SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Petitioners,

For an Order and Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules

-against-

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

Respondents.

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Index No. 904972-22

PETITIONERS' OPPOSITION TO HARKENRIDER PETITIONERS' MOTION TO INTERVENE

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PRELIMINARY STATEMENT

Proposed Intervenors, Petitioners in *Harkenrider v. Hochul*, seek to intervene in this mandamus action to defend against what they mischaracterize as a collateral attack on the *Harkenrider* decision. (Order to Show Cause, Doc. No. 74). But this action is not a collateral attack; it involves different issues, different parties, and different requested relief from *Harkenrider*. Petitioners do not seek to disturb the judgment of the Steuben County Supreme Court, which implemented a congressional map governing the 2022 midterm elections. Instead, Petitioners seek to remedy the fundamental legal violation that was discussed in the *Harkenrider* decision but never fully addressed—namely, the failure of the Independent Redistricting Commission ("IRC") to send a second round of congressional redistricting maps to the New York Legislature as required by Article III, Sections 4 and 5 of the New York Constitution. That relief was unavailable in *Harkenrider* because the petitioners did not seek it; neither the IRC nor the IRC Commissioners were parties to the action; and because the Court of Appeals had not yet invalidated the 2021 Legislation, making clear that the IRC was required to act to complete New York's constitutional redistricting process.

During the *Harkenrider* litigation, Proposed Intervenors purported to share Petitioners' interest in reasserting the primary role of the IRC in New York's redistricting process. But rather than intervene on the side of Petitioners in this lawsuit, Proposed Intervenors now seek to *prevent* the IRC from taking up its constitutionally prescribed role in New York's redistricting process. Because this case does not involve or seek to modify the judgment in *Harkenrider*, and because Proposed Intervenors assert an interest here that is different than the interest they asserted in that case, they do not have a real and substantial interest warranting intervention. Finally, Proposed Intervenors' motion comes nearly two months after the commencement of this expedited litigation.

Their participation at this stage threatens to delay these proceedings and make it more difficult for Petitioners to obtain timely relief.

For these reasons, Petitioners respectfully request that the Court deny Proposed Intervenors' motion to intervene.

BACKGROUND

In 2014, New York voters approved constitutional amendments (the "Redistricting Amendments") to reform the redistricting process. The Redistricting Amendments required the creation of the IRC and a carefully crafted process by which the IRC would submit proposed redistricting plans to the Legislature for consideration. Following a months-long public comment process, which included comments from three of the Petitioners in this action, the IRC abandoned its constitutional duty and failed to submit a second round of redistricting maps to the Legislature. Shortly thereafter, the Legislature—purportedly acting pursuant to L 2021, ch 633 ("the 2021 Legislation")—passed new congressional redistricting maps. The 2021 Legislation provided that, "if the [IRC] d[oes] not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan," the Legislature could proceed to introduce redistricting legislation. *See* L 2021, ch 633; *see also Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *9 (N.Y. Apr. 27, 2022) (describing statute as "authorizing the legislature to move forward on redistricting even if the IRC fails to submit maps").

The Proposed Intervenors subsequently brought suit to challenge the legislatively-enacted congressional map on the grounds that it was invalid because the IRC had failed to submit a second round of redistricting maps to the Legislature, and alleging that the legislative-enacted map was created with impermissible partisan intent. (*Harkenrider* Petition, Doc. No. 50 at 58-63). The case was litigated up to the New York Court of Appeals, which, on April 27, 2022, held that the 2021

Legislation was unconstitutional to the extent that it allowed the Legislature to pass a redistricting plan in the absence of a second set of plans submitted by the IRC. *Harkenrider*, 2022 WL 1236822, at *9. The Court of Appeals' decision made clear that the IRC did not complete its constitutionally required redistricting duties because it failed to submit a second round of proposed congressional districting plans. It also made clear that the Legislature was powerless to enact a new congressional plan once the IRC refused to submit a second set of plans. The Court of Appeals also affirmed the Steuben County Supreme Court's decision finding that the legislatively-enacted map was an unconstitutional partisan gerrymander. *Id.*, at *11. As a result of the Court of Appeals decision, New York's constitutional redistricting process had failed, and New York's last validly enacted congressional districts—from the previous decade—were malapportioned.

The Court of Appeals could not have ordered the IRC to complete the constitutional redistricting process in the *Harkenrider* case for several reasons. Proposed Intervenors did not seek such relief, and neither the IRC nor its Commissioners were parties. Moreover, by the time the Court of Appeals issued its decision on April 27, the 2022 midterm elections were fast approaching. As a result, the Court of Appeals ordered the Steuben County Supreme Court—with the assistance of special master Jonathan Cervas—to implement a map for the 2022 midterm elections. *See generally*, *Harkenrider* Decision & Order at 5, Doc. No. 55; *Harkenrider*, 2022 WL 1236822, at *13.

Petitioners brought this Article 78 action for a writ of mandamus against the IRC and its members in their official capacities on June 28, 2022. (Pet., Doc. No. 1).[1] They did so only after the Court of Appeals held the legislature lacked authority to remedy the IRC's failure to complete

[1] On August 4, 2022, Petitioners amended their petition to add additional petitioners and limit the scope of the action to congressional districts. (Am. Pet., Doc. No. 47).

the "mandatory process for submission of electoral maps to the legislature[,]" *Harkenrider*, 2022 WL 1236822, at *1. Petitioners are New York voters who are invested in their congressional representation and are injured by the IRC's failure to complete its constitutionally mandated redistricting duties. Petitioners request an order compelling Respondents to "prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan," Pet. ¶ 1. Petitioners do not seek relief for this election cycle; they filed the Petition "to ensure that a lawful plan is in place immediately following the 2022 elections and can be used for subsequent elections this decade." *Id.* at 19. In other words, Petitioners do not seek to disturb the judicially-approved map which the *Harkenrider* court implemented to ensure that New Yorkers had a map in place for the 2022 election that did not violate the one-person one-vote requirement. (*Harkenrider* Decision & Order at 3, 5, Doc. No. 55). Petitioners seek relief for future elections, requiring IRC to execute its mandatory duties in the congressional redistricting process. *Harkenrider*, 2022 WL 1236822, at *1.

On August 5, 2022, this Court set a return date of September 9 and required Respondents to file answering papers on or before August 23. (Order to Show Cause ¶¶ 1–2, Doc. No. 58). At the request of Respondents Brady, Conway, Harris, Nesbitt, and Stephens, which Petitioners did not oppose, this Court extended the deadline for answering papers to August 26. (Notice, Doc. No. 73). It also maintained the September 9 return date and set oral argument for September 12.

On August 23, 2022, nearly two months after Petitioners filed this action and after the original deadline for Respondents' answering papers, Proposed Intervenors sought to intervene. (Order to Show Cause, Doc. No. 74). For the reasons set forth below, the Court should deny the motion.

ARGUMENT

Proposed Intervenors do not meet the requirements to intervene in this action. To qualify for intervention as a matter of right, proposed intervenors must demonstrate that: 1) their motion is timely, 2) "the representation of the person's interest by the parties is or may be inadequate," and 3) "the person is or may be bound by the judgment." N.Y. CPLR 1012(a)(2). Although "intervention should be permitted where the proposed intervenor has a real and substantial interest in the outcome of the proceeding . . . it should be restricted where the outcome of the matter to be determined will be needlessly delayed, the rights of the prospective intervenors are already adequately represented, and there are substantial questions as to whether those seeking to intervene have any real present interest in the property which is the subject of the dispute." *Osman v. Sternberg*, 562 N.Y.S.2d 731, 731–32 [2d Dep't 1990].

Separately, a court "may" in its discretion permit a party to intervene "when the person's claim or defense and the main action have a common question of law or fact." N.Y. CPLR 1013. "In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." *Id.* Although permissive intervention "may be appropriate when the main action and the claim or defense of the person seeking intervention have a common question of law or fact," again when "the action will be needlessly delayed, and the rights of the prospective intervenors are already adequately represented, and there are substantial questions as to whether those seeking to intervene have any real present interest in the property which is the subject of the dispute, intervention should not be permitted." *Quality Aggregates Inc. v. Century Concrete Corp.*, 623 N.Y.S.2d 957, 958 [3d Dep't 1995].

I. Proposed Intervenors are not entitled to intervene as of right.

A. Proposed Intervenors' role in *Harkenrider* does not give them a real and substantial interest in this case.

The most important requirement for intervention as of right is that the proposed intervenor has a "direct and substantial interest in the outcome of the proceeding." *Pier v. Bd. of Assessment Rev. of Town of Niskayuna*, 209 A.D.2d 788, 789 [3d Dep't 1994]; *see also Wells Fargo Bank, Nat'l Ass'n v. McLean*, 70 A.D.3d 676, 677 [2d Dep't 2010] (holding intervention should only be granted where intervenor has a "real and substantial interest in the outcome of the proceedings") (quoting *Berkoski v. Bd. of Trs. of Inc. Vill. of Southampton*, 67 A.D.3d 840, 843 [2d Dep't 2009]). Intervention "should be restricted where . . . there are substantial questions as to whether those seeking to intervene have any real present interest in the property which is the subject of the dispute." *Osman*, 562 N.Y.S.2d at 731–32; *see also Unitarian Universalist Church of Cent. Nassau v. Shorten*, 315 N.Y.S.2d 506, 512 [Sup. Ct.], *vacated on other grounds*, 316 N.Y.S.2d 837 [Sup. Ct. 1970] (stating movants "have no right to intervene unless the interest which they seek to protect gives them the necessary standing").

Proposed Intervenors claim an interest in defending the "judgment they obtained in the Steuben County Supreme Court." (Mem. of Law at 12, Doc. No. 66). But this action does not seek to undo the outcome in *Harkenrider*, and it is not a collateral attack on the map approved by the Steuben County Supreme Court for the 2022 election. To the contrary, Petitioners seek to remedy the constitutional violation identified by Proposed Intervenors in *Harkenrider* by seeking mandamus relief against the parties that have the constitutional authority and obligation to fix it—the IRC and its Commissioners. Contrary to Proposed Intervenors' suggestion, *id.*, an appeal of the Steuben County Supreme Court's final redistricting order would not have resulted in the relief Petitioners seek here. Neither Petitioners, nor the IRC, nor its Commissioners were parties to the

Harkenrider case. Nor did the *Harkenrider* petitioners seek the relief requested by the Petitioners here. And the exigency of the impending 2022 elections made it infeasible for the IRC to complete the constitutionally mandated process in time for the 2022 election year.

Furthermore, Petitioners do not seek to modify the map adopted by the Steuben County Supreme Court. The Steuben County Supreme Court "Ordered, Adjudged, and Decreed" "the official approved 2022 Congressional map," but did not address whether the map would be in place beyond the 2022 midterm elections. (*Harkenrider* Decision & Order at 5, Doc. No. 55). Proposed Intervenors suggest that the Steuben County court's use of the word "final" means that this map is in place for the entire decade. Doc. 66 at 12. But the word "final" appeared in an order making "minor revisions" to the enacted map. (Medina Aff. Ex. 1, Decision and Order, *Harkenrider v. Hochul*, No. E2022-0116CV (Sup. Ct, Steuben County, June 2, 2022)). Those revisions thus made that map the "final" version of the "2022 Congressional map." *Id.* They did not explicitly make it the "final" map for the remainder of the decade. The only other support Proposed Intervenors can muster for the proposition that the Steuben County court's map has been ordered to be in place for the rest of the decade comes from a *dissenting* opinion at the New York Court of Appeals that, by its terms, does not find that the Steuben County court's map must be in place until the next census. In that dissent, Judge Troutman noted her disagreement with the Court's remedy on the basis that it "*may* ultimately subject the citizens of this State, for the next 10 years, to an electoral map created by an unelected individual, with no apparent ties to this State, whom our citizens never envisioned having such a profound effect on their democracy." *Harkenrider*, 2022 WL 1236822, at *14 (Troutman, J., dissenting) (emphasis added); *see also* (Mem. of Law at 6, Doc. No. 66) (selectively quoting Judge Troutman's dissenting opinion).

Because Petitioners seek relief against the Commissioners of the IRC, and do not seek to modify the Steuben County Supreme Court's map, this action is not a "collateral attack" on that Court's order. Instead, Petitioners seek to ensure that the IRC completes its constitutionally mandated duties so that a constitutionally drawn map can be in place after the 2022 midterm elections. In doing so, they seek to reassert what Proposed Intervenors themselves have described as the "primary role" of the IRC in New York's redistricting process. *See* (Medina Aff. Ex. 2, Br. for Petitioners-Respondents at 18, *Harkenrider v. Hochul*, No. CAE 22-00506 [4th Dep't Apr. 15, 2022]). As Proposed Intervenors asserted in *Harkenrider*, anything less "*would lead to the impossible result that the Constitution's carefully drawn IRC process is meaningless*." *Id*. (emphasis in original); *see also id.* at 20 ("The 2022 maps are unconstitutional for failure to follow the *exclusive redistricting process* that the Constitution mandates.") (emphasis added).

If anything, Proposed Intervenors should be aligned with Petitioners in this action, not "directly adverse" as they claim. (Mem. of Law at 13, Doc. No. 66). In *Harkenrider*, Proposed Intervenors sought a remedy for the *Legislature's* violation of law that emanated from the IRC's failure to act. (*Harkenrider* Am. Pet. ¶ 244, Doc. No. 51) (alleging that "the Legislature had and has no constitutional authority to draw congressional or state Senate districts given the IRC's failure to follow the exclusive, constitutionally mandated procedures"). Inexplicably, Proposed Intervenors now claim the IRC can have no role in redistricting for the rest of the decade. Rather than joining Petitioners in seeking a judicial remedy to cure the IRC's inaction, they seek to intervene as Respondents in order to *prevent* this Court from ordering the IRC to fulfill its constitutional mandate. Proposed Intervenors' interest in *Harkenrider* does not give them a real and substantial interest as intervening Respondents in this action, particularly when the interests they now assert run contrary to their purported interests in that case.

B. Even if Proposed Intervenors have a real and substantial interest in this litigation, the existing Respondents adequately represent their interests.

Intervention as of right is permitted only where "representation of the person's interest by the parties is or may be inadequate." N.Y. CPLR 1012(a)(2).

This is not a collateral attack on the *Harkenrider* order, and Proposed Intervenors have not asserted any other interest in this litigation. But even if Proposed Intervenors' interest in the Steuben County map was cognizable for purposes of intervention, they have not shown that the existing Respondents would be unable to adequately defend their interest. The existing Respondents in this action are the IRC and its Commissioners. Petitioners seek to compel those Respondents to comply with their constitutional obligation and send a second round of maps to the Legislature. Commissioners Brady, Conway, Harris, Nesbitt and Stephens have filed a motion to dismiss that mirrors many of the same arguments made in Proposed Intervenors' proposed motion to dismiss. (Mem. of Law, Doc. No. 109); *see McCrory v. Vill. of Mamaroneck*, 932 N.Y.S.2d 850, 614 (Sup. Ct. 2011) (proposed intervenors' interests were adequately represented by municipal defendant where the "content and tenor" of the defendant's opposition to the petition demonstrated that its representation was "more than adequate").

C. Proposed Intervenors' motion is not timely and threatens to delay these proceedings.

"In examining the timeliness of [a] motion [to intervene], courts . . . consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party." *Jones v. Town of Carroll*, 72 N.Y.S.3d 657 [4th Dep't 2018] (quoting *Yuppie Puppy Pet Prod., Inc. v. St. Smart Realty, LLC*, 906 N.Y.S.2d 231, 235 [1st Dep't 2010]). This Court has a limited, sixty-day window in which to render a decision on Petitioners' claim. *See* N.Y. Const. art. III, § 5 (providing that "any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings" and "[t]he

court shall render its decision within sixty days after a petition is filed."). Because Petitioners filed their amended petition on August 4, this Court "shall render" its decision by October 3. *See id*. Respondents' answering papers were due on August 26, and Petitioners' Reply is due on September 6. (Court Notice, Doc. 73). The return date is set for September 9, and oral argument is scheduled for September 12. *Id.* This schedule is already set and provides sufficient time for this Court to render a decision ahead of the October 3 deadline.

Proposed Intervenors' potential participation in this litigation threatens to upset this Court's carefully crafted schedule. Proposed Intervenors waited to file their motion to intervene until August 23, which was the last day for Respondents to file their responsive pleading. Proposed Intervenors did not provide any explanation for their failure to move to intervene earlier. *See Vacco v. Herrera*, 669 N.Y.S.2d 228 [2d Dep't 1998] (denying intervention as untimely where proposed intervenor "did not provide a sufficient explanation for not filing their motion to intervene in a timely manner"). Proposed Intervenors' belated motion has necessitated a separate briefing schedule on intervention, and their motion will not be resolved until September 1 at the earliest. If Proposed Intervenors are permitted to participate, then Petitioners will need time to respond to Proposed Intervenors' motion to dismiss, and the Court may need to hold separate argument on that motion as well. (Proposed Mot. to Dismiss, Doc. No. 69; Proposed Mem. of Law, Doc. No. 70).

The additional proceedings that will be required because of Proposed Intervenors' participation in this action threaten to cause unnecessary delay, further limiting the time for this Court to render a decision in this already-expedited proceeding. *See Mavente v. Albany Med. Ctr. Hosp.*, 6 N.Y.S.3d 158, 160 [3d Dep't 2015] (upholding denial of intervention where it "would cause some delay because it would lead to duplicative discovery and motion practice" and holding

it would be prejudicial to require a party "to respond to similar repetitive demands and motions"). Proposed Intervenors' motion should be denied because it is untimely.

II. This Court should deny Proposed Intervenors' request for permissive intervention, as their belated participation would prejudice Petitioners and raise questions not relevant to the resolution of this case.

A court may permit intervention "when the person's claim or defense and the main action have a common question of law or fact," but "[i]n exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." N.Y. CPLR 1013. "[N]ew issues may not be interposed on intervention." *St. Joseph's Hosp. Health Ctr. v. Dep't of Health of State of N.Y.*, 637 N.Y.S.2d 821, 823 [4th Dep't 1996]. And where intervention would "raise various . . . questions which are not relevant to the resolution of the issue herein," it may properly be denied. *See Leonard v. Planning Bd. of Town of Union Vale*, 136 A.D.3d 866, 868 [2d Dep't 2016].

For the reasons described in Section II.C, because of the expedited nature of this action and Proposed Intervenors' decision to wait two months to file their motion to intervene, their intervention would delay this proceeding and make it more difficult for Petitioners to obtain relief within the sixty days allotted by law. Moreover, allowing intervention would raise new and irrelevant issues. Proposed Intervenors state that "they seek only to protect the *Harkenrider v. Hochul* judgment from collateral attack." (Mem. of Law at 15-16, Doc. No. 66). But for the reasons previously discussed, this suit is not a collateral attack on the *Harkenrider* decision. Instead, it seeks entirely different relief and does not seek to modify the judgment of the Steuben County Supreme Court. Because Proposed Intervenors' mischaracterization of this action forms the basis of both their motion for intervention and their proposed motion to dismiss (*see, e.g.*, *id.* at 10–13; Doc. 70 at 11–13), it is clear that their involvement will "raise various . . . questions which are not

relevant to the resolution of the issue herein," *Leonard*, 136 A.D.3d at 868. This Court should deny permissive intervention.

CONCLUSION

For all of the reasons stated herein, Proposed Intervenors' motion to intervene should be denied.

Dated: August 30, 2022

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**Pro hac vice applications pending*