).

Applying this understanding here, the activities that Mr. Tseytlin and Dr. Trende were engaged in—advising the Presiding Officer in the process of drafting legislation (redistricting maps)—were unquestionably

legislative in nature, as Plaintiffs no longer dispute. *Supra* p.4. Thus, legislative privilege attaches regardless of any claimed underlying motivations. At bottom, Plaintiffs impermissibly seek testimony from Mr. Tseytlin and Dr. Trende that "would reveal . . . the [Presiding Officer's] iterative process of creating legislation," *Campaign for Fiscal Equity,* 687 N.Y.S.2d at 231, and it "would defeat this purpose of the immunity" to allow discovery into "background documents and data" "outside the official record which may have been considered and rejected by [the Presiding Officer] in connection with" those activities, *Humane Soc'y of N.Y.*, 729 N.Y.S.2d at 364 (citation omitted).

b. Plaintiffs' arguments for the recognition of an illicit-purpose exception to legislative privilege are all unpersuasive.

As an initial matter, Plaintiffs' claim that the Supreme Court "did not reach" Plaintiffs' argument on this point, Resp.1 n.1, 40–41, is misleading. Plaintiffs expressly "invit[ed] [the Supreme Court] to apply a qualified legislative privilege" would not allow witnesses to withhold testimony "because there is evidence that the redistricting process was tainted by intentional racial discrimination and partisan bias." R.1198–

99. The Supreme Court directly addressed and rejected Plaintiffs' argument in its ruling related to the Presiding Officer. *See* R.1198–201.

That point aside, Plaintiffs invoke a few cases to support their claim that legislative privilege has an illicit-motive exception, Resp.42, but none of them are helpful to Plaintiffs' cause.

The only New York state case on legislative privilege Plaintiffs cite, *Humane Society of New York*, 729 N.Y.S.2d 360—a non-binding Supreme Court case—does not support Plaintiffs' position here. There, the court held that a plaintiff cannot obtain discovery into "the legislators' deliberations and motivations in passing a regulation," as this was "prohibited by the legislative immunity privilege," which privilege plaintiff could not "avoid[ ] . . . based on plaintiff's unsupported allegations of bad faith or improper motives on the part of the [lawmakers at issue]," *Humane Soc'y*, 729 N.Y.S.2d at 739–40, which is all Plaintiffs offer here, *see infra* pp.17–21. In any event, *Humane Society* is a non-binding, trial-court decision that, if read as Plaintiffs urge, would be contrary to New York's legislative privilege principles, as noted immediately above.

Plaintiffs' federal case law, Resp.42, also does not help them. Both *Rodriquez v. Pataki*, 280 F. Supp. 2d 89, 102 (S.D.N.Y. 2003), *aff'd*, 293 F. Supp. 2d 302 (S.D.N.Y. 2003), and *Bethune-Hill v. Virginia State Board of Elections*, 114 F. Supp. 3d 323, 337–39 (E.D. Va. 2015), involved federal-law claims under the Equal Protection Clause of the Fourteenth Amendment, Section 2 of the federal Voting Rights Act, or both. The federal courts held that state actors facing federal-law claims enjoyed only a qualified legislative privilege, which makes sense given that the U.S. Constitution's Supremacy Clause trumps state law. *See Rodriquez*, 280 F. Supp. 2d at 95–101; *Bethune-Hill*, 114 F. Supp. 3d at 337–39. Here, in contrast, Plaintiffs raise only state-law statutory claims; Plaintiffs' hoped-for illicit-motive-exception cannot trump the well-recognized legislative privilege principles under New York common law.

2. Even if this Court were to adopt an illicit-motive-waives-legislative-privilege rule, Plaintiffs presented no evidence even coming close to satisfy that rule. As the Supreme Court correctly explained when granting the Presiding Officer's motion to quash Plaintiffs' subpoenas, "Plaintiffs' examples do not constitute objective evidence of discriminatory intent and partisan bias." R.1201. Plaintiffs rely on the

same examples here, *compare* R.1199–200, *with* Resp.42–48, and this Court should similarly "reject[ ] Plaintiffs' examples as furnishing a sufficient basis . . . to set aside or qualify the common law legislative privilege," R.1201.

Specifically, the Presiding Officer engaged Mr. Tseytlin and relied on Dr. Trende's methodology to ensure that the proposed maps were politically neutral and so complied with New York's "prohibition on partisan gerrymandering" as opposed to the Republican and Democratic TDAC Commissioners' maps which the Presiding Officer rejected as partisan gerrymanders. Br.12–13; *see* R.1200. And the Presiding Officer did not draw a map based upon racial consideration given Dr. Trende and Mr. Tseytlin's advice and conclusions that "there was no justification for drawing any additional districts based on race," and that doing so would be "unconstitutional." R.1200.

Plaintiffs' reliance on a chart generated by Dr. Trende analyzing the adopted map in no way shows that Defendants acted with illicit intent to enact "an extreme partisan gerrymander," as Plaintiffs claim. Resp.44. Plaintiffs base this conclusion on a partisan-fairness analysis conducted by Plaintiffs' own expert Dr. Daniel Magleby. *See* R.263, 296.

Importantly, however, Dr. Trende analyzed the adopted map using a different methodology—*which was the same approach blessed by the New York Court of Appeals in Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022)—and concluded that the proposed map was politically neutral. R. 643–48, 654. This chart is thus evidence of a *good-faith* intent to follow the law, not a bad-faith desire to politically gerrymander, given that the Presiding Officer followed the expert whose methodology matched that approved by the highest court in this State, rather than following a different, untested approach. At most, Dr. Magleby's conclusion just shows a disagreement among the parties' experts who "employed different analyses, and it does not show discriminatory intent," as the Supreme Court correctly held when ruling on the Presiding Officer's motion below. R.1200–01.

Plaintiffs' contention that "Defendants drew the map to intentionally deny racial groups equal access to the political process," Resp.47, is also without support. According to Plaintiffs, Dr. Trende and Mr. Tseytlin "analyzed several iterations of potential maps" to compare the percentages of minority voters in potential districts "to those in Dr. Trende's computer-generated map ensemble," but "t[old] the public it was improper" to consider race in drawing maps. Resp.47–48. This grossly

mischaracterizes the record and the nature of Dr. Trende's and Mr. Tseytlin's work. As Defendants have explained, the Presiding Officer retained Troutman to ensure that the proposed map complied with the various legal requirements under state and federal law governing redistricting, and Troutman retained Dr. Trende to help perform the complex social-science and statistical analyses required to properly analyze compliance with those requirements. Br.10–11. As part of these compliance efforts, Dr. Trende analyzed whether the County had to create any race-focused districts for purposes of complying with Section 2 of the Voting Rights Act, as interpreted by Troutman Pepper's legal analysis of U.S. Supreme Court case law. *See* R.764–67, R.783–86. Based on Dr. Trende's and Troutman Pepper's advice, the Presiding Officer "decline[d] to draw any districts to any racial targets" in the proposed map. R.786.

Notably, awareness of the districts' demographics during the map-drawing process is not equivalent to drawing districts based on race. *Indeed, Troutman Pepper discussed the racial makeup of the districts in the publicly released Troutman Pepper memoranda and in Mr. Tseytlin's testimony while specifically explaining that the districts were not drawn*

based on race, so Plaintiffs' bad-faith claims here make no sense. *See* R.764–67, 774–77, 783–86, 798–802.[2]

II. While The Now-Uncontested Legislative Privilege Covers All Of The Disputed Discovery Sought After Here, Attorney-Client Privilege And The Work-Product Doctrine Also Prohibit The Same Discovery

A. Both the attorney-client privilege and work-product doctrine protect the documents and testimony that Plaintiffs seek from Mr. Tseytlin and Dr. Trende, as well as the material that Defendants redacted and/or withheld in response to Plaintiffs' document requests. Br.45–50. Regarding Mr. Tseytlin, Plaintiffs seek materials central to the legal advice and services that he provided to the Presiding Officer regarding the Legislature's compliance with state and federal law in their redistricting efforts. Br.45–46. As for Dr. Trende, Plaintiffs similarly seek materials from him that he produced in his role as an agent of

[2] Plaintiffs' claim that Defendants demonstrated "bad intent" by withholding the identity of a member of "their map-making team," Resp.46, is similarly without merit. Plaintiffs contend that Defendants had "no colorable basis" to withhold the name, Resp.46, but Defendants asserted multiple privilege arguments on the record to support their decision to redact the information on productions to opposing counsel, and the parties ultimately submitted the issue to the Supreme Court, Resp.16–17. Defendants' legal determination to redact information for privilege says nothing about Defendants' underlying motives in drawing redistricting maps. Moreover, this issue is beside the point because Defendants have already disclosed this information, so as not to distract from the core issues in this appeal.

Troutman Pepper to facilitate its ability to provide legal advice to the Legislature, as the complexity of redistricting law requires the performance of expert social-science analyses. Br.46–47. Further, given the controversial nature of redistricting and the threats of litigation on the record here, both Mr. Tseytlin's and Dr. Trende's work for the Legislature was expressly done both "in anticipation of litigation" and "in order to avoid [additional] litigation" over the County's redistricting map. Br.45–47 (citing *App. Advocs. v. State Dep't of Corr. & Cmty. Supervision*, 40 N.Y.3d 547, 553 (2023)). For these same reasons, Defendants' redacted and/or withheld material that Plaintiffs seek is also protected because it comprises discussions between Defendants' counsel, Mr. Tseytlin, and Defendants' litigation and consulted expert, Dr. Trende, regarding the Legislature's redistricting process. Br.47–48.

B. Plaintiffs argue that Mr. Tseytlin's and Dr. Trende's roles in the Legislature's redistricting process here were "not predominantly legal" because, Plaintiffs assert, Mr. Tseytlin was "a map-drawer" and Dr. Trende "provid[ed] statistical analyses to facilitate the drawing of the proposed maps." Resp.32. Neither Mr. Tseytlin nor Dr. Trende performed the technical steps of drawing the lines in the Presiding

Officer's proposed map. Br.49–50. If Plaintiffs deposed Mr. Tseytlin or Dr. Trende on how or why they drew the Presiding Officer's proposed maps, the depositions would be exceedingly short. Br.49–50.

Plaintiffs' related argument that Dr. Trende's work of "'scoring' iterations of redistricting maps" is "not predominantly legal" fares no better. Resp.32. Dr. Trende's "scoring" of the proposed maps here was the same complicated social-science analysis that he performed as the plaintiffs' lead expert in *Harkenrider*, 38 N.Y.3d 494, to show that the redistricting map there was a partisan gerrymander, in violation of the New York Constitution, *compare id.* at 506, 519, *with* R.770–72, *and* R.790–95. Dr. Trende repeated that same exercise here with respect to the proposed redistricting maps submitted to the Legislature, so that the Presiding Officer did not end up proposing a map that—like the map in *Harkenrider*—would have run afoul of applicable anti-partisan-gerrymandering requirements. *See* R.770–72, 790–95; N.Y. Mun. Home R. L. §§ 10(1)(a)(13)(a), 34(4).

Finally, Plaintiffs argue that Mr. Tseytlin's and Dr. Trende's work for the Presiding Officer falls outside of the protections of attorney-client privilege and the work-product doctrine because "[b]oth were retained

months before the Presiding Officer publicized his proposed maps and even longer before this litigation commenced." Resp.36–40. These arguments are both legally and factually wrong.

As a legal matter, impending litigation is not the only trigger for attorney-client privilege and work-product doctrine protections under New York law. Rather, these protections also apply to advice designed "to *avoid* litigation." *App. Advocs.*, 40 N.Y.3d at 553 (emphasis added). As the Court of Appeals recently explained, providing "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," is privileged. *Id.* Here, Mr. Tseytlin and Dr. Trende provided legal advice to the Presiding Officer to ensure that his proposed redistricting map complied with the numerous legal requirements for such maps under state and federal law. Br.10–11; R.316, 629–30, 634–44. This advice on legal compliance, designed to avoid litigation, is privileged under New York law. *See App. Advocs.*, 40 N.Y.3d at 553.

Plaintiffs' half-hearted attempt to factually distinguish *Appellate Advocates*, Resp.36–37, depends entirely on Plaintiffs repeating their incorrect theory that Mr. Tseytlin and Dr. Trende "dr[e]w maps

themselves," Resp.37. Again, neither Mr. Tseytlin nor Dr. Trende "perform[ed] the technical steps of drawing the lines in the Presiding Officer's proposed map," but rather only provided legal advice and analyses on the proposed maps. Br.49–50; *see* R.456–57, 580–81; *supra* pp.22–23. So, just like in *Appellate Advocates*—and as Plaintiffs themselves describe this case—the attorney-client privilege attached here because Mr. Tseytlin and Dr. Trende "provided government actors with documents . . . that provided 'counsel's legal analysis and advice on the statutory, regulatory, and decisional law that [government actors] should consider during their decision-making process.'" Resp.37 (citing *App. Advocs.*, 40 N.Y.3d at 554).

And as a factual matter, Plaintiffs are wrong that Mr. Tseytlin's and Dr. Trende's work was not performed reasonably in anticipation of litigation. Resp.37–38. Indeed, throughout the Temporary Districting Advisory Commission ("TDAC") process in the Fall of 2022, Democratic Commissioners threatened litigation and engaged experts like Dr. Magleby to provide the type of analysis that partisan litigation plaintiffs often bring into court. *See* R.263, 448, 576, 1094; *see also* Tr. of TDAC

Meeting X at 14–15, 41–42 (Nov. 16, 2022);[3] Tr. of TDAC Meeting XI at 13, 16 (Nov. 21, 2022). Contrary to Plaintiffs' assertions, Resp.36–40, this began before the Presiding Officer's retention of Mr. Tseytlin and Dr. Trende. It thus made sense for "the Presiding Officer of the Legislature [to] engage[ ] . . . Troutman Pepper" and, "[t]o best serve the Presiding Officer as lead counsel, Troutman Pepper engaged Sean Trende, a litigation consultant and leading redistricting expert . . . to facilitate Troutman Pepper's provision of legal advice to the Presiding Officer regarding the redistricting process." R.316; *see* Br.45–50. And none of this is surprising, as it is well-established that "the road to redistricting is rarely straight forward and frequently requires court intervention." *Nichols v. Hochul*, 177 N.Y.S.3d 424, 425 (Sup. Ct. N.Y. Cnty. 2022).

III. This Court Should Reject Plaintiffs' Remarkable Position That The Standard, Good-Government Practice Of Counsel Advising A Legislator On The Legality Of Draft Redistricting Legislation Opens That Counsel Up To Being Deposed In A Case Challenging The Adopted Map

A. New York law imposes a heightened burden on parties seeking to subpoena their adversary's counsel of record, requiring a

[3] Available at https://www.nassaucountyny.gov/AgendaCenter/ViewFile/Item/2841?fileID=198856.

demonstration of a "good faith basis" for the subpoena in addition to showing that the information sought is material and necessary. Br.61–62; *see Matter of Winston*, 238 A.D.2d 345, 346 (2d Dep't 1997); *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 concluded that that the availability of information from other sources shows a lack of good faith, *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401, 406, 408 (1st Dep't 2018), setting a standard that lower courts within this Department have followed, *see, e.g.*, *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) (citing *Liberty Petroleum,* 164 A.D.3d at 401, 406).

This Court should quash Plaintiffs' subpoena to Mr. Tseytlin because Plaintiffs cannot meet this heightened burden, given that the information that they seek is "available from another source," Br.63 (citing *Liberty Petroleum,* 164 A.D.3d at 406)—Defendants themselves and Dr. Trende. Moreover, whatever marginal value might be gleaned from pursuing this subpoena is outweighed by the "substantial costs associated with" deposing opposing counsel, Br.63–64 (citing *Liberty*

Petroleum, 164 A.D.3d at 406–07), including the risk of revealing privileged information and chilling the legislators' ability to receive complete and candid legal advice. Although Plaintiffs have committed not to seek Mr. Tseytlin's disqualification based on their attempt to take discovery from him, R.478–79; Resp.50; *compare Liberty Petroleum,* 164 A.D.3d at 406–07, his deposition would needlessly distract him from preparing for imminent deadlines and trial dates, *see* Br.64; R.180, 196.

B. Plaintiffs' various counterarguments are unconvincing.

Plaintiffs fail to present any compelling justification to depart from *Liberty Petroleum*'s standard that the availability of sought-after information from alternative sources shows a lack of a good-faith basis for issuing a subpoena to an opposing party's counsel of record. *See* Resp.49–50; *Liberty Petroleum*, 164 A.D.3d at 406. Plaintiffs merely acknowledge that the "First Department [ ] requires a showing that 'the deposition is necessary because the information is not available from another source,'" Resp.49 (citing *Liberty Petroleum*, 164 A.D.3d at 406), and note "the Second Department, however, does not" require this showing, Resp.49. Of course, the Second Department has yet to provide any standard for "the unusual situation where a party seeks to depose

opposing counsel." *Liberty Petroleum*, 164 A.D.3d at 406. And the *Liberty Petroleum* ruling aligns with this Department's standard for the production of communications between a witness and an attorney, which are immune from disclosure absent a showing that the information "c[an] not be secured from any less intrusive source." *See People v Marin*, 86 A.D.2d 40, 48 (2d Dep't 1982), *abrogated on other grounds by People v. Juarez*, 31 N.Y.3d 1186 (2018).

Plaintiffs misunderstand *Liberty Petroleum*'s ruling and fail to meet its standard in any case. Plaintiffs claim that "*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." Resp.51 (citing *Liberty Petroleum*, 164 A.D.3d at 406). But *Liberty Petroleum* explains that the good-faith basis inquiry "rule[s] out the possibility that the deposition is sought . . . to disqualify counsel *or for some other illegitimate purpose*," and situates the requirement that "the information is not available from another source" squarely within this "analysis of the *mischief* that can be caused by noticing the deposition of an attorney who has appeared in the litigation." *Liberty Petroleum*, 164 A.D.3d at 406 (emphases added).

Regardless of where the inquiry lies, Plaintiffs do not contest the fundamental point that the information in question is, in fact, obtainable from alternative sources. While Plaintiffs assert that "Mr. Tseytlin . . . participated in the drawing of the enacted map," "communicated with Dr. Trende and the unnamed third party about statistical analyses of the proposed maps," and "publicly testified . . . about the map," Resp.51, Plaintiffs simply do not identify any information that only Mr. Tseytlin can provide.

The cases that Plaintiffs invoke in support of their position are readily distinguishable. *See* Resp.51–52. In *305-7 W. 128th St. Corp. v. Gold*, the First Department compelled the deposition of the defendant's counsel because, unlike Mr. Tseytlin, that "attorney . . . function[ed] as an agent or negotiator in [the] commercial venture" being challenged. 178 A.D.2d 251, 251 (1st Dep't 1991); *see also* Resp.52 (citing *Planned Indus. Ctrs., Inc. v. Eric Builders, Inc.*, 51 A.D.2d 586 (2d Dep't 1976) (allowing examination of an attorney where that "attorney function[ed] as an agent or negotiator in a commercial venture")). *Hudson Valley Marine, Inc. v. Town of Cortlandt*, 30 A.D.3d 378 (2d Dep't 2006), as Plaintiffs themselves acknowledge, "permit[ed] [the] attorney's

deposition because plaintiff had waived attorney-client privilege through voluntary disclosure," Resp.52—factual circumstances that are not present here. Plaintiffs cite *Town of Brookhaven v. Liere*, 24 A.D.3d 431 (2d Dep't 2005), to suggest that the Second Department "compel[ed] [the] deposition of [an] attorney where it concerned 'material and necessary' information," Resp.52 (quoting *Liere*, 24 A.D.3d at 431–32), but Plaintiffs ignore that "the witness previously produced" in that case "did not possess sufficient knowledge of the circumstances surrounding" the subject of the deposition, *Liere*, 24 A.D.3d at 431–32. *Matter of Winston* simply concluded that "respondents established [ ] a good faith basis for the deposition," 238 A.D.2d 345, 346 (2d Dep't 1997), without referencing pertinent facts or providing any rationale that could inform this Court's analysis. Finally, *Kapon v. Koch* did not consider the deposition of a party's attorney; thus, *Kapon*'s conclusion that "so long as the disclosure sought is relevant . . . it must be provided by the nonparty," 23 N.Y.3d 32, 38 (2014), does not apply to "the unusual situation where a party seeks to depose opposing counsel," *Liberty Petroleum*, 164 A.D.3d at 406.

Plaintiffs argue that Mr. Tseytlin should "sit for the deposition and 'take an appropriate [privilege] objection at that time' in response to

specific questions," Resp.55 (citation omitted), but they fail to furnish even a single example of such a question that does not implicate protected information. Instead, Plaintiffs vaguely reference "Mr. Tseytlin's role in the redistricting process," "his legislative testimony[,] and the Troutman memos." Resp.55. Such a paucity of "specific questions" fails to establish that Plaintiffs' subpoena would result in anything more than the "mischief . . . caused by noticing the deposition of an attorney who has appeared in the litigation." *Liberty Petroleum*, 164 A.D.3d at 406.

Plaintiffs' assertion that Mr. Tseytlin "must respond to Plaintiff's document requests because they seek . . . non-privileged documents," Resp.56, is unfounded, as explained above, *supra* Parts I–II. While Plaintiffs argue that these requests are both "material" and "necessary," Resp.56, they do not state their reasons for concluding that their document requests "seek . . . non-privileged" information, *see* Resp.56. This is a glaring oversight, given that Plaintiffs "seek . . . documents in [Mr. Tseytlin's] personal possession," including those related to "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." Resp.56.

Finally, it is particularly apt to close this briefing with Plaintiffs' bizarre assertion that redistricting "does not require the unique skills of a lawyer," Resp.54, as that claim is at the heart of much of their confusion in these appeals. Attorneys are frequently "involve[d]" during modern redistricting because of its legal complexity and, given the knowledge attorneys gain during this advice-giving function, "[d]efendants [often then] choose to retain the same firm in [subsequent] litigation." *Contra* Resp.54. Mr. Tseytlin is no different, having, for example, been retained (alongside other counsel) to advise the Colorado Redistricting Commission during the map-making process and then subsequently serving as counsel for that Commission in successful litigation defending that map before the Colorado Supreme Court. *See In re Colorado Indep. Cong. Redistricting Comm'n*, 497 P.3d 493 (Colo. 2021). Just based upon Defendants' limited knowledge, the same pattern obtained with counsel

for the Wisconsin State Legislature,[4] the Louisiana Legislature,[5] and the North Carolina General Assembly,[6] to name just a few examples.

Indeed, given the litany of state and federal legal requirements guiding and constraining the development of district maps, it is perfectly sensible—in fact, prudent—to engage the "unique skills of a lawyer" during the map-making process, with the lawyer ensuring that the map complies with all legal requirements. *Contra* Resp.54. Plaintiffs' suggestion that the Presiding Officer did something unusual in hiring

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[4] *See Waity v. LeMahieu*, 969 N.W.2d 263, 267–68 (Wis. 2022) (discussing redistricting-consulting contract between Wisconsin State Legislature and certain counsel); *Johnson v. Wisconsin Elections Comm'n*, 967 N.W.2d 469 (Wis. 2021) (those same counsel representing the Wisconsin State Legislature in subsequent redistricting litigation); *see generally* Patrick Marley, *Wisconsin Republicans Hire Redistricting Lawyers That Could Cost $1 Million Or More*, Milwaukee J. Sentinel (Feb. 16, 2021) (similar), https://www.jsonline.com/story/news/politics/2021/02/16/wisconsin-republicans-hire-redistricting-lawyers-1-million/6757773002/.

[5] *See* Julie O'Donoghue, *Louisiana Legislature Hires Law Firm With Republican Ties To Advise On Political Maps*, La. Illuminator (Feb. 5, 2022) (discussing Louisiana Legislature's decision to hire counsel "to advise on creating new political districts"), https://lailluminator.com/2022/02/05/louisiana-legislature-hires-law-firm-with-republican-ties-to-advise-on-political-maps/; *Robinson v. Ardoin*, No.3:22-cv-00211-SDD-SDJ (M.D. La.) (showing same attorneys represented Louisiana Legislature in subsequent redistricting litigation).

[6] *See* Travis Fain, *NC's Last Redistricting Case Cost Taxpayers $2.9 Million,* WRAL News (Oct. 5, 2022) (discussing counsel who represented Republican legislative leaders in litigation over redistricting maps), https://www.wral.com/story/nc-s-last-redistricting-case-cost-taxpayers-2-9-million/20508565/; Lynn Bonner, *Here's How Much NC Republicans' Redistricting Lawyers Cost Taxpayers*, NC Newsline (Sept. 29, 2022) (same counsel "hired to do redistricting work" for the Republican legislators "in the last round of map-drawing"), https://ncnewsline.com/briefs/heres-how-much-nc-republicans-redistricting-lawyers-cost-taxpayers/.

Mr. Tseytlin is thus nonsensical. By retaining counsel during the map-making process, the Presiding Officer sought to make sure that any map he proposed to the Legislature complied with all legal requirements and then would be successfully defended in court. Plaintiffs' attempt to invade the attorney-client relationship and the legislative process is the only aspect of all of this that is at all unusual here, and this Court should make clear that their tactics are impermissible under New York law.

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.

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Respectfully submitted,

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