SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

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TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, AND MARIANNE VIOLANTE,

Index No. E2022-0116CV

Petitioners,

-against-

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, AND THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents.

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REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITION AND AMENDED PETITION AND RESPONSE TO MOTION TO DISMISS*

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* Petitioners understand that this Court has not yet ruled on Petitioners' Motion For Leave To Amend their Petition. Given the necessarily streamlined nature of these proceedings, however, Petitioners file this combined Reply Memorandum in support of their Petition and proposed Amended Petition.

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PRELIMINARY STATEMENT

In the first redistricting cycle after New York's landmark 2014 constitutional amendments, New York's Democrat-dominated Legislature and Democratic Governor refused to follow the constitutionally mandated redistricting process and enacted flagrantly partisan-gerrymandered maps. In their Response Briefs, Legislative Respondents and the Governor offer no plausible defense of these maps. With respect to Petitioners' procedural argument that the Legislature had no authority to enact the 2022 Congressional Map and the 2022 Senate Map because it evaded the IRC-centric redistricting process, Respondents refuse to engage with the constitutional text, relying instead on meritless policy arguments. As to the substantive partisan-gerrymandering challenges, Respondents concede by silence that they enacted the challenged maps without any Republican input, and they are unable to produce any evidence or expert with knowledge about New York's political geography to rebut Petitioners' showing that many of the maps' lines subordinated neutral redistricting principles for partisan gain. Respondents also have no coherent answer to the devastating conclusion in the Trende Report that the maps that they adopted are more pro-Democratic than 5,000 neutrally drawn computer-generated maps. Instead, Respondents invent an alternative "methodology" that is so obviously, demonstrably wrong that its use leads to the comical conclusion that 2022 Congressional Map and 2022 Senate Map—the most notorious, pro-Democratic gerrymanders in the Nation—are actually pro-Republican.

Given that the underlying merits of this case are no longer in serious doubt, Petitioners respectfully request that the Court proceed in the following sensible manner. First, on the March 3, 2022 return date for the Petition, this Court should order the following: (1) the 2012 Maps are invalid, since they are malapportioned; (2) the 2022 Congressional Map and the 2022 Senate Map are procedurally invalid, due to the failure to follow the 2014 amendments' mandatory process; (3) Respondents are enjoined from administering any elections under these maps, which would

necessarily include enjoining all 2022-election-related deadlines; and (4) all parties may submit proposed remedial maps by March 10. Further, while the remedial proceedings continue, this Court should permit Petitioners to conduct their expedited discovery, which is relevant to their substantive gerrymandering claim, which claim this Court should decide in parallel with the remedial process, thereby giving the appellate courts a full record. In this way, this Court can enter a final judgment on all of the claims and issues in this case and (if this Court so chooses) adopt remedial maps "within sixty days after [the] petition is filed." N.Y. Const. art. III, § 5.

ARGUMENT

I. The 2022 Congressional And State Senate Maps Are Plainly Procedurally Unconstitutional, And Only The Courts Can Adopt Replacement Maps

A. The 2022 Congressional and Senate Maps are procedurally unconstitutional. The Constitution requires that the Legislature fully consider two rounds of maps proposed by the Independent Redistricting Commission ("IRC") before it has any authority to draft its own maps—that is "***[t]he process*** for redistricting," which "***shall govern redistricting in this state***." N.Y. Const. art. III, § 4(b), (e) (emphasis added). The Legislature ignored these procedural requirements, never receiving or considering any second-round IRC maps before proceeding with its own map-drawing process. Petitioners' Memorandum of Law In Support Of Petition And Amended Petition, NYSCEF No.25 ("Mem.") at 9–13. The Legislature's reliance on statutory authority, L.2021 c. 633, § 1, cannot cure this obvious constitutional violation. Mem.12–13. Because the Legislature had no authority to enact the 2022 maps, the only remaining maps are the Legislature-enacted 2012 Senate Map and federal-court-adopted 2012 Congressional Map, which are now malapportioned. Mem.14–16. Thus, this Court should either adopt its own constitutional maps, or simply enjoin conducting any elections on those maps and allow a federal court to draw new maps, as happened with New York's congressional map in 2012. Mem.16–17.

B. Respondents do not dispute many of Petitioners' arguments here. ***Critically, they do not even attempt to provide an answer on the constitutional text***: "[t]he process for redistricting," which process "shall govern," and requires two rounds of consideration of IRC maps. N.Y. Const. art. III, § 4(b), (e). Given that "'[t]he constitutional command is unambiguous'" in Article III, Section 4, "the Legislature's 'outright disregard' for the constitutional limitations imposed on it" by that constitutional provision and their complete failure to grapple with that text end the matter. *Silver v. Pataki*, 3 A.D.3d 101, 106 (1st Dep't 2003) (citation omitted). And Respondents concede by silence that the 2012 Congressional and Senate Maps are now unconstitutional.

The various non-textual arguments that Respondents make to attempt to salvage the 2022 maps and avoid the courts performing their constitutional duty to adopt remedial maps are wrong.

First, rather than engaging with the Constitution's text after 2014, they rely upon pre-2014 process and precedent. *See* NYSCEF No.72 at 10 & n.1; NYSCEF No.82 at 17–20. The People concluded that this pre-2014 process—controlled by an ever-gerrymandering-thirsty-Legislature—was inadequate, and decided to place the IRC as the driver of redistricting in this State. N.Y. Const. art. III, § 4(b), (e). So, Respondents' reliance on pre-2014 case law fails to shed any light on "[t]he process" that "shall govern redistricting congressional and state legislative districts" now contained in Article III, Section 4. *Id.* § 4(e). Accordingly, Legislative Respondents' citation of *Cohen v. Cuomo*, 19 N.Y.3d 196 (2012) (per curiam), offers them no support. Unlike in *Cohen*, where the Constitution was "silen[t] on th[e] issue" before the Court, *id.* at 202, Article III, Section 4 ***explicitly provides*** "[t]he process" that "shall govern" redistricting, and the Legislature has no answer at all for this language, and may not contradict that process via statute, *City of N.Y. v. N.Y. State Div. of Hum. Rts.*, 93 N.Y.2d 768, 774 (1999).

Second, Respondents make a policy argument that IRC Commissioners should not be permitted to undermine the Legislature's subjective desire to redistrict, NYSCEF No.72 at 13–14, but this ignores that the Legislature has ample authority to remove and replace any IRC Commissioners that refuse to do their constitutional jobs. The Constitution empowers legislative leadership to appoint eight of the ten members of the IRC, N.Y. Const. art. III, § 5-b(a)(1)–(4), meaning that this legislative leadership has plenary "power to remove," *Melendez v. Bd. of Educ. of Yonkers City Sch. Dist.*, 34 A.D.3d 814, 814 (2d Dep't 2006); *see also Sharkey v. Thurston*, 268 N.Y. 123, 127 (1935), any IRC Commissioners who may seek to undermine the redistricting process, *Bartlett v. Bedient*, 47 A.D.2d 389, 390 (4th Dep't 1975) (per curiam), and appoint new members who will discharge their duties, N.Y. Const. art. III, § 5-b(a)(1)–(4). What the Legislature cannot do is what it did here: allow (or perhaps, depending on what discovery reveals, *encourage*) the exclusive constitutional map-drawing process to fail, and then adopt redistricting maps exactly as it would have done if the People never enacted the 2014 amendments. It is, in fact, Respondents' position that would lead to absurd results. Under Respondents' approach, ***legislative leaders can always render the entire IRC process meaningless by appointing IRC members whom legislators know will refuse to agree on a map***. After taking such actions, the Legislature could then adopt any map that it wanted, exactly as before the 2014 amendments.

Third, Respondents' reliance on L.2021, c. 633, § 1, NYSCEF No.72, at 11–13; NYSCEF No.82, at 21–22, is pure question begging, given that—if Petitioners are correct that "[t]he process" for redistricting is constitutionally exclusively—then Respondents necessarily concede by silence that L.2021, c. 633, § 1 is unconstitutional, *see* Mem.12–13.

Finally, Legislative Respondents are wrong when they make the illogical claim that they must be permitted to draw new maps if this Court finds that they violated Article III, Section 4's

exclusive process in enacting the 2022 maps. NYSCEF No.72 at 13. Article III only requires that a court remand an infirm map to the Legislature when there exists a "reasonable opportunity to correct the law's legal infirmities." N.Y. Const. art. III, § 5. And Respondents fail entirely to explain how the Legislature could "reasonabl[y]" "correct the law's [procedural] infirmities," *id.*, given that the infirmity here is failure to follow the *constitutional, IRC-centric process*.

II. The 2022 Congressional And Senate Maps Are Obvious Partisan Gerrymanders

The Constitution prohibits the drawing of districts "to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties," N.Y. Const. art. III, § 4(c)(5); Mem.17–18. Courts considering whether a map is a partisan gerrymander typically look to three factors in conducting the partisan-gerrymandering inquiry—whether the map-creating and adoption process was partisan, whether the map has a partisan effect, and whether specific lines subordinated traditional redistricting criteria for partisan gain—and these three factors overwhelmingly demonstrate that the maps here are partisan gerrymanders. Mem.18–20. Respondents offer no coherent response to Petitioners' showing on all three factors.

A. The Map-Drawing Process For Both Maps Was Entirely Partisan

The map-drawing and enactment process that Democrats used was entirely partisan. Mem.20–21. As Senate Minority Leader Robert G. Ortt and others explained—without any contradiction in the record before this Court—the legislative Democrats controlled the whole map-drawing process with no Republican input or involvement, Mem.20–21, 43 (citing NYSCEF No.28 at 2–3, and Transcript at 10–12, 20–21, Session, New York State Assembly (Feb. 2, 2022)). Further, Governor Kathy Hochul explicitly promised to "***use [her] influence to help Democrats expand the House majority through the redistricting process***," so that she could help the Democratic Party "***regain its position that it once had when [she] was growing up***." Mem.21 (citation omitted). Finally, the legislative Democrats passed their single-party-drawn

congressional map, which the Democratic Governor signed, despite every Republican in the Assembly and Senate voting against it—like many prior single-party-supported maps struck down by courts across the country as drawn with impermissible partisan intent. *Id.*

Respondents have no answer for Petitioners' powerful showing that partisanship dominated the map-drawing process. Legislative Respondents do not address the partisanship of this process *at all*. *See* NYSCEF No.72. And the Governor only lamely attempts to explain away her extremely telling promise that she would "use [her] influence to help Democrats expand the House majority through the redistricting process." Mem.21 (citation omitted); *see* NYSCEF No.82 at 9–10, 12. The Governor claims that she made this promise "months prior," NYSCEF No.82 at 9, but that timing does not undercut her impermissible partisan intent related to *the current decennial redistricting process*, *see* Mem.21. Her obviously incorrect claim that the "context" of this quote makes it "innocuous" fares no better, as every single part of this quote demonstrates the Governor's intent to adopt a redistricting map that "favor[s]" a "particular . . . political part[y]." NYSCEF No.82 at 9; N.Y. Const. art. III, § 4(c)(5). And the Petition clearly alleges that she actually acted to fulfill the explicit promise that she made, *contra* NYSCEF No.82, as it specifically asserts that the Governor "signed" the 2022 Congressional Map and 2022 Senate Map into law and "bless[ed] her fellow Democrats' blatant gerrymandering efforts," NYSCEF No.1. ¶ 173, in direct violation of Article III, Section 4(c)(5) of the Constitution.

B. The Maps Will Have An Extreme, Starkly Partisan Effect

The 2022 Congressional Map and 2022 Senate Map will have extreme partisan effects. NYSCEF No.26 at 21–23; Mem.44–45. Mr. Sean Trende in his expert report[1] analyzed 5,000

[1] Legislative Respondents criticize Petitioners for submitting unsworn expert reports. NYSCEF No.72 at 1, 8, 17, 21–22. But New York law does not require parties to submit sworn expert reports at this procedural stage. *See* CPLR § 3101(d)1 (setting forth disclosure requirements

neutral, computer-generated maps, employing methodology grounded in the academic literature and commonly used by courts, including state supreme courts recently, *see, e.g.*, *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, ___N.E.3d___, 2022 WL 110261, at *23 (Ohio Jan. 12, 2022). NYSCEF No.26 at 7–10, 21–23; Mem.44–45. Mr. Trende used this well-accepted approach by comparing how the parties would fare under those 5,000 maps versus the 2022 Congressional Map and 2022 Senate Map and, based on this analysis, concluded that both maps were more biased in favor of the Democrats than all of the 5,000 computer generated maps. Mem.21–23, 44–45; NYSCEF No.26 at 11–23. Further, Mr. Trende generated a dotplot model to compare the maps' partisanship with the simulated maps, which showed that they packed Republican votes into as few districts as possible while spreading the remainder over as many districts as possible to dilute the effectiveness of their votes. NYSCEF No.26 at 14–15, 20–21. This statistical evidence is extremely powerful, objective evidence that the Legislature and the Governor drew these maps for the purpose of favoring the Democratic Party, NYSCEF No.21–23, 44–45, which the Constitution expressly forbids, N.Y. Const. art. III, § 4(c)(5).

Respondents attack the Trende Report's methodology, but their criticisms are without merit. Respondents do not—and cannot—dispute that Mr. Trende's methodology is both broadly accepted in the political-science literature and commonly used. NYSCEF No.26 at 7–10. While Legislative Respondents attack Mr. Trende for using the Gerrymandering Index, NYSCEF No.72 at 20, this is a reliable and accepted metric to measure partisanship in a map, Reply Of Sean P. Trende ("Trende.Reply.Rep.") at 4–5, Attached as Exhibit A; NYSCEF No.26 at 12–13, and the

for experts, with no mention of oath or swearing requirement); *compare id.*, *with* CPLR § 3133(b) (expressly providing that "[i]nterrogatories shall be answered in writing under oath"); *accord Adams v. Back*, 64 A.D.3d 1070, 1072 (3d Dep't 2009). In any event, both of Petitioners' experts have now filed affidavits with the Court, swearing to all of the contents of their reports.

Trende Report bolstered this analysis with his dotplot inquiry that Respondents do not even attempt to dispute, *id.* at 14–15, 20–21. Legislative Respondents also claim that Mr. Trende did not instruct his computer program to consider factors such as municipal splits and minority-vote-dilution rules. NYSCEF No.72 at 19–20. Fully rebutting this criticism, Mr. Trende re-ran his analysis in his Reply Report to account for municipal splits and minority-vote-dilution rules and obtained the same results. Trende.Reply.Rep.16–20. Finally, Legislative Respondents assert that Mr. Trende's report "does not evidence a deep understanding of the underlying algorithm he employs," NYSCEF No.72 at 19; *accord id.* at 20, but the report itself states that Mr. Trende "simplif[ied] greatly" his explanations due to their "complicated" nature, which is consistent with New York law, *De Long v. County of Erie*, 60 N.Y.2d 296, 307–08 (1983), and the approach taken by one of Respondents' own experts, Trende.Reply.Rep.22.[2]

Having no serious answer to the Trende Report's devastating conclusions, Respondents invent an alternative "methodology" for measuring partisanship that is so blatantly flawed that it leads to the risible conclusion that the 2022 Congressional Map and 2022 Senate Map—the same ones that powerful left-leaning interest groups have called a "master class in how to draw an effective gerrymander," Nicholas Fandos, Luis Ferré-Sadurní & Grace Ashford, *A 'Master Class' in Gerrymandering, This Time Led by N.Y. Democrats*, N.Y. Times (Feb. 2, 2022)[3] (quoting Senior Counsel Michael Li of the Brennan Center for Justice), and which Democratic leaders said are revenge for Republican gerrymanders in other States, Nat'l Republican Redistricting PAC

[2] Legislative Respondents' gratuitous insult of Mr. Trende cannot go unanswered. NYSCEF No.72 at 17. Mr. Trende is a universally respected expert with multiple professional publications and deep, relevant experience—including having just recently served as a special master appointed by the Virginia Supreme Court to redraw successfully Virginia's maps. NYSCEF No.26 at 2–4.

[3] https://www.nytimes.com/2022/02/02/nyregion/redistricting-gerrymandering-ny.html.

(@GOPRedistrict), Twitter (Feb. 9, 2022, 3:19 PM)[4] (remarks of Chairman of the Democratic Congressional Campaign Committee Congressman Sean Patrick Maloney)—actually favor Republicans, Trende.Reply.Rep.7–14. The reason that this "methodology" yields such facially ridiculous results is because it is wholly baseless, and ***Respondents and their experts do not cite political analysis or a court that has adopted this approach to predicting elections***. This frankly silly "methodology" is as follows: Respondents categorizes districts as "Democratic" or "Republican" based *solely* on whether the average Democratic performance of that district in certain statewide races is in excess of 50%; that is, Respondents would treat a district where Democrats get 50.01% of the statewide average as a "Democratic District," while one where the average is 49.99% Democratic in statewide races is a "Republican District." Trende.Reply.Rep.7–8. Respondents cite no academic literature supporting this approach, which contradicts basic precepts of election analysis, including that whether a party will win a race is a probabilistic inquiry, and the fraught endeavor of predicting whether a party is likely to win any particular district must—at the absolute minimum—take into account the actual performance of the parties' congressional candidates in that district. *See* Trende.Reply.Rep.7–9.

Finally, properly taking into account this probabilistic understanding of what is a "Republican" or "Democratic" district, and considering statewide data along with actual congressional races in New York over the last decade, leads to the conclusion that the enacted congressional map creates only four districts where Republicans are favored and five where they have a chance to win a competitive seat, whereas the average computer-generated map has an average of six districts where Republicans are favored and nine where they have a chance to win a competitive seat. Trende.Reply.Rep.11–12. That result is entirely consistent with the

[4] https://twitter.com/gopredistrict/status/1491507079479181312?s=10.

conclusions of the Trende Report, based upon the Gerrymandering Index and dotplot analysis, as well as the considered views of commentators—left, middle, and right—that have looked at the 2022 Congressional Map. NYSCEF No.26 at 14–19.

C. Multiple Individual Lines In Both Maps Subordinate Traditional Redistricting Principles For No Reason Other Than Partisanship

Multiple specific lines in the 2022 Congressional Map and 2022 Senate Map subordinate traditional redistricting principles for no discernible reason other than partisan gain. Mem.23–43, 45–55. These partisan-infused line changes show that Democrats attempted to gain four seats in the 2022 Congressional Map, Mem.23–43, and many more seats in the Senate, *see* Mem.43–55. The expert report of Mr. Claude A. LaVigna explains all of these changes in full detail, NYSCEF No.27, but consider here just some of the particularly egregious examples: With the 2022 Congressional Map, the Legislature effectively shifts Congressional District 1 from a strong Republican district into a Democrat-leaning district by packing Republicans into Congressional District 2, Mem.23–24; it cracks Republican-leaning communities of interest in Brooklyn—specifically, concentrated Orthodox Jewish and Russian communities—across Congressional Districts 8, 9, 10, and 11 for Democrats' advantage, specifically to seize Congressional District 11 for the Democratic Party, Mem.25–31; it reconfigures Congressional Districts 16, 17, 18, and 19 in order to flip both Districts 18 and 19 from lean Republican to lean Democrat, Rebuttal Expert Report of Claude A. LaVigna ("LaVigna.Rebuttal.Rep."), at 11, Attached as Exhibit B; and it packs Republicans into various upstate New York districts in order to seize Congressional District 22 as a safe Democratic seat, LaVigna.Rebuttal.Rep.12–13.

Legislative Respondents, NYSCEF No.72 at 25–26, respond by relying on an expert, Dr. Stephen Ansolabehere, who has ***absolutely no expertise or qualifications related to New York's political geography***, *see* LaVigna.Rebuttal.Rep.3–4, and who submitted a report that makes

numerous demonstrably false claims, as Mr. LaVigna's Rebuttal Report explains in detail. To take just a few examples, Dr. Ansolabehere claims that Congressional District 1 and Congressional District 2 were Democrat-leaning in 2012, although the Cook Partisan Voting Index rated them Republican +6 and Republican +5, respectively, under the 2012 map, and District 2 has elected Republican congressmen continuously since 2013. LaVigna.Rebuttal.Rep.5–6. When discussing Districts 7–11, Dr. Ansolabehere described Brooklyn neighborhoods as having discrete Jewish communities, without recognizing that the Jewish populations in Brooklyn share ties that stretch across connected neighborhoods. LaVigna.Rebuttal.Rep.8. Finally, Dr. Ansolabehere claimed that Congressional District 22 is a Democratic district when comparing it with the configuration of District 24 under the 2012 map, but a Republican congresswoman has won this district *for the past decade*. LaVigna.Rebuttal.Rep.13.

III. This Court Should Pause Election-Related Deadlines

As Petitioners have shown, the 2022 maps are procedurally invalid under Article III, Section 4(b) and substantively invalid as egregious partisan gerrymanders under Article III, Section 4(c)(5). *Supra* Parts I–II. Accordingly, this Court should declare these maps invalid at the March 3, 2022, return date and then immediately postpone the election-related deadlines. It would make no sense for candidates to engage in election-related activity—such as collecting petition signatures, N.Y. Election Law § 6-134(4)—for districts that are invalid and must be redrawn. Mem.56 (quoting *Carter v. Chapman*, No.7 MM 2022 (Pa. Sup. Ct. Feb. 9, 2022)[5]).

The Governor, NYSCEF No.82 at 24–25, but not Legislative Respondents, *see* NYSCEF No.72 at 29, claims that Petitioners failed to request in their Petition that this Court pause election-

[5] https://www.pacourts.us/assets/opinions/Supreme/out/7mm2022pco%20-%202-9-2022.pdf#search=%227%20mm%202022%22.

related deadlines, but this is false, as the Petition (and the proposed Amended Petition) requests such injunctive relief against these deadlines, NYSCEF No.1 ¶ 34 & at 67 ¶ F. In any event, while Respondents oppose this Court pausing these deadlines, *see* NYSCEF No.82 at 24–26; NYSCEF No.72 at 29–30, they nowhere explain how these deadlines could remain if Petitioners are correct that the maps are unconstitutional. And while Respondents cite *Purcell v. Gonzales*, 549 U.S. 1 (2006) (per curiam), *see* NYSCEF No.82 at 25–27; NYSCEF No.72 at 29–30, this is of no help to them here. The "*Purcell* principle" precludes "lower federal courts" from "alter[ing] the election rules [of a State] on the eve of an election," in light of the confusion that such alteration would cause, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct.1205, 1207 (2020) (per curiam). This principle does not prevent a state court from enforcing state election-law-related constitutional provisions. *See, e.g.*, *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1 (2020). If anything, *Purcell* weighs in strong favor of pausing these deadlines, as Petitioners are not seeking to alter election rules "on the eve of an election," given the timing of their request, *Republican Nat'l Comm.*, 140 S. Ct. at 1207, and that such a pause would avoid election confusion by eliminating the need for candidates to seek signatures to run for office in unconstitutional districts that must be redrawn. Finally, multiple courts have taken this very approach, in light of a finding that a redistricting map is unconstitutional. *See, e.g.*, *Carter*, No.7 MM 2022; *Harper v. Hall*, 865 S.E.2d 301, 302 (N.C. 2021); *Wilson v. Eu*, 817 P.2d 890, 892–93 (Cal. 1991) (postponing petition circulation and signature deadlines); *accord Petteway v. Henry*, No. 11-511, 2011 WL 6148674, at *3 n.7 (S.D. Tex. Dec. 9, 2011) (noting that the court has "authority to postpone . . . election deadlines if necessary"); *Terrazas v. Ramirez*, 829 S.W.2d 712, 721 (Tex. 1991) (same).

IV. Respondents' Various Efforts To Evade Their Unconstitutional Actions Are Meritless

A. The Constitution Mandates Judicial Review Of These Unconstitutional Maps

The Governor's argument that Petitioners' claims are nonjusticiable is wrong. Article III, Section 5 provides this Court with jurisdiction to "review" any "apportionment by the legislature, or other body," N.Y. Const. art. III, § 5, for its compliance with all of the rules governing mapdrawing, including the prohibition against partisan gerrymandering, *id.* § 4(c)(5). Even before this constitutional language, New York courts have routinely reviewed challenges to redistricting maps. *See, e.g.*, *Schneider v. Rockefeller*, 31 N.Y.2d 420 (1972); *Bay Ridge Cmty. Council v. Carey*, 454 N.Y.S.2d 186 (Kings Cty. Sup. Ct. 1982); *Wolpoff v. Cuomo*, 80 N.Y.2d 70 (1992).

B. The Governor Is A Proper Defendant

Contrary to her claim, NYSCEF No.82 at 10–15, the Governor is a proper defendant for multiple reasons. First, she is the "chief executive officer" of the State, with the "responsibility to manage the operations of the divisions of the executive branch," *Dorst v. Pataki*, 90 N.Y.2d 696, 700 (1997), including the Board of Elections, which "is itself an executive agency," *Clark v. Cuomo*, 66 N.Y.2d 185, 190 (1985). Petitioners named the Governor as a defendant in part because of her role as head of the Executive Branch and the Board of Elections, as numerous redistricting challengers have done to obtain fully effective relief against any administration of elections under unconstitutional maps. *E.g.*, *Schneider*, 31 N.Y.2d 420 (naming Governor Rockefeller); *Bay Ridge Cmty. Council*, 454 N.Y.S.2d 186 (naming Governor Carey); *Wolpoff*, 80 N.Y.2d 70 (naming Governor Mario Cuomo). Indeed, New York law required Petitioners to serve this Petition on the Governor and Lieutenant Governor. N.Y. Unconsolidated Laws § 4221. Further, as Petitioners explain more fully in their Reply Memorandum In Support Of Motion For Leave To Amend, Article III, Section 4 prohibits partisan gerrymandering in "*the creation of* state senate and . . . congressional districts," N.Y. Const. art. III, § 4(c) (emphasis added), and the 2022 maps were not

"creat[ed]," *id.*, until the Governor signed those bills into law, *Matter of King v. Cuomo*, 81 N.Y.2d 247, 252 (1993); N.Y. Const. art. IV, § 7.

C. Petitioners Have Standing

New York standing "involves a determination of whether the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast [ ] the dispute in a form traditionally capable of judicial resolution." *Graziano v. Cnty. of Albany*, 3 N.Y.3d 475, 479 (2004) (citation omitted). To have standing, a plaintiff must meet a two-part test, demonstrating (1) injury in fact, meaning that the plaintiff "will actually be harmed by the challenged . . . action"; and (2) that he "fall[s] within the zone of interests or concerns sought to be promoted or protected" by the law at issue. *Id.* (citation omitted). "The question of standing to challenge particular governmental action may, of course, be answered by the [law] at issue, which may identify the class of persons entitled to seek review." *Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 769 (1991). Thus, the Court of Appeals has noted as a sufficient example of explicit standing State Finance Law § 123, which declares that "any citizen-taxpayer should have and hereafter does have a right to seek the remedies provided for herein." *Id.* (quoting State Finance Law § 123).

Petitioners clearly have standing to bring their claims. Article III, Section 5 provides that a lawsuit may be brought by "*any citizen*" challenging whether "any law establishing congressional or state legislative districts . . . violate[s] the provisions of [Article III]." N.Y. Const. art. III, § 5. Thus, Article III, Section 5 explicitly provides standing to each of the Petitioners, individually, to maintain this lawsuit, *Soc'y of Plastics*, 77 N.Y.2d at 769, any of which is sufficient to allow this Court to proceed to the merits, *see Humane Soc'y of U.S. v. Empire State Dev. Corp.*, 53 A.D.3d 1013, 1017 & n.2 (3d Dep't 2008). Further, twelve Petitioners have now submitted to the Court their own Affidavits explaining the specific and concrete harms Respondents' gerrymander has caused and will cause them. Finally, Petitioners would meet the criteria for standing even under

Legislative Respondents' overly restrictive view, as they reside in or border nearly every Congressional District in the State, NYSCEF No.1, ¶¶ 10–23; *see* NYSCEF No.72 at 21, and the Legislature "pursue[d] a common redistricting policy toward multiple districts, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017).

D. The Governor's Claim That Petitioners Failed To Serve The Attorney General Is Frivolous, Waived, And Moot

The Governor claims that this Court lacks jurisdiction over the Petition, since Petitioners failed to serve the Attorney General with the Petition and signed first Order to Show Cause at her proper regional office under CPLR § 2214(d). NYSCEF No.82 at 6–7. This argument is frivolous, waived, and moot. CPLR § 403 governs service of these documents, not CPLR § 2214(d), and Petitioners fully complied with the former. CPLR § 403(d) provides that "[t]he court may grant an order to show cause to be served, in lieu of a notice of petition at a time and in a manner specified therein," *id.*, and, per this rule, this Court's first Order to Show Cause ordered that "service of a copy of this Order and the Petition upon the Respondents and anyone else required [including the Attorney General] . . . *in the same manner as a summons* . . . shall be deemed good and sufficient service," NYSCEF No.11 at 4 (emphasis added). Petitioners served the Attorney General under this Court's Order, as they "deliver[ed]" the required papers "to an assistant attorney-general at an office of the attorney-general," as service-of-summons rules require. CPLR § 307(1); NYSCEF No.62. The Governor claims that Petitioners failed to comply with CPLR § 2214(d)—which provides for service of the Attorney General at a particular regional office—but that rule applies only to *motions*, not to petitions. NYSCEF No.82 at 6–7. Even if CPLR § 2214(d) did apply, the alleged failure to comply with it would not impact this Court's jurisdiction. The Governor admits that the Attorney General received the Petition and first Order to Show Cause, including via email service to which the Attorney General consented, and thus,

there is no prejudice. *O'Brien v. Pordum*, 120 A.D.3d 993, 994 (4th Dep't 2014) (citing CPLR § 2001). In any event, the Attorney General waived this frivolous argument by appearing and participating in this case without first raising this alleged error. *Duffy v. Schenck*, 341 N.Y.S.2d 31, 33 (Sup. Ct. Nassau Cnty. 1973), *aff'd*, 42 A.D.2d 774 (1973). Finally, Petitioners have mooted any possible lack-of-service argument under CPLR § 2214(d) by serving the Attorney General with all of their papers filed in this case at the Rochester regional office.

CONCLUSION

Petitioners request that this Court grant the Petition (and Amended Petition) in its entirety, enjoining these maps and drawing new maps for Congress and Senate, consistent with the New York Constitution.

Dated: New York, New York
March 1, 2022

Respectfully submitted,

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CERTIFICATION

I hereby certify that the foregoing memorandum of law complies with the bookmarking requirement and word count limitations set forth in the Parties stipulation for 5,000 words for Petitioners' Reply Brief. *See* Petitioners' Letter To The Court (Feb. 14, 2022); 22 NYCRR § 202.8-b(d). This memorandum of law contains 4,986 words, excluding parts of the document exempted by Rule 202.8-b(b).

Dated: New York, New York
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