

New York Supreme Court

Appellate Division—Fourth Department

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 VOLANTE,

Docket No.:
CAE 22-00506

Petitioners-Respondents,

-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,
and THE NEW YORK STATE LEGISLATIVE TASK FORCE ON
DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents-Appellants,

and

NEW YORK STATE BOARD OF ELECTIONS,

Respondent.

JOINT RECORD ON APPEAL
Volume 5 of 6 (Pages 2069 – 2686)

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(For Continuation of Appearances See Inside Cover)

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**EXHIBIT S TO MOSKOWITZ AFFIRMATION -
ROUGH TRANSCRIPT FROM THE MARCH 11, 2022 DEPOSITION
OF ERIC KATZ [2069 - 2107]**

FILED: STEUBEN COUNTY CLERK 03/13/2022 12:02 PM

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1 #####

2 STATE OF NEW YORK

3 SUPREME COURT: COUNTY OF STEUBEN

4 Index No. E2022-0116CV

5 ----- x

6 TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE

7 CANNING, PATRICIA CLARINO, GEORGE DOOHER,

8 JR., STEVEN EVANS, LINDA FANTON, JERRY

9 FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN

10 NEWPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS,

11 and MARIANNE VOLANTE,

12 Petitioners,

13 - against -

14 GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR

15 AND PRESIDENT OF THE SENATE BRIAN A.

16 BENJAMIN, SENATE MAJORITY LEADER AND

17 PRESIDENT PRO TEMPORE OF THE SENATE ANDREA

18 STEWART-COUSINS, SPEAKER OF THE ASSEMBLY

19 CARL HEASTIE, NEW YORK STATE BOARD OF

20 ELECTIONS, and THE NEW YORK STATE

21 LEGISLATIVE TASK FORCE ON DEMOGRAPHIC

22 RESEARCH AND REAPPORTIONMENT,

23 Respondents.

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25 March 11, 2022
9:11 a.m.

2

1 #####

2

3 SCHEDULED DEPOSITION of ERIC

4 KATZ, taken by the Plaintiffs, to be held

5 remotely via Zoom videoconference, before

6 Debbie Zaromatidis, a Shorthand Reporter

7 and Notary Public of the State of New

8 York.

9

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3

1 #####

2 A P P E A R A N C E S :

3

4 FIRM

5 ^ Attorney ^ Attorneys for

6 ^ Plaintiff ^ Plaintiffs

7 NAME

8 address

9 New York, New York zip

10 BY: NAME, ESQ.

11

12

13 FIRM

14 ^ Attorney ^ Attorneys for

15 ^ Defendant ^ Defendants

16 NAME

17 address

18 New York, New York zip

19 BY: NAME, ESQ.

20

21

22

23

24

25

4

1 #####

2 MR. MOSKOWITZ: On the record.

3 This is Bennett Moskowitz. We are
4 going on the record. It is 9:11 a.m.
5 March 11, 2022. I am with the law
6 firm Troutman Pepper, counsel for the
7 petitioners in this matter.

8 In accordance with an order of
9 the court, we have duly noticed and
10 subpoenaed a deposition for Mr. Katz.
11 He is not here right now. My
12 understanding is based on his
13 counsel's statements that he is has
14 no intention of showing up.
15 Petitioners believe this is highly
16 inappropriate, contrary to the
17 court's order, and we reserve all
18 rights to seek discovery and

19 sanctions including adverse inference
20 that is just improper.

21 I am going to go ahead and read
22 questions into the record that Mr.
23 Katz should have been here to answer,
24 and I will note for the record that
25 Matthew Brown of the AG's office is

5

1 #####
2 here, but yet no other counsel from
3 the respondents side is here.
4 Have you spoken with
5 respondents.
6 Have you spoken with any
7 responds regarding deposition today?
8 Have you spoken with any
9 lawyers from respondents' offices
10 before your deposition today?
11 Have you spoken with
12 respondents's counsel about this
13 action?
14 Have you discussed this
15 deposition with respondents' counsel?
16 What general duties does LATFOR
17 perform?

18 What is your current position
19 with LATFOR/SKWR-RBGS.
20 What are your responsibilities
21 in that position.
22 How long have you been in that
23 position/SKWR-RBGS.
24 How long have you been working
25 with LATFOR.

6

1 #####
2 Do you currently work anywhere
3 else?
4 Are you familiar with the
5 process that LATFOR used to draw the
6 2022 redistricting maps.
7 Can you describe this process?
8 What program or software did
9 LATFOR use to draw the 2022
10 redistricting maps.
11 What data did LATFOR input into
12 such programs to create the maps.
13 /WHAT data did LATFOR rely on,
14 Population data, census block data,
15 geographic data, demographic data or

16 political data.

17 Why did LATFOR decide to use

18 the sources you've identified?

19 Where did LATFOR get such

20 political data/SKWR-RBGS.

21 Did LATFOR look at any other

22 sources for political data?

23 Did LATFOR consider any

24 political data that showed that the

25 senate map would favor the democratic

7

1 #####

2 party?

3 Did LATFOR consider any

4 political data that showed that the

5 final senate map would favor the

6 democratic party.

7 Did LATFOR communicate with any

8 outside organizations or politicians

9 about political data.

10 Did LATFOR communicate with any

11 outside organizations or legislatures

12 about political data.

13 Did LATFOR consider political

14 data drafted for congressional

15 district one.

16 Did LATFOR consider whether

17 changing congressional district one

18 would benefit the democratic party.

19 Did LATFOR consider political

20 data when drafting political district

21 2?

22 Did LATFOR consider whether

23 changing district two's lines would

24 benefit the democratic party.

25 Did LATFOR consider political

8

1 #####

2 data in drafting the congressional

3 district 3?

4 Did LATFOR consider whether

5 changing district 3's lines would

6 benefit the democratic party.

7 Did LATFOR consider political

8 data when drafting political district

9 eight?

10 Did LATFOR consider whether

11 changing congressional district 8

12 lines would benefit the democratic

13 party.

14 I just want to note for the
15 record that in addition to Mr. Brown,
16 one of his colleagues appears to also
17 be on, so that would be two attorneys
18 from the AG's office present but no
19 other counsel for any of the
20 respondents.

21 Did LATFOR consider political
22 data when drafting congressional
23 district 9?

24 Did LATFOR consider whether
25 changing congressional district 9

9

1 #####

2 lines would benefit the democratic
3 party.

4 Did LATFOR consider political
5 data when drafting congressional
6 district 10?

7 Did LATFOR consider whether
8 changing congressional district 10's
9 lines would benefit the democratic
10 party.

11 Did LATFOR consider political

12 data when drafting congressional
13 district 11?
14 Did LATFOR consider whether
15 changing congressional district 11's
16 lines would benefit the democratic
17 party?
18 Did LATFOR consider political
19 data when drafting congressional
20 district 16?
21 Did LATFOR consider whether
22 changing congressional district 16's
23 lines would benefit the democratic
24 party.
25 Did LATFOR consider political

10

1 #####
2 data when drafting congressional
3 district 17?
4 Did LATFOR consider whether
5 changing congressional district 17's
6 lines would benefits the democratic
7 party?
8 Did LATFOR consider political
9 data when changing congressional

10 district 18?

11 Did LATFOR consider whether

12 changing congressional district 18's

13 lines would benefit the democratic

14 party?

15 Did LATFOR consider political

16 data when drafting congressional

17 district 19?

18 Did LATFOR consider when

19 drafting congressional district 19's

20 lines would benefit the democratic

21 party.

22 Did LATFOR consider political

23 data when drafting congressional

24 district 21?

25 Did LATFOR consider whether

11

1 #####

2 changing congressional district's

3 21's lines would benefit the

4 democratic party.

5 Did LATFOR consider political

6 data when drafting congressional

7 district 22?

8 Did LATFOR consider whether

9 changing congressional district 22
10 lines would benefit the democratic
11 party.
12 Did LATFOR consider political
13 data when drafting congressional
14 district 23?
15 Did LATFOR consider whether
16 changing congressional district 23's
17 lines would benefit the democratic
18 party.
19 LATFOR consider political data
20 when drafting congressional district
21 24?
22 Did LATFOR consider whether
23 changing congressional district 24's
24 lines would benefit the democratic
25 party?

12

1 #####
2 Did LATFOR consider political
3 data when drafting senate district 1?
4 Did LATFOR consider whether
5 changing senate district 1's lines
6 benefit the democratic party.

7 Did LATFOR consider political
8 data when drafting senate district 2?
9 Did LATFOR consider whether
10 changing senate district 2's lines
11 would benefit the democratic party.
12 Did LATFOR consider political
13 data when drafting senate district 3?
14 Did LATFOR consider whether
15 changing senate district 3's lines
16 would benefit the democratic party.
17 Did LATFOR consider political
18 data when drafting senate district 4?
19 Did LATFOR consider whether
20 changing senate district 4's lines
21 would benefit the democratic party.
22 Did LATFOR consider political
23 data when drafting senate district 5?
24 Did LATFOR consider whether
25 changing senate district 5's lines

13

1 #####
2 would benefit democratic party.
3 Did LATFOR consider political
4 data when drafting senate district 6?
5 Did LATFOR consider whether

6 changing senate district 6's lines
7 would benefit the democratic party?
8 Did LATFOR consider political
9 data when drafting senate district 7?
10 Did LATFOR consider whether
11 changing senate district 7 lines
12 would benefit the democratic party.
13 Did LATFOR consider political
14 data when drafting senate district 9?
15 Did LATFOR consider whether
16 changing senate district 9's lines
17 would benefit the democratic party.
18 Did LATFOR consider political
19 data when drafting senate district
20 10?
21 Did LATFOR consider whether
22 changing senate district 10's lines
23 would benefit the democratic party?
24 Did LATFOR consider political
25 data when drafting senate district
14

1 #####

2 22?

3 Did LATFOR consider whether

4 changing senate district 22 lines
5 would benefit the democratic party.

6 Did LATFOR consider political
7 data when drafting senate district
8 42?

9 Did LATFOR consider whether
10 changing senate district 42's lines
11 would benefit the democratic party?

12 Did LATFOR consider political
13 data when drafting senate district
14 41?

15 Did LATFOR consider whether
16 changing senate district 41's lines
17 would benefit the democratic party?

18 Did LATFOR consider political
19 data when drafting senate district
20 44?

21 Did LATFOR consider whether
22 changing senate district 44 would
23 benefit the democratic party?

24 Did LATFOR consider political
25 data when drafting senate district

15

1 #####

2 48?

3 Did LATFOR consider whether
4 changing senate district 48 lines
5 would benefit the democratic party.

6 Did LATFOR consider political
7 data when drafting senate district
8 51?

9 Did LATFOR consider whether
10 changing senate district 51's lines
11 benefit the democratic party.

12 Did LATFOR consider political
13 data when drafting senate district
14 52?

15 Did LATFOR consider whether
16 changing senate district 52's lines
17 would benefit the democratic party?

18 Did LATFOR consider political
19 data when drafting senate district
20 53?

21 Did LATFOR consider whether
22 changing senate district's 53's lines
23 would benefit democratic party?.

24 Did LATFOR consider political
25 data when drafting senate district

1 #####

2 54?

3 Did LATFOR consider whether
4 changing senate district 54's lines
5 would benefit the democratic party.

6 Did LATFOR consider political
7 data when drafting senate district
8 56.

9 Did LATFOR consider whether
10 changing senate district 56's lines
11 would benefit the democratic party?

12 Did LATFOR consider political
13 data when drafting senate district
14 60?

15 Did LATFOR consider whether
16 changing senate district's 60's lines
17 would benefit the democratic party.

18 Did LATFOR consider political
19 data what drafting senate district
20 62.

21 Did LATFOR consider whether
22 changing senate district's 62's lines
23 would benefit the democratic party.

24 Did LATFOR consider political
25 data what drafting senate district

1 #####

2 63?

3 Did LATFOR consider whether
4 changing senate district 63's lines
5 would benefit the democratic party?

6 Isn't it true that LATFOR
7 specifically drew the final house of
8 representatives map with the goal of
9 favoring the democratic party?

10 Isn't it true that LATFOR
11 specifically drew the final state
12 senate map with the goal of favoring
13 the democratic party?

14 Are you familiar with the
15 process the democratic seat members
16 used to draft the map that was
17 submitted to legislation.

18 Can you please describe the
19 process??

20 How does LATFOR's process line
21 up with the R S C process?

22 How does LATFOR's process
23 differ from the R C S C's process.

24 Did LATFOR consider additional

25 types of data when drawing its maps.
18

1 #####

2 Did LATFOR use different

3 sources of data to draw its maps?

4 Is it your testimony that

5 LATFOR printed from square one and

6 did not utilize any of the prior work

7 done by the IRC?

8 Is it your testimony that

9 LATFOR started from square one and

10 did not utilize any of the data

11 collected by the IRC.

12 Before LATFOR assumed

13 redistricting responsibilities, did

14 you communicate with any outside

15 organizations regarding the post 2020

16 census redistricting process?

17 Before LATFOR assumed

18 redistricting responsibility, did you

19 communicate with any politicians

20 regarding the post 2020 census

21 redistricting process?

22 Are you aware of any other

23 LATFOR appointee staff member having
24 communicated with any outside
25 organizations or politicians

19

1 #####
2 regarding the post 2020 redistricting
3 process?
4 After LATFOR assumed
5 redistricting responsibilities and
6 began its map drawing process, did
7 you communicate with any outside
8 organizations or politicians
9 regarding the new maps?
10 Are you aware of any other
11 LATFOR appointee or staff member
12 having communicated with any outside
13 organizations or politicians
14 regarding the new maps?
15 Are you aware of any other
16 LATFOR appointee or staff member
17 receiving any unsolicited inquiries
18 or communications from outside
19 organizations or politicians
20 regarding LATFOR's redistricting
21 process or new maps?

22 Did you receive any unsolicited
23 inquiries, communications from
24 outside organizations or politicians
25 regarding LATFOR's redistricting

20

1 #####
2 process of new maps?
3 After the I R C's redistricting
4 attempts failed, LATFOR assumed
5 responsibility for drawing new maps,
6 correct??
7 At this time who was on the
8 task for? Please list all members.
9 Are you public call affiliated
10 with a political party?
11 Do you represent a political
12 party in any capacity?
13 Is any other member of the task
14 force publically affiliated with a
15 political party?
16 Is any other member of the task
17 force a representative of a political
18 party in any capacity?
19 Who appointed you for LATFOR?

20 Who hired you for LATFOR?
21 What is that person or person's
22 political parties affiliation or
23 affiliations?
24 Who appointed or hired the
25 other members?

21

1 #####
2 What are those hiring persons'
3 political party affiliations.
4 Were there any republicans on
5 the task force during map drawing
6 process?
7 Did you or any other LATFOR
8 appointee staff member discuss the
9 post 2020 redistricting process with
10 any republican legislature not on the
11 task force?
12 Isn't it true that that
13 occurred?
14 Did you provide such persons
15 including republican legislators the
16 opportunity to give meaningful inputs
17 into LATFOR's redistricting process
18 in new maps? In.

19 Did you or any other LATFOR
20 appointee or staff member discuss
21 preliminary map districts or district
22 lines with any republican legislator
23 not on the task force?

24 Did you provide any such
25 republican legislator the opportunity
22

1 #####

2 to give meaningful input into the
3 LATFOR redistricting process.

4 To correct the record earlier I
5 said isn't it true that you provided
6 such legislator an opportunity to
7 give meaningful input into the
8 LATFOR's redistricting maps. That
9 question is withdrawn.

10 At any time with LATFOR's
11 redistricting process in drawing of
12 new maps, was any republican
13 legislator given an opportunity to
14 provide meaningful input that
15 affected final outcome.

16 Did LATFOR discuss

17 redistricting process with any
18 republican before releasing that to
19 full senate assembly.

20 Did you or any other LATFOR
21 appointee or staff member show the
22 maps to any republic before sharing
23 with democrats?

24 Did LATFOR show the maps to any
25 democrat before sharing with the

23

1 #####

2 republicans.

3 Before LATFOR assumed the
4 redistricting responsibility, did you
5 or any other LATFOR appointee or
6 staff member discusses those 2020
7 census redistricting process with any
8 I R C commissioner? Please describe
9 those communications?

10 Were you or any other LATFOR
11 appointee or staff member privy to
12 the IRC renegotiations at any point?

13 Please describe those
14 renegotiations?

15 Have you ever had any contact

16 with IRC commissioner and chair David
17 Imamura IM A M U R A, regarding the
18 redistricting process for anything
19 related to any new map.

20 Please describe such
21 communication.

22 Have you ever had any contact
23 with I R C commissioner Eugene bait B
24 E N G ER regarding redistricting
25 process or anything related to

24

1 #####

2 drawing new maps.

3 Please describe those
4 communications.

5 Have you ever had any contact
6 with I R C commissioner Ive Lisse IV
7 E, L I S S E cue he /SRAS C U E V A
8 S- /PHOly that. M O L I N A,
9 regarding redistricting process or
10 anything related to drawing new maps?

11 Please describing those
12 communications.

13 Have you ever had any contact I

14 R C commissioner John in tow F L A T
15 E A U, regarding the redistricting
16 process or anything related to
17 drawing the maps. Please describe
18 those communications.

19 Have you ever had any contact
20 with I R C commissioner owe lane
21 phrase certificate regarding
22 redistricting process or anything
23 related to drawing new maps? Please
24 describe those communications.

25 Before LATFOR's assumed

25

1 #####
2 redistricting responsibilities, did
3 you or any other LATFOR appointee or
4 staff member discuss the possibility
5 of LATFOR or the New York legislature
6 regarding the 2022 maps?

7 Please describing those
8 communications/SKWR-RBGS regarding
9 the 2020 maps/SKWR-RBGS/SKWR-RBGS are
10 you aware of any redistricting
11 preparations made by LATFOR in the
12 legislature in advance of the I R C's

13 January 24 announcement that it would
14 not submit revised maps?

15 Please describe those
16 communications -- excuse
17 me/SKWR-RBGS/SKWR-RBGS please
18 describe those preparations and any
19 related cases?

20 Did you or any other LATFOR
21 appointee or staff member discuss the
22 post 2020 redistricting process with
23 any democratic legislator not on the
24 task force?

25 Please describe those

26

1 #####

2 communications.

3 Did you or any other LATFOR
4 appointee or staff member discuss
5 preliminary maps, districts or
6 district lines with any democratic
7 legislator not on the task force.

8 Please describe those
9 communications.

10 Were you or any other LATFOR

11 member contacted by any republican
12 legislator during the map drawing
13 process.

14 Please describe those
15 communications.

16 Isn't it true that you
17 communicated directly or through your
18 staff with the democratic
19 commissioners on the I R C to tell
20 them not to adopts a redistricting
21 map as parts of constitutional
22 process?

23 Isn't it true that you
24 communicated directly with or or
25 through your staff with the

27

1 #####

2 democratic commissioners of the I R C
3 to tell them not to adopt a state
4 senate redistricting map as parts of
5 constitutional process?

6 Did you or any other LATFOR
7 appointee or staff member provide
8 comments to any news outlet or member
9 of the media regarding the 2020

10 redistricting process for new maps.

11 Please describe those

12 communications.

13 Did you or any of the other

14 LATFOR appointees provide off the

15 record or background comments to any

16 news outlet or member ever media

17 regarding the 2020 redistricting

18 process maps.

19 Please describe those

20 communications.

21 Did you or any other LATFOR

22 appointee or staff member contacted

23 by any news outlet or member of the

24 media regarding the 2022

25 redistricting process for new maps.

28

1 #####

2 Please describe those communications.

3 Did you or any other LATFOR

4 appointee discuss the 2022

5 redistricting process for new maps

6 with any constituents?

7 Did any constituents contact

8 you or any other LATFOR appointee
9 regarding the 2022 redistricting
10 process for new maps.

11 Did you or any other LATFOR
12 appointee discuss the redistricting
13 process 2020 with any member of the
14 public.

15 Please describe such
16 communications.

17 Did any member of the public
18 contact you or any of the LATFOR
19 appointee staff members regarding
20 2022 process for new perhaps.

21 Please describe those
22 communications.

23 I asked you earlier if you
24 communicated with any constituents.
25 Please describe those communications.

29

1 #####

2 Are you aware of any public
3 comment submitted to LATFOR by any
4 member of the public regarding its
5 2022 redistricting process for new
6 maps?

7 Please describe it.
8 Did LATFOR consider such
9 comments and concerns concerning the
10 new maps.

11 MR. MOSKOWITZ: I would like
12 to go off the record for a moment.

13 (Recess taken.)

14 MR. MOSKOWITZ: Back on the
15 record.

16 I am going to introduce some
17 exhibits to this record to show that
18 Mr. Katz failed to show in violation
19 of court order, violation of the
20 subpoena, violation of notice of
21 deposition. /SKWR-RBGS that show
22 that Mr. Katz failed to
23 appear/SKWR-RBGS/SKWR-RBGS/SKWR-RBGS.

24 I am marking as exhibit 1 this
25 is the subpoena duces tecum add at
30

1 #####
2 the city if I can dumb for which he
3 is supposed to appear here today but
4 he is/SKWR-RBGS to Eric

5 cats/SKWR-RBGS/SKWR-RBGS.

6 For the record this subpoena
7 also requests various documents that
8 petitioner's are entitled to seek
9 pursuant to the court's decision and
10 order. I am not aware of any such
11 documents being produced, thus
12 we -- the petitioners have been
13 severely prejudiced.

14 I am going to introduce as
15 exhibit 2 the notice to take
16 deposition upon oral examination to
17 Eric cats which is supplemental to
18 the subpoena both are valid and again
19 Mr. Katz is not here, notwithstanding
20 that he was duly served and indeed as
21 stated earlier on the record his
22 counsel brazenly advised that Mr.
23 Katz would not appear today.

24 I am now introducing as exhibit
25 3 the decision -- March 3 decision of
31

1 #####

2 the court, which states among other
3 things members of the I R C and at

4 least members are not
5 legislators/SKWR-RBGS/SKWR-RBGS/SKWR-
6 RBGS/SKWR-RBGS/SKWR-RBGS the decision
7 states among other things that all
8 persons asked to provide discovery
9 are to give his or her highest
10 priority and to set aside other
11 matters. The court will permit
12 discovery of the respondents as to
13 whether or not the map drawing
14 process was controlled by one
15 political party or legislative
16 leaders one of political party this
17 would include whether the respondents
18 input directed or controlled the map
19 drawing process. The court will
20 also permits discovery of any public
21 remarks or statements made by them,
22 any public testimony he or she gave
23 about the redistricting process and
24 the maps, any inquiries and any
25 responses to the public or media

32

1

#####

2 about the redistricting process.
3 This would include public comments by
4 the respondent about the I R C and I
5 R C's action or lack of action.
6 This would include any communications
7 from respondents, third parties about
8 advancing the party's agenda or any
9 efforts to undermine the
10 constitutional process of having IRC
11 produce the map and reliable second
12 map. This would also include all
13 documents and communications
14 concerning the work of the
15 commissioner's of the democratic
16 caucus of the I R C which documents
17 and communications were received from
18 third parties. The decision goes on
19 it is hereby decided that all
20 discovery shall be completed by March
21 12, 2022.

22 I am now going to introduce as
23 exhibit 4 a copy of the court's order
24 dated March 9, 2022. This order
25 states in part Honorable Steven K M E

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2 D L Y justice of Supreme Court

3 appellate division ruled a519 A do

4 not automatic

5 stay/SKWR-RBGS/SKWR-RBGS do not

6 apply. The petitioner's therefore

7 seek from this court an order

8 granting discovery to support the

9 decision dated March 3, 2022. The

10 decision goes on. It says the

11 following, the court issued a

12 decisions dated March 3, 2022

13 provided for discovery based on the

14 New York State courts and federal

15 court's analysis of particularly as

16 pertained to alleged wrongdoing by

17 legislators.

18 This court believes were

19 allegations of legislators trying to

20 engineer signatory manned enter maps

21 which is prohibited to New York State

22 constitution could be akin to

23 other -- or were alleged to have

24 committed wrongdoings. Therefore

25 this court carefully constructed what

1 #####

2 would be and what would not be

3 discoverable, for the reasons on the

4 record/SKWR-RBGS/SKWR-RBGS and for

5 the reasons set forth in the court's

6 March 3, 2022 decision, this court

7 will hereby grants the petitioner's

8 discovery in accordance with the

9 March 3, 2022 decision.

10 Now, therefore, upon all papers

11 and proceedings hereto before and

12 herein after due deliberation it

13 is -- it is ordered that the

14 petitioner's are granted expedited

15 limited discovery in accordance with

16 the court's March 3, 2022 decision.

17 We are now going to close this

18 record. I am reserving all rights as

19 stated at the beginning of this

20 deposition.

21 (Time noted: 9:50 p.m.)

22

23

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2

C E R T I F I C A T I O N

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4

5

6

I, DEBBIE ZAROMATIDIS, a Shorthand

7

Reporter and a Notary Public, do hereby

8

certify that the foregoing is a true and

9

accurate transcription of my stenographic

10

notes.

11

I further certify that I am not

12

employed by nor related to any party to

13

this action.

14

15

16

17

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19

20

DEBBIE ZAROMATIDIS

21

22

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5 EXHIBIT DESCRIPTION PAGE

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**EXHIBIT T TO MOSKOWITZ AFFIRMATION -
SPEAKER HEASTIE'S AND THE ASSEMBLY MAJORITY'S OBJECTIONS
AND RESPONSES TO PETITIONERS' FIRST REQUEST
FOR PRODUCTION [2108 - 2116]**

FILED: STEUBEN COUNTY CLERK 03/13/2022 12:02 PM
NYSCEF DOC. NO. 196

INDEX NO. E2022-0116CV
RECEIVED NYSCEF: 03/13/2022

STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

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
VOLANTE,

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.

**SPEAKER HEASTIE'S
AND THE ASSEMBLY
MAJORITY'S
OBJECTIONS AND
RESPONSES TO
PETITIONERS' FIRST
REQUEST FOR
PRODUCTION**

Index No.
E2022-0116CV

Respondent Carl Heastie, Speaker of the New York State Assembly, and the
Assembly Majority (collectively, the "Speaker"), submits the following objections and
responses to "Petitioners' First Request for the Production of Documents to Respondents"
dated March 9, 2022 (the "Requests").

GENERAL OBJECTIONS

1. The Speaker objects to each Definition, Instruction, and Document
Requested to the extent they exceed the scope of discovery authorized by the Court's

Decision dated March 3, 2022 (Dkt. No. 126) and its Order dated March 9, 2022 (Dkt. No. 135) (collectively, the “Discovery Order”).

2. The Speaker objects to the Requests to the extent they purport to seek privileged matter (including matter protected by legislative privilege under the New York State Constitution, attorney-client privilege, or the attorney work-product doctrine); matter prepared or obtained in anticipation of litigation; or matter that discloses the mental impressions of the Speaker’s counsel or his counsel’s conclusions, opinions, memoranda, notes, summaries, legal research, or legal theories. The Speaker’s inadvertent inclusion of such matter in response to the Requests, if any, does not waive this objection.

3. The Speaker objects to each Definition, Instruction, and Document Requested to the extent they purport to impose burdens and obligations upon him that are inconsistent with, or in excess of, the obligations described in the New York Civil Practice Law and Rules, the Uniform Civil Rules for the Supreme Court, or any other applicable rules (collectively, the “Rules”).

4. The Speaker objects to each Instruction, Definition, and Document Requested to the extent they are overbroad, cumulative, duplicative, vague, ambiguous, expansive, oppressive, or unduly burdensome; or exceed the scope of discovery authorized by the Discovery Order or the Rules.

5. The Speaker objects to the “time frame” set forth in the Requests because it bears no relation to the claims asserted in Petitioners’ Amended Petition (Dkt. No. 18).

6. The Speaker objects to the Requests’ definition of “You” and “Your,” which purport to include all persons “acting or purporting to act for or on [the Speaker’s]

behalf, including, without limitation, representatives, agents, employees, attorneys, accountants and investigators.” These definitions render Requests incorporating those terms overly broad and inclusive, unduly burdensome, and oppressive, and they purport to require that such Requests be construed to call for discovery beyond the scope of the Discovery Order and the Rules.

7. The Speaker objects to the Requests to the extent they seek information that is not material and necessary in the prosecution of this special proceeding, nor reasonably calculated to lead to the discovery of admissible evidence, nor proportional to the needs of this special proceeding.

8. The Speaker objects to the Requests to the extent they seek matter for use other than in this special proceeding.

9. The Speaker objects to the Requests to the extent they seek information or material that is not within his possession, custody, or control.

10. The Speaker objects to the Requests to the extent they seek documents that are already in Petitioners’ possession, custody, or control; have been filed in this or any other court; or are otherwise publicly available. Searching for and producing such documents would be duplicative and unduly burdensome, and the responsive documents are more easily obtained through other means.

11. The Speaker objects to the Requests to the extent they seek to impose upon him the burden of producing documents that are not reasonably accessible, including electronic mail or other electronic information, documents, or statements that must be restored from back-up tapes or discs, or from other types of electronic storage media.

12. The Speaker's eventual production of documents in response to the Requests, if any, will be made without waiving the right to: (a) object, on the grounds of competency, privilege, relevance, materiality, or any other proper ground, to the use of the information and documents for any purpose, in whole or in part, in any aspect of this special proceeding or in any other special proceeding or action; and (b) object on any grounds, at any time, to other requests for production and other discovery procedures involving or relating to the subject matter of the information and documents to which the Speaker may respond.

13. These objections are made without prejudice to the Speaker's right to raise any additional objections deemed necessary or appropriate.

14. The Speaker declines any purported obligation to: (a) generate documents not currently existing; (b) describe any unsuccessful efforts to respond to any of the Requests; (c) locate any document or tangible thing not in his possession, custody, or control; (d) add or change the meaning of any of the Requests in the conjunctive or disjunctive; or (e) respond to any portion or aspect of the Requests not described with reasonable particularity by the express language of the Requests.

15. Neither the fact that an objection is interposed to a particular Request, nor the fact that no objection is ultimately interposed, necessarily means that responsive information, documents, or statements exist in the Speaker's possession, custody, or control.

SPECIFIC OBJECTIONS AND RESPONSES

Subject to, and without waiver of, the General Objections above, the Speaker makes the following specific objections and responses:

Request No. 1: All Documents and Communications concerning whether or not the map-drawing process was directed and controlled by one political party or the

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legislative leaders of one political party, including whether You, without Republican input, directed and/or controlled the map-drawing process.

Response to Request No. 1: The Speaker objects to this Request because it is vague, overbroad, and unduly burdensome, and because it calls for production of documents that are protected by absolute legislative privilege and that may also be protected by attorney-client privilege, the attorney work-product doctrine, and other privileges. Subject to and without waiving these objections, the Speaker produces transcripts of floor activity in his possession, custody, or control that are responsive to this Request and that can be identified and gathered without undue burden. These transcripts are set forth in the accompanying documents bearing Bates-numbered pages SPKR001 through SPKR114. The Speaker will also produce additional, non-privileged documents in his possession, custody, or control, if any, that are located as discovery proceeds.

Request No. 2: All Documents and Communications concerning any public remarks or statements made by You, any public testimony You gave about the redistricting process and/or maps, and any inquiries from and any responses to the public or media about the redistricting process and/or maps.

Response to Request No. 2: The Speaker objects to this Request because it is vague, overbroad, and unduly burdensome, and because it calls for production of documents already in the possession of or available to Petitioners. Subject to and without waiving these objections, the Speaker produces the accompanying non-privileged documents, bearing Bates numbers SPKR115 through SPKR131, that are in his possession, custody, or control; that are responsive to this Request; and that can be identified and gathered without undue burden. The Speaker will produce additional, non-privileged documents in his possession, custody, or control, if any, that are located as discovery proceeds.

Request No. 2(i): All Documents and Communications concerning public comments You made about the IRC and the IRC's action or lack of action.

Response to Request No. 2(i): The Speaker objects to this Request because it is vague, overbroad, and unduly burdensome, and because it calls for production of documents already in the possession of or available to Petitioners. Subject to and without waiving these objections, the Speaker produces the accompanying non-privileged documents, bearing Bates numbers SPKR115 through SPKR131, that are in his possession, custody, or control; that are responsive to this Request; and that can be identified and gathered without undue burden. The Speaker will produce additional, non-privileged documents in his possession, custody, or control, if any, that are located as discovery proceeds.

Request No. 2(ii): All Documents and Communications concerning any communication between You and third-parties about advancing a partisan agenda or any efforts to undermine the constitutional process of having the IRC provide a viable map and/or viable second map.

Response to Request No. 2(ii): The Speaker objects to this Request because it is vague, overbroad, and unduly burdensome, and because it calls for production of documents that are protected by absolute legislative privilege and that may be protected by attorney-client privilege, the attorney work-product doctrine, and other privileges.

Request No. 2(iii): All Documents and Communications concerning the work of the Commissioners of the Democratic Caucus of the IRC, which Documents and Communications You received from third parties.

Response to Request No. 2(iii): The Speaker objects to this Request because it is vague, overbroad, and unduly burdensome, and because it calls for production of documents that are protected by absolute legislative privilege and that may be protected by attorney-client privilege, the attorney work-product doctrine, and other privileges.

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Dated: New York, New York
March 12, 2022

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By: /s/ C. Daniel Chill
C. Daniel Chill
Elaine Reich
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Dated: Buffalo, New York
March 12, 2022

PHILLIPS LYTLE LLP

By: Craig R. Bucki
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Brian Lee Quail, Esq.

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THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC
RESEARCH AND REAPPORTIONMENT

198 State Street

Lobby

Albany, New York 12210

Doc #10263378

**EXHIBIT U TO MOSKOWITZ AFFIRMATION -
SENATE MAJORITY LEADER AND THE SENATE MAJORITY'S APPOINTEES TO THE
NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND
REAPPORTIONMENT OBJECTIONS AND RESPONSES TO PETITIONERS' FIRST
REQUEST FOR PRODUCTION [2117 - 2122]**

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

x

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
VOLANTE,

Index No. E2022-0116CV

Justice Patrick F. McAllister

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.

x

**OBJECTIONS AND RESPONSES OF THE SENATE MAJORITY
LEADER AND THE SENATE MAJORITY'S APPOINTEES TO THE NEW
YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC
RESEARCH AND REAPPORTIONMENT TO PETITIONERS' FIRST
REQUEST FOR THE PRODUCTION OF DOCUMENTS TO RESPONDENTS**

Senate Majority Leader and President *Pro Tempore* of the Senate Andrea

Stewart-Cousins and the New York State Senate Majority's appointees to the New York State

Legislative Task Force on Demographic Research and Reapportionment (collectively, the

"Senate Respondents"), by and through their attorneys, Cuti Hecker Wang LLP, hereby respond

to Petitioners' First Request for the Production of Documents to Respondents dated March 9,

2022 (the "Requests") as follows:

GENERAL OBJECTIONS

In addition to any specific objections set forth in response to specific discovery requests, the Senate Respondents lodge the following general objections (collectively, the “General Objections”) to the Requests:

- A. The Senate Respondents object to each Definition, Instruction, and Document Requested to the extent it exceeds the scope of discovery authorized by the Court’s Decision dated March 3, 2022 (Dkt. No. 126) and its Order dated March 9, 2022 (Dkt. No. 135) (collectively, the “Discovery Order”).
- B. The Senate Respondents object to the “time frame” set forth in the Requests because it bears no relation to the claims asserted in Petitioners’ Amended Petition (Dkt. No. 18).
- C. The Senate Respondents object to the Requests’ definition of “You” and “Your,” which purport to include all persons “acting or purporting to act for or on [the Senate Respondents’] behalf, including, without limitation, representatives, agents, employees, attorneys, accountants and investigators.” These definitions render Requests incorporating those terms overly broad and inclusive, unduly burdensome, and oppressive, and they purport to require that such Requests be construed to call for discovery beyond the scope of the Discovery Order, the New York Civil Practice Law and Rules (“CPLR”), the Uniform Civil Rules for the Supreme Court, or any other applicable rules.
- D. By responding to the Requests or an individual Request, the Senate Respondents do not concede the materiality or relevance of the subject to which they or it refer or refers. The Senate Respondents’ responses are made expressly subject to, and without waiving or intending to waive, any questions or objections as to the breadth, burdensomeness, competency, relevancy,

materiality, privilege, propriety, or admissibility of any of the information provided in this or any proceeding.

E. The Senate Respondents object to the Requests to the extent they call for providing information which is privileged, whether pursuant to the legislative privilege, the attorney-client privilege, the work product doctrine, or any other privilege that may apply.

F. The Senate Respondents object to the Requests to the extent that they purport to impose discovery obligations upon persons who are not parties to the proceeding.

G. The Senate Respondents object to the Requests to the extent that they call for information outside the scope of disclosure permitted under the CPLR.

H. Inadvertent inclusion of any information which is privileged or is otherwise immune from discovery shall not constitute a waiver of any privilege or of any other ground for objecting to the use of such information contained therein in this or any other proceeding or otherwise.

I. The Senate Respondents object to the Requests to the extent that they seek information for use other than in this proceeding.

J. The Senate Respondents reserve the right to supplement their responses to the Requests with additional information if and when such information becomes available to counsel for the Senate Respondents, and the Senate Respondents reserve their rights to object to the future disclosure of any such information.

RESPONSES AND OBJECTIONS TO SPECIFIC REQUESTS

Request No. 1: All Documents and Communications concerning whether or not the map-drawing process was directed and controlled by one political party or the legislative leaders of one political party, including whether You without Republican input directed and/or controlled the map-drawing process.

Response to Request No. 1: The Senate Respondents object to this Request on the grounds that it is vague, overbroad, unduly burdensome, and calls for the production of documents that are protected by absolute legislative privilege and that may be protected by attorney-client, work product, and/or other privileges. In addition, this Request calls for documents and information publicly available to Petitioners. Subject to and without waiving those objections or the General Objections, the Senate Respondents will produce any transcripts of legislative debate on the Senate floor in their possession, custody, or control that are responsive to this Request and that can be identified and gathered without undue burden.

Request No. 2: All documents and communications concerning any public remarks or statements made by You, any public testimony You gave about the redistricting process and/or maps, and any inquiries from and any responses to the public or media about the redistricting process and/or maps.

Response to Request No. 2: Senate Respondents object to this Request on the grounds that it is vague, overbroad, unduly burdensome, and already in the possession of and/or available to Petitioners. Subject to and without waiving those objections or the General Objections, the Senate Respondents will produce any non-privileged documents in their possession, custody, or control that are responsive to this Request and that can be identified and gathered without undue burden.

Request No. 2(i): All Documents and Communications concerning public comments You made about the IRC and the IRC's action or lack of action.

Response to Request No. 2(i): The Senate Respondents object to this Request on the grounds that it is vague, overbroad, unduly burdensome, and already in the possession of and/or available to Petitioners. Subject to and without waiving those objections or the General

Objections, the Senate Respondents will produce any non-privileged documents in their possession, custody, or control that are responsive to this Request and that can be identified and gathered without undue burden.

Request No. 2(ii): Any communication between You and third-parties about advancing a partisan agenda or any efforts to undermine the constitutional process of having the IRC produce a viable map and/or viable second map.

Response to Request No. 2(ii): The Senate Respondents object to this Request on the grounds that it is vague, overbroad, unduly burdensome, and calls for the production of documents that may be protected by absolute legislative privilege and that may be protected by attorney-client, work product, and/or other privileges.

Request No. 2(iii): All Documents and Communications concerning the work of the Commissioners of the Democratic Caucus of the IRC which Documents and Communications were received from third parties.

Response Request No. 2(iii): The Senate Respondents object to this Request on the grounds that it is vague, confusing, overbroad, unduly burdensome, and calls for the production of documents that may be protected by absolute legislative privilege and that may be protected by attorney-client, work product, and/or other privileges.

Dated: New York, New York
March 12, 2022

CUTI HECKER WANG LLP



By: _____
John R. Cuti

FILED: STEUBEN COUNTY CLERK 03/13/2022 12:02 PM

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Attorneys for Petitioners

**ORDER TO SHOW CAUSE WHY PETITIONERS SHOULD BE GRANTED LEAVE
TO SUBMIT SUPPLEMENTAL BRIEFING ON THE TIMING OF REMEDY,
DATED MARCH 14, 2022 [2123 - 2124]**

FILED: STEUBEN COUNTY CLERK 03/14/2022 10:41 AM

NYSCEF DOC. NO. 203

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RECEIVED NYSCEF: 03/14/2022

At IAS Part __ of the Supreme Court of the State of New York, held in and for the County of Steuben, at the Courthouse located at 3 East Pulteney Square Bath, NY 14810, on the 14 day of March, 2022.

PRESENT: _____

HON. PATRICK F. McALLISTER, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

-----X

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
VOLANTE,

Index No. E2022-0116CV

Petitioners,

-against-

**ORDER TO SHOW CAUSE
WHY PETITIONERS
SHOULD BE GRANTED
LEAVE TO SUBMIT
SUPPLEMENTAL
BRIEFING ON THE
TIMING OF REMEDY**

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.

-----X

FILED: STEUBEN COUNTY CLERK 03/14/2022 10:41 AM

NYSCEF DOC. NO. 203

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RECEIVED NYSCEF: 03/14/2022

UPON reading of Petitioners' Memorandum Of Law In Support Of Their Motion For Leave To Submit Supplemental Briefing On The Timing And Scope Of Remedy; and all of the pleadings and proceedings heretofore had herein, it is hereby:

ORDERED that Respondents or their counsel appear and show cause before this Court, at IAS Part __, Room ____, at the Courthouse located at 3 East Pulteney Square Bath, NY 14810, on the 14th day of March, 2022, at 9:30 a.m., or as soon thereafter as counsel can be heard, why an Order should not be issued granting Petitioners Motion for Leave to Submit Supplemental Briefing on the Timing of Remedy; and it is

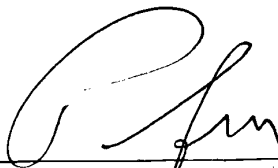
FURTHER ORDERED that Petitioners shall serve a copy of this Order and all papers in support thereof upon counsel for Respondents and counsel of record for the Attorney General by NYSCEF, on or before the 14th day of March, 2022; and it is

FURTHER ORDERED that Respondents shall serve any papers in opposition to Petitioners' Motion for Leave to Submit Supplemental Briefing on the Timing of Remedy by NYSCEF no later than the 15 day of March, 2022; ^{by 4:30 p.m.} and it is

FURTHER ORDERED that Petitioners shall serve any reply papers in further support of their Motion for Leave to Submit Supplemental Briefing on the Timing of Remedy by NYSCEF no later than the ____ day of March, 2022.

Signed
March 14, 2022

Enter


Hon. Patrick F. McAllister
Acting Supreme Court Justice

LETTER FROM STEVEN B. SALCEDO TO HONORABLE
PATRICK F. MCALLISTER, DATED MARCH 15, 2022



Phillips Lytle LLP

Via NYSCEF

March 15, 2022

Hon. Patrick F. McAllister
Acting New York State Supreme Court Justice
Steuben County Courthouse
3 East Pulteney Square
Bath, New York 14810

Re: *Matter of Harkenrider v. Hochul* (Steuben County Index No. E2022-0116CV)


Dear Justice McAllister:

As co-counsel with Graubard Miller to New York State Assembly Speaker Carl Heastie and the Assembly Majority (collectively, the "Speaker"), we acknowledge the Court's three (3) Orders to Show Cause issued yesterday, March 14, 2022.

Through one of the Orders to Show Cause, Petitioners move to strike portions of the expert reports submitted by Professor Jonathan N. Katz and Dr. Kristopher R. Tapp (Dkt. No. 201). The Speaker opposes Petitioners' motion and joins any and all opposing arguments asserted by Respondent Senate Majority Leader Andrea Stewart-Cousins and the State Senate Majority.

Respectfully,

Phillips Lytle LLP

By 

Steven B. Salcedo

SBS3SBS3
Doc #10287738

STEVEN B. SALCEDO
DIRECT 716 504 5782 SSALCEDO@PHILLIPSLYTLE.COM

ATTORNEYS AT LAW

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**AFFIRMATION OF ERIC HECKER, ESQ., FOR RESPONDENTS SENATE MAJORITY
LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-
COUSINS AND THE NEW YORK STATE SENATE MAJORITY'S APPOINTEES TO THE
NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND
REAPPORTIONMENT, IN OPPOSITION TO PETITIONERS' ORDER TO SHOW CAUSE
WHY PORTIONS OF THE EXPERT REPORTS OF PROF. JONATHAN N. KATZ AND DR.
KRISTOPHER R. TAPP SHOULD NOT BE STRICKEN,
DATED MARCH 15, 2022 [2126 - 2131]**

FILED: STEUBEN COUNTY CLERK 03/15/2022 03:28 PM

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RECEIVED NYSCEF: 03/15/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

-----X

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,

Steuben County Index
No. E2022-0116CV

Motion Sequence No. 7

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.

-----X

**AFFIRMATION OF ERIC HECKER IN OPPOSITION TO PETITIONERS'
MOTION TO STRIKE PORTIONS OF THE TAPP AND KATZ REPORTS**

ERIC HECKER, ESQ., hereby affirms under penalty of perjury that the following is
true and correct:

1. I am an attorney duly licensed to practice law in New York State, and a member
of Cuti Hecker Wang LLP, counsel for Respondents Senate Majority Leader and President *Pro
Tempore* of the Senate Andrea Stewart-Cousins and the New York State Senate Majority's
appointees to the New York State Legislative Task Force on Demographic Research and

Reapportionment (collectively, the “Senate Respondents”). I submit this Affirmation in opposition to Petitioners’ motion to strike portions of expert reports, filed on March 13, 2022. (Dkt. Nos. 169-173).

2. Petitioners say that they were “blindsided” and “sandbagged” by the use of an “entirely different methodology” in Dr. Tapp’s Second Affidavit. *See* Petitioners’ Memorandum of Law in Support of Petitioners’ Motion to Strike Portions of the Katz Expert Report and the Second Tapp Expert Report, Dkt. No. 170 (“Pet. Motion to Strike MOL”), at 3-4. That is the proverbial pot calling the kettle black. In Mr. Trende’s first report, he very clearly “calculate[d] [the] partisanship” of the districts in his simulations by using a standard index of recent statewide results for the precincts in those districts. Dkt. No. 26 at 7-13 and n.2. Then, in his reply report, Mr. Trende did a sudden about-face, contending for the first time that it supposedly makes sense to calculate the partisanship of his simulated districts an entirely different way. Mr. Trende’s reply report even purports to use a brand-new regression methodology that was never mentioned in his initial report. Dkt. No. 103 at 10-11.

3. Mr. Trende’s “simple regression” (as he called it), which he revealed for the first time in his reply report, is unreliable for a variety of reasons, including, as Dr. Tapp explains in his second affidavit, that Mr. Trende’s “simple regression” does not account for incumbency.

4. Petitioners cannot credibly contend that it was prejudicial or otherwise improper for Respondents to respond to the “simple regression” methodology that Mr. Trende unveiled for the first time in his reply affidavit. If Mr. Trende had included this methodology in his initial report, Respondents would have exposed it as statistically invalid in their opposition papers. Petitioners cannot insulate their expert’s analysis from scrutiny and challenge by

springing it on Respondents for this first time in reply papers. If anything, it is Mr. Trende's reply report that should be stricken, not Dr. Tapp's Second Affidavit.

5. When Respondents submitted their papers in opposition to the original Petition, they did not have an opportunity to respond to Mr. Trende's second ensemble model, or to the second, brand-new proposed partisanship measures Mr. Trende proposed, because Petitioners did not include that purported expert analysis in their filings in support of the Petition, but only in their reply papers submitted less than 36 hours before argument. Accordingly, it was appropriate and fair – and not remotely prejudicial – for the Senate Respondents to address Mr. Trende's new ensemble model, and his new proposed measure of analysis, for the Congressional map when we timely filed our papers on the March 10, 2022 deadline the Court set.

6. With respect to Dr. Katz's report, Petitioners conceded, as they obviously must, that Dr. Katz's report was timely filed with respect to the Senate plan, and therefore must be considered at least with respect to the Senate plan. *See* Pet. Motion to Strike MOL at 1. The Court therefore will have the benefit of hearing Dr. Katz's testimony regarding his methodology, at least with respect to the Senate plan, and Petitioners will have ample opportunity to cross-examine him. By the time that Dr. Katz testifies (presumably on Wednesday), Petitioners will have had his report for more than five days. That is more than ample time to prepare to cross-examine him. To the extent the schedule is more compressed than in a typical case, we are where we are because of the extraordinary nature of Petitioners' claims and the extraordinary relief they are seeking, and because they inexplicably failed to challenge the Senate plan when they first commenced this special proceeding.

7. We respectfully submit that once the Court hears Dr. Katz’s testimony explaining the manner in which his methodology shows that the Senate plan is not in any way unfair to Republicans, and once Petitioners have been afforded the opportunity to cross-examine him – both of which are certainties – it simply would not make any sense for the Court to decline to receive what is essentially the exact same argument, using the exact same methodology, and that will be subject to the exact same cross-examination, with respect to the congressional plan as well. At a minimum, the Court should defer ruling on this motion, listen to Dr. Katz’s direct testimony and cross-examination about his methodology and conclusions with respect to both the Senate plan and the congressional plan, and then decide whether there is any fairness-related basis to consider his methodology and conclusions with respect to the Senate plan (which Petitioners concede the Court must do) but not the congressional plan.

8. Petitioners rely on CPLR 405 to support their assertion that “this Court has discretion to strike any prejudicial matter in Respondents’ answers and supporting affidavits and reports submitted after the set deadline has expired.” Pet. Motion to Strike MOL at 2. But that provision entitles a party in a special proceeding to move “to strike scandalous or prejudicial matter unnecessarily inserted in a *pleading*.” CPLR 405 (emphasis added). An expert report obviously is not a pleading.

9. Petitioners cite no authority that supports their motion. In *PB-36 Doe v. Niagara Falls City Sch. Dist.*, 152 N.Y.S.3d 242, 247 (Sup. Ct. Niagara Cnty. 2021), the court struck

prejudicial matter from a pleading in a child sex abuse case. Because that case involved a pleading, not an expert report, it is irrelevant.¹

10. Moreover, this proceeding is not a personal injury case. This is a reapportionment case in which Petitioners are seeking to overturn a duly enacted reapportionment plan by proving beyond reasonable doubt that it violates the New York State Constitution. In an effort to meet that formidable burden, Petitioners made the choice to rely primarily on extremely complicated, highly technical computer simulation “technology.” To the extent this trial is complicated, it is complicated because Petitioners made it so. There is nothing “prejudicial” about the fact that a widely respected Caltech professor who regularly testifies on behalf of Republicans and Democrats alike engaged in a rigorous technical statistical analysis and concluded that there is nothing unfair about either redistricting plan at issue. There is also nothing “prejudicial” about giving Petitioners the opportunity to cross-examine Dr. Katz about both his conclusions about the Senate plan (which they concede is proper) and the conclusions he drew about the congressional plan using the very same methodology.

11. I affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

¹ The other case Petitioners cite, *LaFurge v. Cohen*, 61 A.D.3d 426 (1st Dep’t 2009), is also inapposite. See Pet. Motion to Strike MOL at 4. In that personal injury case, the court precluded the Plaintiff’s expert from testifying about “a new theory of liability” because Plaintiff had failed to provide defendant any notice. *Id.* This case is entirely different. The Senate Respondents are proffering expert testimony to *rebut* evidence the Petitioners already have submitted. Moreover, the expert in *LaFurge* was called to testify after having failed to disclose the subject of the testimony in any expert report. Here, by contrast, each expert submitted written analysis prior to offering testimony in this proceeding. Therefore, unlike in *LaFurge*, there is no unfair surprise here.

FILED: STEUBEN COUNTY CLERK 03/15/2022 03:28 PM

NYSCEF DOC. NO. 208

INDEX NO. E2022-0116CV

RECEIVED NYSCEF: 03/15/2022

Dated: March 15, 2022
New York, New York

/s/ Eric Hecker

Eric Hecker, Esq.
CUTI HECKER WANG LLP
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600

*Attorneys for Respondent Senate
Majority Leader Andrea Stewart-Cousins
and the New York State Senate Majority's
appointees to the New York State Legislative
Task Force on Demographic Research and
Reapportionment*

LETTER FROM STEVEN B. SALCEDO, ESQ. TO HONORABLE
PATRICK F. MCALLISTER, DATED MARCH 15, 2022 [2132 - 2133]



Phillips Lytle LLP

Via NYSCEF

March 15, 2022

Hon. Patrick F. McAllister
Acting New York State Supreme Court Justice
Steuben County Courthouse
3 East Pulteney Square
Bath, New York 14810

Re: *Matter of Harkenrider v. Hochul* (Steuben County Index No. E2022-0116CV)

Dear Justice McAllister:

As co-counsel with Graubard Miller to New York State Assembly Speaker Carl Heastie and the Assembly Majority (collectively, the "Speaker"), we acknowledge this Court's three (3) Orders to Show Cause issued yesterday, March 14, 2022.

Through one of the Orders to Show Cause, Petitioners move for an adverse inference against Respondents (Dkt. No. 202). Petitioners claim an adverse inference is warranted because several individuals did not attend depositions Petitioners requested (Dkt. No. 175)—even though this Court did not authorize any depositions. The Speaker opposes Petitioners' motion and joins any and all opposing arguments asserted by Respondent Senate Majority Leader Andrea Stewart-Cousins and the State Senate Majority.

Additionally, the Speaker notes that any sanction against him would be particularly inappropriate. To obtain an adverse inference, Petitioners must demonstrate, among other things, that the non-appearing deponent was "under the control of the party against whom the inference is sought." *Matter of Estate of Lewis*, 158 A.D.3d 1247, 1250 (4th Dep't 2018) (citing *DeVito v. Feliciano*, 22 N.Y.3d 159, 165–66 (2013)). None of the individuals Petitioners sought to depose are under the Speaker's control: they are not members of the Speaker's staff, and they are not even members of the Assembly. Nor did Petitioners seek to depose the Speaker himself.

STEVEN B. SALCEDO

DIRECT 716 504 5782 SSALCEDO@PHILLIPSLYTLE.COM

ATTORNEYS AT LAW



Hon. Patrick F. McAllister
Page 2

March 15, 2022

Hence, no grounds exist to draw an adverse inference against the Speaker, or to otherwise sanction him. But again, for the reasons explained by the Senate Majority Leader and the State Senate Majority, this Court should not sanction any Respondent.

Respectfully,

Phillips Lytle LLP

By *Steven B. Salcedo*

Steven B. Salcedo

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Doc [REDACTED]

AFFIRMATION OF JOHN R. CUTI, ESQ., FOR RESPONDENTS SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS AND THE NEW YORK STATE SENATE MAJORITY'S APPOINTEES TO THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT, IN OPPOSITION TO ORDER TO SHOW CAUSE FOR ADVERSE INFERENCES FROM RESPONDENTS AND THEIR AGENTS' FAILURE TO APPEAL FOR NOTICED DEPOSITIONS, DATED MARCH 15, 2022 [2134 - 2153]

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NYSCEF DOC. NO. 210

INDEX NO. E2022-0116CV

RECEIVED NYSCEF: 03/15/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

-----X

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,

Steuben County Index
No. E2022-0116CV

Motion Sequence No. 8

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.

-----X

**AFFIRMATION OF JOHN R. CUTI IN OPPOSITION
TO PETITIONERS' MOTION FOR SANCTIONS**

JOHN R. CUTI, ESQ., hereby affirms under penalty of perjury that the following is true
and correct:

1. I am an attorney duly licensed to practice law in New York State, and a member
of Cuti Hecker Wang LLP, counsel for Respondents Senate Majority Leader and President *Pro*
Tempore of the Senate Andrea Stewart-Cousins and the New York State Senate Majority's
appointees to the New York State Legislative Task Force on Demographic Research and

Reapportionment (collectively, the “Senate Respondents”). I submit this Affirmation in opposition to Petitioners’ motion for sanctions, filed on March 13, 2022. Dkt. Nos. 174-197.

PRELIMINARY STATEMENT

2. Petitioners are not entitled to adverse inferences because the Senate Respondents have not engaged in anything close to sanctionable conduct. Counsel for the Senate Respondents never understood this Court to have granted Petitioners leave to obtain deposition testimony from Senator Gianaris in his capacity as a member of LATFOR, Philip Chonigman in his capacity as the Senate Co-Executive Director of LATFOR, and/or Eric Katz, counsel to the Senate Majority Leader, in his capacity as a member of LATFOR (collectively, the “Legislative Witnesses”).

3. That is why counsel informed Petitioners last Thursday that they did not have permission to seek deposition testimony. Despite the timely objection, and notwithstanding that this Court’s order granting leave for Petitioners to seek discovery never mentioned deposition testimony, Petitioners never bothered to request that Your Honor clarify the matter. Nor did they move to compel, despite Fourth Department Justice Lindley’s direction regarding the procedures that were to be followed if a discovery dispute arose after Petitioners served any requests for disclosure. Instead, Petitioners plowed ahead, demanding that the Legislative Witnesses – in the midst of intensive budget deliberations – appear at their Manhattan offices on 17 hours’ notice or else. There is no basis to draw an adverse inference against any Respondent.

4. Even assuming *arguendo* that counsel for the Senate Respondents misunderstood the scope of this Court’s Decision and subsequent Order and Petitioners in fact had permission

to serve deposition notices, this motion for sanctions is still baseless given the undisputed record of Petitioners' failure to follow the CPLR. After a series of missteps, Petitioners did not serve notices of deposition until 3:50 p.m. on the Thursday before the Saturday discovery cutoff in a case set down for trial on Monday. They plainly sought to question the Legislative Witnesses about their legislative activity. That is why counsel asserted their absolute legislative privilege. To be sure, the Court ruled on March 3 that Petitioners would be permitted to seek "limited discovery" based in part on the view that there was only a qualified legislative privilege. But the Court's decision – rendered after an oral argument at which Petitioners' counsel responded to Your Honor's observation that the proposed discovery demands were overbroad by inviting the Court to narrow the proposed document demands, but never mentioned or asked for depositions – did not direct any Respondent to do anything. Nor did the Court decide any specific assertion of privilege because Respondents had not been served with any discovery requests.

5. For the reasons explained below, Petitioners' assertions that the Senate Respondents "brazenly defied this Court's directives" and that their counsel's assertion of his clients' evidentiary privileges was "obstinate and obtuse" are as offensive as they are false.¹ Petitioners made the decision not to try to seek an order compelling the depositions at issue. The Court should deny the motion for adverse inferences and decide this case on the merits.

¹ These regrettable *ad hominem* attacks are contained in Petitioners' Memorandum of Law in Support of their motion for sanctions ("Pet. Sanctions Mem."), Dkt. 175 at 4, 8.

BACKGROUND

6. Because Petitioners' papers provide an incomplete statement of the procedural history, the Senate Respondents here recite the relevant facts.

7. On March 3, 2022, the Court issued a Decision granting Petitioners leave to serve "limited discovery" demands on Respondents. *See* Dkt. No. 126 (the "Decision"), at 2.

8. The Speaker of the Assembly filed a notice of appeal from the Decision on March 3, 2022, *see* Dkt. No. 128, and the Senate Respondents filed a notice of appeal from the Decision on March 4, 2022, *see* Dkt. No. 130 (collectively, the "Notices of Appeal").

9. Although the Decision did not order any Respondent to provide disclosure or take any action at all, on March 7, 2022, four days after this Court entered the Decision, Petitioners filed an emergency application in the Appellate Division, Fourth Department seeking to vacate what they misunderstood to be an automatic stay arising from the filing of the Notices of Appeal. *See* Ex. A (Proposed Order to Show Cause to the Fourth Department).

10. Over the next two days, there was intensive motion practice in the Appellate Division. In the early morning hours of March 8, 2022, the Senate Respondents and the Speaker each filed papers opposing Petitioners' emergency application.

11. At 9:30 a.m. on March 8, the parties argued the application before Justice Stephen K. Lindley. Following the extensive oral argument before Justice Lindley, he invited Petitioners to submit reply papers by 12:30 p.m. that day, and he invited Respondents to file sur-reply papers in further opposition to the motion by 3:00 p.m. that day.

12. At 10:49 a.m. on March 9, 2022, Justice Lindley declined to sign Petitioners' proposed Order to Show Cause, explaining that the Decision was not an order, but merely a

ruling, and therefore not appealable. *See* Ex. B (March 9, 2022 decision declining to sign Petitioners’ proposed Order to Show Cause). Justice Lindley also explained that even if the Decision were interpreted to have been an Order, no automatic stay would have resulted from filing the Notices of Appeal because the Decision did not direct any Respondent to take any affirmative action. Specifically, Justice Lindley observed that the decision “did not compel discovery or direct any of the respondents to do anything, *such as sit for depositions.*” *Id.* (emphasis added). Instead, the Decision merely reflected this Court’s ruling granting Petitioners leave to seek limited discovery. *Id.*

13. Later that day, six days after the Decision granting them leave to serve discovery, Petitioners sought “from this court an order granting limited discovery consistent with” the Decision. *See* Dkt. No. 135. The Court entered such order at 4:28 p.m., *id.* (the “Order”).

14. At 6:28 p.m. on March 9, 2022, Petitioners sent an email to counsel for the Senate Respondents (and the other Respondents) purporting to serve subpoenas commanding the Legislative Witnesses to produce documents and appear for a deposition. *See* Exhs. C - E (the “Subpoenas”). As counsel for Petitioners should have known, subpoenas are for non-parties (entities described in CPLR § 3101(a)(2) as “person[s]”), and notices of deposition and requests for inspection and production of documents are sent to “part[ies].” *Id.* § 3101(a)(1).

15. At 2:05 p.m. on March 10, 2022, counsel for the Senate Respondents sent a letter to counsel for Petitioners explaining that the Subpoenas were invalid because the Legislative Witnesses, as members and a director of LATFOR, were parties to this proceeding for purposes of disclosure under CPLR §3101(a), not non-parties subject to subpoena. *See* Ex. F (J. Cuti

Letter to Bennet Moskowitz, March 10, 2022, 2:05 p.m.).² That letter also noted that even had Petitioners sent notices of deposition, the Senate Respondents would object to same because the Order did not authorize Petitioners to obtain deposition testimony, and in any event the notices sought information plainly protected by absolute legislative privilege and thus sought information not discoverable under CPLR § 3101(b). *Id.*

16. At 3:50 p.m. on March 10, 2022, counsel for Petitioners (apparently recognizing that the Subpoenas had been invalid on their face) purported to serve by email notices of deposition directed to the three Legislative Witnesses. *See* Ex. G (B. Moskowitz Letter to J. Cuti, March 10, 2022, 3:50 p.m.); Exhs. H - J (the “Deposition Notices”). The Deposition Notices do not contain any requests for the production of documents. *Id.*

17. At 8:35 p.m. on March 10, 2022, counsel for the Senate Respondents sent a letter to counsel for Petitioners, stating as follows:

² Petitioners now concede that the Legislative Witnesses are treated as parties for purposes of discovery under Article 31 of the CPLR. *See* Pet. Sanctions Mem. at 6. Yet they insist that they also had the right to serve subpoenas for documents and testimony from the same witnesses. *Id.* at 4. Again, Petitioners either misunderstand or misstate the rules of civil procedure. A party obtains information from another party in litigation through discovery demands addressed to the party and/or by serving notices of deposition on the party, including the party’s employees or other agents. *See* CPLR §§ 3101(a)(1), 3107, 3111, 3120. A party obtains information from a non-party by service of a subpoena which can request both documents and deposition testimony. *See* CPLR §§ 3101(a)(2), 3111; *see also* CPLR Art. 23. The distinction is fundamental. A subpoena is directed at a non-party and must be served in the same way as a summons. CPLR § 2303(a). But discovery demands and notices of deposition directed at a party are served like any other interlocutory paper in a litigation by sending them to the party’s counsel. *See* Siegel, N.Y. Prac. § 354 (6th ed. 2021) (“One difference [between deposition notices and subpoenas] is that the notices served on the parties are interlocutory papers which go by mail to the parties’ lawyers, while the subpoena must be served on the witness in the same manner as a summons.”).

Thank you for withdrawing the improper subpoenas that you served. Sending your agents to contact represented parties in a litigation to serve subpoenas was highly improper.

The deposition notices that you emailed at 3:50 pm today purporting to require witnesses to appear at 9:00 am tomorrow, in person at your Manhattan offices, for an examination to “continue from day to day until complete” are invalid on numerous grounds.

First, we do not read the March 3 Decision or the March 9 Order to have granted Petitioners leave to conduct depositions. Neither the Decision nor the Order ever mentions depositions, nor did the Court mention depositions during the March 3 oral argument.

Second, your assertion that the Court already rejected the objection that these deposition notices seek discovery of information that is protected by an absolute evidentiary privilege is baseless. The only issue the Court decided on March 3 was whether Petitioners could seek discovery. The Court did not rule on any specific privilege objection because no requests had been served.

Third, Petitioners have made plain that they seek to question these witnesses about core legislative activities. For example, the papers Petitioners filed in the Fourth Department reveal that there is substantial confusion even on Petitioners’ side about what discovery from LATFOR would or would not be protected by the legislative privilege. Because it is clear that Petitioners seek information from LATFOR members or employees that falls squarely within the absolute legislative privilege, the Senate Respondents hereby assert the objection under CPLR § 3101(b) that the information you seek is privileged matter that is not obtainable under Article 31.

Fourth, the Court granted Petitioners leave to serve discovery on March 3 at 11:45 am. It is not Respondents’ fault that you misunderstood the scope of the Court’s decision or the effect that the filing of a notice of appeal had with respect to your right to seek discovery. You did not serve subpoenas on these witnesses until yesterday, and those were nullities. Then, at 3:50 p.m. today, *more than a week after the Court permitted you to serve discovery requests*, you emailed notices of deposition. As we explained in our submissions to Justice Lindley, the Senate Respondents are in the midst of the heat of budget season, yet you demand that senior legislative officials appear in your office tomorrow morning on 17 hours notice. That is so unreasonable that any party would have valid objections on that ground alone. That you purport to command these government witnesses to appear on such a schedule only makes the point more clear.

Fifth, Petitioners do not have even a colorable basis to seek sanctions under CPLR § 3126. As Justice Lindley's decision explained, Justice McAllister has not ordered Respondents to do anything, much less to appear on extremely truncated notice to sit for a deposition, much less to do so to accommodate your failure to serve deposition notices for more than a week. The papers you filed in the Appellate Division make clear that you intend to question these witnesses about their intentions and motivations with respect to debating and participating in the legislative enactment of the challenged plans. Such inquiry is absolutely foreclosed by the New York Constitution's Speech or Debate Clause and the case law construing it. The Fourth Department's ruling makes clear that there is no operative Order or ruling compelling Respondents to appear for depositions, and we doubt that Justice McAllister would order these witnesses to appear in the first instance. At the bare minimum, they have a good faith basis to assert their objections (which they have done by this letter and in my letter of earlier today).

Finally, the Senate Respondents and their counsel have been working diligently to search through documents and identify any non-privileged information that can be produced. We anticipate that we will serve responses and objections to Petitioners' document demands, together with responsive documents, by the date specified in the notice. There is no basis to suggest that the Senate Respondents are acting in anything other than good faith. Once the privilege is invaded, the bell cannot be unrung. Petitioners have no right to purport to force these witnesses to surrender their privilege based on Petitioners' threats of sanctions and Petitioners' self-serving interpretation of Justice McAllister's Decision and Order.

If Petitioners move to compel, we will of course respond. In the meanwhile, we will continue to prepare our discovery responses and document production and for the expert testimony that begins in four days.

See Ex. K (J. Cuti Letter to B. Moskowitz, March 10, 2022, 8:35 p.m.).

18. At 9:29 p.m., Petitioners' counsel replied, claiming that Petitioners had not withdrawn the Subpoenas to Senator Gianaris, a member of LATFOR, Mr. Katz, Counsel to the Senate Majority Leader and a member of LATFOR, and Philip Chonigman, the Senate Co-Executive Director of LATFOR, but also insisting that these legislative officials appear for a deposition pursuant to the Deposition Notices the following morning. *See* Ex. L.

19. At 10:16 p.m. on March 10, 2022, counsel for the Senate Respondents sent a letter in reply, advising Petitioners' counsel as a courtesy that, having interposed privilege objections to the demands for the depositions, we would not produce these legislative officials to be interrogated about their legislative activities. *See* Ex. M. Three days later, Petitioners filed this motion. Dkt. Nos. 174-197.

20. Apparently on the morning of Friday, March 11, 2022, lawyers for Petitioners posed questions to an empty chair that they "had intended to ask each deponent." Pet. Sanctions Mem. at 2.

ARGUMENT

21. There is no basis to impose sanctions on this record. Counsel for the Senate Respondents' appointees to LATFOR reasonably interposed objections to the Deposition Notices that commanded that the Legislative Witnesses appear for depositions on 17 hours' notice during budget negotiations. First, Petitioners did not have leave to serve these Deposition Notices. Second, even assuming *arguendo* that Petitioners had leave to serve these notices, there was no court order compelling these witnesses to appear for depositions. Third, there is no basis to conclude that these witnesses willfully and contumaciously refused to comply with a valid demand for deposition testimony, especially given the extraordinarily truncated return date (17 hours). Fourth, the testimony Petitioners seek regarding the intentions and motivations of these legislative officials is barred by absolute legislative privilege under the New York Constitution's Speech or Debate Clause.

A. Petitioners Did Not Have Leave to Serve the Deposition Notices

22. The only disclosure permitted in this special proceeding is that which the court

grants leave to pursue. *See* CPLR 408 (requiring leave of court for disclosure in a special proceeding). Petitioners thus are constrained by this Court's March 3 Decision and March 9 Order, which tightly cabined the disclosure Petitioners were permitted to seek.

23. During the oral argument on Petitioners' motion for leave to serve disclosure, neither Petitioners nor the Court ever mentioned depositions. To the contrary, the colloquy between Your Honor and Petitioners' counsel focused solely on Petitioners' proposed discovery demands for the production of documents.

24. In response to a question from the Court regarding whether some of the material that Petitioners sought would be subject to privilege objections, counsel for Petitioners replied: "Of course, Your Honor. If Your Honor thin[k]s this aspect of our request is overbroad or subject to that privilege, we would certainly be open to a narrowing of our discovery request." Tr. 38.

25. The Court then made clear that it was focused on Petitioners' proposed demands for production of documents: "Well, your request seemed a little overbroad to me. It was just sort of open ended. Anything relating to the redistricting, that's pretty broad." *Id.* at 38-39.

26. Petitioners' presentation related solely to their proposed document demands. Thus, counsel for Petitioners noted that "again, I will reiterate, if Your Honor thinks some of those later requests we have in our five requests are overbroad, anything to do with redistricting, you know we certainly would welcome Your Honor narrowing that to get to the nub of what we're really trying to get to, which is the political data they looked at, and the communications they had with third parties." *Id.* at 41-42.

27. Counsel for the Senate Respondents who argued the motion understood the preceding colloquy to reflect that the Court was contemplating permitting only document

demands: “Now, no discovery request[s] have yet been propounded. The issue before you is whether they should be allowed to [be], and as Your Honor noted, they’re rather dramatically overbroad. So one assumes if leave is granted [Petitioners] would serve some sort of narrowed requests.” *Id.* at 46.

28. The Decision that Your Honor issued shortly after the oral argument never mentions Petitioners taking depositions.

29. After the interlocutory litigation before the Appellate Division, Petitioners wrote to Your Honor to ask the Court to prepare and enter the Order. *See* Ex. N (B. Moskowitz letter to Court, March 9, 2022). Petitioners represented to Your Honor that they “expect that Respondents will timely comply with any forthcoming *discovery demands* and intend to complete discovery within the Court’s original deadline.” *Id.* at 1 (emphasis added). Again, Petitioners never mentioned that they sought leave to serve notices of deposition. To the contrary, their letter sought entry of an Order permitting them to serve only “discovery demands.”

30. “Discovery demands” is a term of art referring to requests for discovery and inspection of documents. The Fourth Department has consistently distinguished between “discovery demands” for documents and “depositions.” *See Burke v. Arcadis G & M cf New York Architectural and Engineering Servs., P.C.*, 149 A.D.3d 1514, 1515-16 (4th Dep’t 2017) (discussing “discovery demands” and notices to take depositions separately); *Rauls v. DirecTV*, 81 A.D.3d 1252, 1253 (4th Dep’t 2011) (same); *Hobbs v. Enprotech Corp.*, 12 A.D.3d 1063,

1064 (4th Dep't 2004) (same); *Truesdale v. Cnty. Cf Erie*, 229 A.D.2d 907, 908 (4th Dep't 1996) (same).³

31. Senate Respondents did not object to Petitioners' letter because they understood from the Fourth Department and this Court's Decision that Petitioners had the right to serve demands for production, subject to Senate Respondents having the right to object to any specific requests that called for privileged material.

32. Petitioners asked Your Honor to enter an order permitting them to serve "discovery demands." But then, without authorization, they first improperly served facially invalid subpoenas and then served notices of deposition.

33. Because Petitioners did not seek and were not granted leave to serve the Deposition Notices, their motion for sanctions is baseless.

B. No Court Order Required the Legislative Witnesses to Appear for Depositions

34. Even assuming for the sake of argument that Petitioners had leave to serve the Deposition Notices, such notices obviously were not tantamount to a court order compelling the witnesses to appear. Petitioners conceded during oral argument before Justice Lindley on March 8, 2022 that Your Honor merely had granted Petitioners leave to seek disclosure and did not direct Respondents to do anything. Justice Lindley so ruled on March 9, 2022. *See* Ex B at p. 1.

³ Petitioners' citation to *Lopez v. Imperial Delivery Serv.*, 282 A.D.2d 190, 197 (2d Dep't 2001), is inapposite. Of course the discovery phase of a case and the general term "discovery" can include the exchange of documents and depositions. The point is that Petitioners' March 9 letter sought leave to serve only "discovery *demands*" (emphasis added), a recognized term of art. Moreover, *Lopez* was an ordinary action, not a special proceeding in which the only discovery permitted is that which the Court grants leave to pursue. *See* CPLR 408.

And this Court's subsequent Order does nothing more than effectuate this Court's decision that Petitioners were permitted leave to seek disclosure.

35. Therefore, Petitioners' citation to *Iskalo Elec. Tower LLC v. Stantec Consulting Servs.*, 113 A.D.3d 1105 (4th Dep't 2014), Pet. Sanctions Mem. at 3, is beside the point because that case involved a party's alleged failure to comply with a court order. *Id.* at 1106. Here, the Order – which did not mention depositions at all – certainly did not specifically direct the Senate Respondents to make the Legislative Witnesses available for depositions on less than a day's notice or submit to sanctions.

C. The Senate Respondents Acted Reasonably by Objecting to the Deposition Notices

36. Where, as here, there has not been a court order directing disclosure, sanctions are not available unless a party “wilfully fails to disclose information which the court finds ought to have been disclosed.” CPLR § 3126. There is no basis to find that the Senate Respondents' failure to produce legislative officials on 17 hours' notice, in the middle of budget season, and in the absence of a court order authorizing such disclosure, was a “wilful” refusal to comply with lawful disclosure requests for purposes of CPLR § 3126.

37. Such a finding under the statute is reserved for situations in which a party engages in repeated, indefensible refusals to provide discovery. *See, e.g., Rogers v. Howard Realty Estates*, 145 A.D.3d 1051, 1052 (2d Dep't 2016) (imposing sanctions only after defendant's representative “failed to appear for a court-ordered deposition on several separate dates [and] defendant failed to demonstrate a reasonable excuse for those failures”); *Longo v. Armor Elevator Co., Inc.*, 307 A.D.2d 848, 849 (1st Dep't 2003) (order under CPLR 3126(1) was “appropriate” sanction for defendants' “repeated and continuing failure to produce documents

that they were ordered to produce in a decision of this Court . . . or to adequately explain their inability to do so”); *Chamberlain, D’Amanda, Oppenheimer & Greer,field v Beauchamp*, 209 A.D.2d 983, 983 (4th Dep’t 1994) (defendants’ failure to attend deposition did not constitute a “willful failure to disclose,” where, *inter alia*, plaintiff’s service of the notice of deposition was improper); *Herzog v. Progressive Equity Funding Corp.*, 199 A.D.2d 897, 898 (3d Dep’t 1993) (willfulness for purposes of CPLR 3126 “can be inferred from [a] persistent course of conduct evincing an intent to frustrate [a party’s] pursuit of discovery”); *County cf Westchester v. Unity Mech. Corp. et al.*, Index No. 59897/2016, Dkt. No. 891, at 7 (Sup. Ct. Westchester Cnty. 2021) (refusing to impose any sanction, including adverse inference, because moving party “failed to establish that the alleged spoliation was willful, contumacious or in bad faith or that the conduct deprives it of proving its case”). In most of these cases, the party that is sanctioned has *also* refused to comply with a direct court order. *See, e.g., Rogers*, 145 A.D.3d at 1052; *Longo*, 307 A.D.2d at 849; *Herzog*, 199 A.D.2d at 898. Moreover, even the least severe sanctions are not warranted unless “a party has not made a ‘meaningful attempt to comply with disclosure and [has] an entirely inadequate excuse for such failure.’” *Kumar v. Kumar*, 63 A.D.3d 1246, 1248 (3d Dep’t 2009) (internal citation omitted).

38. Petitioners cite a single case, *Leahy v. Allen*, 221 A.D.2d 88 (3d Dep’t 1996), in ostensible support for their motion for adverse inferences. *See* Pet. Sanctions Mem. at 4. *Allen* was a negligence case in which the defendant engaged a physician to examine the plaintiff’s claimed injuries, but then failed to call the physician at trial. The court noted that a missing witness charge was appropriate, relying on the well-established rule that “where a party fails to call an available witness in support of his or her case and such witness is under that party’s

control and in a position to provide noncumulative evidence favorable to the opposing party, the jury should be permitted to draw an adverse inference by reason thereof.” *Id.* at 92. That rule has no application here, where Petitioners served eleventh-hour deposition notices without leave of the Court, in an Article 4 special proceeding, on individuals asserting claims of privilege.

39. The Senate Respondents have acted reasonably and diligently at every stage of this dispute. As explained above, Petitioners never obtained leave to serve the Deposition Notices. If anything, it is Petitioners who engaged in sharp practice by serving them and demanding, on threat of moving for sanctions against senior government officials, that these legislative officials appear on 17 hours’ notice for a deposition noticed to continue from day to day until concluded. *See* Ex. K.

40. As soon as counsel received Petitioners’ invalid Subpoenas directed at the Legislative Witnesses, counsel wrote to explain that the Subpoenas were nullities and that, even assuming they were proper notices of deposition, they would be invalid because the Court had not granted Petitioners leave to obtain deposition testimony. *See* Ex. F.

41. In addition, counsel explained that – even assuming that Petitioners had obtained permission to seek depositions – it was palpably unreasonable to expect these witnesses to appear on 17 hours’ notice during intensive budget negotiations. *See* Ex. K at 1-2.

42. In addition to objecting to the inadequate notice, counsel also noted that – again assuming Petitioners even had permission to serve notices of deposition – the Legislative Witnesses would object to them on the grounds of absolute privilege. *See* Ex. F; Ex. K at 1.

43. In inviting Petitioners to move to compel if they disagreed, *see* Ex. K at 2, counsel for the Senate Respondents was relying on Justice Lindley’s discussion of how matters were to

proceed if Petitioners were to serve discovery demands: “Of course, *if respondents object to those demands, petitioners may file a motion to compel, and the trial court will then be called upon to resolve the discovery dispute.*” Ex. B at 2 (emphasis added). There was nothing willful or contumacious in following the process that an appellate judge had specifically outlined. To the contrary, counsel made clear that if Petitioners moved to compel, we would oppose that motion. *See* Ex. K at 2.

44. It is telling that Petitioners never moved to compel the testimony at issue. Not only did they wait four and a half days after the Decision was issued on Thursday morning, March 3, before first seeking emergency relief in the Appellate Division on the afternoon of Monday, March 7, and not only did they fail to serve deposition notices for another day and a half after Justice Lindley ruled at 10:49 a.m. on March 9 that there never was an automatic stay in the first place, but Petitioners never sought an order from Your Honor compelling the testimony that is the subject of this sanctions motion. The record supports the conclusion that Petitioners want an adverse inference instruction more than they wanted to take the depositions.

45. Moreover, the undersigned counsel believed, and believes, that he has a professional duty to protect the privilege afforded to the Legislative Witnesses under the New York Constitution’s Speech or Debate Clause. To have failed to object to these Deposition Notices and permit these witnesses to be subjected to questioning outside the Legislature about their legislative activities would have destroyed the privilege, even if the appellate courts subsequently vindicated its assertion. *See* Ex. K at 2 (“Once the privilege is invaded, the bell cannot be unrung”).

46. New York law makes clear that LATFOR is a legislative body whose members perform legislative functions. *See* N.Y. Leg. Law § 83-m (creating LATFOR); *id.* at subd. 5 (“The primary function of the task force shall be to compile and analyze data, conduct research for and make reports and recommendations to the legislature, legislative commissions and other legislative task forces.”); *id.* at subd. 10 (“The task force may hold public and private hearings and otherwise have all of the powers of a legislative committee under this chapter.”); *id.* at subd. 12 (“Employees of the task force shall be considered to be employees of the legislature for all purposes.”). In short, these members of LATFOR whom Petitioners sought to depose are integrally involved in core legislative activities; they are not remotely akin to lobbyists.

47. As the Senate Respondents have repeatedly asserted, the proper body of precedent for privilege rulings in this proceeding is comprised of cases from state courts, not federal courts, and such cases establish an absolute legislative privilege for persons performing legislative functions under the New York Constitution’s Speech or Debate Clause. *See, e.g.,* Senate Majority Leader’s Opposition to Petitioners’ Motion for Leave to Engage in Disclosure (“Disclosure Opp.”), at 9-12, Dkt. 96 (Feb. 25, 2022) (citing *inter alia* *People v. Ohrenstein*, 77 N.Y.2d 38, 53 (1990), *Humane Soc’y cf New York v. City cf New York*, 188 Misc. 2d 735, 739-

40 (Sup. Ct. N.Y. Cnty. 2001), and *Campaign for Fiscal Equity v. State of New York*, 179 Misc.2d 907 (Sup. Ct. N.Y. Cnty. 1999)).⁴

48. But even assuming that the federal precedents from *Rodriguez* and *Favors* are relevant – and for the reasons explained in the preceding paragraph and footnote 4 they are not – those courts held unequivocally that LATFOR employees and members are entitled to assert legislative privilege for activities related to legislative acts. See *Rodriguez v. Pataki*, 293 F. Supp. 2d 302, 305 (S.D.N.Y. 2003); *Favors v. Cuomo*, No. 11 CV 5632, 2013 WL 11319831, at *9 (E.D.N.Y. Feb. 8, 2013).

49. Before this Court’s Decision, no court had ever held that LATFOR is categorically outside the zone of legislative privilege.⁵ To the contrary, the court in *Favors* expressly held that even unelected third parties employed by LATFOR as “experts and staff” were protected by the legislative privilege because they engaged in activity that was integrally related to the quintessentially legislative function of redistricting. 2013 WL 11319831, at *9.

50. The Legislative Witnesses’ well-established entitlement to privilege makes sanctions particularly inappropriate. Where a defendant – or respondent, as the case is here –

⁴ In their papers submitted to the Fourth Department in opposition to Petitioners’ (unnecessary) motion to vacate a non-existent automatic stay, the Senate Respondents explained that the federal common law relied on by the federal courts in the decisions on which Your Honor relied in rendering the Decision does not apply in this proceeding. See Ex. O (Affirmation of John R. Cuti in Opposition to the Motion by Order to Show Cause to Vacate the Automatic Stay), at 25-26; Ex. P (Sur-Reply Affirmation of John R. Cuti in Further Opposition to the Motion by Order to Show Cause to Vacate the Automatic Stay), at 7. The privilege that does apply in this proceeding brought under the New York Constitution is the absolute legislative privilege afforded to persons performing legislative functions under the New York Constitution’s Speech or Debate Clause. See Disclosure Opp. at 9-12; Ex. O at 17-25; Ex. P at 2-4. By this reference, the Senate Respondents incorporate those arguments here.

⁵ For a more in-depth analysis, see Exhibit O, at 26-29, incorporated by reference here.

“legitimately” invokes a privilege, “no sanction may be invoked because the privilege is a shield and that’s the way the defendant is using it.” Siegel, N.Y. Prac. § 367 (6th ed. 2021) (contrasting a situation where “the . . . person who brought the case to court” attempts to “use the privilege as a sword” to refuse disclosure, in which case “he will face a civil sanction under CPLR 3126”); *see also Pinnock v. Mercy Med. Ctr.*, 180 A.D.3d 1086, 1087 (2d Dep’t 2020) (denying motion for sanctions, including adverse inference instruction, where defendant’s refusal to answer questions during deposition was on basis of privilege, and thus “was not demonstrated to be willful or contumacious so as to warrant the sanctions sought”).

51. For all these reasons, there is no basis to conclude that counsel, and these witnesses, acted in anything other than good faith. There plainly is no basis to find that we engaged in willful, contumacious conduct. The motion for sanctions should be denied.

52. Petitioners drop a footnote that objects to the responses and objections to Petitioners’ discovery demands that the Senate Respondents served on March 12. *See* Pet. Sanctions Mem. at 3 n. †. There is no basis for this complaint. Along with their responses, and the 388 pages of documents produced, the Senate Respondents offered “to meet and confer with [Petitioners’ counsel] about any areas of disagreement or to discuss any specific responses.” *See* Ex. Q (Senate Respondents’ Responses and Objections and cover email dated March 12, 2020). Petitioners made no effort to confer with Senate Respondents about their responses or anything related to the Senate Respondents’ good-faith efforts to comply with Petitioners’ demands. Judicial intervention would be improper for that reason alone, in addition to the fact that Senate Respondents served compliant and proper responses. *Cf. Yargeau v. Lasertron*, 74 A.D.3d 1805, 1806 (4th Dep’t 2010) (reversing as abuse of discretion trial court’s grant of motion to compel

because movant failed to submit a compliant affirmation of good faith as required by Rule 202.7); *Baez v. Sugrue*, 300 A.D.2d 519, 521 (4th Dep’t 2006) (affirming trial court’s denial of motion to preclude expert from testifying at trial because movant failed to submit compliant Rule 202.7 affirmation).

53. Finally, we repeat that Justice Lindley expressly ruled that the Decision did not “direct any of the respondents to do anything, such as sit for depositions.” Ex. B at 1. Petitioners’ motion for sanctions is baseless in light of that ruling alone. The fact that Petitioners engaged in such dilatory behavior and either failed to understand or chose not to follow the rules makes it all the more clear that their motion should be denied.

54. I affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: March 15, 2022
New York, New York

/s/ John R. Cuti
John R. Cuti, Esq.
CUTI HECKER WANG LLP
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600

*Attorneys for Respondent Senate
Majority Leader Andrea Stewart-Cousins
and the New York State Senate Majority’s
appointees to the New York State Legislative
Task Force on Demographic Research and
Reapportionment*

**EXHIBIT A TO CUTI AFFIRMATION -
PROPOSED ORDER TO SHOW CAUSE WITH INTERIM RELIEF [2154 - 2155]**

FILED: STEUBEN COUNTY CLERK 03/15/2022 03:48 PM

NYSCEF DOC. NO. 211

INDEX NO. E2022-0116CV

RECEIVED NYSCEF: 03/15/2022

**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT**

-----X
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,

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.

-----X

**ORDER TO
SHOW CAUSE
WITH INTERIM
RELIEF**

Steuben County
Index No. E2022-
0116CV

A.D. No. _____

Upon the annexed affirmation of Bennet J. Moskowitz, sworn to on March 7,
2022, with exhibits, pursuant to C.P.L.R. § 5519(c),

LET respondents appear and show cause before this Court at the M. Dolores
Denman Courthouse located at 50 East Avenue, Rochester, New York 14604, on
March _____, 2022 at 10 o'clock in the forenoon of that day or as soon thereafter

as the parties and counsel may be heard, why an order should not be entered vacating the automatic stay pending appeal of the order of Supreme Court, Steuben County, dated March 3, 2022, imposed pursuant to C.P.L.R. § 5519(a)(1). Sufficient reason appearing therefore, it is

ORDERED pending the hearing and determination of this motion, the automatic stay is VACATED in its entirety.

ORDERED that, consistent with prior agreement of the parties, email service of a copy of this order and the papers upon which it is granted upon the attorneys for respondents on or before the _____th day of March, 2022, shall be deemed good and sufficient service thereof, and it is further

ORDERED that the motion brought on by this order to show cause shall not be orally argued unless counsel are notified to the contrary by the Clerk of the Court.

Dated: Rochester, New York
March ___, 2022

HON. _____
Justice

**EXHIBIT B TO CUTI AFFIRMATION -
DECISION OF THE HONORABLE STEPHEN K. LINDLEY,
DATED MARCH 9, 2022 [2156 - 2160]**

FILED: STEUBEN COUNTY CLERK 03/15/2022 03:48 PM

INDEX NO. E2022-0116CV

NYSCEF DOC. NO. 212

RECEIVED NYSCEF: 03/15/2022

Saturday, March 12, 2022 at 16:02:01 Eastern Standard Time

Subject: Decision on Petitioners' Order to Show Cause
Date: Wednesday, March 9, 2022 at 10:49:48 AM Eastern Standard Time
From: Hon. Stephen K. Lindley
To: Alice Reiter, Dutton, Sean T.H., Craig R. Bucki, Adam M. Oshrin
CC: Tseytlin, Misha, George H. Winner Jr., LeRoy, Kevin M., Harris-Finkel, Sarah, Moskowitz, Bennet J., Lewis, Richard C., McKay, Heather, O'Brien, Ted, Halliyadde, Muditha, ereich@graubard.com, jlessem@graubard.com, dchill@graubard.com, Eric Hecker, Daniel Mullkoff, John Cuti, Alex Goldenberg
Attachments: image001.gif, image002.gif

Counselors, having reviewed the papers submitted in support and in opposition to petitioners' order to show cause, and having considered the arguments advanced by counsel during our telephone conference yesterday, I am declining to sign the order to show cause, which seeks to vacate a purported automatic stay under CPLR § 5519 (a) (1) triggered by the appeals of respondents Heastie and Stewart-Cousin from Justice McAllister's discovery ruling. I am declining to sign the order to show cause because a motion to vacate the "supposed automatic stay" is "unnecessary" (*Fassl v New York State Dept. of Taxation and Finance*, 159 AD3d 1029 [4th Dept 1990]; *Shorten v City of White Plains*, 216 AD2d 344 [2d Dept 1995]). A motion to vacate is unnecessary because there is no automatic stay in effect. The automatic stay provision of CPLR 5519 (a) applies to "proceedings to enforce the judgment or order appealed from," and, here, respondents have not appealed from a judgment or order. Instead, they appealed from Justice McAllister's decision dated March 3, 2022, and it is well settled that "[n]o appeal lies from a mere decision" (*Kuhn v Kuhn*, 129 AD2d 967 [4th Dept 1987]). The document in question is labeled "decision," does not contain any ordering paragraphs, and, in contravention of CPLR 2219, does not "recite the papers used on the motion" (CPLR 2219 [a]). This paper, as well as its docket entry and characterization by the parties, is substantively identical as that in *Garcia v Town of Tonawanda*, where we held that that no appeal lied from what was, in that case, deemed a mere decision (194 AD3d 1479, 1479-1480 [4th Dept 2021] [although entered as a "decision and order," paper was "on its face" a "mere decision from which no appeal lies"]). Because there is no valid appeal, my colleagues and I on the Appellate Division lack jurisdiction to take action.

In any event, even if we were to treat the decision as if it were an order, respondents' appeal therefrom does not give rise to an automatic stay because the court merely granted petitioners leave to pursue discovery; it did not compel discovery or direct any of the respondents to do anything, such as sit for depositions or turn over emails or disclose other communications regarding redistricting. CPLR § 5519 (a) does not stay all proceedings; as noted, it stays only "proceedings to enforce the judgment or order appealed from" (CPLR § 5519 [a]; see *Young v State of New York*, 213 AD2d 1084, 1084 [4th Dept 1995] ["The stay under CPLR 5519 (a) (1) stays only proceedings to enforce the order on appeal, not all proceedings"]; see *Baker v Board of Educ. of West Irondequoit School Dist.*, 152 AD2d 1014, 1014 [4th Dept 1989] [same]). What constitutes a "proceeding to enforce" is strictly construed. For example, although a trial is "a natural consequence" of an order denying summary judgment, a trial is not a

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proceeding to enforce that order, and thus is not stayed by an appeal from that order (*Schwartz v New York City Hous. Auth.*, 219 AD2d 47, 48 [2d Dept 1996]; see *White v City of Jamestown*, 242 AD2d 979, 980 [4th Dept 1997]). Stated another way, the automatic stay applies to “executory directions that command a person to do an act beyond what is required under the CPLR” (*Tax Equity Now NY LLC v City of New York*, 173 AD3d 464, 465 [1st Dept 2019]; see 4 NY Jur 2d Appellate Review § 428 [“The inclusion in an order of affirmative directives on matters addressed in the Civil Practice Laws and Rules (CPLR) does not trigger the automatic stay as to obligations provided for in the CPLR pending appeal of that order”]).

Here, again, the court’s decision does not itself compel respondents to disclose any specific thing (*cf. Craigie v Consolidated Edison, Co.*, 127 AD2d 556 [2d Dept 1987] [applying stay to appeal from order granting motion to compel]). Instead, the court merely granted leave for petitioners to seek disclosure, which now places the parties within the framework of CPLR article 31, allowing petitioners to seek disclosure in those areas for which the court granted leave and, upon such a request, would allow respondent to raise any objections. Because the court’s decision merely granted leave to petitioners to seek disclosure, and required respondents to respond to those demands, as provided for in the CPLR, the decision does not “command a person to do an act beyond what is required under the CPLR,” and the stay provided by CPLR § 5519 (a) (1) does not apply to “directives on matters addressed in the [CPLR]” (4 NY Jur 2d Appellate Review § 428; see *Tax Equity Now*, 173 AD3d at 465).

Accordingly, I conclude that § 5519 (a) (1) does not prevent petitioners from serving specific discovery demands on respondents. Of course, if respondents object to those demands, petitioners may file a motion to compel, and the trial court will then be called upon to resolve the discovery dispute. If the court rules against respondents on a particular discovery request and issues an order to that effect, respondents’ appeal from such order would trigger an automatic stay.

If counsel for petitioners wishes to prepare an order for me to sign wherein I formally decline to sign their order to show cause, please submit electronically with notice to opposing counsel.

To: Dutton, Sean T.H. <Sean.Dutton@troutman.com>; Hon. Stephen K. Lindley <slindley@nycourts.gov>; Craig R. Bucki <CBucki@phillipslytle.com>; Adam M. Oshrin <aoshrin@nycourts.gov>

Cc: Tseytlin, Misha <Misha.Tseytlin@troutman.com>; George H. Winner Jr. <gwinner@kmw-law.com>; LeRoy, Kevin M. <Kevin.LeRoy@troutman.com>; Harris-Finkel, Sarah <Sarah.Harris-Finkel@troutman.com>; Moskowitz, Bennet J. <Bennet.Moskowitz@troutman.com>; Lewis, Richard C. <rlewis@hhk.com>; McKay, Heather <heather.mckay@ag.ny.gov>; O'Brien, Ted <Ted.O'Brien@ag.ny.gov>; Halliyadde, Muditha <Muditha.Halliyadde@ag.ny.gov>; ereich@graubard.com; jlessem@graubard.com; dchill@graubard.com; Eric Hecker <ehecker@chwillp.com>; Daniel Mullkoff <dmullkoff@chwillp.com>; John Cuti <jcuti@chwillp.com>; Alex Goldenberg <agoldenberg@chwillp.com>

Subject: Re: Assembly Speaker's Papers Opposing Proposed Order to Show Cause in Matter of Harkenrider v. Hochul., Index No. E2022-0116CV (Sup. Ct. Steuben County)

FILED: STEUBEN COUNTY CLERK 03/15/2022 03:48 PM

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INDEX NO. E2022-0116CV

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Justice Lindley:

Attached please find the Sur-Reply Affirmation of John R. Cuti, counsel for the Senate Majority Leader, in further opposition to Petitioners' emergency application.

Respectfully submitted,

Alice Reiter
Cuti Hecker Wang LLP

From: "Dutton, Sean T.H." <Sean.Dutton@troutman.com>
Date: Tuesday, March 8, 2022 at 12:32 PM
To: "Hon. Stephen K. Lindley" <slindley@nycourts.gov>, "Craig R. Bucki" <CBucki@phillipslytle.com>, "Adam M. Oshrin" <aoshrin@nycourts.gov>
Cc: "Tseytlin, Misha" <Misha.Tseytlin@troutman.com>, "George H. Winner Jr." <gwinner@kmw-law.com>, "LeRoy, Kevin M." <Kevin.LeRoy@troutman.com>, "Harris-Finkel, Sarah" <Sarah.Harris-Finkel@troutman.com>, "Moskowitz, Bennet J." <Bennet.Moskowitz@troutman.com>, "Lewis, Richard C." <rlewis@hhk.com>, "McKay, Heather" <heather.mckay@ag.ny.gov>, "O'Brien, Ted" <Ted.O'Brien@ag.ny.gov>, "Halliyadde, Muditha" <Muditha.Halliyadde@ag.ny.gov>, "ereich@graubard.com" <ereich@graubard.com>, "jlessem@graubard.com" <jlessem@graubard.com>, "dchill@graubard.com" <dchill@graubard.com>, Eric Hecker <hecker@chwillp.com>, Daniel Mullkoff <dmullkoff@chwillp.com>, John Cuti <jcuti@chwillp.com>, Alex Goldenberg <agoldenberg@chwillp.com>, Alice Reiter <areiter@chwillp.com>
Subject: RE: Assembly Speaker's Papers Opposing Proposed Order to Show Cause in Matter of Harkenrider v. Hochul., Index No. E2022-0116CV (Sup. Ct. Steuben County)
Resent-From: Proofpoint Essentials <do-not-reply@proofpointessentials.com>
Resent-To: Alice Reiter <areiter@chwillp.com>
Resent-Date: Tuesday, March 8, 2022 at 12:29 PM

Your Honor,

Please see attached Petitioners' Reply Affirmation In Support Of Vacating The Automatic Stay.

Best,
Sean

Sean Dutton

Associate
troutman pepper

Direct: 312.759.1937 | Mobile: 248.227.1105 | Internal: 20-1937
sean.dutton@troutman.com

From: Hon. Stephen K. Lindley <slindley@nycourts.gov>
Sent: Tuesday, March 8, 2022 1:39 AM
To: Craig R. Bucki <CBucki@phillipslytle.com>; Adam M. Oshrin <aoshrin@nycourts.gov>
Cc: Tseytlin, Misha <Misha.Tseytlin@troutman.com>; George H. Winner Jr. <gwinner@kmw-law.com>; LeRoy,

FILED: STEUBEN COUNTY CLERK 03/15/2022 03:48 PM

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INDEX NO. E2022-0116CV

RECEIVED NYSCEF: 03/15/2022

Kevin M. <Kevin.LeRoy@troutman.com>; Harris-Finkel, Sarah <Sarah.Harris-Finkel@troutman.com>; Moskowitz, Bennet J. <Bennet.Moskowitz@troutman.com>; Dutton, Sean T.H. <Sean.Dutton@troutman.com>; Lewis, Richard C. <rlewis@hhk.com>; McKay, Heather <heather.mckay@ag.ny.gov>; O'Brien, Ted <Ted.O'Brien@ag.ny.gov>; Halliyadde, Muditha <Muditha.Halliyadde@ag.ny.gov>; ereich@graubard.com; jlessem@graubard.com; dchill@graubard.com; Eric Hecker <hecker@chwillp.com>; Daniel Mullkoff <dmullkoff@chwillp.com>; John Cuti <jcuti@chwillp.com>; Alex Goldenberg <agoldenberg@chwillp.com>; 'Alice Reiter' <areiter@chwillp.com>
Subject: Re: Assembly Speaker's Papers Opposing Proposed Order to Show Cause in Matter of Harkenrider v. Hochul., Index No. E2022-0116CV (Sup. Ct. Steuben County)

EXTERNAL SENDER

For scheduling purposes, following oral argument on the order to show cause this morning at 9:30 via telephone conference, petitioners may email reply papers to me by noon today, with any sur reply papers due by 3:00 p.m. I will render a decision on the order to show cause by the end of the day.

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From: Craig R. Bucki <CBucki@phillipslytle.com>
Sent: Tuesday, March 8, 2022 2:14:13 AM
To: Hon. Stephen K. Lindley <slindley@nycourts.gov>; Adam M. Oshrin <aoshrin@nycourts.gov>
Cc: Tseytlin, Misha <Misha.Tseytlin@troutman.com>; George H. Winner Jr. <gwinner@kmw-law.com>; LeRoy, Kevin M. <Kevin.LeRoy@troutman.com>; Harris-Finkel, Sarah <Sarah.Harris-Finkel@troutman.com>; Moskowitz, Bennet J. <Bennet.Moskowitz@troutman.com>; Dutton, Sean T.H. <Sean.Dutton@troutman.com>; Lewis, Richard C. <rlewis@hhk.com>; McKay, Heather <heather.mckay@ag.ny.gov>; O'Brien, Ted <Ted.O'Brien@ag.ny.gov>; Halliyadde, Muditha <Muditha.Halliyadde@ag.ny.gov>; ereich@graubard.com <ereich@graubard.com>; jlessem@graubard.com <jlessem@graubard.com>; dchill@graubard.com <dchill@graubard.com>; Eric Hecker <hecker@chwillp.com>; Daniel Mullkoff <dmullkoff@chwillp.com>; John Cuti <jcuti@chwillp.com>; Alex Goldenberg <agoldenberg@chwillp.com>; 'Alice Reiter' <areiter@chwillp.com>
Subject: Assembly Speaker's Papers Opposing Proposed Order to Show Cause in Matter of Harkenrider v. Hochul., Index No. E2022-0116CV (Sup. Ct. Steuben County)

Dear Justice Lindley and Mr. Oshrin:

With the Graubard Miller firm, we are co-counsel to Assembly Speaker Carl Heastie in *Matter of Harkenrider v. Hochul*, in which Petitioners-Respondents provided the Appellate Division, Fourth Department, on March 7, 2022, with a proposed Order to Show Cause in support of a motion to vacate the automatic stay of discovery available to the Speaker under CPLR 5519(a)(1).

Attached are the Speaker's papers in opposition to the Order to Show Cause and Petitioners-Respondents' application to vacate that stay. They consist of the Affirmation of Steven B. Salcedo, Esq., dated March 8,

FILED: STEUBEN COUNTY CLERK 03/15/2022 03:48 PM

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2022, with Exhibit A; and the Speaker's Memorandum of Law also dated March 8, 2022. We plan to participate in the scheduled 9:30 a.m. conference call with the Court to discuss Petitioners-Respondents' application.

Respectfully,
Craig R. Bucki
Phillips Lytle LLP
One Canalside
125 Main Street
Buffalo, New York 14203
Telephone No.: (716) 847-5495

Craig R. Bucki
Partner

**Phillips Lytle LLP**

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EXHIBIT C TO CUTI AFFIRMATION -
SUBPOENA DUCES TECUM AD TESTIFICANDUM TO MICHAEL GIANARIS
DATED MARCH 9, 2022
(REPRODUCED HEREIN AT PP. 1489-1650)

EXHIBIT D TO CUTI AFFIRMATION -
SUBPOENA DUCES TECUM AD TESTIFICANDUM TO PHILLIP CHONIGMAN,
DATED MARCH 9, 2022
(REPRODUCED HEREIN AT PP. 1325-1486)

EXHIBIT E TO CUTI AFFIRMATION -
SUBPOENA DUCES TECUM AD TESTIFICANDUM TO ERIC KATZ
DATED MARCH 9, 2022
(REPRODUCED HEREIN AT PP. 1814-1975)

EXHIBIT F TO CUTI AFFIRMATION -
LETTER DATED MARCH 10, 2022, FROM JOHN R. CUTI, COUNSEL FOR
RESPONDENTS, TO COUNSEL FOR PETITIONERS
(REPRODUCED HEREIN AT PP. 1989)

EXHIBIT G TO CUTI AFFIRMATION -
LETTER DATED MARCH 10, 2022, FROM COUNSEL FOR PETITIONERS TO JOHN R.
CUTI, COUNSEL FOR RESPONDENTS
(REPRODUCED HEREIN AT PP. 1990-1991)

EXHIBIT H TO CUTI AFFIRMATION -
NOTICE TO TAKE DEPOSITION UPON ORAL EXAMINATION TO MICHAEL GIANARIS
DATED MARCH 10, 2022
(REPRODUCED HEREIN AT PP. 1651-1652)

EXHIBIT I TO CUTI AFFIRMATION -
NOTICE TO TAKE DEPOSITION UPON ORAL EXAMINATION TO PHILLIP CHONIGMAN
DATED MARCH 10, 2022
(REPRODUCED HEREIN AT PP. 1487-1488)

EXHIBIT J TO CUTI AFFIRMATION -
NOTICE TO TAKE DEPOSITION UPON ORAL EXAMINATION TO ERIC KATZ
DATED MARCH 10, 2022
(REPRODUCED HEREIN AT PP. 1976-1977)

EXHIBIT K TO CUTI AFFIRMATION -
LETTER DATED MARCH 10, 2022, FROM JOHN R. CUTI, COUNSEL FOR
RESPONDENTS, TO COUNSEL FOR PETITIONERS
(REPRODUCED HEREIN AT PP. 1992-1993)

EXHIBIT L TO CUTI AFFIRMATION
-LETTER DATED MARCH 10, 2022, FROM COUNSEL FOR PETITIONERS TO JOHN R.
CUTI, COUNSEL FOR RESPONDENTS
(REPRODUCED HEREIN AT PP. 1994)

EXHIBIT M TO CUTI AFFIRMATION -
LETTER DATED MARCH 10, 2022, FROM JOHN R. CUTI, COUNSEL FOR
RESPONDENTS, TO COUNSEL FOR PETITIONERS
(REPRODUCED HEREIN AT PP. 1995)

EXHIBIT N TO CUTI AFFIRMATION -
LETTER DATED MARCH 9, 2022, FROM MISHA TSEYTLIN TO
HONORABLE PATRICK F. MCALLISTER [2163 - 2170]

FILED: STEUBEN COUNTY CLERK 03/15/2022 03:48 PM

NYSCEF DOC. NO. 224

Troutman Pepper Hamilton Sanders LLP
875 Third Avenue
New York, New York 10022

troutman.com

INDEX NO. E2022-0116CV

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Bennet J. Moskowitz
bennet.moskowitz@troutman.com

March 9, 2022

VIA NYSCEF

Honorable Patrick F. McAllister
Supreme Court, Steuben County
3 East Pulteney Square
Bath, New York 14810

Re: *Harkenrider, et al. v. Hochul, et al.*, Index No. E2022-0116CV (Sup. Ct. Steuben Cnty.)

Dear Justice McAllister:

As of this morning, March 9, 2022, Justice Stephen K. Lindley of the Appellate Division, Fourth Department issued an e-mail decision (Attached as **Exhibit A** to this letter) to all parties, denying Petitioners' emergency Order To Show Cause to vacate the CPLR § 5519(a)(1) automatic stay that followed Respondents' filing Notices Of Appeal, NYSCEF Nos.128, 130, from this Court's March 3, 2022 "Decision & Order On Motion" permitting Petitioners to conduct discovery against Respondents and non-parties, NYSCEF No.126. In so ruling, Justice Lindley concluded that vacatur was "unnecessary because there is no automatic stay in effect," given that this Court's decision and order on Petitioners' discovery motion was not "a judgment or order," but merely a "decision." (**Exhibit A**, citing CPLR § 2219(a); *Garcia v Town of Tonawanda*, 194 A.D.3d 1479, 1479–80 (4th Dep't 2021)). Thus, contrary to *both sides'* understanding of this Court's March 3 ruling, the Fourth Department concluded that there was no order entered granting Petitioners leave to seek discovery under CPLR § 408, in accordance with Your Honor's decision finding Petitioners may do so.

Petitioners hereby request that this Court enter a simple order, *see* CPLR § 2219(a), ordering that Petitioners can seek discovery consistent with this Court's decision. This enforceable order would permit Petitioners to quickly serve and receive their requested discovery under CPLR § 408, consistent with this Court's own decision on the issue, entered last week.

Given that this Court directed all parties to give the discovery in this case absolute priority, Petitioners expect that Respondents will timely comply with any forthcoming discovery demands and intend to complete discovery within the Court's original deadline. To that end, Petitioners will serve discovery expeditiously following this Court's entry of order, copying this Court's own language for permissible topics of discovery, so there can be no claim of any surprise by any party.

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Honorable Patrick F. McAllister

March 9, 2022

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Sincerely,

A handwritten signature in blue ink, appearing to read "Bennet J. Moskowitz".

Bennet J. Moskowitz

A handwritten signature in blue ink, appearing to read "Misha Tseytlin".

Misha Tseytlin

cc: All Counsel of Record (via NYSCEF)

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EXHIBIT A

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From: Hon. Stephen K. Lindley <slindley@nycourts.gov>
Sent: Wednesday, March 9, 2022 10:49 AM
To: Alice Reiter; Dutton, Sean T.H.; Craig R. Bucki; Adam M. Oshrin
Cc: Tseytlin, Misha; George H. Winner Jr.; LeRoy, Kevin M.; Harris-Finkel, Sarah; Moskowitz, Bennet J.; Lewis, Richard C.; McKay, Heather; O'Brien, Ted; Halliyadde, Muditha; ereich@graubard.com; jlessem@graubard.com; dchill@graubard.com; Eric Hecker; Daniel Mullkoff; John Cuti; Alex Goldenberg
Subject: Decision on Petitioners' Order to Show Cause

EXTERNAL SENDER

Counselors, having reviewed the papers submitted in support and in opposition to petitioners' order to show cause, and having considered the arguments advanced by counsel during our telephone conference yesterday, I am declining to sign the order to show cause, which seeks to vacate a purported automatic stay under CPLR § 5519 (a) (1) triggered by the appeals of respondents Heastie and Stewart-Cousin from Justice McAllister's discovery ruling. I am declining to sign the order to show cause because a motion to vacate the "supposed automatic stay" is "unnecessary" (*Fassl v New York State Dept. of Taxation and Finance*, 159 AD3d 1029 [4th Dept 1990]; *Shorten v City of White Plains*, 216 AD2d 344 [2d Dept 1995]). A motion to vacate is unnecessary because there is no automatic stay in effect. The automatic stay provision of CPLR 5519 (a) applies to "proceedings to enforce the judgment or order appealed from," and, here, respondents have not appealed from a judgment or order. Instead, they appealed from Justice McAllister's decision dated March 3, 2022, and it is well settled that "[n]o appeal lies from a mere decision" (*Kuhn v Kuhn*, 129 AD2d 967 [4th Dept 1987]). The document in question is labeled "decision," does not contain any ordering paragraphs, and, in contravention of CPLR 2219, does not "recite the papers used on the motion" (CPLR 2219 [a]). This paper, as well as its docket entry and characterization by the parties, is substantively identical as that in *Garcia v Town of Tonawanda*, where we held that that no appeal lied from what was, in that case, deemed a mere decision (194 AD3d 1479, 1479-1480 [4th Dept 2021] [although entered as a "decision and order," paper was "on its face" a "mere decision from which no appeal lies"])). Because there is no valid appeal, my colleagues and I on the Appellate Division lack jurisdiction to take action.

In any event, even if we were to treat the decision as if it were an order, respondents' appeal therefrom does not give rise to an automatic stay because the court merely granted petitioners leave to pursue discovery; it did not compel discovery or direct any of the respondents to do anything, such as sit for depositions or turn over emails or disclose other communications regarding redistricting. CPLR § 5519 (a) does not stay all proceedings; as noted, it stays only "proceedings to enforce the judgment or order appealed from" (CPLR § 5519 [a]; see *Young v State of New York*, 213 AD2d 1084, 1084 [4th Dept 1995] ["The stay under CPLR 5519 (a) (1) stays only proceedings to enforce the order on appeal, not all proceedings"]; see *Baker v Board of Educ. of West Irondequoit School Dist.*, 152 AD2d 1014, 1014 [4th Dept 1989] [same]). What constitutes a "proceeding to enforce" is strictly construed. For example, although a trial is "a natural consequence" of an order denying summary judgment, a trial is not a proceeding to enforce that order, and thus is not stayed by

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an appeal from that order (*Schwartz v New York City Hous. Auth.*, 219 AD2d 47, 48 [2d Dept 1996]; see *White v City of Jamestown*, 242 AD2d 979, 980 [4th Dept 1997]). Stated another way, the automatic stay applies to “executory directions that command a person to do an act beyond what is required under the CPLR” (*Tax Equity Now NY LLC v City of New York*, 173 AD3d 464, 465 [1st Dept 2019]; see 4 NY Jur 2d Appellate Review § 428 [“The inclusion in an order of affirmative directives on matters addressed in the Civil Practice Laws and Rules (CPLR) does not trigger the automatic stay as to obligations provided for in the CPLR pending appeal of that order”]).

Here, again, the court’s decision does not itself compel respondents to disclose any specific thing (*cf. Craigie v Consolidated Edison, Co.*, 127 AD2d 556 [2d Dept 1987] [applying stay to appeal from order granting motion to compel]). Instead, the court merely granted leave for petitioners to seek disclosure, which now places the parties within the framework of CPLR article 31, allowing petitioners to seek disclosure in those areas for which the court granted leave and, upon such a request, would allow respondent to raise any objections. Because the court’s decision merely granted leave to petitioners to seek disclosure, and required respondents to respond to those demands, as provided for in the CPLR, the decision does not “command a person to do an act beyond what is required under the CPLR,” and the stay provided by CPLR § 5519 (a) (1) does not apply to “directives on matters addressed in the [CPLR]” (4 NY Jur 2d Appellate Review § 428; see *Tax Equity Now*, 173 AD3d at 465).

Accordingly, I conclude that § 5519 (a) (1) does not prevent petitioners from serving specific discovery demands on respondents. Of course, if respondents object to those demands, petitioners may file a motion to compel, and the trial court will then be called upon to resolve the discovery dispute. If the court rules against respondents on a particular discovery request and issues an order to that effect, respondents’ appeal from such order would trigger an automatic stay.

If counsel for petitioners wishes to prepare an order for me to sign wherein I formally decline to sign their order to show cause, please submit electronically with notice to opposing counsel.

To: Dutton, Sean T.H. <Sean.Dutton@troutman.com>; Hon. Stephen K. Lindley <slindley@nycourts.gov>; Craig R. Bucki <CBucki@phillipslytle.com>; Adam M. Oshrin <aoshrin@nycourts.gov>

Cc: Tseytlin, Misha <Misha.Tseytlin@troutman.com>; George H. Winner Jr. <gwinner@kmw-law.com>; LeRoy, Kevin M. <Kevin.LeRoy@troutman.com>; Harris-Finkel, Sarah <Sarah.Harris-Finkel@troutman.com>; Moskowitz, Bennet J. <Bennet.Moskowitz@troutman.com>; Lewis, Richard C. <rlewis@hhk.com>; McKay, Heather <heather.mckay@ag.ny.gov>; O'Brien, Ted <Ted.O'Brien@ag.ny.gov>; Halliyadde, Muditha <Muditha.Halliyadde@ag.ny.gov>; ereich@graubard.com; jlessem@graubard.com; dchill@graubard.com; Eric Hecker <hecker@chwillp.com>; Daniel Mullkoff <dmullkoff@chwillp.com>; John Cuti <jcuti@chwillp.com>; Alex Goldenberg <agoldenberg@chwillp.com>

Subject: Re: Assembly Speaker's Papers Opposing Proposed Order to Show Cause in Matter of Harkenrider v. Hochul., Index No. E2022-0116CV (Sup. Ct. Steuben County)

Justice Lindley:

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Attached please find the Sur-Reply Affirmation of John R. Cuti, counsel for the Senate Majority Leader, in further opposition to Petitioners' emergency application.

Respectfully submitted,

Alice Reiter
Cuti Hecker Wang LLP

From: "Dutton, Sean T.H." <Sean.Dutton@troutman.com>
Date: Tuesday, March 8, 2022 at 12:32 PM
To: "Hon. Stephen K. Lindley" <slindley@nycourts.gov>, "Craig R. Bucki" <CBucki@phillipslytle.com>, "Adam M. Oshrin" <aoshrin@nycourts.gov>
Cc: "Tseytlin, Misha" <Misha.Tseytlin@troutman.com>, "George H. Winner Jr." <gwinner@kmw-law.com>, "LeRoy, Kevin M." <Kevin.LeRoy@troutman.com>, "Harris-Finkel, Sarah" <Sarah.Harris-Finkel@troutman.com>, "Moskowitz, Bennet J." <Bennet.Moskowitz@troutman.com>, "Lewis, Richard C." <rlewis@hhk.com>, "McKay, Heather" <heather.mckay@ag.ny.gov>, "O'Brien, Ted" <Ted.O'Brien@ag.ny.gov>, "Halliyadde, Muditha" <Muditha.Halliyadde@ag.ny.gov>, "ereich@graubard.com" <ereich@graubard.com>, "jlessem@graubard.com" <jlessem@graubard.com>, "dchill@graubard.com" <dchill@graubard.com>, Eric Hecker <hecker@chwllp.com>, Daniel Mullkoff <dmullkoff@chwllp.com>, John Cuti <jcuti@chwllp.com>, Alex Goldenberg <agoldenberg@chwllp.com>, Alice Reiter <areiter@chwllp.com>
Subject: RE: Assembly Speaker's Papers Opposing Proposed Order to Show Cause in Matter of Harkenrider v. Hochul., Index No. E2022-0116CV (Sup. Ct. Steuben County)
Resent-From: Proofpoint Essentials <do-not-reply@proofpointessentials.com>
Resent-To: Alice Reiter <areiter@chwllp.com>
Resent-Date: Tuesday, March 8, 2022 at 12:29 PM

Your Honor,

Please see attached Petitioners' Reply Affirmation In Support Of Vacating The Automatic Stay.

Best,
Sean

Sean Dutton

Associate

troutman pepper

Direct: 312.759.1937 | Mobile: 248.227.1105 | Internal: 20-1937
sean.dutton@troutman.com

From: Hon. Stephen K. Lindley <slindley@nycourts.gov>
Sent: Tuesday, March 8, 2022 1:39 AM
To: Craig R. Bucki <CBucki@phillipslytle.com>; Adam M. Oshrin <aoshrin@nycourts.gov>
Cc: Tseytlin, Misha <Misha.Tseytlin@troutman.com>; George H. Winner Jr. <gwinner@kmw-law.com>; LeRoy, Kevin M. <Kevin.LeRoy@troutman.com>; Harris-Finkel, Sarah <Sarah.Harris-Finkel@troutman.com>; Moskowitz, Bennet J. <Bennet.Moskowitz@troutman.com>; Dutton, Sean T.H. <Sean.Dutton@troutman.com>; Lewis, Richard C. <rlewis@hhk.com>; McKay, Heather <heather.mckay@ag.ny.gov>; O'Brien, Ted <Ted.O'Brien@ag.ny.gov>; Halliyadde, Muditha <Muditha.Halliyadde@ag.ny.gov>; ereich@graubard.com; jlessem@graubard.com; dchill@graubard.com; Eric Hecker <hecker@chwllp.com>; Daniel Mullkoff <dmullkoff@chwllp.com>; John Cuti <jcuti@chwllp.com>; Alex

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Goldenberg <agoldenberg@chwillp.com>; 'Alice Reiter' <areiter@chwillp.com>

Subject: Re: Assembly Speaker's Papers Opposing Proposed Order to Show Cause in Matter of Harkenrider v. Hochul, Index No. E2022-0116CV (Sup. Ct. Steuben County)

EXTERNAL SENDER

For scheduling purposes, following oral argument on the order to show cause this morning at 9:30 via telephone conference, petitioners may email reply papers to me by noon today, with any sur reply papers due by 3:00 p.m. I will render a decision on the order to show cause by the end of the day.

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From: Craig R. Bucki <CBucki@phillipslytle.com>

Sent: Tuesday, March 8, 2022 2:14:13 AM

To: Hon. Stephen K. Lindley <slindley@nycourts.gov>; Adam M. Oshrin <aoshrin@nycourts.gov>

Cc: Tseytlin, Misha <Misha.Tseytlin@troutman.com>; George H. Winner Jr. <gwinner@kmw-law.com>; LeRoy, Kevin M. <Kevin.LeRoy@troutman.com>; Harris-Finkel, Sarah <Sarah.Harris-Finkel@troutman.com>; Moskowitz, Bennet J. <Bennet.Moskowitz@troutman.com>; Dutton, Sean T.H. <Sean.Dutton@troutman.com>; Lewis, Richard C. <rlewis@hhk.com>; McKay, Heather <heather.mckay@ag.ny.gov>; O'Brien, Ted <Ted.O'Brien@ag.ny.gov>; Halliyadde, Muditha <Muditha.Halliyadde@ag.ny.gov>; ereich@graubard.com <ereich@graubard.com>; jlessem@graubard.com <jlessem@graubard.com>; dchill@graubard.com <dchill@graubard.com>; Eric Hecker <ehecker@chwillp.com>; Daniel Mullkoff <dmullkoff@chwillp.com>; John Cuti <jcuti@chwillp.com>; Alex Goldenberg <agoldenberg@chwillp.com>; 'Alice Reiter' <areiter@chwillp.com>

Subject: Assembly Speaker's Papers Opposing Proposed Order to Show Cause in Matter of Harkenrider v. Hochul, Index No. E2022-0116CV (Sup. Ct. Steuben County)

Dear Justice Lindley and Mr. Oshrin:

With the Graubard Miller firm, we are co-counsel to Assembly Speaker Carl Heastie in *Matter of Harkenrider v. Hochul*, in which Petitioners-Respondents provided the Appellate Division, Fourth Department, on March 7, 2022, with a proposed Order to Show Cause in support of a motion to vacate the automatic stay of discovery available to the Speaker under CPLR 5519(a)(1).

Attached are the Speaker's papers in opposition to the Order to Show Cause and Petitioners-Respondents' application to vacate that stay. They consist of the Affirmation of Steven B. Salcedo, Esq., dated March 8, 2022, with Exhibit A; and the Speaker's Memorandum of Law also dated March 8, 2022. We plan to participate in the scheduled 9:30 a.m. conference call with the Court to discuss Petitioners-Respondents' application.

Respectfully,

Craig R. Bucki

Phillips Lytle LLP

One Canalside

125 Main Street

Buffalo, New York 14203

Telephone No.: (716) 847-5495

Craig R. Bucki
Partner



Phillips Lytle LLP

One Canalside

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**EXHIBIT O TO CUTI AFFIRMATION -
AFFIRMATION OF JOHN R. CUTI, ESQ. IN OPPOSITION TO THE MOTION BY
ORDER TO SHOW CAUSE TO VACATE THE AUTOMATIC STAY,
DATED MARCH 8, 2022 [2171 - 2204]**

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

-----X

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,

Steuben County Index
No. E2022-0116CV

A.D. No. _____

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.

-----X

**AFFIRMATION OF JOHN R. CUTI IN OPPOSITION TO THE MOTION
BY ORDER TO SHOW CAUSE TO VACATE THE AUTOMATIC STAY**

JOHN R. CUTI, ESQ., hereby affirms under penalty of perjury that the following
is true and correct:

1. I am an attorney duly licensed to practice law in New York State. I am a member
of Cuti Hecker Wang LLP, counsel for the Senate Majority Leader. I submit this Affirmation in
opposition to Petitioners' motion by proposed order to show cause to vacate the automatic stay.

PRELIMINARY STATEMENT

2. There is no basis to vacate the automatic stay. The court below plainly erred in refusing to apply the settled law that the privilege afforded by the New York Constitution's Speech or Debate Clause to members of the New York Assembly and Senate and their aides involved in legitimate legislative activity is absolute. Instead, adopting Petitioners' highly misleading and baseless arguments, the court below followed the decisions of federal courts applying federal common law, which do not even arguably apply, much less govern here.

3. The state courts do not have the power to compel a state legislator to be questioned about her legislative conduct, period. Doing so would fly in the face of settled law and would raise profound separation of powers concerns. Given the fundamental issues at stake, Petitioners' application merits full consideration by a panel of this Court.

4. Petitioners continue to make misleading arguments before this Court. They suggest that the legislative privilege under New York's Constitution is merely "comparable" to the well-established, absolute legislative privilege under the U.S. Constitution. That is baseless. The New York Court of Appeals, and many other New York courts, have repeatedly held that the legislative privilege afforded to New York legislators is *at least as broad* as that provided to federal legislators under the federal constitution. Those cases also make clear that the decisions of the United States Supreme Court and other federal courts construing the federal Speech or Debate Clause are persuasive authority when construing the reach of New York's Speech or Debate Clause. That makes perfect sense because New York recognized an absolute legislative privilege even before the United States Constitution was ratified.

5. There is no balancing test to apply here. The federal cases on which the court below and Petitioners rely did not apply either the federal Speech or Debate Clause or New

York's Speech or Debate Clause. In each of those cases, a *federal* court was considering a challenge to *state legislative* acts related to the state redistricting process. There are no separation of powers concerns in such a case because a federal court and a state legislator serve entirely separate sovereigns.

6. The federal court in a case involving redistricting litigation has no occasion to construe the federal Speech or Debate Clause because U.S. Senators and Representatives are never defendants in such cases (the federal legislature does not draw legislative districts). Nor do federal courts construe any state constitutional privilege in such cases because under the Supremacy Clause a State Constitution does not bind a federal court.

7. The law that federal courts apply in federal redistricting cases is the *federal common law*, not constitutional law. And Federal Rule of Evidence 501 requires federal judges to construe common law privileges narrowly. For that reason, federal courts apply a balancing test to state legislators' assertion of legislative privilege and have held that a state legislator does not have an absolute privilege under federal common law. But the Speech or Debate Clause – under both the U.S. and New York Constitutions – has consistently been, and must be, construed broadly to protect legislative independence from judicial interference. Petitioners do not cite a single case in which a court applying a constitutional Speech or Debate Clause permitted a legislator to be questioned about her legislative conduct. There are no such cases.

8. Even were the law not as clear as it is, there is no basis to grant relief to Petitioners. Petitioners insist that the Order directs Respondents to provide discovery. But the Order, which granted Petitioners' motion for *leave* to serve discovery requests, does not so direct. Instead, it merely permits Petitioners to serve discovery demands and to do so only *after* Petitioners narrowed their obviously overbroad proposed demands in accordance with the court's

general guidance. Yet Petitioners, who waited more than four days to file the proposed order to show cause in this Court, still have not even bothered to serve discovery requests on Respondents.

9. Were Petitioners to serve discovery requests, Respondents would either assert their legislative privilege or, if no privilege applied, produce any responsive documents that could be timely gathered. And if the Court below were required to resolve a dispute about whether legislative privilege barred a particular request, and in so doing ordered a Respondent to provide privileged material, the Respondent could then file an appeal from such order, and unlike here, this Court would have an appropriate record of exactly what was in dispute.

10. There is nothing “cynical” or improper about a litigant asserting a privilege, especially when the litigant is a member of a coequal branch of government that has an express constitutional privilege against being “questioned in any other place” than the Legislature about her legislative activities.

11. Finally, the assertion that Petitioners would suffer irreparable harm unless this Court permits them to take discovery regarding the Respondents’ legislative conduct is frivolous. Although they now claim that the discovery they seek is “crucial,” Affirmation of Richard C. Lewis dated March 7, 2022 (“Lewis Aff.”) ¶ 80, Petitioners have repeatedly submitted papers and made arguments below that their claims are supported by “overwhelming evidence,” March 3, 2022 Transcript (“Transcript”) at 41:18, that they were entitled to judgment on the return date (without having engaged in any discovery), and that they sought discovery only so that “they may more fully discover . . . facts *further establishing* their claims.” Petitioners’ Memorandum of Law in Support of Motion for Discovery (“Pets. Mem.”), Dkt. No. 48 at 2 (emphasis added). In fact, it is Respondents who face irreparable injury if they are ordered by a coequal branch of

government to set all pressing legislative business aside and submit to questioning from Petitioners in violation of their absolute constitutional privilege.

BACKGROUND

The Redistricting Process

12. The New York Constitution may be amended in either of two ways: the People may amend the Constitution themselves, with no participation by the Legislature, through a constitutional convention, a process that requires three separate statewide elections (one to call a convention, a second to elect convention delegates, and a third to ratify any proposed amendments that are adopted at the convention), *see* N.Y. Const. art. XIX, § 2; or the Legislature may amend the Constitution, which requires two successive Legislatures to enact the identical proposed amendments, which are then submitted to voters for approval, *see id.* § 1.

13. The 2014 amendments at issue in this special proceeding were twice considered and twice enacted by the Legislature – once in 2012, A.9526/S.6698, and then a second time in 2013, A.2086/S.2107. The voters approved the Legislature’s proposed amendments in 2014.

14. Given that the Legislature itself was the impetus behind the 2014 amendments, it is not surprising that the 2014 amendments expressly preserve the Legislature’s traditional role, authority, and discretion in enacting redistricting plans following each decennial census. The 2014 amendments delegated authority to a new Independent Redistricting Commission to hold hearings and make redistricting plan recommendations, but the 2014 amendments provide unambiguously that the Legislature has unfettered discretion to reject any Commission proposal for any reason, and that if the Legislature rejects a Commission proposal, the Legislature may enact any plan it chooses by making “any amendments” it “deems necessary.” *See* N.Y. Const. art. III, § 4(b).

15. The 2014 amendments expressly prescribe a specific schedule. The Commission was required to publish draft redistricting plans and relevant supporting data by September 15, 2021. *Id.* § 4(c)(6). The Commission was then required to hold at least one public hearing in each of twelve locations throughout the State to enable the “public to review, analyze, and comment upon such plans and to develop alternative redistricting plans for presentation to the commission at the public hearings.” *Id.* The Commission was then required to submit a proposed redistricting plan to the Legislature between January 1 and January 15, 2022, which the Legislature had unfettered discretion to adopt or reject for any reason. *Id.* § 4(b). If the Legislature declined to adopt the first Commission proposal, the Commission was then required to submit a second proposed plan to the Legislature within fifteen days of the Legislature’s rejection of the first proposed plan, and in no event later than February 28, 2022. *Id.*

16. The process of running for Congress in New York in 2022 officially started on March 1, the day after the last possible deadline for the Commission to submit its final proposed plan to the Legislature. To get on the ballot for the June 2022 congressional or New York State Senate primary in New York, a candidate must submit designating petitions to the Board of Elections containing the required number of signatures from voters residing in the congressional or Senate district in which the candidate is seeking to run.

17. The deadline for submitting designating petitions with all required signatures is April 7, 2022, and candidates were allowed to begin collecting signatures on March 1, 2022. N.Y. Election Law § 6-158(1). Each voter may sign only one petition, and any signatures collected outside of this 37-day window are void. *Id.* § 6-134(3)-(4). Because signatures count only if the voter signing the petition resides in the congressional or Senate district in which the candidate is seeking to run, *id.* § 6-136(2), it would have been impracticable for candidates to

begin collecting signatures on March 1 if the new congressional or Senate district lines had not yet been established or if there were uncertainty about which redistricting plan is operative.

18. Given that the 2014 amendments allow the Commission to submit its final proposed redistricting plan to the Legislature as late as February 28, 2022, the day before the designating petition signature collection process begins, and after the Commission has already completed an extensive public hearing and comment process, the 2014 amendments do not contemplate that the Legislature itself will hold any public hearings before it decides whether to accept or reject the Commission's final proposal and, if necessary, amend the final proposal. Instead, the 2014 amendments contemplate that the Legislature will rely on the expansive record that the Commission is required to develop during the required public hearings. *See* N.Y. Const. art. III, § 4(c) (the Commission "shall report the findings of all such hearings to the legislature upon submission of a redistricting plan").

19. The 2014 amendments impose important constraints on the redistricting process. These amendments require that legislative districts (a) avoid the denial or abridgement of racial or language minority voting rights, (b) ensure that racial and minority language groups do not have less opportunity to participate in the political process than other members of the electorate and to elect representatives of their choice, (c) consist of contiguous territory, (d) be as compact as practicable, (e) refrain from drawing districts to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties, (f) maintain the cores of existing districts, (g) unite communities of interest, and (h) consider pre-existing political subdivisions, including counties, cities, and towns. *Id.* §§ 4(c)(1), (3), (4), (5). The New York Constitution requires that "[t]o the extent practicable, districts shall contain as nearly as may be an equal number of inhabitants," and the federal Constitution further requires that

congressional districts vary in population by no more than one person. *See Karcher v. Daggett*, 462 U.S. 725 (1983).

20. Although there is no doubt that constraining partisanship and creating a role for the Commission to develop redistricting plans were important aspects of the 2014 amendments, those amendments plainly provide that the Legislature continues to have the final word with respect to approving or disapproving the Commission's proposals and, if the Legislature deems it necessary for any reason, enacting its own redistricting plan.

21. The 2014 amendments assume that the Commission will faithfully discharge each of the mandatory duties that the Constitution expressly and unambiguously imposes on it. The 2014 amendments do not address what happens if the Commission abdicates its mandatory duty to submit a final proposed redistricting plan or plans for the Legislature to consider.

22. In 2020 and 2021, the Legislature attempted to improve the new redistricting process that it had enacted through the 2014 amendments. The Legislature proposed new constitutional amendments that would have, among other changes, fixed the number of Senate seats at 63; required that district lines be based on total population of all residents, including non-citizens; required that incarcerated individuals be counted at their place of last residence, instead of at their place of incarceration; changed the Commission's quorum rules; advanced the timetable for the redistricting process by two months to allow more time for it to be completed before the beginning of the designating petition period; and clarified that if the Commission fails to present a final proposed redistricting plan to the Legislature, the Legislature has the same discretion to enact its own plan that it has when the Commission presents a final recommendation. The Legislature enacted these proposed amendments twice, A.10839/S.8833 of 2020; A.1916/S.515 of 2021, but voters did not approve them in the 2021 election.

23. Meanwhile, in June 2021 – approximately five months before voters declined to approve the proposed 2021 amendments – the Legislature enacted a statute that addresses what happens if the Commission abdicates its duty to submit a final proposed redistricting plan. The statute provides that “if the commission does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan,” then the Legislature “shall introduce such implementing legislation with any amendments each house deems necessary.” L.2021, c. 633, § 1.

24. Between July 20 and December 5, 2021, the Commission held 24 public hearings comprised of dozens of hours of testimony from officials and members of the public about communities of interest, minority voting strength, and myriad other redistricting issues. On January 3, 2022, the Commission submitted its first proposed congressional and Senate plans to the Legislature for consideration.

25. Because the Commission deadlocked along party lines and was unable to form a bipartisan consensus, it submitted two proposed plans, one urged by the Democrats and one urged by the Republicans. The Legislature rejected both plans on January 10, 2022. The Commission then had fifteen days, until January 25, 2022, to present its final proposal or proposals for the Legislature to consider.

26. On January 24, 2022, the day before the deadline, the Commission announced that it remained hopelessly deadlocked along party lines, and that it would not be meeting again or presenting any final proposal to the Legislature. The Democratic Commissioners issued a statement asserting that the Republican Commissioners had sabotaged the process by refusing to meet to vote on a final proposed plan or plans, and the Republican Commissioners likewise issued a statement blaming the Democrats for the impasse.

27. In the absence of a Commission proposal to consider, and with the designating petitioning period fast approaching, the Legislature did what the Constitution, the June 2021 statute, and two centuries of precedent plainly allowed it to do: it enacted a new redistricting plan for Congress and the state Legislature. In doing so, the Legislature balanced a complex array of often competing considerations, including the need to comply with the strict population equality requirement for congressional districts – which, given that the State’s congressional delegation was reduced from 27 to 26 seats, and given that the State’s significant population growth during the last decade was unevenly distributed between the downstate and upstate regions, required drawing a completely different congressional map – the need to avoid diluting minority voting strength, and the need to join communities of interest, among other considerations. The Legislature enacted the plan for Congress on February 2, 2022 and the plan for the Senate and Assembly on February 3, 2022. The Governor signed both plans into law on February 3, 2022.

The Instant Litigation

28. Petitioners commenced this special proceeding on February 3, 2022. Article III, section 5 of the Constitution requires the Court to “render its decision within sixty days” of the commencement of this special proceeding – *i.e.*, by April 4, 2022.

29. Because a special proceeding “is analogous” to a “summary judgment motion,” it “is designed to go to hearing and determination promptly.” Siegel, *New York Practice* §§ 554, 556 (6th ed. 2021); *Buckley v. Zoning Board cf Appeals cf City cf Geneva*, 189 A.D.3d 2080, 2081 (4th Dep’t 2020). Petitioners therefore should have submitted all of their proof and arguments together with the Petition. Instead, they filed an unverified Petition, no fact affidavits

(other than an attorney affirmation attaching legal provisions that are subject to judicial notice), no expert affidavits, and no memorandum of law.

30. Five days later, on February 8, 2022, Petitioners submitted a motion for leave to file the Amended Petition that greatly expands the scope of this special proceeding. Whereas the Petition challenges only the congressional plan, the Amended Petition challenges the Senate plan as well. Once again, Petitioners submitted no verified allegations, no fact affidavits, no expert affidavits, and no memorandum of law in support of the claims in their Amended Petition. The Court set a return date of March 3, 2022 to hear the Petition and the motion to amend the Petition.

31. On February 14, 2022, eleven days after they commenced this special proceeding, Petitioners finally filed their memorandum of law in support of the Petition. Petitioners also filed two unsworn expert reports.

32. Also on February 14, 2022 – eleven days after they commenced this special proceeding, and only ten days before the return date the Court had set for the Petition and the motion to amend the Petition – Petitioners moved for leave to conduct expedited discovery. Petitioners were required affirmatively to move for leave to serve discovery demands because CPLR 408 expressly provides that there shall be no disclosure in a special proceeding without leave of Court. As the leading practice commentary explains, a special proceeding is a “quick and inexpensive way to implement a right” and is intended to be “brought on with the ease, speed, and economy of a mere motion.” Siegel, *New York Practice* § 547 (6th ed. 2021). In line with these objectives, and recognizing that “among the main purposes of a special proceeding are

speed and economy, the disclosure devices, so pervasively relied on in an action . . . are available in special proceedings only by leave of court” and only with “good cause.” *Id.* § 555.¹

33. Applying CPLR 406, which provides that “[m]otions in a special proceeding, made before the time at which the petition is noticed to be heard, shall be noticed to be heard at that time,” the Court set the same March 3, 2022 return date for the motion for leave to conduct expedited discovery that it had set for the Petition and the motion to amend the Petition.

34. The Court also ordered Respondents to file papers in opposition to the Petition and the motion to amend the Petition by February 24, 2022, and to file papers in opposition to the motion to serve discovery by February 25, 2022.

35. On February 24, 2022, Respondents filed papers in opposition to the Petition and the motion to amend the Petition. Respondents’ opposition papers contained multiple sworn affidavits from experts showing, stunningly, that Petitioners’ own unsworn expert report had demonstrated that the enacted congressional plan *actually favors Republicans*, not Democrats, because at least one more district in the enacted plan contains a Republican majority than in any

¹ It is a “well-established rule that the nature and purpose of summary proceedings are such that disclosure will rarely be granted[.]” 7 Carmody-Wait 2d § 42:20 (2021). *See also Matter cf Suit-Kote Corp. v Rivera*, 137 A.D.3d 1361, 1364 (3d Dep’t 2016) (“Consistent with the summary nature of a special proceeding, CPLR 408 generally disallows pretrial disclosure without leave of court.”) (quoting Vincent C. Alexander, Practice Commentaries, McKinney’s Con. Laws of N.Y., Book 7B, CPLR 408, at 405)); *Neighborhood P’ship Hous. Dev. Corp. v. Okolie*, No. 2001–1142 K C., 2003 WL 1923731 (Sup. Ct. App. Term 2003) (stating that discovery is “deemed presumptively ‘antithetical to [the] purposes’” of a special proceeding) (quoting *Cox v. J.D. Realty Assocs.*, 217 A.D.2d 179, 184 (1st Dep’t 1995)); *People v. Condor Pontiac, Cadillac, Buick and GMC Trucks, Inc.*, Index Nos. 02–1020, 19–02–0497, 2003 WL 21649689, at *4 (N.Y. Sup. Ct. N.Y. Cnty. 2003) (stating that “[a] party seeking discovery in a [special] proceeding carries a heavy burden to justify its use” and that the party “must demonstrate special or unusual circumstances which would justify permitting discovery”); *Plaza Operating Partners Ltd. IRM (U.S.A.) Inc.*, 143 Misc. 2d 22, 23 (N.Y. Civ. Ct. N.Y. Cnty. 1989) (“[B]ecause discovery tends to prolong an action” it is “therefore inconsistent with the expeditious nature of a special proceeding”) (quoting *Dubowsky v. Goldsmith*, 202 A.D. 818 (2d Dep’t 1922)).

of Petitioners' thousands of computer-simulated plans. The Senate Majority Leader also submitted a detailed counterstatement of facts with her Answer, explaining at length why the objective characteristics of the enacted plan confirm that it complies with all constitutional requirements.

36. Respondents explained in their memorandum of law that the Court of Appeals has repeatedly held that:

Balancing the myriad requirements imposed by both the State and the Federal Constitution is a function entrusted to the Legislature. It is not the role of this, or indeed any, court to second-guess the determinations of the Legislature, the elective representatives of the people, in this regard. We are hesitant to substitute our own determination for that of the Legislature even if we would have struck a slightly different balance on our own.

Wolpczf v. Cuomo, 80 N.Y.2d 70, 79 (1992); *see also id.* at 80 (recognizing that the Legislature must engage in “a complex analysis of population trends and voting patterns, and the way in which both must be accommodated in order to comply” with all requirements, and holding that “it is not appropriate for [courts] to substitute our evaluation of the relevant statistical data for that of the Legislature”); *Cohen v. Cuomo*, 19 N.Y.3d 196, 202 (2012) (“It is not our task to address the wisdom of the methods employed by the Legislature in accomplishing its constitutional mandate.”); *Schneider v. Rockefeller*, 31 N.Y.2d 420, 427 (1972) (“[I]t is not our function to determine whether a plan can be worked out that is superior to that set up[.]”); *Matter of Orans*, 17A N.Y.2d 7, 10 (1966) (“It must be conceded that no reapportionment plan can be perfect in every detail, and none can be drawn that will be satisfactory to everyone.”)

37. Among their arguments on the merits with respect to the new district lines, Respondents observed that Petitioners fundamentally ignore that because New York lost one of its 27 congressional seats despite a population increase of 823,147 people, and because the

congressional plan is subject to a strict population equality requirement, nearly all of the 2012 districts had to be reconfigured substantially. Petitioners further ignore that because the downstate region experienced far more population growth during the last decade than the upstate region, the reconfiguration that was necessary to comply with the equal population rule was even more significant than it would have been if New York's population changes had been evenly distributed geographically. Thus, to the extent that the districts in the enacted congressional plan are different from the 2012 plan, they indisputably had to be.

38. On February 25, 2022, Respondents filed their opposition to Petitioners' motion for leave to conduct discovery. Respondents explained that leave to engage in discovery should be denied altogether under CPLR 408 because Petitioners had not demonstrated that there is a compelling need for discovery and because Petitioners' proposed requests, which included proposed demands for "[a]ll Documents and Communications concerning the drawing of the 2022 New York Congressional and state Senate districts" and "[a]ll Documents and Communications concerning the subject matter of the Amended Petition," were remarkably overboard. Respondents further explained that any effort to engage in the kind of far-reaching discovery Petitioners contemplate would plainly be barred by the absolute legislative privilege that is grounded New York's Speech or Debate Clause and that the Court of Appeals has repeatedly held forbids a court from ordering legislators or their aides to respond to questioning or other demands for information regarding the performance of legislative activities.

The Court's Order Regarding Discovery

39. The Court held oral argument on the Petition, the motion to amend the Petition, and the motion for leave to engage in expedited discovery on March 3, 2022.

40. During the argument, the Court expressly stated to Petitioners' counsel that the Court believed that the proposed discovery requests that Petitioners had appended to their motion were overbroad: "Well, your request seemed a little overbroad to me. It was just sort of open ended. Anything relating to the redistricting, that's pretty broad." March 3, 2022 Hearing Transcript ("Tr.") at 38-39.

41. Counsel for Petitioners expressly told the Court that Petitioners were prepared to narrow their proposed requests, stating that "we would certainly be open to a narrowing of our discovery request." Tr. at 38, 39. This offer was consistent with Petitioners' motion papers, which made clear that they understood that they only were seeking leave under CPLR 408 to engage in disclosure, that the proposed requests they appended to the motion papers were simply that – proposed requests – and that if leave to engage in disclosure were granted, the next step would be for Petitioners to serve *actual* discovery requests on Respondents. *See* Affirmation of Bennet J. Moskowitz in Support of Motion to Conduct Discovery ("Moskowitz Aff.") Dkt. No. 31 ¶ 9 ("Specifically, Petitioners are now moving for leave *to serve* the party document requests and deposition notices and non-party subpoenas attached in full hereto as Exhibits 1–14, respectively.") (emphasis added).

42. Although Petitioners assert in their Affirmation in support of this application that that have previously "served their proposed discovery requests on Respondents," Lewis Aff. ¶ 32, Petitioners have not in fact served discovery demands or deposition notices on Respondents or anyone else. All that Petitioners have served is their motion for leave to conduct discovery with proposed demands attached as exhibits thereto. But, as explained below, the Court rejected Petitioners' overbroad document demands and did not address Petitioners' request to take depositions (and the alleged deposition dates in Petitioners' proposed notices have long passed).

43. The Court granted Petitioners' motion for leave to engage in expedited discovery from the bench, and shortly thereafter the Court issued a written order (the "Order").

44. The Order addresses the standard that governs the assertion of legislative privilege by state legislators and their aides in state court. But the trial court seriously misunderstood the law of legislative privilege. As discussed more fully below, when a member of Congress asserts legislative privilege in federal court, or where a New York legislator asserts legislative privilege in a New York court, separation of powers concerns, and the federal or New York Speech or Debate Clauses, are directly at issue, and legislative privilege is absolute. However, when a *federal* court seeks information from a *state* legislator, there are no separation of powers concerns, and neither the federal nor the New York Speech or Debate Clause applies, and there is only a qualified common law privilege. The Court grossly erred by applying a qualified federal common law privilege, when Respondents here are entitled to the absolute privilege afforded by the New York Constitution's Speech or Debate Clause.

45. Moreover, the Order did not actually direct any party to produce any discovery. Rather, the Order merely granted Petitioners leave, pursuant to CPLR 408, to engage in discovery. In the final two paragraphs of the Order, the Court described the kind of discovery that it had concluded would be permissible, making clear that the Court was merely "permit[ting]" such discovery. Order at 3.

46. Although Petitioners assert "that the Supreme Court permitted Petitioners to depose any Respondents involved with the redistricting choices," Lewis Aff. ¶ 72, the Order is entirely silent on that issue and the Court did not address the question of depositions at oral argument. Yet, Petitioners infer from this silence an absolute right to depose each of New

York's highest state officers for the first time in the history of any state or federal redistricting case in New York.

47. The Speaker of the Assembly and the Senate Majority Leader filed notices of appeal from the Order on March 3 and March 4, 2022, respectively.

48. Petitioners did nothing for four and a half days. Late yesterday afternoon, more than four days after the Court issued the Order, Petitioners filed the instant motion to vacate the automatic stay.

ARGUMENT

I. VACATING THE AUTOMATIC STAY WOULD EVISCERATE THE ABSOLUTE LEGISLATIVE PRIVILEGE

49. CPLR 5519(a)(1) provides for an automatic stay rooted in the “public policy designed to protect a ‘political subdivision of the state,’ and such a stay is not lightly to be vacated.” *DeLury v. City of New York*, 48 A.D.2d 405, 405 (1st Dep’t 1975) (denying motion to vacate automatic stay, given the unlikelihood of appellants’ success on the appeal of a temporary injunction).

50. The purpose of an automatic stay under CPLR 5519(a)(1) is to preserve the status quo pending determination of the appeal of the underlying motion. *See Ulster Home Care, Inc. v. Vacco*, 255 A.D.2d 73, 78-79 (3d Dep’t 1999) (stating that purpose of automatic stay under CPLR 5519(a)(1) is “to maintain the status quo pending resolution of . . . an appeal”); *see also Siegel, New York Practice*, § 535.

51. That bar is easily met here, where the trial court’s order directed invasion of the absolute legislative privilege afforded to state legislators and those performing legislative functions under New York’s Speech or Debate Clause.

52. Petitioners seek to depose and otherwise obtain from Respondents – all of whom are legislators, aides, or other officials performing legislative functions – information about basic legislative activities relating to the enacted reapportionment plans. They have no right to any such discovery.

53. The Court of Appeals has held that the Speech or Debate Clause of the New York Constitution provides at least as much protection to members of the New York State Assembly and Senate as the federal Speech or Debate Clause does to members of Congress. *People v. Ohrenstein*, 77 N.Y.2d 38, 53 (1990). A long line of Supreme Court cases makes clear that the federal Speech or Debate Clause affords an absolute privilege against the provision of testimony or other information about legislative activities by legislators.

A. The Speech or Debate Clause in the U.S. Constitution Provides Federal Legislators with Absolute Legislative Privilege

54. The federal Speech or Debate Clause provides that “for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place.” U.S. Const. art. I, § 6, cl. 1.

55. “Two interrelated rationales underlie the Speech or Debate Clause: first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence.” *United States v. Gillock*, 445 U.S. 360, 369 (1980).

56. The protections of the Clause are fundamental. *See United States v. Johnson*, 383 U.S. 169, 178 (1966) (the legislative privilege embodied in this Clause “has been recognized as an important protection of the independence and integrity of the legislature” which “serves the additional function of reinforcing the separation of powers so deliberately enshrined by the

Founders.”); *United States v. Helstoski*, 442 U.S. 477, 491 (1979) (the Clause “preserve[s] the constitutional structure of separate, coequal, and independent branches of government.”); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 503 (1975) (Clause protects federal legislators from proceedings that “divert their time, energy, and attention from their legislative tasks”; when a party seeks to invoke the “judicial power” to compel a legislator to answer questions regarding her legislative activities, “legislative independence is imperiled”).

57. The legislative privilege emanating from the Speech or Debate Clause and separation-of-powers principles is remarkably broad. If the actions of a Representative or Senator “fall within the ‘sphere of legitimate legislative activity,’” then that legislator “‘shall not be questioned in any other Place’ about those activities since the prohibitions of the Speech and Debate Clause are absolute.” *Id.* at 501.

58. Federal lawmakers enjoy absolute immunity from civil or criminal actions based on their legislative acts. *See id.* at 502-03 (collecting cases).² “The English and American history of the privilege suggests that any lesser standard would risk intrusion by the Executive and the Judiciary into the sphere of protected legislative activities.” *Helstoski*, 442 U.S. at 491.

59. Thus, the legislative immunity enjoyed by federal legislators includes an absolute evidentiary privilege that protects members of Congress from having evidence of their legislative acts introduced in a proceeding against them. *See Johnson*, 383 U.S. at 182-85.

² “A legislative act has consistently been defined as an act generally done in Congress or in relation to the business before it. In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House or the Senate in the performance of official duties and into the motivations for those acts.” *United States v. Brewster*, 408 U.S. 501, 512 (1972); *see also Gillock*, 445 U.S. at 367 (the “Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivations for those acts”) (internal quotation omitted). Petitioners ignore this law.

60. The privilege is broader still, in a way that bears directly on the issues presented here. “The Clause does not simply state, ‘No proof of a legislative act shall be *questioned*’; the prohibition of the Clause is far broader. It provides that Members ‘shall not be *questioned* in any other Place.’” *Helstoski*, 442 U.S. at 489 (emphases in original).

61. In other words, the legislative immunity provided under the Clause affords members of Congress (and their aides) an absolute privilege to be free from judicial or executive questioning about legislative activities. *See United States v. Gravel*, 408 U.S. 606, 615-16 (1972).³

62. *Gravel* is instructive. There, a grand jury issued a subpoena to an aide to Senator Gravel seeking to obtain information regarding “events occurring at [a] subcommittee hearing,” and the Court found it “incontrovertible” that the Senator could not be subjected to “questioning elsewhere than in the Senate” about legislative activities. *Id.* at 616 (“We have no doubt that *Senator Gravel may not be made to answer – either in terms of questions or in terms of defending himself from prosecution – for the events that occurred at the subcommittee meeting.*”) (emphasis added).

63. This evidentiary privilege applies in equal force in civil actions given “the absoluteness of the terms ‘shall not be questioned,’ and the sweep of the term ‘in any other Place.’” *Eastland*, 421 U.S. at 503. “In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity ‘should be protected not only from the consequences of litigation’s results, but also from the burden of defending themselves.’” *Id.* (internal citation omitted).

³ The absolute privilege applies equally to legislative staff and aides, as well as other third persons engaged in legislative activity. Petitioners ignore or misstate the law here, as well.

64. That the Speech or Debate Clause provides members of Congress with absolute immunity from suit as well as from compelled discovery or testimony is settled law. *See, e.g., United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 662 (D.C. Cir. 2007) (“If the testimonial privilege under the Clause is absolute and there is no distinction between oral and written materials within the legislative sphere, then the non-disclosure privilege for written materials ... is also absolute, and thus admits of no balancing.”) (citations omitted) (citing *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995)).

B. The New York Constitution Grants State Legislators at Least as Broad a Privilege as Afforded to Members of Congress Under the U.S. Constitution

65. Like the federal government, New York’s fundamental law contains both pillars on which absolute legislative privilege rests: its own Speech or Debate Clause, *see* N.Y. Const., art. III § 11,⁴ and its own tripartite separation of government power, *see Saratoga Cty. Chamber of Com., Inc. v. Pataki*, 100 N.Y.2d 801, 821-22 (2003) (citing division of government power to Legislature, Executive, and Judiciary in articles III, IV, and VI of New York Constitution).

66. Thus, the immunity provided under the New York Constitution affords New York legislators “*at least as much protection* as the immunity granted by the comparable provision of the Federal Constitution.” *People v. Ohrenstein*, 77 N.Y.2d 38, 53 (1990) (emphasis added); *accord Straniere v. Silver*, 218 A.D.2d 80 (3rd Dep’t 1996).

67. Petitioners’ argument to the court below, and their papers filed in support of this application, flatly misstate the law. They repeatedly assert that the New York Speech or Debate

⁴ Indeed, New York’s protection of legislative immunity predates the ratification of the United States Constitution. *See Tenney v. Brandove*, 341 U.S. 367, 374 n.3 (1951) (noting enactment of New York Bill of rights on January 26, 1787, providing that “the freedom of speech and debate, and proceedings in the senate and assembly, shall not be impeached or questioned in any court or place out of the senate or assembly”).

Clause is merely “comparable” to its federal counterpart. *See, e.g.*, Lewis Aff. ¶ 58 (citing *Ohrenstein*, 77 N.Y.2d at 53; Pets. Reply Memorandum of Law in Support of Motion for Discovery, Dkt No. 119 at 5 (same)).

68. But that is not what the Court of Appeals held in *Ohrenstein*. In fact, the New York Constitution’s Speech or Debate Clause confers “*at least as much protection*” to members of the New York Legislature as the U.S. Constitution’s Speech or Debate Clause affords to federal lawmakers. 77 N.Y.2d at 53.

69. Surely, Petitioners’ counsel knows this is the law. It has been stated in decision after decision interpreting the New York Speech or Debate Clause. *See, e.g.*, *Straniere*, 218 A.D.2d 80; *Campaign for Fiscal Equity v. State of New York*, 179 Misc. 2d 907 (N.Y. Sup. Ct. N.Y. Cty. 1999); *Humane Society of New York v. City of New York*, 188 Misc. 2d 735, 739-40 (Sup. Ct. N.Y. Cty. 2001).

70. The cases construing legislative privilege under the New York Constitution make clear that legislative immunity is absolute, and that it includes an evidentiary and testimonial privilege.

71. For example, in *Campaign for Fiscal Equity v. State of New York*, plaintiffs sought to depose the Education Department employee who was primarily responsible for creating the computer software that evaluated the distributional impact of changes to the state’s public school funding formulae regarding her interactions with legislators. 179 Misc. 2d at 908. The motion court, citing *Ohrenstein*, noted that New York’s legislative privilege is at least as extensive as its federal counterpart, and that “cases interpreting the federal Speech or Debate Clause constitute persuasive authority.” *Id.* at 911-12.

72. Rejecting the plaintiffs' invitation to construe the New York Clause narrowly, the court held that "the privilege is . . . designed to provide state legislators and other state officials acting within the legislative sphere with 'breathing room' to debate and decide on policy and mold it into legislation." *Id.* at 914. It therefore upheld the aide's absolute privilege to be free from questioning about her legislative activities, holding that "[d]iscovery of background documents and data would defeat this purpose of immunity." *Id.*

73. On appeal, the plaintiff argued that the trial court erred in upholding the claim of absolute privilege, but the First Department affirmed:

The motion court properly determined that [the consultant] was entitled to invoke the privilege under the Speech or Debate Clause with respect to her contacts with State legislators and their staff. Her position . . . required her to work closely with legislators in the formulation of budgetary legislation, and thus, the privilege in question was properly invoked by her to safeguard the legislative function from judicial interference inimical to the legislature's constitutional stature and performance as a separate, co-equal branch of government.

Campaign for Fiscal Equity, 265 A.D.2d 277, 278 (1st Dep't 1999) (citing *Gravel*, 408 U.S. at 618). Nothing in either opinion even suggests that the privilege is qualified in any way, or subject to any sort of balancing test.⁵

74. Consistent with the application of an absolute legislative privilege under the New York Constitution, the court in *Humane Society cf New York v. City cf New York* rejected the

⁵ New York is not alone. The high courts of several other states also interpret their state constitutions to provide the same – or greater – protection than that afforded under the federal constitution, *see, e.g., Kerttula v. Abood*, 686 P.2d 1197, 1202-05 (Alaska 1984) (recognizing absolute testimonial privilege), including in opinions analyzing the issue in the context of redistricting litigation, *see Edwards v. Vesilind*, 292 Va. 510, 523-27 (2016) (same); *Holmes v. Farmer*, 475 A.2d 976, 981-83 (R.I. 1984) (same). *See also Arizona Independent Redistricting Com'n v. Fields*, 206 Ariz. 130, 136-41 (Ct. of App. Div. 1 2003) (same).

plaintiff's requests for document and deposition discovery because such discovery would defeat the purpose of the privilege. 188 Misc.2d at 739-40.

75. Petitioners contend that *Humane Society* stands for the proposition that the Speech or Debate privilege only "ordinarily" applies and that it is "subject to multiple exceptions." Lewis Aff. ¶ 60. That is an aggressive misreading of the case.

76. Nothing in that decision suggests that the privilege is qualified in any way. Nor is there any discussion of "exceptions" much less "multiple exceptions" to the privilege, as Petitioners wrongly assert. *Id.*

77. In fact, the court adopted a broad view of the privilege, holding that it applied to the conduct of persons who worked for an executive agency, and that it could not be "avoided based on plaintiff's unsupported allegations of bad faith or improper motives on the part" of those officials. *Humane Society*, 188 Misc. 2d at 738-39.⁶

78. Perhaps in tacit acknowledgment of the absolute nature of the legislative privilege under New York's Constitution, Petitioners go so far as to ask Your Honor on this emergency application to find that the enactment of the 2014 amendments to the New York Constitution

⁶ Petitioners also cite a 1959 Second Department decision involving the decisions of a local zoning board, *Reformed Church of Mile Square v. City of Yonkers*, 8 A.D.2d 639 (2d Dep't 1959), in support of their contention that there is an "exception" to legislative privilege that permits inquiry into the purpose of legislation when there are "supported allegations of bad faith or improper motives." Lewis Aff. ¶ 60. They plainly misstate what that case holds. In fact, the opinion in *Reformed Church*, like the 1918 decision of the Illinois Supreme Court on which it relied (and which Petitioners cited below), makes clear that "*there may not be an examination into the motives which move a legislative body in the exercise of its legislative discretion.*" 8 A.D.2d at 639-40 (citing *People ex rel. Burton v. Corn Prods. Co.*, 286 Ill. 226, 234 (1918) (emphasis added)). Both courts distinguished the impermissible inquiry into a lawmaker's motives from an effort to discern the "purpose of the legislation," *Reformed Church*, 8 A.D.2d at 640, by examining the zoning ordinance's "results and the surrounding circumstances in order to determine whether its purpose is public, and therefore in the scope of legislative discretion, or private, and therefore without such scope." *Corn Products*, 286 Ill. at 235.

regarding redistricting impliedly repealed the Speech or Debate Clause. Lewis Aff. ¶ 65. That is yet another specious argument.

79. “A repeal by implication is not favored even in regard to a statute; still less can it be favored in regard to any provision of our organic law.” *Carter v. Rice*, 135 N.Y. 473, 496 (1892). A court cannot find that a constitutional provision has been impliedly repealed unless it can “be said that, in the case of the constitutional amendment, the fact of its opposition to a former provision, and the intent to displace it by the amendment adopted, [is] so plainly shown by the provisions themselves that there can be no rational doubt in regard to it.” *Id.*

80. The Speech or Debate Clause has been a part of the organic law of New York for centuries. It was enshrined in the Constitution in order to protect the independence of legislators and structurally enforce the separation of powers. The notion that the Legislature, which twice passed the laws that were enacted as the 2014 Constitutional amendments, intended to abrogate the absolute privilege, and to do so *sub silentio*, is absurd.

C. The Federal Common Law of Legislative Privilege Is Inapposite

81. As noted above, when a state legislator raises a claim of legislative privilege in a federal court, the federal Speech or Debate Clause does not apply, and the federal court looks to federal common law (not a state constitution) to define the scope of immunity. *See, e.g., Gillock*, 445 U.S. at 370.

82. The common law privilege available to a state lawmaker in federal court is less robust than that provided under the federal constitution because the federal Speech or Debate Clause does not apply, and because the separation-of-powers concerns that animate the absolute legislative privilege for Members of Congress simply do not exist when a federal court is deciding whether to require a state lawmaker to answer questions or produce documents

concerning their legislative activities. *Id.* at 371-73 (explaining that “we do not have the struggles for power between the federal and state systems such as inspired the need for the Speech or Debate Clause” because “the Supremacy Clause dictates that federal [law] will prevail over competing state exercises of power”). *Id.*

83. Federal courts do not afford state legislators the full legislative privilege as a matter of comity because of the federal sovereign’s paramount interest in enforcing its laws. *Id.* at 373.

84. Petitioner relies exclusively on federal court decisions holding that legislative privilege is qualified under federal common law. *See, e.g.,* Lewis Aff. ¶ 62 (citing cases). In fact, the federal common law legislative privilege, as applied through Rule 501 of the Federal Rules of Evidence, must be “strictly construed and accepted ‘only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.’” *Favors v. Cuomo*, 285 F.R.D. 187, 209 (E.D.N.Y. 2012) (holding that the legislative privilege is governed by federal common law, as applied through Rule 501 of the Federal Rules of Evidence); *see also Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 93-94 (S.D.N.Y. 2003)) (citing *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

D. Petitioners Distort What Constitutes Legitimate Legislative Activity

85. Petitioners cite the trial court’s holding that the legislative privilege does not apply to two members of the New York Task Force on Demographic Research and Reapportionment (“LATFOR”) who are not legislators. Lewis Aff. ¶ 64.

86. The trial court’s decision on this point mistakenly rests on a paragraph from *Rodriguez v. Pataki*, which equated LATFOR’s workings “to a conversation between legislators

and knowledgeable outsiders, such as lobbyists.” Order at 2 (citing *Rodriguez*, 280 F. Supp. 2d at 101). This is another legal error. See N.Y. Leg. Law § 83-m (creating LATFOR); *id.* at subd. 5 (“The primary function of the task force shall be to compile and analyze data, conduct research for and make reports and recommendations to the legislature, legislative commissions and other legislative task forces.”); *id.* at subd. 10 (“The task force may hold public and private hearings and otherwise have all of the powers of a legislative committee under this chapter.”); *id.* at subd. 12 (“Employees of the task force shall be considered to be employees of the legislature for all purposes.”). In short, these members of LATFOR are integrally involved in core legislative activities; they are not remotely akin to lobbyists.

87. As a threshold matter, Petitioners, and the trial court, are wrong about how the federal court in *Rodriguez* treated privileged materials in LATFOR’s possession. Although the federal Magistrate Judge made the statement attributed to him, he later held that the legislative privilege applied to LATFOR, as it did other legislative actors, with respect to “the reasons why [the LATFOR representative] and others in the Senate majority redistricting office drew the lines for particular Senate districts in the ways that they did.” *Rodriguez*, 293 F. Supp. 2d at 309.

88. On appeal from the Magistrate Judge’s ruling, the District Court emphasized “the rather narrow circumstances” addressed in the Magistrate Judge’s order, emphasizing that there was no authorization to conduct “any depositions of legislators or their staffs,” and that no discovery of any LATFOR officials was permitted “where LATFOR was acting solely as the surrogate of [the Majority Leader] or other individual members of the Legislature.” *Id.* at 305.

89. In 2012, the federal district court in *Favors* revisited whether LATFOR was protected by the federal common law legislative privilege, and expressly held that the privilege applied to a wide variety of conduct by LATFOR staff. “Included in this category are documents

and communications reflecting the following: the drafting of remarks to be made on the floor of the Legislature in support of proposed legislation; proposed changes to statutory language; decisionmaking over placement of district lines; exchanges between legislators or their aides and experts about possible changes to their districts; consideration of public proposals; and emails forwarding newspaper stories or other information to legislators or their staff, to be considered in connection with legislative deliberations.” *Favors v. Cuomo*, No. 11 CV 5632, 2013 WL 11319831, at *9 (E.D.N.Y. Feb. 8, 2013); *see also id.* at *9 (distinguishing public materials posted on LATFOR’s website from documents that reflect “legislative acts”).

90. In reliance on the initial *Rodriguez* language regarding LATFOR, the trial court quoted verbatim from Petitioner’s reply brief, which asserted this argument about LATFOR for the first time and to which Respondents had no opportunity to respond.

91. Reliance on the *Rodriguez* language ignores what the District Court ultimately held in that case, and it ignores the subsequent federal court ruling from 2012, which clarified and significantly expanded the privilege afforded to LATFOR under the federal common law.

92. Here, the LATFOR designees at issue are senior attorneys employed fulltime by the Legislature (one designee is an attorney for the Senate, the other designee is an attorney for the Assembly).

93. These designees, who participated in the redistricting process in their professional capacities as fulltime, in-house aides to legislative leaders, engaged in legislative activities at the core of the legislative privilege. *See* N.Y. Leg. Law § 83-m. These legislative attorneys plainly cannot be characterized as outside lobbyists. They offered vital legal and policy advice to their legislator employers, all of which is protected under the legislative privilege (and also potentially under the attorney-client privilege).

94. Even applying the federal common law, the court in *Favors* held that such unelected third parties were protected by the legislative privilege because they engaged in activity that was integrally related to the quintessentially legislative function of redistricting. *Favors*, 2013 WL 11319831, at *9.

95. That reason applies with even more force under the Speech or Debate Clause which, again, must be broadly construed (unlike the narrow construction of common law privileges in federal court mandated by the Federal Rules of Evidence).

96. Recognizing that the “‘day-to-day work of such aides is so critical to the Members’ performance that they must be treated as [the Members’] alter egos,” the Supreme Court has made clear that the absolute legislative privilege “prohibits inquiry into things done by . . . the Senator’s agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally.” *Gravel*, 408 U.S. at 616-17. This doctrine applies not just to personal staff of a legislator, but also to other third persons, such as “Committee staff, . . . consultant[s], or . . . investigator[s].” *Doe v. McMillan*, 412 U.S. 306, 312 (1973).

97. Petitioners contend that because they allege that Respondents acted with improper partisan intent, their conduct is not within “the sphere of *legitimate* legislative activity.” *Lewis Aff.* ¶ 65 (emphasis in original). Again, Petitioners misstate the law. “Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it.” *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998). Thus “it simply is ‘not consonant with our scheme of government for a court to inquire into the motives of legislators.’” *Id.* at 55 (quoting *Tenney v. Brandove*, 341 U.S. 367, 377 (1951)).

E. Petitioners May Not Inquire Into the Motivations of Individual Legislators

98. The legislative privilege applies with particular force here given the nature of the discovery Petitioners seek.

99. Petitioners seek to compel Respondents to answer questions and provide additional information about “two categories of facts: (a) whether Respondents *acted with impermissible partisan intent* in drawing” the challenged maps, and “(b) whether Respondents worked with [others in order] *to frustrate* the mandatory constitutional process for redistricting.” Pets. Mem., Dkt. No. 48 at 6 (emphasis added).

100. Petitioners claim that Respondents “acted with impermissible partisan intent” so as “purposefully” to draw maps for their own “party’s political ends.” Petitioners’ Memorandum of Law in Support of the Petition, Dkt. No. 25 at 20, 21. But where the “essence of [a claim] is that the [legislator]’s conduct was improperly motivated . . . that is *precisely* what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.” *United States v. Johnson*, 383 U.S. 169, 181 (1966) (emphasis added). “It is beyond doubt that the Speech or Debate Clause *protects against inquiry* into acts that occur in the regular course of the legislative process and *into the motivation for those acts*.” *United States v. Brewster*, 408 U.S. 501, 525 (1972) (emphasis added).

101. The “testimonial privilege created by the [New York] Speech or Debate Clause” prohibits discovery that “would reveal a legislator’s thought processes or the iterative process of creating legislation.” *Campaign for Fiscal Equity*, 179 Misc. 2d at 912.

102. Even assuming for the sake of argument that evidence of an individual legislator’s subjective motivations was relevant to a determination of what the Legislature’s collective purpose was in enacting these laws, the legislative privilege remains absolute. “The Speech and

Debate Clause was designed neither to assure fair trials nor to avoid [congressional corruption]. Rather, its purpose was to preserve the constitutional structure of separate, coequal, and independent branches of government.” *United States v. Helstoski*, 442 U.S. 477, 491 (1979).

103. Even if barring discovery and introduction of evidence regarding the motivations of legislators makes proving Petitioners’ case “more difficult,” that is the price to be paid for the constitutional protection of absolute legislative immunity. *Id.* at 488.

F. Petitioners Are Not Being Irreparably Harmed, But Vacating the Automatic Stay Would Irreparably Harm Respondents

104. Petitioners rely primarily on *Destiny USA Holdings, LLC v. Citigroup Glob. Markets Realty Corp.*, 69 A.D.3d 212, 220-23 (4th Dep’t 2009), for the proposition that they will be irreparably harmed if they are not granted discovery. That case involved a dispute between private parties regarding payments on a construction loan. It did not involve discovery, let alone fundamental questions about legislative privilege and the separation of powers.

105. As explained above, Petitioners will not be irreparably harmed because they have argued repeatedly in submissions below that the information they seek is unnecessary. Moreover, some of the information specified in the Order is available to Petitioners through other sources.

106. By contrast, the Respondents will be irreparably harmed if Petitioners are permitted to invade the longstanding and constitutionally enshrined legislative privilege. The harm will be particularly acute if discovery is compelled at this moment, when the legislative leadership is working nearly around the clock to make decisions regarding nearly \$200 billion in spending. Passing an annual budget is among the most crucial and challenging duties the

Legislature must perform, and the timing for discovery from the Legislature could not be worse – the budget deadline is April 1.

107. Any failure to conclude the budget would lead to a state government shutdown and severe harm to the public and thousands of public employees. Yet, the trial court – apparently misled by Petitioners’ cavalier discussion of the privilege into ignoring the profound separation of powers issue – boldly directs senior legislative leadership, including the Majority Leader of the Senate and Speaker of the Assembly, “to give this his/her highest priority and to set aside other matters.” Order at 3. This extraordinary and perhaps unprecedented intrusion into the Legislature’s business and priorities would cause significantly greater harm than Petitioners’ inability to obtain discovery that is superfluous by their own account.

II. IF THE AUTOMATIC STAY WERE LIFTED, THE NEXT STEP WOULD BE FOR PETITIONERS TO SERVE DISCOVERY DEMANDS

108. Under CPLR 408, a petitioner is barred from engaging in any disclosure without leave of court. The whole point of the motion practice that led to this appeal is that Petitioners sought, and were granted, leave to engage in disclosure pursuant to CPLR 408. But there is a big difference between granting *leave to serve* discovery requests and *compelling a party to produce documents or sit for a deposition*.

109. Here, the Order did no more than merely “permit” Petitioners to engage in discovery. Order at 3. To be sure, in doing so, the Court also provided guidance on the categories of discovery that it thought would be appropriate. But it is clear from the oral argument that the Order provides that guidance because the Court believed that the proposed discovery demands appended to Petitioners’ moving papers were overbroad. *See* Tr. at 38-39.

110. The Order by its terms does not direct Respondents to produce any specific information, much less to sit for any depositions. Indeed, the Court could not have compelled Respondents to produce anything given that Petitioners never served Respondents with any document demands or deposition notices.

111. The Court made clear that the proposed demands that Petitioners attached to their discovery motion were overbroad and Petitioners' counsel offered on the record during the argument to narrow them. But Petitioners inexplicably never did that, nor did they ever serve any demands or notices, notwithstanding that their motion papers said they would do so if the Court granted the leave they sought. *See* Moskowitz Aff, Dkt. No. 31 ¶ 9 ("Specifically, Petitioners are now moving for leave *to serve* the party document requests and deposition notices and non-party subpoenas attached in full hereto as Exhibits 1–14, respectively.") (emphasis added).

112. Petitioners still have not served any discovery demands on any party, even though the Order permitted them to do so on a highly compressed schedule.

113. Were Petitioners to serve demands or notices on Respondents, Respondents would immediately evaluate such demands or notices, attempt to gather and produce any documents that could be timely gathered, reviewed, and produced without violating their legislative privilege, and then lodge overbreadth, privilege, and any other applicable objections, meet and confer with Petitioners' counsel to try to narrow any areas of disagreement, and defend any motion to compel that Petitioners might make.

114. If the trial court were to issue an order compelling Respondents to produce any privileged materials, Respondents would appeal to this Court, which would then have a record on which specific issues could be fairly evaluated.

115. And if the trial court were to compel Respondents to sit for any depositions – which seems highly unlikely given that the Order does not even *mention* depositions⁷ – then Respondents would appeal to this Court, which once again would then have a record on which specific issues could be fairly evaluated. Right now, there is nothing concrete for this Court to evaluate, because no demands were ever served, no objections were ever lodged, and there is not even clarity about the nature of the documents that may be in dispute.

116. We respectfully submit that the appropriate path forward is clear: the Court should not vacate the automatic stay; at a minimum, that request is sufficiently serious that it should be referred to a full motion panel for consideration. If the automatic stay is lifted, the next step is for Petitioners to do the first thing that all litigants seeking discovery are charged with doing, namely, serve appropriately narrow discovery requests seeking information that is not overbroad, not unduly burdensome, and not privileged.

117. I affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: March 8, 2022
New York, New York

/s/ John R. Cuti
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⁷ Even when only a qualified common law privilege was involved, no federal court has ever ordered the depositions of legislators or their aides in a New York redistricting case. Two cycles ago, the District Court emphasized in *Rodriguez v. Pataki* that the Magistrate Judge had not allowed “any depositions of legislators or their staffs,” 293 F. Supp. 2d 302, 305 (S.D.N.Y. 2003), and during the most recent cycle, no depositions took place in *Favors v. Cuomo* either.

**EXHIBIT P TO CUTI AFFIRMATION -
SUR-REPLY AFFIRMATION OF JOHN R. CUTI, ESQ. IN FURTHER OPPOSITION TO
THE MOTION BY ORDER TO SHOW CAUSE TO VACATE THE AUTOMATIC STAY,
DATED MARCH 8, 2022 [2205 - 2215]**

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INDEX NO. E2022-0116CV

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

-----X

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,

Steuben County Index
No. E2022-0116CV

A.D. No. _____

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.

-----X

**SUR-REPLY AFFIRMATION OF JOHN R. CUTI IN
FURTHER OPPOSITION TO THE MOTION BY ORDER
TO SHOW CAUSE TO VACATE THE AUTOMATIC STAY**

JOHN R. CUTI, ESQ., hereby affirms under penalty of perjury that the following is true
and correct:

1. I am an attorney duly licensed to practice law in New York State. I am a member
of Cuti Hecker Wang LLP, counsel for the Senate Majority Leader. I submit this Sur-Reply

Affirmation in further opposition to Petitioners' motion by proposed order to show cause to vacate the automatic stay.

2. We know that time is short and that much has already been said. We respectfully urge the Court to consider the following points.

3. Petitioners continue to press their reliance on *Humane Soc'y of N.Y. v. City of N.Y.*, 188 Misc.2d 735, 739 (N.Y. Sup. Ct. N.Y. Cnty. 2001). We noted in the papers we filed this morning that Petitioners had submitted to Your Honor an "aggressive misreading" of this decision, Affirmation of John R. Cuti in Opposition to Motion to Vacate the Automatic Stay ("Cuti Aff.") ¶ 75, and challenged Petitioners to support that reading. *Id.* at ¶ 75 (noting that "[n]othing in that decision suggest that the privilege is qualified in any way" or subject to exceptions); *id.* at ¶ 76 (explaining that, in fact, *Humane Society* "adopted a broad view of the privilege" and that the privilege "could not be 'avoided based on plaintiff's unsupported allegations of bad faith or improper motives on the part'" of persons performing legislative functions) (citing *Humane Society*, 188 Misc.2d at 738-39). Petitioners made no effort to defend their reading of this case because their reading is insupportable.

4. Petitioners insist that because the Constitution prohibits the enactment of maps drawn for the purpose of favoring a particular party, it is "remarkable" to contend that the centuries-old absolute legislative privilege could apply. Reply Affirmation of Richard C. Lewis in Support of Petitioners' Motion to Vacate the Automatic Stay ("Lewis Reply Aff.") ¶ 19. There is nothing remarkable about the Speech or Debate Clause providing legislators an absolute privilege. The Framers of the Constitution enshrined this privilege precisely because of the fundamental importance of protecting the independence of legislators and to respect the separation of powers. As Chief Justice Burger has explained:

Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it. * * * In *Brewster*, we said that ‘the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts.’ . . . And in *Tenney v. Brandhove* we said that ‘(t)he claim of an unworthy purpose does not destroy the privilege.’ . . . If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of the Clause, then the Clause simply would not provide the protection historically undergirding it. ‘In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed.’

Eastland v. U.S. Serviceman’s Fund, 421 U.S. 491, 508-09 (1975) (internal citations omitted).

Even when the government is investigating a matter of national security, a Senator has the absolute right to be free from questioning about his legislative conduct. *See Gravel v. United States*, 408 U.S. 606, 615-16 (1972) (neither Senator nor his aide could be questioned about activities at subcommittee regarding the publication of the Pentagon Papers).

5. Petitioners assert that the decision of the Court of Appeals in *People v. Ohrenstein*, 77 N.Y.2d 38 (1990), held that the legislative privilege did not attach in a case involving the acceptance of a bribe, Lewis Reply Aff. ¶ 23, and that there is “no relevant difference between an exception to legislative privilege under the New York Speech or Debate Clause for bribery and one for intentional acts of partisan effect in redistricting.” *Id.* ¶ 24. Again, Petitioners misread the law. *Ohrenstein* did not involve discovery and did not apply legislative privilege; the only issue in that case was whether legislators were immune from criminal prosecution for paying cronies for no-show jobs. Not surprisingly, the Court of Appeals held that such legislators were not immune from criminal prosecution. *Id.* That case did not involve whether the legislators could be questioned (after all, they were defendants in a criminal case who enjoyed a Fifth Amendment privilege).

6. Petitioners misunderstand the scope of the privilege and Respondents' arguments. No one contends that the absolute legislative privilege protects everything a legislator does or says that in any way relates to her legislative role. That has never been the law. For example, in *United States v. Brewster*, the Court explained that the absolute privilege applies to acts "generally done in Congress in relation to the business before it" and that the absolute privilege applies to "acts generally done in the course of the process of enacting legislation." 408 U.S. at 512. Even though the Clause "must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch," *id.* at 516, and that it "is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts," *id.* at 525, the protections did not reach the legislator's promise to accept the bribe. *Id.* at 526-27. Thus, the privilege did not protect the legislator from prosecution for *agreeing to take the bribe* because that act was "obviously no part of the legislative process or function" and there was no need to inquire into the legislator's motivations in performing any legislative conduct. *Id.* In other words, the government could prove that the legislator agreed to accept the bribe, even though the Clause prohibited any questions about the speech the legislator gave on the floor or any other legislative conduct. *Id.* at 527 (noting that the crime was agreeing to take the bribe, which could be proven without any "inquiry into the [floor speech] or its motivation"). Here, the discovery at issue is precisely about legislative conduct and legislative motive.

7. Petitioners continue to act as if their application raises only a garden-variety discovery dispute in a typical action. *See* Lewis Reply Aff. ¶ 9 (citing "material and necessary" standard applicable in actions). They are incorrect. Because discovery is generally unavailable in a special proceeding, a petitioner seeking leave to serve and obtain discovery must do more

than meet the low bar of mere relevance. To the contrary, petitioners must show that obtaining discovery is “essential” for their claims or defenses. *Town of Wallkill v. N.Y. State Bd. of Real Prop. Servs.*, 274 A.D.2d 856, 860 (3d Dep’t 2000) (petitioner was not entitled to engage in disclosure, having failed to “establish[] that [it was] essential to establish its position”).

8. Petitioners already have conceded that they cannot meet this standard because they have repeatedly asserted in the court below (and in this Court) that they have overwhelming evidence and seek discovery only to “further establish” their claims. March 4, 2022 Transcript (“Tr.”) at 41:18; Petitioners’ Memorandum of Law in Support of Motion for Discovery, Dkt. No. 48 at 2. Their request for discovery is thus based on the argument that it would be helpful or relevant. Again, that is not the standard.

9. Of course, Petitioners now insist that the discovery they seek is “necessary.” Lewis Reply Aff. ¶ 8. But “necessary” is defined to mean “absolutely essential.” American Heritage College Dictionary (3d ed.) at p. 911. And evidence that one seeks merely to “further” establish something is by definition not absolutely essential, despite Petitioners’ *ipse dixit* to the contrary. See Lewis Reply Aff. ¶ 15 (claiming that discovery they seek “is plainly necessary” even though “Petitioners have other, powerful evidence of Petitioners’ powerful, unconstitutional intent.”).

10. Petitioners decry the unfairness of the possibility that they may not get the discovery they want in this truncated Article 4 special proceeding because of the legislative privilege that the Constitution and case law clearly afford Respondents. That Petitioners *want* such discovery does not mean they *need* it, and it certainly does not mean that centuries of constitutional jurisprudence protecting a foundational privilege should be gutted so that they might have it.

11. In ruling that Petitioners are permitted under CPLR 408 to conduct limited discovery – albeit in a much narrower form than the overbroad proposed requests that Petitioners attached to their motion for leave to serve discovery requests – Justice McAllister himself recognized that the discovery Petitioners seek is not essential to his determination of this matter, that expert testimony would proceed on March 14, and that he would enter his ultimate decision by April 4, regardless of the status of any stay of discovery pending appeal of his ruling. Tr. 71-72.

12. Petitioners have never even tried to respond to Respondents’ consistent articulations that Petitioners’ comparisons of this case to redistricting litigations in other states are inapposite. Memorandum of Law of Senate Majority Leader in Opposition to Petitioners’ Motion for Leave to Engage in Discovery, Dkt. No. 96 at 14-17. Nor could they because those cases were not conducted as expedited Article 4 special proceedings, those cases were not governed by CPLR 408, and those cases did not involve the assertion of an absolute constitutional privilege pursuant to a state constitution’s Speech or Debate Clause. (To take just one example, the Florida Constitution does not contain a Speech or Debate Clause.)

13. Petitioners seek discovery that generally falls into one of two categories: (1) matters of public record for which they do not need discovery, *see* Lewis Reply Aff. ¶ 13 (seeking, *inter alia*, “any public remarks or statements made by [Respondents], [and] any public testimony he/she gave about the redistricting process and/or maps[.]”), and (2) matters relating to core legislative activities in the development, consideration, and enactment of legislation, *see id.* which is barred by the absolute legislative privilege conferred by New York’s Speech or Debate Clause. The trial court ruled erroneously that Petitioners were entitled to broad discovery into

matters that are either publicly available or would irrevocably invade a core constitutional privilege and upset the separation of powers.

14. Petitioners make a variety of conflicting and confusing arguments regarding LATFOR. They first appear to suggest that LATFOR's members are "not [even] legislators" and therefore have no claim to privilege, which they claim that trial court so held. Lewis Reply Aff. ¶ 11. They then suggest that LATFOR members may sometimes have a privilege, and that the trial court entered a narrow order that pierced privilege of LATFOR members only to the extent that they acted as *de facto* "lobbyists" – whatever that means. *Id.* ¶ 25. Petitioners then appear to contend that the appointment of legislative attorneys as LATFOR members supposedly may broadly waive attorney-client privilege for a range of conversations between those attorneys and their legislator clients. *Id.* ¶¶ 31-41.

15. First, Petitioners and the trial court fundamentally misunderstand the legal and practical role that LATFOR, which is an arm of the Legislature, plays. *See* Cuti Aff. ¶ 86. This Court should not be lulled into sweeping and dangerous pronouncements about LATFOR, on this highly truncated schedule, the way the trial court was misled by Petitioners' misguided assertions about legislative privilege in their reply brief on their motion below.

16. Second, as explained above, the proper body of precedent for privilege rulings in this proceeding are cases from state courts, not federal courts. But even assuming that the federal precedents from *Rodriguez* and *Favors* are relevant, those courts held unequivocally that LATFOR employees and members are entitled to assert legislative privilege for activities related to legislative acts. *Rodriguez v. Pataki*, 293 F. Supp. 2d 302, 305 (S.D.N.Y. 2003); *Favors v. Cuomo*, No. 11 CV 5632, 2013 WL 11319831, at *9 (E.D.N.Y. Feb. 8, 2013). Prior to the trial

court's cursory treatment of the issue in this case, no court has ever held that LATFOR is categorically outside the zone of legislative privilege. Such a ruling would plainly be erroneous.

17. Moreover, Petitioners' disjointed arguments about LATFOR only serve to highlight the prudential issue here: the question of whether particular activity was legislative, and therefore privileged, is complex, fact-intensive, and not susceptible to resolution in the span of a day and a half, or even a week.

18. Petitioners attempt to dismiss the obviously substantial attorney-client privilege issues their arguments raise by asserting casually that Respondents can just serve privilege logs. Notably, however, during the last redistricting cycle, it took *more than six months* before the federal Magistrate Judge was able to issue the first opinion resolving privilege issues raised by the document production dispute. *Favors v. Cuomo*, 2015 7075960 (E.D.N.Y. Feb. 8, 2013). The claimants in that case served discovery demands on May 31, 2012. *Id.* Following initial motion practice, the Court ordered an *in camera* review. *Id.* Defendants submitted 12,792 documents (far more than 12,792 pages) to the Court for *in camera* review on August 29, 2012. *Id.* The Court then asked for more information from the defendants, and the defendants complied. *Id.* The Court held a hearing on January 13, 2013, and issued a decision on February 8, 2013. *Id.* No documents were ever produced because the federal District Court dismissed the case before it heard the appeal from the Magistrate Judge's decision regarding privilege issues. The process was expedited from start to finish and still took half a year.

19. With respect to Petitioners' assumption that they are entitled to obtain documents from and/or depose members of the Independent Redistricting Commission, it bears emphasis that those Commissioners are not parties to this special proceeding; they have not been afforded any notice of any of these arguments, much less an opportunity to be heard; they are represented

by separate counsel who have never appeared in this case; they may well have their own privilege-based or other objections to submitting to discovery; and they could not possibly be compelled to do anything in this proceeding, for fundamental jurisdictional reasons alone, unless and until they are served with subpoenas, which has not happened.

20. Finally, Petitioners' astounding suggestion that the Senate Majority Leader could possibly be held in *contempt* under the circumstances presented here is perhaps the best evidence that their exceedingly aggressive position lacks merit. The Senate Majority Leader is asserting an absolute legislative privilege that is clearly established in the plain text of the Constitution and centuries of case law. She is respectfully asking this Court to decline Petitioners' invitation even to consider causing her to become, apparently, the first State legislator in the history of the State of New York ever to be compelled to testify about legislative intent in a redistricting case (or any other case that we are aware of), which would be a clear and serious separation of powers violation.

21. The Senate Majority Leader still has not been served with any document requests or deposition notice, and the proposed deposition notice that Petitioners appended to their proposed order to show cause below (Dkt. No. 37) supposedly would have required her to travel some 240 miles from Albany to Bath (or, as the footnote in Petitioners' proposed notice says, to some other location that *Petitioners* approve), in the middle of intense and time-sensitive budget negotiations about how to spend approximately \$200 billion of taxpayer money, to answer plainly privileged questions that no New York court has ever allowed or even ever considered allowing. Petitioners likewise proposed, but never served, deposition notices that supposedly would have required the same of the Deputy Majority Leader (Dkt. No. 40) and their attorney, the Counsel to the Senate Majority (Dkt. No. 41).

22. And now, having inexplicably waited four and a half days after the lower court issued its decision *even to seek relief* from this Court – and after Justice Lindley made comments during the hearing this morning that appeared to signal his understanding that if the automatic stay were vacated the next step would be for Petitioners to serve demands, for Respondents to respond, and for the lower court to rule on any ensuing motion to compel – Petitioners have the temerity to suggest that the Senate Majority Leader, the Deputy Majority Leader, and their lawyer would be risking *contempt* by opposing a motion to compel them to be questioned outside of the halls of the Legislature, even though article III, § 11 of the Constitution states expressly and unequivocally that legislators “shall not be questioned in any other place,” when none of them has even been served with discovery demands or a deposition notice in this proceeding.

23. Petitioners plainly are attempting to manufacture a constitutional clash between two co-equal branches of government that has no basis in the text of the Constitution, the copious case law directly on point, or the basic rules of civil procedure. We respectfully suggest that the fact that Petitioners would threaten the Senate Majority Leader, the Deputy Majority Leader, and their counsel with contempt, on this record, is highly irresponsible and reason enough for the Court to deny their application to vacate the automatic stay.

24. I affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: March 8, 2022
New York, New York

/s/ John R. Cuti
John R. Cuti, Esq.
CUTI HECKER WANG LLP
305 Broadway, Suite 607

FILED: STEUBEN COUNTY CLERK 03/15/2022 03:48 PM

NYSCEF DOC. NO. 226

INDEX NO. E2022-0116CV

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New York, New York 10007
(212) 620-2600

*Attorneys for Respondent Senate
Majority Leader Andrea Stewart-Cousins*

**EXHIBIT Q TO CUTI AFFIRMATION -
EMAILS, DATED MARCH 9, 2022 THROUGH MARCH 12, 2022 AND OBJECTIONS
AND RESPONSES, DATED MARCH 12, 2022 [2216 - 2223]**

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INDEX NO. E2022-0116CV

NYSCEF DOC. NO. 227

Tuesday, March 15, 2022 at 14:21:15 Eastern Daylight Time

Subject: Re: Tim Harkenrider et al v. Governor Kathy Hochul et al, Case Index: E2022-0116CV
Date: Saturday, March 12, 2022 at 10:26:46 AM Eastern Standard Time
From: John Cuti
To: Harris-Finkel, Sarah, 'Ted.O'Brien@ag.ny.gov', 'Muditha.Halliyadde@ag.ny.gov', 'ereich@graubard.com', 'jlessem@graubard.com', 'dchill@graubard.com', Eric Hecker, Daniel Mullkoff, Alex Goldenberg, 'CBucki@phillipslytle.com', 'gwinner@kmw-law.com', 'heather.mckay@ag.ny.gov', Heather Gregorio, Alice Reiter
CC: Tseytlin, Misha, Moskowitz, Bennet J., 'rlewis@hhk.com'
Attachments: S00001-S00184.pdf, S00185-S00238.pdf, S00239-S00384.pdf, S00385-S00388.pdf, Senate Respondents' Responses and Objections.pdf

Dear Counsel,

Attached please find the Senate Respondents' Responses and Objections to Petitioners' discovery requests, together with documents Bates Stamped S00001-S00388. My colleagues and I are available to meet and confer with you about any areas of disagreement or to discuss any specific responses.

John R. Cuti
Cuti Hecker Wang LLP
 305 Broadway, Suite 607
 New York, New York 10007
 he/him/his

Tel: 212.620.2601
Fax: 212.620.2612

Email: jcuti@chwllp.com
www.cutiheckerwang.com

From: Harris-Finkel, Sarah <Sarah.Harris-Finkel@troutman.com>
Date: Wednesday, March 9, 2022 at 6:08 PM
To: 'Ted.O'Brien@ag.ny.gov' <Ted.O'Brien@ag.ny.gov>, 'Muditha.Halliyadde@ag.ny.gov' <Muditha.Halliyadde@ag.ny.gov>, 'ereich@graubard.com' <ereich@graubard.com>, 'jlessem@graubard.com' <jlessem@graubard.com>, 'dchill@graubard.com' <dchill@graubard.com>, Eric Hecker <ehecker@chwllp.com>, Daniel Mullkoff <dmullkoff@chwllp.com>, John Cuti <jcuti@chwllp.com>, Alex Goldenberg <agoldenberg@chwllp.com>, 'CBucki@phillipslytle.com' <CBucki@phillipslytle.com>, 'gwinner@kmw-law.com' <gwinner@kmw-law.com>, 'heather.mckay@ag.ny.gov' <heather.mckay@ag.ny.gov>
Cc: Tseytlin, Misha <Misha.Tseytlin@troutman.com>, Moskowitz, Bennet J. <Bennet.Moskowitz@troutman.com>, 'rlewis@hhk.com' <rlewis@hhk.com>
Subject: Tim Harkenrider et al v. Governor Kathy Hochul et al, Case Index: E2022-0116CV

Good evening all,
 On behalf of Bennet Moskowitz please see the attached for service in connection with the above

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referenced matter.

Please contact me if you have trouble opening the attached.

Best,
Sarah Finkel

Sarah Harris-Finkel**Paralegal**

Direct: 212.704.6280 | Internal: 13-6280

sarah.harris-finkel@troutman.com

troutman pepper

875 Third Avenue

New York, NY 10022

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A HIGHER COMMITMENT TO CLIENT CARETroutman Pepper is a 2020 Mansfield Certified Plus Firm

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

_____ X

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
VOLANTE,

Index No. E2022-0116CV

Justice Patrick F. McAllister

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.

_____ X

**OBJECTIONS AND RESPONSES OF THE SENATE MAJORITY
LEADER AND THE SENATE MAJORITY'S APPOINTEES TO THE NEW
YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC
RESEARCH AND REAPPORTIONMENT TO PETITIONERS' FIRST
REQUEST FOR THE PRODUCTION OF DOCUMENTS TO RESPONDENTS**

Senate Majority Leader and President *Pro Tempore* of the Senate Andrea

Stewart-Cousins and the New York State Senate Majority's appointees to the New York State

Legislative Task Force on Demographic Research and Reapportionment (collectively, the

"Senate Respondents"), by and through their attorneys, Cuti Hecker Wang LLP, hereby respond

to Petitioners' First Request for the Production of Documents to Respondents dated March 9,

2022 (the "Requests") as follows:

GENERAL OBJECTIONS

In addition to any specific objections set forth in response to specific discovery requests, the Senate Respondents lodge the following general objections (collectively, the “General Objections”) to the Requests:

- A. The Senate Respondents object to each Definition, Instruction, and Document Requested to the extent it exceeds the scope of discovery authorized by the Court’s Decision dated March 3, 2022 (Dkt. No. 126) and its Order dated March 9, 2022 (Dkt. No. 135) (collectively, the “Discovery Order”).
- B. The Senate Respondents object to the “time frame” set forth in the Requests because it bears no relation to the claims asserted in Petitioners’ Amended Petition (Dkt. No. 18).
- C. The Senate Respondents object to the Requests’ definition of “You” and “Your,” which purport to include all persons “acting or purporting to act for or on [the Senate Respondents’] behalf, including, without limitation, representatives, agents, employees, attorneys, accountants and investigators.” These definitions render Requests incorporating those terms overly broad and inclusive, unduly burdensome, and oppressive, and they purport to require that such Requests be construed to call for discovery beyond the scope of the Discovery Order, the New York Civil Practice Law and Rules (“CPLR”), the Uniform Civil Rules for the Supreme Court, or any other applicable rules.
- D. By responding to the Requests or an individual Request, the Senate Respondents do not concede the materiality or relevance of the subject to which they or it refer or refers. The Senate Respondents’ responses are made expressly subject to, and without waiving or intending to waive, any questions or objections as to the breadth, burdensomeness, competency, relevancy,

materiality, privilege, propriety, or admissibility of any of the information provided in this or any proceeding.

E. The Senate Respondents object to the Requests to the extent they call for providing information which is privileged, whether pursuant to the legislative privilege, the attorney-client privilege, the work product doctrine, or any other privilege that may apply.

F. The Senate Respondents object to the Requests to the extent that they purport to impose discovery obligations upon persons who are not parties to the proceeding.

G. The Senate Respondents object to the Requests to the extent that they call for information outside the scope of disclosure permitted under the CPLR.

H. Inadvertent inclusion of any information which is privileged or is otherwise immune from discovery shall not constitute a waiver of any privilege or of any other ground for objecting to the use of such information contained therein in this or any other proceeding or otherwise.

I. The Senate Respondents object to the Requests to the extent that they seek information for use other than in this proceeding.

J. The Senate Respondents reserve the right to supplement their responses to the Requests with additional information if and when such information becomes available to counsel for the Senate Respondents, and the Senate Respondents reserve their rights to object to the future disclosure of any such information.

RESPONSES AND OBJECTIONS TO SPECIFIC REQUESTS

Request No. 1: All Documents and Communications concerning whether or not the map-drawing process was directed and controlled by one political party or the legislative leaders of one political party, including whether You without Republican input directed and/or controlled the map-drawing process.

Response to Request No. 1: The Senate Respondents object to this Request on the grounds that it is vague, overbroad, unduly burdensome, and calls for the production of documents that are protected by absolute legislative privilege and that may be protected by attorney-client, work product, and/or other privileges. In addition, this Request calls for documents and information publicly available to Petitioners. Subject to and without waiving those objections or the General Objections, the Senate Respondents will produce any transcripts of legislative debate on the Senate floor in their possession, custody, or control that are responsive to this Request and that can be identified and gathered without undue burden.

Request No. 2: All documents and communications concerning any public remarks or statements made by You, any public testimony You gave about the redistricting process and/or maps, and any inquiries from and any responses to the public or media about the redistricting process and/or maps.

Response to Request No. 2: Senate Respondents object to this Request on the grounds that it is vague, overbroad, unduly burdensome, and already in the possession of and/or available to Petitioners. Subject to and without waiving those objections or the General Objections, the Senate Respondents will produce any non-privileged documents in their possession, custody, or control that are responsive to this Request and that can be identified and gathered without undue burden.

Request No. 2(i): All Documents and Communications concerning public comments You made about the IRC and the IRC's action or lack of action.

Response to Request No. 2(i): The Senate Respondents object to this Request on the grounds that it is vague, overbroad, unduly burdensome, and already in the possession of and/or available to Petitioners. Subject to and without waiving those objections or the General

Objections, the Senate Respondents will produce any non-privileged documents in their possession, custody, or control that are responsive to this Request and that can be identified and gathered without undue burden.

Request No. 2(ii): Any communication between You and third-parties about advancing a partisan agenda or any efforts to undermine the constitutional process of having the IRC produce a viable map and/or viable second map.

Response to Request No. 2(ii): The Senate Respondents object to this Request on the grounds that it is vague, overbroad, unduly burdensome, and calls for the production of documents that may be protected by absolute legislative privilege and that may be protected by attorney-client, work product, and/or other privileges.

Request No. 2(iii): All Documents and Communications concerning the work of the Commissioners of the Democratic Caucus of the IRC which Documents and Communications were received from third parties.

Response Request No. 2(iii): The Senate Respondents object to this Request on the grounds that it is vague, confusing, overbroad, unduly burdensome, and calls for the production of documents that may be protected by absolute legislative privilege and that may be protected by attorney-client, work product, and/or other privileges.

Dated: New York, New York
March 12, 2022

CUTI HECKER WANG LLP



By: _____
John R. Cuti

FILED: STEUBEN COUNTY CLERK 03/15/2022 03:48 PM

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Attorneys for Petitioners

AFFIRMATION OF ERIC HECKER, ESQ., FOR RESPONDENTS SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS AND THE NEW YORK STATE SENATE MAJORITY'S APPOINTEES TO THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT, IN OPPOSITION TO PETITIONERS' ORDER TO SHOW CAUSE WHY PETITIONERS SHOULD BE GRANTED LEAVE TO SUBMIT SUPPLEMENTAL BRIEFING ON THE TIMING OF REMEDY, DATED MARCH 15, 2022 [2224 - 2226]

FILED: STEUBEN COUNTY CLERK 03/15/2022 03:55 PM

NYSCEF DOC. NO. 228

INDEX NO. E2022-0116CV

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

-----X

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,

Steuben County Index
No. E2022-0116CV

Motion Sequence No. 9

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.

-----X

**AFFIRMATION OF ERIC HECKER IN OPPOSITION TO PETITIONERS'
MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEFING RE REMEDY**

ERIC HECKER, ESQ., hereby affirms under penalty of perjury that the following is true
and correct:

1. I am an attorney duly licensed to practice law in New York State, and I am a
member of Cuti Hecker Wang LLP, counsel for Respondents Senate Majority Leader and
President *Pro Tempore* of the Senate Andrea Stewart-Cousins and the New York State Senate
Majority's appointees to the New York State Legislative Task Force on Demographic Research

and Reapportionment (collectively, the “Senate Respondents”). I submit this Affirmation in opposition to Petitioners’ proposed Order to Show Cause regarding Petitioners’ request for leave to file supplemental briefing on the timing and scope of a “remedy.” Dkt. Nos. 198-99.

2. Now is not the time to talk about remedies. We are in the middle of a trial. Were the Petitioners to prevail, there would be a stay of any such order during the appellate process that would ensue. And even if the appellate process were somehow to conclude quickly, the 2022 election process already is underway, candidates are collecting signatures in the duly enacted districts as we speak, and military primary ballots must be finalized, printed, and mailed to servicemembers by May 14, 2022, with significant steps that must be completed before then. The Court already has recognized that “it is highly unlikely that a new viable map could be drawn and be in place within a few weeks or even a couple of months, therefore striking these maps would more likely than not leave New York State without any duly elected Congressional delegates.” *See* Tr. at 70. Nothing has changed since March 3, 2022 to undermine this Court’s reasoning.

3. We respectfully submit that the Court should not entertain briefing on the “remedy” issue at this time. If the Court disagrees and directs the parties to submit further briefing, Senate Respondents reserve all of their rights and will respond as directed in due course.

4. I affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

FILED: STEUBEN COUNTY CLERK 03/15/2022 03:55 PM

NYSCEF DOC. NO. 228

INDEX NO. E2022-0116CV

RECEIVED NYSCEF: 03/15/2022

Dated: March 15, 2022
New York, New York

/s/ Eric Hecker

Eric Hecker, Esq.
CUTI HECKER WANG LLP
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600

*Attorneys for Respondent Senate
Majority Leader Andrea Stewart-Cousins
and the New York State Senate Majority's
appointees to the New York State Legislative
Task Force on Demographic Research and
Reapportionment*

**AFFIRMATION OF STEVEN B. SALCEDO, ESQ., FOR RESPONDENT CARL HEASTIE,
SPEAKER OF THE NEW YORK STATE ASSEMBLY, IN OPPOSITION TO PETITIONERS'
ORDER TO SHOW CAUSE WHY PETITIONERS SHOULD BE GRANTED LEAVE TO
SUBMIT SUPPLEMENTAL BRIEFING ON THE TIMING OF REMEDY,
DATED MARCH 15, 2022 [2227 - 2229]**

FILED: STEUBEN COUNTY CLERK 03/15/2022 04:04 PM

NYSCEF DOC. NO. 230

INDEX NO. E2022-0116CV

RECEIVED NYSCEF: 03/15/2022

STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

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
VOLANTE,

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.

**AFFIRMATION OF
STEVEN B. SALCEDO**

Index No.
E2022-0116CV

Assigned Justice:
Hon. Patrick F.
McAllister, A.J.S.C.

STEVEN B. SALCEDO, an attorney duly admitted to practice in the Courts
of New York State, affirms the following upon information and belief and under penalty of
perjury, pursuant to CPLR 2106:

1. I am associated with Phillips Lytle LLP, attorneys for Respondent
Carl Heastie, Speaker of the New York State Assembly.
2. I am familiar with the facts stated in this affirmation.

FILED: STEUBEN COUNTY CLERK 03/15/2022 04:04 PM

NYSCEF DOC. NO. 230

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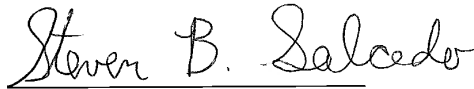
RECEIVED NYSCEF: 03/15/2022

3. Petitioners have moved, by proposed Order to Show Cause, for permission to submit supplemental briefing “on the Timing of Remedy” (Dkt. No. 203). I respectfully submit this affirmation in opposition to that motion.

4. This Court heard oral argument on March 3, 2022. A true copy of the transcript of those proceedings is attached at Exhibit A.

5. For the reasons described in the accompanying memorandum of law, Petitioners’ motion should be denied.

Dated: Buffalo, New York
March 15, 2022


Steven B. Salcedo, Esq.

Doc #10287966

FILED: STEUBEN COUNTY CLERK 03/15/2022 04:04 PM

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RECEIVED NYSCEF: 03/15/2022

CERTIFICATE OF COMPLIANCE WITH 22 N.Y.C.R.R. § 202.8-b

This affirmation complies with 22 N.Y.C.R.R. § 202.8-b because it contains 137 words, excluding the caption, table of contents, table of authorities, and signature block. The word count was generated by the word-processing system used to prepare this document.

Dated: Buffalo, New York
March 15, 2022

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**EXHIBIT A TO SALCEDO AFFIRMATION -
TRANSCRIPT OF SPECIAL PROCEEDINGS,
DATED MARCH 3, 2022 [2230 - 2301]**

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INDEX NO. E2022-0116CV

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1 STATE OF NEW YORK COUNTY OF STEUBEN

2 SUPREME COURT

3 -----X

4 TIM HARKENRIDER et al., : Index No.

5 : Petitioners, : E2022-0116CV

6 -vs- :

7 :

8 GOVERNOR KATHY HOCHUL et al., :

9 Respondents. : Special Proceedings

10 ----- X

11 Hall of Justice

12 Bath, New York

13 March 3, 2022

14 BEFORE:

15 HON. PATRICK F MCALLISTER

16 Acting Supreme Court Justice

17 APPEARANCES:

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REPORTED BY:

LAURA BLISS POWER
Official Court Reporter

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1 THE COURT: This is the matter of Tim
2 Harkenrider, et al. Versus Governor Kathy Hochul, et al.
3 Just a word before we start today, I see everybody has
4 got their mask on. Masks are still required in the state
09:31:41 5 courtrooms. When you move outside the courtroom, that's
6 the county and they don't have a mask requirement, but
7 when you're in here, all masks are required. The only
8 exception to that is if the attorneys are speaking at the
9 podium I'll allow them to take down their masks to speak.
09:32:03 10 I'm a little hard of hearing, I'm going to ask you all to
11 speak up, and we'll use the podium for argument. This is
12 being simulcast, and that way people will be able to see
13 you.

14 Let's find out who's here today. Do we have
09:32:20 15 any of the Petitioners here?

16 (No indication.)

17 THE COURT: Not present, but their attorneys
18 are. I'm going to ask the attorneys to put their
19 appearances on the record. We'll start with Petitioners.

09:32:38 20 MR. MOSKOWITZ: Bennet Moskowitz; Troutman
21 Pepper.

22 THE COURT: Thank you, Mr. Moskowitz.

23 MR. TSEYTLIN: Misha Tseytlin; Troutman,
24 Pepper.

09:32:47 25 THE COURT: Misha Tseytlin. Am I saying that

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1 correctly?

2 MR. TSEYTLIN: Yes, Your Honor.

3 MR. WINNER: George H Winner Junior,
4 Petitioner.

09:32:56 5 THE COURT: Mr. Winner.

6 All right on behalf of Governor Kathy Hochul,
7 attorneys?

8 MS. MCKAY: Heather McKay of The New York State
9 Attorney General's Office.

09:33:06 10 THE COURT: Was that Heather McKay?

11 MS. MCKAY: Yes.

12 MS. CRANE: Michele Crane from the New York
13 State Attorney General's Office.

14 THE COURT: What's the name again?

09:33:14 15 MS. CRANE: Michele Crane.

16 THE COURT: Michele Crane.

17 MS. HALLIYADDE: Muditha Halliyadde for
18 Attorney General's Office.

19 THE COURT: I'm sorry?

09:33:28 20 MS. HALLIYADDE: Muditha Halliyadde.

21 THE COURT: Thank you.

22 On behalf of the Senate Majority Leader?

23 MR. HECKER: Eric Hecker from Cuti, Hecker,
24 Wang.

09:33:42 25 THE COURT: Eric Hecker?

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MR. HECKER: Yes.

MR. CUTI: John Cuti from Cuti, Hecker, Wang.

THE COURT: John, what's the last name?

MR. CUTI: Cuti.

09:33:54 MR. GOLDENBERG: Alexander Goldenberg for Cuti,
Hecker, Wang.

MS. REITER: And Alice Reiter from --

THE COURT: Alex Reiter?

MS. REITER: Alice Reiter.

09:34:14 THE COURT: Alice Reiter.

Are the same attorneys here on behalf of the
Speaker of the Assembly?

MR. BUCKI: No, Your Honor, I'm here on behalf
of Speaker Heastie. My name is Craig Bucki, last name
09:34:24 spelled, B-U-C-K-I from The Law Firm of Phillips Lyte in
Buffalo.

THE COURT: Thank you, Mr. Bucki.

Anyone else here on behalf of the Speaker of
the Assembly?

09:34:36 MR. BUCKI: No.

THE COURT: Is there anyone here on behalf of
The New York State Board of Elections? Is there anyone
here on behalf of the New York State Legislative Task
Force on Demographic Research and Reapportionment?

09:34:52 MR. HECKER: Your Honor, each house of the

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1 legislature has two appointees to Lot 4, so collectively
2 the attorneys for the Senate Majority Leader and the
3 Assembly Speaker effectively represent Lot 4.

4 THE COURT: Very good, thank you.

09:35:11 5 We have several matters on this morning. We're
6 going to start with the motion to dismiss brought by the
7 Governor and Lieutenant Governor. Which attorney for the
8 Governor/Lieutenant Governor would like to present that?

9 MS. MCKAY: Heather McKay, Your Honor.

09:35:32 10 THE COURT: Okay, Ms. McKay, please proceed.

11 MS. MCKAY: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MS. MCKAY: I don't want to -- there's been
14 extensive briefing on our motion to dismiss. I don't
09:35:50 15 want to belabor the points. I'm sure that Your Honor is
16 familiar with our arguments as detailed in those papers.
17 I want to touch on a couple of highlighting points here,
18 and I'm happy to answer any questions that Your Honor may
19 have. First, I want to discuss the jurisdictional defect
09:36:10 20 that we've raised in our papers. The retroactive service
21 attempts do not in fact cure the jurisdictional defect,
22 and I believe our papers make abundantly clear that no
23 email service occurred, nor was it actually agreed to by
24 the Governor and Lieutenant Governor --

09:36:33 25 THE COURT: But they did receive notice, did

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1 they not?

2 MS. MCKAY: Notice -- we certainly are able --
3 we're able to access the papers, those are publicly filed
4 documents. So to the extent that we can access NYSEF, we
09:36:46 5 certainly have access to it. However these rules are in
6 place for very important reasons, and that's how the
7 Court obtains jurisdiction over the Respondents and with
8 respect to any discussion of waiver, the docket makes
9 abundantly clear that the Executive Respondents did not
09:37:05 10 appear until the time of our filed motion in which
11 obviously we were raising the issue. With respect to the
12 Lieutenant Governor it appears the Petitioners have
13 abandoned any purported claim against him by failing to
14 address that in their opposition papers to our motion.
09:37:27 15 With respect to the Governor herself there's still no
16 competent evidence. Our memo of law cites extensive
17 cases that establish that in a proceeding such as this, a
18 special proceeding, the Petitioners have a burden of
19 providing competent proof, and here there's absolutely no
09:37:50 20 proof whatsoever with respect to Governor Hochul's
21 involvement.

22 THE COURT: But, Ms. McKay, doesn't the law
23 require the Governor and the Lieutenant Governor to be
24 served in this type of matter?

09:38:01 25 MS. MCKAY: Yes, absolutely.

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1 THE COURT: How do I let them out? They're
2 necessary parties, aren't they?

3 MS. MCKAY: Well, I don't believe that's what
4 Unconsolidated Laws 4221 says. That provision is
09:38:11 5 indicating that service need to be made on them, amongst
6 many others, and not all of those entities are named in
7 this action because that provision does not pertain to --
8 it doesn't establish a basis for bringing a legal claim
9 against any of them individually. And here there's
09:38:34 10 nowhere -- there's no allegations as to her involvement
11 in the actual drawing of redistricting lines.

12 THE COURT: She had to approve it.

13 MS. MCKAY: Sure.

14 THE COURT: Correct?

09:38:43 15 MS. MCKAY: Absolutely. The Governor pursuant
16 to the Constitution does play a role the same way that
17 she does with any legislative act that she signed it into
18 law, and she certainly did. So here however what we're
19 left with then is a quasi-legislative act that's entitled
09:39:04 20 to absolute legislative immunity. So that's why she
21 should be released from this case. The first cause of
22 action fails as a matter of law the attempts at having
23 the -- that the IRC needs to take the first and second
24 attempts at creating a plan. The fact that that shall be
09:39:29 25 the redistricting process does not automatically equate

9

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1 to failure of the IRC agreeing, then transforms what is a
2 fundamental legislative function and always has been into
3 a -- frankly a judicial one. The legislature -- that the
4 legislature has the authority to draw the maps is
09:39:51 5 absolutely clear and unambiguous even after the 2014
6 amendments and even if there were an ambiguity in the
7 constitutional provisions, including the 2014 amendments,
8 Petitioners' suggested interpretation of intent behind
9 the 2014 amendment to take that quintessential
09:40:14 10 legislative function and remove it entirely leads to
11 absurd results. Certainly the 2021 legislation is
12 permissible because it doesn't contradict anything in the
13 2014 amendment. So obviously all these arguments are
14 very intertwined. If you buy into the concept that
09:40:39 15 Petitioners are advocating here that the legislature in
16 first proposing the 2014 amendments and then the people
17 in approving them -- if you buy into the concept that
18 that meant that the legislature no longer has the
19 authority, and that the IRC can essentially hold everyone
09:41:01 20 hostage, at which point it has to be now drawn by a
21 Court, then you're necessarily going to find that the
22 2021 legislation did not fill in a gap that's there. So
23 these things really rise and fall together.

24 THE COURT: Did the 2021 legislation pass
09:41:22 25 basically what was proposed and voted down in the

10

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1 constitutional amendment?

2 MS. MCKAY: Well I'm glad Your Honor asked
3 about that because the arguments that Petitioner's make
4 on this are -- they're borderline misleading. First, the
09:41:39 5 2021 legislation was fully approved by both houses of the
6 legislature in June of 2021, so that predates the failure
7 of Ballot Proposal 1. In addition to that, while Ballot
8 Proposal 1 did contain language that clarified this issue
9 of an IRC stalemate, it was only one tiny part of that
09:42:05 10 overall ballot proposal which is why I've included the
11 ballot proposal in our papers from the Board of
12 Elections' public website which shows that there were
13 numerous matters in that proposed ballot initiative that
14 would absolutely have required constitutional amendment.
09:42:25 15 Changing quorum requirements, changing timing, those are
16 things that would truly have changed the terms in the
17 2014 amendments, and therefore did absolutely need a
18 constitutional amendment approved by the voters. This
19 aspect of the IRC stalemate, which essentially just
09:42:45 20 clarified what was already the process, was not something
21 that actually needed to be in a constitutional amendment,
22 it would be great if it was, but it could be accomplished
23 by legislation.

24 Finally, as to the second and third causes of
09:43:05 25 action, the Governor doesn't have an expansive amount of

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1 arguments to present in that, other than indicating that
2 Petitioners really have not satisfied their extremely
3 high burden of demonstrating a con -- that the maps are
4 unconstitutional beyond a reasonable doubt. Given the
09:43:28 5 Governor's extremely minimal role -- excuse me -- in just
6 merely signing the maps, we are not prepared -- excuse me
7 one moment.

8 THE COURT: You're fine.

9 MS. MCKAY: We would primarily rely on the
09:43:48 10 arguments of our Co-Respondents in terms of the
11 substantive maps as they've been drawn.

12 And finally, as to the motions to amend, I'm
13 happy to address those now. We have very minimal --
14 primarily we would rely on our papers. Again these were
09:44:02 15 extensively briefed, and unless Your Honor has any
16 questions for us --

17 THE COURT: In regards -- I'd like to go back
18 to the legislative immunity. I mean, isn't that really
19 qualified immunity under the Pataki and Cuomo cases?

09:44:21 20 MS. MCKAY: No. It is right conferred under
21 the Constitution in New York State, and it's not -- it
22 is -- in fact the cases that we've cited do indicate that
23 it is an absolute right with respect to the -- especially
24 the particular tasks that are alleged here by Governor
09:44:40 25 Hochul. Just in terms of signing, it's very limited, the

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1 actual factual allegations against her, and given that
2 very limited nature this can be a basis for dismissal,
3 not just obviously a basis for opposing discovery
4 requests and all of that, which here you couldn't
09:45:01 5 envision much more broad discovery demands than we have
6 here. But that's why that's included in our motion is
7 because given the limited nature of the factual
8 allegations against the Governor, those are absolute
9 immunity she's entitled to under the cases that we've
09:45:18 10 provided.

11 THE COURT: Thank you.

12 MS. MCKAY: Thank you, Your Honor.

13 THE COURT: I may call you back up, Ms. McKay,
14 on the motion to amend. We'll deal with that separately.

09:45:27 15 MS. MCKAY: Okay, thank you.

16 THE COURT: Who'd like to answer this on behalf
17 of the Petitioners?

18 MR. TSEYTLIN: Thank you, Your Honor.
19 Misha Tseytlin on behalf of the Petitioners.

09:45:43 20 First, briefly on the service issue. As we
21 pointed out in our papers, service of a petition is
22 governed by CPLR 403 not 2214, that was reflected in this
23 Court's order to show cause, which directed us to serve
24 in the manner of a summons, that's docket 18 -- docket
09:46:05 25 11. We followed that to a T. To the extent my friends

13

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1 wanted the papers at the Rochester office for some reason
2 we did serve them their as a courtesy. They received
3 services in their reply brief filed last night. Their
4 only objection to that was while they claimed that that
09:46:23 5 was violative of this Court's order to show cause, the
6 initiating one, again that's docket 11, that orders us to
7 deliver the -- to serve it consistent with a summons, not
8 under 2214. So the issue is not only frivolous, but it's
9 also moot. Further, Counsel for the Governor did in fact
09:46:45 10 waive this entire issue by participating in the court
11 ordered meet and conferral process. I think almost
12 every --

13 THE COURT: Didn't they bring a motion to
14 dismiss? Isn't that -- the motion to dismiss for lack of
09:46:55 15 jurisdiction and proper service right off the bat cover
16 that?

17 MR. TSEYTLIN: They participated in that
18 conference before they filed that. I think almost every
19 attorney here was on that call. Counsel for the Governor
09:47:08 20 participated and quite aggressively making multiple
21 points that a conferral occurred consistent, and by the
22 direction of this Courts on its order to show cause.
23 Finally under the controlling O'Brien case any defect
24 here is a technical defect under CPLR 2001 and so there
09:47:33 25 is no jurisdictional defect at all with regard to

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1 O'Brien. The service there wasn't made at all on the
2 Governor at all, not to the claim drawing office. And
3 yet the fourth division said that because that case --
4 the Board of Elections was represented, there was no
09:47:54 5 prejudice, no substantial rights were violated under
6 2001. Here of course the Board of Elections represented
7 by separate counsel, all the legislative respondents
8 represented by separate counsel, Governor's counsel
9 appearing here, no prejudice. So if there was some sort
09:48:12 10 of error, which absolutely clearly there wasn't, it would
11 be just a technical issue that is not jurisdictional at
12 all under 2001. Unless Your Honor has any questions
13 about that I would move on to the other points.

14 THE COURT: Go ahead.

09:48:29 15 MR. TSEYTLIN: With regard to the Governor as a
16 Defendant -- and the only thing I would add to Your
17 Honor's question is the Governor has been a Respondent or
18 a Defendant in virtually every single redistricting
19 challenge in the state's history, that's because not only
09:48:42 20 does the Governor sign the maps, the Governor also is
21 above the Board of Elections, which needs to administer
22 the elections. Now of course I agree with my friends
23 that because we did in fact name the Board of Elections,
24 if the Governor was dismissed including on this by
09:49:00 25 submission -- frivolous service issue, the case could

15

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1 fully go on and we could have binding injunction
2 prohibiting the Board of Election represented by separate
3 counsel from administering the elections on any of these
4 unconstitutional maps.

09:49:14 5 THE COURT: Doesn't there have to be some
6 allegations against the Governor and Lieutenant Governor
7 to hold it in there?

8 MR. TSEYTLIN: First of all, we do have an
9 allegation against the Governor that she promised to do
09:49:25 10 the very egregious gerrymandering that occurred.

11 THE COURT: Which they say was taken out of
12 context.

13 MR. TSEYTLIN: I leave it to Your Honor to lead
14 that article and see if that is a credible articulation
09:49:36 15 of what she said. But in any event, for example, the
16 Board of Elections, we don't have any allegation that
17 they did anything wrong, but there's no gainsaying that
18 they can be named as a respondent here because we need
19 them here to obtain effective relief. We are seeking an
09:49:51 20 injunction against administering elections under
21 unconstitutional maps. So the Board of Elections is a
22 proper Respondent because we need them for full relief,
23 they're a necessary party. The Governor is in this case
24 for the same reason. Now, again, because we did name the
09:50:10 25 Board of Elections, the Governor is not an essential

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1 party, but it is entirely appropriate to name the
2 Governor because she oversees the Board of Elections, and
3 an injunction stopping elections from happening under
4 these unconstitutional maps should certainly bind both
09:50:28 5 the Board of elections and the Governor.

6 Now moving on to the procedural argument and
7 the substantive argument. I don't know to the extent
8 that Your Honor would like me to fully opine on why we
9 think we are not only -- defeat their motion to dismiss,
09:50:44 10 but in fact on the papers before Your Honor, Your Honor
11 should with respect today enter a judgment in our favor
12 and injunction in our favor on the procedural argument.
13 Now --

14 THE COURT: Well Ms. McKay covered it somewhat.
09:50:57 15 So you can respond.

16 MR. TSEYTLIN: Okay the text of the
17 Constitution is clear and my friends don't engage with it
18 at all. It says that the process shall govern
19 redistricting. The process involves two rounds of maps
09:51:12 20 coming out from the IRC and the legislature voting on it,
21 only thereafter does the legislature get to enact a map.

22 THE COURT: It's not a complete process, is it?
23 It's part of the process?

24 MR. TSEYTLIN: The process, there's definite --

09:51:27 25 THE COURT: That's in the Constitution, but --

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17

MR. TSEYTLIN: Right.

THE COURT: But it is not the complete process,
is it?

MR. TSEYTLIN: The --

09:51:35 THE COURT: It still takes the Governor and the
legislature to pass it.

MR. TSEYTLIN: Your Honor, that's also in the
Constitution.

THE COURT: That is.

09:51:43 MR. TSEYTLIN: And the problem for them is the
process wasn't followed. They don't engage with that
cautious language. To the extent I think I understand
the argument -- it's hard to follow -- is what they're
saying is if that process isn't followed, we get to
09:52:00 default to a different process, the process used before
2014, but that's not what the Constitution says. The
Constitution could have said if this process doesn't work
then go to the pre-2014 process, that is not what it
says. In fact, what the Constitution says -- I'll read
09:52:20 this language, it's very short and I think it settles
this issue and it's so straight forward that I think both
Congressional and Senate maps should be struck down to
short order. Quote, "The process for redistricting
congressional and state legislatures shall be established
09:52:42 by this section and section 5, and it shall govern

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1 redistricting in the state except to the extent that a
2 court is required to order the adoption or changes to a
3 redistricting plan as a remedy". So what does that mean?
4 There is one exclusive process. The process there is one
09:53:00 5 and only one exception when courts order a fix. There is
6 no off-ramp for a different process, if the IRC doesn't
7 pass the map such that the legislature can't enact any
8 maps. The legislature understood this, which is why they
9 attempted to put this ballot measure before the People.
09:53:23 10 I heard my friend for the Governor say, well there were
11 other provisions in that, fair enough, but why do they
12 put that provision in there before the People --

13 THE COURT: But is your argument that the
14 Commission absolutely has to send a first set of maps?
09:53:39 15 If they're turned down they have to submit a second set
16 of maps? Is that the argument?

17 MR. TSEYTLIN: That's exactly --

18 THE COURT: That's the procedural argument.

19 MR. TSEYTLIN: That's exactly --

09:53:47 20 THE COURT: What if in good faith they can't
21 come to an agreement on that? We don't have an election?

22 MR. TSEYTLIN: That's right, Your Honor. That
23 it could be the same as if the Governor and the
24 legislature couldn't agree on a map. You know if --
09:54:02 25 let's say you had -- in good faith the Assembly can't

19

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1 agree to a replacement map with the Senate or the
2 Governor, that happened in the last cycle, in the 2012
3 cycle with regard to the Congressional maps. So what
4 happens then? The old map still governs, if the old map
09:54:18 5 is still constitutional. Let's say there weren't any
6 population changes, you can hold an election under the
7 old map. If the old map is now unconstitutional because
8 it's mal apportioned then it becomes the duty of the
9 courts to correct this. This is not unusual. Again,
09:54:32 10 when the mandatory constitutional process for enacting a
11 new map fails and the old map is unconstitutional, the
12 courts always step in. But again, the old map is still
13 the law of the lands, the one that was enacted in 2012.
14 And an election can be held under that map unless someone
09:54:52 15 challenged that map in court. We have challenged those
16 maps in court.

17 THE COURT: I see that.

18 MR. TSEYTLIN: So both the 2012 map is
19 unconstitutional because it's mal apportioned and the
09:55:02 20 2022 map is unconstitutional because they didn't follow
21 the exclusive process in the same way as if they can't --
22 under the old system if they didn't follow the process of
23 getting by cameralism of presentment. It's just an ultra
24 vires act, and it becomes the duty of the courts to enjoy
09:55:20 25 any actions under that act, and then a court will need to

20

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1 adopt a remedial map. In -- and the reason the Court
2 needs to adopt a remedial map is because the Constitution
3 provides the legislature with the opportunity to -- a
4 reasonable opportunity to fix any errors. But when the
09:55:35 5 error is procedural, there's no way that error can be
6 fixed. It would be as if the legislature -- only one
7 house of the legislature passed a new map. That before
8 2014 was the exclusive process for enacting redistricting
9 legislation. One house didn't pass it or two houses
09:55:53 10 passed it, but the Governor vetoed, that was an ultra
11 vires law. In the same way if the commission does not do
12 a necessary step in the exclusive redistricting process,
13 the output is an ultra vires act, which is not the law of
14 the lands. The law of the lands currently is the 2012
09:56:13 15 maps, but again we have challenged those as
16 unconstitutional, and my friends have not argued to the
17 contrary, they have conceded by silence that those maps
18 are now unconstitutional even though they were
19 constitutional when a federal court adopted the 2012
09:56:28 20 congressional map and a legislature with the Governor's
21 signature adopted the Senate map.

22 THE COURT: Are you claiming that the 2021
23 legislation is unconstitutional?

24 MR. TSEYTLIN: It is absolutely
09:56:39 25 unconstitutional. We put that in our briefs and we put

21

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1 that in our petition. The reason for that is it attempts
2 to create an additional process. Again the Constitution
3 provided that there's only a single process for adopting
4 replacement redistricting maps, and it provides only one
09:56:56 5 exception, a textual exception where a court can order
6 some change. What they attempted to do with Section 633
7 was create an additional process, and again I will
8 emphasize, they knew that this couldn't be done without
9 constitutional amendment which is why they also passed
09:57:17 10 the constitutional amendment and put it before the People
11 because they knew they were changing the process, the
12 process that was exclusive in the Constitution. Now of
13 course if the constitutional amendment had passed, then
14 the legislation -- then it would be under a different
09:57:31 15 constitutional footing. There's all kind of legislation
16 that's passed that reenforce constitutional amendments.
17 In fact they have legislation that codifies the 2014
18 process. But upon -- but because the People rejected
19 that amendment resoundingly, the legislation that they
09:57:52 20 drafted in view of that amendment is unconstitutional.

21 THE COURT: Anything further?

22 MR. TSEYTLIN: I do have obviously extensive
23 arguments on the substantive aspect of our challenge.
24 However, Counsel for the Governor only addressed that
09:58:07 25 briefly, so perhaps I'll reserve that until --

22

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1 THE COURT: How about legislative immunity or
2 qualified immunity?

3 MR. TSEYTLIN: Your Honor, do you mean with
4 regard to the Governor being a Defendant or with regard
09:58:19 5 to discovery?

6 THE COURT: Well, both.

7 MR. TSEYTLIN: With regard to the Governor
8 being a Defendant, again we have explained -- and I've
9 explained this morning that the Governor is a Defendant
09:58:33 10 in large part for the same reason the Board of Elections
11 is a Governor -- is an enforcer of the elections in the
12 state. Again, the Board of Elections is the primary
13 enforcer, but the Governor, she sits above the Board of
14 Elections and there's no legislative immunity to not be
09:58:49 15 enjoyed, not to enforce unconstitutional law. The
16 Governor is sued all the time. There was a pretty big
17 case maybe about a year ago where Governor Cuomo was sued
18 to not enforce certain restrictions on places of worship.
19 You know, he was sued because he would have been
09:59:07 20 enforcing those restrictions. This kind of thing
21 happened all the time. Now with regard to legislative
22 privilege, as Your Honor pointed out, that's a qualified
23 privilege. What we're seeking here is the -- and we've
24 quoted case law from New York that says that the New York
09:59:25 25 Speech and Debate Clause is parallel to the Federal

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1 Speech and Debate Clause. We now have many years of
2 experience with the federal courts treatment of
3 legislative immunity in the partisan gerrymandering
4 context. What the Federal courts have said is this is a
09:59:41 5 qualified privilege and there's five factors that need to
6 be determined whether to set aside. Those factors are
7 readily satisfied in partisan redistricting cases,
8 because a significant portion of the evidence of a
9 partisan gerrymandering -- of gerrymandering purpose is
10:00:00 10 exclusively in the hands of the legislature or the
11 Governor, and the need for it is great. The issues are
12 very serious and because partisan gerrymandering is
13 unconstitutional, it wouldn't have any sort of chilling
14 affect. So the New York Speech and Debate Clause is
10:00:17 15 parallel to the Federal one, and all the Federal cases
16 that have been cited to Your Honor apply this five factor
17 test, only thing we're asking is for the very standard
18 form of discovery that's always given to Plaintiffs in
19 partisan gerrymandering cases here -- Petitioners, things
10:00:34 20 like did they look at political data which could be
21 unconstitutional, did they speak --

22 THE COURT: I won't have you get into the
23 discovery because we'll cover that soon.

24 MR. TSEYTLIN: Yes, Your Honor. So that's the
10:00:45 25 extent of what I'll say on that.

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1 THE COURT: All right, thank you.

2 MR. TSEYTLIN: Thank you.

3 THE COURT: With regard to the Governor and

4 Lieutenant Governor's motion to dismiss for lack of

10:00:59 5 proper service and not mentioning anything in the

6 paperwork, there's some -- as regards to Governor,

7 nothing that I saw as regards to Lieutenant Governor.

8 I'm still denying the motion for the following reasons.

9 The New York Unconsolidated Law Section 4221 requires

10:01:17 10 service of the petition on the Governor and the

11 Lieutenant Governor. I believe they're necessary

12 parties. CPLR 403 is controlling, it doesn't specify

13 service upon the nearest office of the Attorney General,

14 and while CPLR 2214 does refer to services of an order to

10:01:38 15 show cause upon the nearest Attorney General's office,

16 that is specifically in reference to motions and not the

17 commencement of an action which we have here. In

18 addition, the Governor and Lieutenant Governor admit they

19 received notice, and I've heard no argument that anyone

10:01:56 20 was prejudiced by it. So that's my ruling on that

21 motion.

22 And that's going to move us to the Petitioner's

23 order to show cause to add the New York Senate

24 redistricting to the action. Who will be arguing that on

10:02:16 25 behalf of the Petitioner? Mr. Tseytlin?

25

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1 MR. TSEYTLIN: Yes, Your Honor. I'm going to
2 be very brief on this. Leave to amend is freely granted,
3 there's really two considerations, one; whether it would
4 basically be so insubstantial as to be dismissed. I've
10:02:40 5 already explained why our procedural argument is not only
6 substantial, but sure to win. We also have a substantive
7 argument and the procedural argument applies to the same
8 extent to the Congressional and Senate, they use the same
9 procedure.

10:02:58 10 With regard to the substantive arguments we
11 haven't developed those this morning, but Your Honor can
12 see in the papers that the process that was used was
13 justice partisan, which is a major consideration in
14 substantive partisan gerrymandering allegations and our
10:03:15 15 experts methodology which is wildly accepted by courts
16 around the country including most recently by the Ohio
17 Supreme Court showing that the senate map was more
18 pro-democrat than 5,000 computer generated maps, is
19 powerful evidence of substantive gerrymandering. We also
10:03:33 20 have an expert based specific discussion about specific
21 senate districts that were gerrymandered to favor the
22 Democrats. So we can discuss those things in more
23 detail, but that certainly survives that low barrier for
24 it's so insubstantially dismissed.

10:03:49 25 The only other inquiry on the motion on an

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1 amendment is prejudice. There's clearly no prejudice
2 here. We filed our initial petition within a couple of
3 hours of the Governor signing the maps. We filed the
4 motion to amend, I think three business days later. The
10:04:08 5 reason we did that is during the legislative process they
6 revealed the Congressional map first, so we had more time
7 to analyze it. The Senate map didn't get put out to the
8 world until a little bit later, so we needed more time to
9 look at it. There was absolutely no prejudice to anyone
10:04:27 10 by the way that we did this.

11 THE COURT: Are you saying the Senate map came
12 out after the Congressional maps?

13 MR. TSEYTLIN: Yes, it came out to the world.
14 They were signed together, but it came out to the world
10:04:38 15 later. And given the complexity of how many districts
16 there are, we needed a couple more days to analyze.
17 There was absolutely no prejudice. The procedural
18 arguments are entirely identical, so there's no -- you
19 know, those rise and fall together. With regard to the
10:04:52 20 substantive arguments, you know, we have the Trende
21 Report which applies the same methodology to both. They
22 presumably have the same critique of the Trende Report
23 with regard to the Senate and the Congressional. In
24 fact, in their opposition to leave to amend, they just
10:05:13 25 repurposed our expert criticism of the Trende approach to

27

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1 the Senate map.

2 So now -- and then the only other aspect is the
3 discussion of the specific Senate districts. They chose
4 not to put anything in writing responding to that, but I
10:05:31 5 will note that even when they contemplated[sic] to contest
6 the specific congressional districts, they didn't put in
7 any competent evidence to rebut our showing. They put in
8 an expert report from this Harvard professor from
9 Mesiti[sic], looks like he may have never been to the
10:05:48 10 State of New York, let alone certainly had no expertise
11 in New York to be able to talk about New York's district.
12 So even if they had responded to the Senate specific
13 districts, they presumably would have put in the same
14 expert who has no ability to testify on New York
10:06:06 15 communities of interest and that sort.

16 In any event the Court can strike down the
17 Senate districts today on the procedural arguments and
18 during remedial process they can be given the opportunity
19 to make any supplemental submission to the substantive
10:06:21 20 challenges to the Senate districts which would permit
21 this whole case to wrap up within the 60-day window that
22 the Constitution provides.

23 THE COURT: Thank you.

24 On behalf of the Governor?

10:06:36 25 MS. CRANE: Good morning, Your Honor.

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1 THE COURT: Good morning.

2 MS. CRANE: I'm Michele Crane from the Attorney
3 General's Office, Your Honor. The jurisdictional
4 argument which we raised with regard to the motion to
10:06:50 5 dismiss was also raised with respect to this motion to --
6 for leave to amend, the petition and given the fact that
7 this is a motion and that they made a motion to amend
8 their original pleading, then we would say that the CPLR
9 provision 2214 does apply here, and therefore they do not
10:07:09 10 have jurisdiction over the Governor or Lieutenant
11 Governor. I know you've already discussed this in
12 detail, and I think you're familiar with the arguments,
13 so I just want to make the distinction here with respect
14 to that issue. We also raised in this motion or our
10:07:23 15 opposition to the motion to amend the legislative
16 immunity and non-justiciability arguments, we'd like to
17 reiterate those to the Court. I think the Court is
18 familiar with those and lastly, Your Honor, we do believe
19 that allowing this amendment to occur would significantly
10:07:40 20 interfere with the election cycle and in the declaration
21 of Mr. Brown from our office, he specifically sets forth
22 the dates upon which everything needs to be accomplished,
23 and I would really ask the Court to look at those dates.

24 THE COURT: I did.

10:07:54 25 MS. CRANE: And to consider the impact that

29

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1 this amendment may have. The Attorney General's Office
2 on behalf of the Governor and Lieutenant Governor have
3 not responded or answered the petition yet. We would
4 need time to do that. If the Court allows discovery
10:08:06 5 there would be a --

6 THE COURT: You've had it for 20 days or so,
7 haven't you?

8 MS. CRANE: Well, we still need to put --

9 THE COURT: I understand.

10:08:13 10 MS. CRANE: It needs to be approved by Counsel
11 and the Governor's office before we submit, Your Honor,
12 we didn't really have this. There's a dispute about how
13 this was served obviously, and our office was not
14 assigned to represent the Governor and Lieutenant
10:08:27 15 Governor until fairly late in the game. Our focus was on
16 the papers that are before you today. We have not spent
17 the time answering the petition, so we will need time to
18 accomplish that.

19 THE COURT: The amended petition?

10:08:42 20 MS. CRANE: Yes, the amended petition. And so
21 that will need to be done. If the Court allows
22 discovery, that will need to be done, and all of this
23 now -- these cases are in jeopardy for this election
24 cycle to occur. So based on that, we would ask the Court
10:08:57 25 to deny the motion to amend the petition.

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1 THE COURT: Thank you, Ms. Crane.

2 MS. CRANE: Thank you.

3 THE COURT: On behalf of the Senate Majority
4 Leader will you be speaking on behalf of the Senate
10:09:08 5 Majority Leader and Senate Minority Leader there?

6 MR. HECKER: Assembly Speaker
7 there(indicating), Senate Majority Leader.

8 THE COURT: Very good.

9 MR. HECKER: Good morning, Your Honor, Eric
10:09:20 10 Hecker from Cuti, Hecker, Wang for the Senate Majority
11 Leader. I'll be very brief because I expect our
12 discussion to be extensive when we get to the petition
13 itself.

14 As we said in our papers we acknowledge
10:09:33 15 generally speaking that leave to amend is granted
16 liberally in a usual case. This is an unusual case for
17 three reasons. First of all, they've put in expert
18 testimony that fatally undermines their theory.
19 Mr. Trende has shown unmistakably and unequivocally that
10:09:53 20 in literally every single one of his thousands of
21 simulations, there are more Republican majority districts
22 in the Senate plan than in the enacted Senate plan --

23 THE COURT: He disputes that in the reply
24 though, doesn't he?

10:10:08 25 MR. HECKER: He doesn't actually. We can get

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1 into all that. I would respectfully suggest when we get
2 into the petition, but suffice it to say, we have that
3 futility argument.

4 Also as the Attorney General's Office is
10:10:20 5 arguing, we have a significant time problem. There is no
6 amended petition. Your Honor, we've been working very
7 hard on this case, we haven't taken days off in weeks,
8 it's taken everything we have to rebut the evidence both
9 statistically and also in terms of actually how the lines
10:10:40 10 were drawn. And if we have to go back and amend the
11 answer, the amended petition -- which we certainly will
12 if we're directed to, it's going to take time. And then
13 beyond that, as the Attorney General also emphasized, the
14 election season is already underway. The designating
10:10:56 15 petition period started two days ago. It would sew
16 confusion in the extreme for this Court to enjoin
17 anything, which is why in almost every case where there's
18 ever been a really bona fide argument of
19 unconstitutionality at this stage of the process, you
10:11:18 20 stick with what you've got, and you address whatever
21 arguments there are for the next cycle. So for those
22 three reasons, we think there's no reason to grant the
23 amended petition, and I look forward to addressing the
24 merits of the petition when we get to that motion.

10:11:32 25 THE COURT: But there has been a time crunch

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1 for you, for them, the Petitioner, for everybody. I
2 mean, the maps just got passed here, what? Three
3 weeks -- a month ago?

4 MR. HECKER: Correct, and we've now burned half
10:11:45 5 of the 60 days that Your Honor has jurisdictionally
6 because they didn't bother to challenge the Senate map
7 when they could have. They were passed together. The
8 Congressional map was announced 24 hours before the
9 Senate map, several days before they were enacted
10:12:00 10 simultaneously. They didn't bother to put it in their
11 petition, and we lost a month. Thank you, Your Honor.

12 THE COURT: Thank you.

13 Assembly Leader?

14 MR. BUCKI: Good morning, Your Honor, we would
10:12:23 15 second the arguments that were put forth by Counsel for
16 the Senate Majority Leader. We would agree with the
17 futility of the amendment, and in particular what I would
18 note from the evidence that is before the Court, in
19 particular the expert reports, is that typically when you
10:12:39 20 would do all of these various simulations, which
21 Mr. Trende did 5,000 simulations, we would submit
22 pursuant to the experts that we've offered that in fact
23 50,000 simulations would be a more appropriate sample
24 size, specifically in order to draw any kind of
10:12:58 25 conclusions concerning these maps. But what would

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1 specifically be expected, given the Partisan makeup of
2 the voters of the State of New York, is that you would
3 have a map with 63 senate districts with between 51 and
4 53 being more likely to elect a Democrat to the State
10:13:18 5 Senate. And in fact when you look at the map, only about
6 49 of the districts could be expected to have an
7 advantage for a democrat. So as our experts, both from
8 the Assembly side and the Senate side have demonstrated,
9 actually there is a Republican advantage to these maps
10:13:36 10 rather than a Democratic vantage. So we would submit
11 that given that evidence that we provided to the Court,
12 given the expertise that we've offered from our
13 experts -- I would note that in particular Mr. Trende is
14 a graduate student, he's never published anything that's
10:13:51 15 been subject to peer review. Mr. LaVigna is well -- very
16 much an expert in the field of communications, he worked
17 in communications for the State Senate, but he doesn't
18 claim to be a statistician, he doesn't claim to have any
19 kind of particular background that would give him the
10:14:08 20 authority to be able to give a proper statistical opinion
21 as to the propriety of these maps because when you get
22 down to it, evaluating these maps is a matter of social
23 science and a matter of evaluating mathematically whether
24 in fact there is an unfair partisan advantage that's been
10:14:28 25 given to one party or another. So we would submit that

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1 the petition is lacking in merit. The proposed amended
2 petition is lacking in merit.

3 The other thing I'd like to say, and I'm going
4 to touch on it briefly now, but I do anticipate

10:14:41 5 discussing it in greater detail later on if we do get to
6 argument on the merits of the actual petition, is the
7 issue of standing. We only have a limited number of

8 Petitioners in this case and there is no proposal to add
9 any Petitioners in the amended petition. And we would

10:15:00 10 submit that the law is clear both from the United States

11 Supreme Court as it's been put forth in the Gill versus

12 Whitford case which Mr. Tseytlin had the opportunity to

13 argue before the Supreme Court. This is true under the

14 Hays versus United States case, and in the State of New

10:15:16 15 York. It's true under the Bay Ridge Community Council

16 versus Carey case from the mid 1980's, is that in order

17 to challenge the lines of a particular district the

18 Petitioner needs to have standing, and the person who

19 would have standing is a person who actually lives in

10:15:34 20 that district. There are 63 Senate districts that are

21 proposed in this redistricting plan from throughout the

22 State of New York, and many fewer petitioners than 63.

23 And what the Court will find is that the vast majority of

24 districts are not represented by any Petitioner in the

10:15:53 25 amended petition.

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1 THE COURT: Let me ask you something.

2 MR. BUCKI: Yes.

3 THE COURT: The case law seems to indicate that
4 prior to predating the 2014 constitutional amendment that
10:16:06 5 required a Petitioner to be a resident of the district
6 before he would have standing, but wasn't that changed by
7 the constitutional amendment? Doesn't anyone have the
8 standing to challenge it?

9 MR. BUCKI: No, it was not, and I'm glad Your
10:16:20 10 Honor brought this up because we looked into this
11 yesterday, and in preparation for today. And in
12 particular the key case is the Bay Ridge Community
13 Council case that determined that in order to have
14 standing you need to live, for state constitutional
10:16:34 15 purposes, in a district. And the language that
16 Mr. Tseytlin cites from the state Constitution that says
17 any citizen may challenge a map, that very language was
18 not added to the Constitution in the 2014 amendment. In
19 fact, that language was in the state Constitution as it
10:16:55 20 existed in the mid 1980's when Bay Ridge Community
21 Council was decided. So as a consequence, just because
22 it says any citizen may challenge a map -- it's true any
23 citizen may challenge a map, but there's an additional
24 requirement that's unstated expressly in Article 3 of the
10:17:13 25 Constitution. But that is a requirement that comes to us

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1 from the tradition of the common law which is that in
2 order for a citizen to challenge, that citizen needs to
3 have standing. So that language was in the Constitution
4 in the mid 1980's, and not with understanding that -- Bay
10:17:29 5 Ridge Community Council at the Supreme Court level, as
6 affirmed by the appellate division, as affirmed by the
7 Court of Appeals on the decision that are rendered by the
8 Appellate Division, determined that there was no standing
9 on part of a gentleman who I believe lived in Long Lake
10:17:44 10 in Hamilton County who was trying to allege that somehow
11 there was an improper gerrymander on racial grounds in
12 Queens, and the Supreme Court said a person in Long Lake
13 cannot challenge what goes on in terms of how a map is
14 drawn in Queens. And that was true even though the state
10:18:06 15 constitution said then as it does now that any citizen
16 can make a challenge. So we would submit that with
17 respect to the amended petition, the vast majority of
18 Senate districts are unrepresented by the Petitioners,
19 and so as a consequence, the amended petition would lack
10:18:21 20 merit in that the vast majority -- in that the
21 Petitioners themselves cannot challenge the vast majority
22 of the districts that have been put forth in the Senate
23 map.

24 And then of course we would second the
10:18:35 25 contentions made by the counsel for the Senate Majority

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1 Leader with respect to the prejudice if this amendment
2 were to be granted, in that, for example, there are
3 deadlines with respect to issuing ballots under the
4 UOCAVA, U-O-C-A-V-A statute that are coming upon us as
10:18:55 5 soon as the middle of May, not to mention the fact that
6 this proceeding needs to be completed by April 4th. And
7 so for all of those reasons, we oppose the motion for
8 leave to amend.

9 THE COURT: Thank you, Mr. Bucki.

10:19:07 10 Is there anyone else I haven't called on yet?

11 *(No response.)*

12 THE COURT: The issues in both the petition and
13 the amended petition seem to be the same. The parties
14 are the same, the requested relief is almost identical.
10:19:36 15 I don't see any prejudice. I'm going to grant leave to
16 amend the petition to add the New York State Senate
17 redistricting. I'm directing that the answer to the
18 amended petition be filed by March 10th which is
19 Thursday. That brings us to the Petitioner's order to
10:20:03 20 show cause for expedited discovery, and it's been touched
21 upon, but let's revisit it. Who will be arguing that on
22 behalf of the petitioner? Mr. Tseytlin?

23 MR. TSEYTLIN: Thank you, Your Honor, I did
24 touch upon this earlier. What we've requested here is
10:20:29 25 the standard discovery that partisan gerrymandering

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1 Plaintiff's do readily obtain in cases around the
2 country. The only case they've cited that denied the
3 discovery, only did so after there was already a holding
4 that the case was lacking in merit. Now just to be clear
10:20:48 5 on our procedural argument, which I think can be ruled
6 upon today or as soon as Your Honor is able, we do not
7 need discovery in our procedural argument. That is just
8 a matter of straight constitutional text. We are -- on
9 our substantive argument, we do think we have put before
10:21:06 10 Your Honor more than sufficient evidence for us to
11 prevail. Having said that, just because we put enough
12 evidence for us to prevail doesn't mean we're not
13 entitled to the full scope of evidence including --
14 because I'm sure that one way or the other this matter is
10:21:19 15 going to get appealed.

16 THE COURT: Subject to qualified privilege?

17 MR. TSEYTLIN: Sorry?

18 THE COURT: Subject to qualified --

19 MR. TSEYTLIN: Of course, Your Honor. If Your
10:21:29 20 Honor things this aspect of our request is overbroad or
21 subject to that privilege, we would certainly be open to
22 a narrowing of our discovery request.

23 THE COURT: Well, your request seemed a little
24 overbroad to me. It was just sort of open ended.
10:21:45 25 Anything relating to the redistricting, that's pretty

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1 broad.

2 MR. TSEYTLIN: If Your Honor thinks that's too
3 broad, Your Honor, we would not oppose Your Honor
4 narrowing that or striking that paragraph.

10:21:57 5 The primary thing that we do want is to find
6 out what political data -- what political information
7 they looked at and what communications that they had with
8 the IRC or other third parties which are all deeply
9 relevant to when we get to the substantive aspect of our

10:22:16 10 petition. The courts are -- around the country look at
11 three categories of information when deciding whether
12 there was partisan intent, which is the only thing that
13 would be -- that we need to prove. We don't need to
14 prove some sort of other things, partisan intent. So

10:22:34 15 they look at statistical evidence of partisan bias, we've
16 talked about that. If you look at the individual
17 specific lines and see which communities of interest have
18 been broken up for what. Don't necessarily need
19 discovery on that, but they also look at the process.

10:22:51 20 Did the map drawers look at political data? Had -- did
21 they consult with a third party? Did they get
22 behind-the-scenes directions from the state party?

23 THE COURT: I assume you're looking for
24 something that shows somebody directed the Commission not
10:23:07 25 to make any decisions on this thing? Am I right?

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1 MR. TSEYTLIN: That would certainly be a
2 relevant consideration in determining whether the process
3 was directed towards the goal of drawing a partisan map.
4 Under standard intent case law the overall process --

10:23:28 5 THE COURT: Wouldn't that be relevant if that's
6 what you were seeking? Wouldn't that be relevant to your
7 procedural argument?

8 MR. TSEYTLIN: I think it would be more
9 relevant to our substantive argument because even if they
10:23:39 10 hadn't attempted to break the process -- which you know
11 with discovery will reveal if they did -- the bottom line
12 is they just didn't follow the exclusive process. So
13 certainly that kind of evidence would show why their
14 argument must be wrong. That the ability to tell those
10:24:00 15 that you appoint, don't pass anything so we can go back
16 to doing the business exactly how we did in 2014, you
17 know, that is an absurd result of what they're arguing,
18 but we don't need to prove that in any way to prevail in
19 our procedural argument. The reason for that is that's
10:24:17 20 just like -- because the commission didn't pass out a
21 second set of maps, that's just like under the prior
22 system if the assembly didn't pass out a map. It's just
23 a necessary part of the law making process that did not
24 occur. However if they did act to undermine the
10:24:35 25 committee the commission process in service of a map that

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1 left, right and center, everyone -- I mean, I heard my
2 friend say, this is a Pro-Republican, that's silly.
3 Left, right and center. Everyone recognizes this is an
4 egregious partisan gerrymandering. If in service of that
10:24:55 5 they told the IRC, don't pass anything because we don't
6 want to have the political accountability of rejecting a
7 Commission map because we want to jam through this
8 egregious gerrymandering to fulfill the Governor's
9 promise to advance the interest of the national
10:25:12 10 democratic party to fulfill the -- one of the Democratic
11 leaders point that they wanted to gerrymander New York or
12 they did gerrymander New York to get revenge for what
13 Republicans are doing in Texas and North Carolina
14 allegedly in service of that, they communicated with
10:25:33 15 those individuals, they communicated with the IRC, that
16 would be relevant evidence of partisan intent, which is
17 what's illegal. Intent is a fact specific inquiry.
18 While we do have overwhelming evidence of it already,
19 certainly those kind of communications would further
10:25:49 20 bolster our showing of partisan intent. And that's why
21 it's deeply irrelevant under the five-part test that
22 courts use to analyze the qualified Speech and Debate
23 privilege. But again, I will reiterate, if Your Honor
24 thinks some of those later requests we have in our five
10:26:09 25 requests are overbroad, anything to do with

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1 redistricting, you know we certainly would welcome Your
2 Honor narrowing that to get to the nub of what we're
3 really trying to get to, which is the political data they
4 looked at, and the communications they had with third
10:26:22 5 parties about the obvious gerrymander -- the obvious
6 embarrassing gerrymander they've imposed on the state of
7 New York.

8 THE COURT: Thank you, MR. TSEYTLIN.

9 On behalf of the Governor?

10:26:32 10 MS. MCKAY: Yes, Your Honor. Heather McKay,
11 again.

12 First of all, I want to emphasize that as our
13 papers made clear, this kind of a special proceeding
14 which Petitioners themselves have selected here,
10:26:56 15 generally disfavors discovery. And that in particular in
16 order to justify discovery in a case such as this one
17 that it makes them -- it even more necessary that the
18 demands that they need to obtain a court order for, need
19 to be appropriately narrow, and it's not Your Honor's job
10:27:20 20 to narrow those. The requests are completely overbroad,
21 and should therefore be denied in the sense that
22 Petitioner's have to obtain this is different than a
23 regular preliminary action. Petitioners have to obtain a
24 court order to get their discovery and what they've
10:27:37 25 provided to Your Honor is vastly overbroad and again,

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1 it's not Your Honor's job to narrow the scope of those
2 demands. With respect to the first cause of action,
3 Petitioners have conceded that they are raising a purely
4 legal question. I do want to touch just briefly though
10:28:00 5 upon the fact that they continue to insist that they need
6 a discovery with respect to the IRC process. That's
7 absolutely untrue. They need to justify that as relevant
8 material and necessary to prove their claims. And given
9 that all parties agree on the facts surrounding the
10:28:22 10 evidence in the IRC, the IRC could not reach an agreement
11 that's undisputed. They don't need to do a pointless
12 fishing expedition into the IRC process. And that's just
13 one example of how vastly overbroad these are, as
14 presented. And it's the Petitioners' obligation to
10:28:42 15 appropriately narrow any of their requests they've --

16 THE COURT: Wouldn't it be relevant if someone
17 did touch base with the Commission or any member of that
18 Commission to say, you know, then you're doing your job,
19 but don't come up with a set of maps?

10:29:00 20 MS. MCKAY: To be honest, Your Honor, I'm not
21 entirely sure it would be particularly relevant here. We
22 obviously have Democrats and Republicans pointing the
23 finger at each other saying --

24 THE COURT: Wouldn't that sort of tend to
10:29:12 25 indicate someone intentionally not following the process?

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1 MS. MCKAY: Well, I think the only relevance
2 that it could have would be establish that the breakdown
3 of communications -- which again is undisputed between
4 all the parties, they couldn't reach an agreement, so
10:29:28 5 their argument says that necessarily the legislature no
6 longer has any role in the redistricting process and has
7 to completely turn to the judicial branch, and our
8 argument is that of course that's preposterous. If they
9 have the ability to freely change or amend the maps, that
10:29:45 10 would be passed by the IRC in the first place, then
11 obviously they have the ability to create maps when
12 there's an IRC stalemate. As to the second and third
13 causes of action, again our arguments fall back on the
14 principles that we've already covered which is that these
10:30:09 15 claims are not implicating the Governor and now they're
16 essentially admitting here in court that she's named in
17 the same way that the Board of Elections is named, to
18 obtain the relief that they're seeking. Well, now
19 they've completely eviscerated any claims of necessity of
10:30:26 20 discovery from the Governor. They're not seeking any
21 discovery from the Board of Elections, and we've also
22 already -- my colleague has gone into the issues of
23 timing, in particular this motion is where that's
24 relevant because the discovery demands, the document
10:30:47 25 demands, and the number of depositions that they're

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1 proposing to hold of very high ranking statewide
2 officers, would significantly delay the proceedings and
3 not allow resolution within the constitutional confines.
4 And finally I think that we've covered a lot on
10:31:09 5 privileges today, so I'm not going to get further into
6 that, but obviously we're reserving our rights to raise
7 specific privileges as to specific demands, if any are in
8 fact served. Those are absolutely going to bar the
9 discovery in the first place which will mean that we've
10:31:26 10 delayed only to come to that conclusion, and they will
11 not have access to the materials that they're seeking
12 because of the importance of the legislative process and
13 the executive's need to be able to do her job. Thank
14 you.

10:31:46 15 THE COURT: Thank you, Ms. McKay.

16 On behalf of the Senate Majority Leader?

17 MR. CUTI: Thank you, Your Honor, John Cuti.

18 THE COURT: Good morning.

19 MR. CUTI: Good morning. A lot to cover.

10:32:05 20 Let's start with CPLR 408. The standard is not
21 relevance, as Your Honor's questions reflected, it is
22 whether discovery should be allowed in, and the standard
23 for that is whether it's essential. Now Petitioner's
24 counsel has gotten up here today and said that Your Honor
10:32:23 25 should enter judgment on the merits today on their

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1 procedural claim. So obviously discovery is not
2 essential for that claim even on their view. He just
3 told you a few minutes ago, counsel for Petitioner, that
4 they have with respect to their second claim the
10:32:46 5 substantive claim, overwhelming evidence already. So if
6 they already have overwhelming evidence, then discovery
7 by definition is not essential, for that reason alone you
8 should deny leave. Related to another reason to deny
9 leave is the inevitable delay. Now, no discovery
10:33:11 10 requested have yet been propounded. The issue before you
11 is whether they should be allowed to, and as Your Honor
12 noted, they're rather dramatically overbroad. So one
13 assumes if leave is granted they would serve some sort of
14 narrowed requests. But then -- and here I want to talk
10:33:28 15 about absolute legislative privilege. There is going to
16 be intensive litigation both here and depending on Your
17 Honor's rulings interlocutory in the Fourth Department.
18 Now Petitioner's counsel either misunderstands the law of
19 the Speech or Debate Clause or he mislead, Your Honor.
10:33:47 20 The federal cases that apply a qualified privilege do not
21 involve the Speech or Debate Clause. Let me just take a
22 few minutes to unpack that. The United States
23 Constitution has a Speech or Debate Clause. And there's
24 a long line of decisions beginning in the 1940's and
10:34:05 25 running through the 80's where the court in opinion after

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1 opinion stresses that the privilege is absolute based on
2 the plain language of the clause. The Members of the
3 House and Senate shall not be questioned in any other
4 place with respect to their legislative conduct. Now,
10:34:28 5 New York's Constitution has a virtually verbatim clause
6 and the New York Court of Appeals has held in Ohrenstein
7 that the New York Speech or Debate Clause provides at
8 least as much protection as the Federal clause does to
9 members of the Federal Congress, and that privilege is
10:34:49 10 absolute. The law is crystal clear that members of the
11 legislature cannot be questioned about their motives or
12 their intentions or their work they do at the
13 subcommittee or anything that is directly related to the
14 legislative process. Drawing maps is a quintessential
10:35:10 15 legislative function, and the case law from the Supreme
16 Court -- and again there are cases cited in our papers
17 that make clear that the Federal cases construing the
18 Speech or Debate Clause are persuasive authority. The
19 privilege doesn't just apply to the elected members, but
10:35:26 20 to their aides, even to consultants, anyone who is
21 performing legislative functions. It's a functional
22 analysis, it doesn't turn only to the title of the
23 person.

24 And so where does the notion of a qualified
10:35:40 25 privilege come from? I'll explain. There are many

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1 redistricting litigations where state maps are challenged
2 in cases filed in Federal Court. Now one of the main
3 reasons there are two main foundations for the absolute
4 nature of the Speech or Debate Clause privilege, one is
10:36:01 5 respect for the independence of the legislator and
6 legislature, and relatedly respect for the separation of
7 powers. The executive and judiciary are not permitted
8 ever to question what members are doing with respect to
9 their legislative conduct. But when a Federal Court has
10:36:22 10 state legislators before it, there are no separation of
11 powers concerns, it's two different governments. The
12 Federal Court isn't telling a Federal legislator what she
13 can do. There are federalism concerns, but that cuts in
14 favor of the federal government because of supremacy
10:36:41 15 clause. And so when those federal district courts and
16 circuit courts are talking about a qualified privilege,
17 they're not applying the speech or debate clause at all.
18 How could they? The Federal Speech or Debate Clause
19 doesn't apply to state legislators, it says Senators or
10:37:00 20 representatives. A Federal District Court is not going
21 to apply the New York Constitution or the Pennsylvania
22 Constitution. What they do in all the cases, including
23 in every single case they cite for the proposition
24 applies what's called the Federal common law. The
10:37:15 25 Federal common law has long respected legislative

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1 privilege, but when a Federal court's applying the
2 Federal common law, they're bound by Federal Rule Civil
3 Procedure 501, and that rule says; we respect common law
4 privileges, but you must construe them narrowly. The
10:37:34 5 Speech or Debate jurisprudence is the polar opposite,
6 case after case from the Supreme Court says it must be
7 broadly construed to protect the independence of
8 legislators. So this is -- the five-factor test is not
9 applicable at all, not even for illustrative purposes.

10:37:54 10 The cases that matter are cases like Eastland and Graves
11 and Brewster and Helstoski, all Supreme Court cases that
12 stress the privilege is absolute and the core of the
13 privilege protects the motivations and the intentions of
14 legislators. There is what Justice Harlan said in

10:38:17 15 Johnson that is precisely what the Speech or Debate
16 privilege protects. And so yes, intent can be an issue,
17 but it can be proved in many ways. It can be proved by
18 objective evidence. We all know that to prove murder in
19 the second degree in New York you have to prove intent,

10:38:36 20 and while motive is not an element, it's certainly
21 relevant. But you can't ask the Defendant what he
22 intended because he has an absolute privilege, but you
23 can still try to prove the case. Now they say they've
24 already proved their case, so they don't need this

10:38:52 25 discovery at all, but even were they allowed to seek

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1 discovery, they can't have Your Honor order legislators

2 to answer questions or produce documents about their

3 correlative functions. You don't have the power to do

4 that under the Constitution. And for them to tell you

10:39:09 5 that it's a qualified privilege is either really a poor

6 reading of the law or something worse. So if Your Honor

7 has any questions, I'm happy to answer them.

8 THE COURT: Thank you. Thank you. Appreciate

9 it, sir.

10:39:22 10 Mr. Bucki?

11 MR. BUCKI: Thank you, Your Honor. Of course

12 we would agree with counsel for the State Senator

13 Majority as to the absolute nature of the privilege, and

14 as much as it would apply to State Senators it would also

10:39:43 15 apply to Members of the Assembly. We would further agree

16 that just by the nature of the papers that have been

17 offered by the Petitioners, they have offered statistical

18 evidence, they have offered evidence of so called public

19 statements by the Governor. And as Mr. Cuti said, there

10:40:00 20 are other ways to prove partisan intention with the

21 Petitioners' claim is their objective, and I would submit

22 that a good synonym for the word intent -- and this

23 phrase partisan intent comes directly from their motion

24 for leave to engage in discovery. A synonym for intent

10:40:18 25 is motive. And matter of Maron versus Silver from the

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1 Court of Appeal from about a decade ago is clear, that
2 there is no place to require state legislators to answer
3 for their motivations in terms of how it is that they
4 come to enact a certain piece of legislation. And we
10:40:37 5 would agree that enacting a new proposed map for the
6 congressional lines and State Senate lines is
7 quintessentially a legislative act. Where I would like
8 to focus is with respect to the reply papers that were
9 served by the Petitioners on Tuesday, March 1st which we
10:40:57 10 did not have an opportunity to respond to in writing.
11 And in response to the ample authority that demonstrates
12 the absolute nature of the legislative privilege, the
13 Petitioners offer several cases wherein they claim that
14 in fact the privilege is not absolute, and I think it's
10:41:18 15 really important to go through each one of those cases to
16 demonstrate the distinctions such that the argument that
17 the Petitioners' offer does not have merit.

18 So first of all they cite to a case called
19 Larabee versus Governor of the State of New York which
10:41:34 20 eventually went up on appeal under the matter of Maron
21 versus Silver case. They said Larabee demonstrates that
22 in fact the privilege is not absolute. That's not the
23 case. What Larabee was about was the issue of
24 legislative immunity, because there -- what was alleged
10:41:51 25 was that the state legislators had violated their

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1 constitutional requirement to raise the pay of the judges
2 in the State of New York, and the response that was given
3 by state legislators is, well, we cannot be held to
4 account for that on account of legislative immunity. And
10:42:09 5 in fact what eventually was held, in matter of Maron
6 versus Silver was that while legislators could not be
7 required to pay out of their own pockets for additional
8 amounts to be allocated for salaries for judges, a
9 declaratory judgment to be issued such that it could be
10:42:25 10 held that in fact the Constitution had been violated in
11 as much as under the separation of powers doctrine, the
12 legislature had not done its job to give proper
13 compensation to the State Court Judges. So they could do
14 their job. But on appeal when the Larabee case went up
10:42:44 15 with Matter of Maron versus Silver, Maron versus Silver
16 was clear when it got to a paragraph talking about the
17 privilege issue rather than the immunity issue as to the
18 absolute nature of the legislative privilege because
19 under the Speech or Debate Clause in the State
10:43:00 20 Constitution, it could not be more clear, that for any
21 speech or debate in either House of the Legislature, the
22 members shall not be questioned in any other place. And
23 over time this clause has been construed by the courts.
24 And in particular I would note the campaign for fiscal
10:43:19 25 equity case, that was a case where the person who was

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1 being deposed was a staffer at The State Education
2 Department. And that staffer in the deposition was
3 starting to be asked, well what is the nature of your
4 communications with folks in the State Legislature with
10:43:34 5 respect to school funding. And so we would submit that
6 that's a very similar kind of inquiry that the
7 Petitioners are looking to pursue with respect to, oh
8 legislators, what were the nature of your communications
9 that you had with members of the Independent
10:43:50 10 Redistricting Commission and there in campaigned for
11 fiscal equity. The Court said this privilege is so broad
12 that it isn't simply a privilege that can be invoked by
13 state legislators. It can be invoked by the staff, by
14 the people who work with them, by the consultants, by
10:44:06 15 people who work for other state agencies with respect to
16 the interface that takes place with state legislators
17 both orally and in terms of their written communications
18 as well. And we would submit that that same privilege
19 applies, and no matter how much Petitioners may say that
10:44:22 20 they could try to make their request a bit more narrow,
21 and as much as they make -- they offer that invitation to
22 the Court, we would submit that the privilege issue would
23 still apply and we could continue to raise it such that
24 none of -- that no discovery demand that the Petitioners
10:44:41 25 could ever create as to the motivations or partisan

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1 intent could ever be countenanced under the absolute
2 legislative privilege. And Your Honor made a point, well
3 isn't it relevant that in fact say a State Legislator had
4 some communication with a member of the Independent
10:45:00 5 Redistricting Commission, and I would say that under the
6 law, privilege has superiority over relevance all the
7 time. So for example, if an attorney is counseling a
8 polluter with respect to bad documents that exist in the
9 polluter's files about some kind of toxic tort
10:45:22 10 allegations, documents that would not be helpful if they
11 were to see the light of day, that document -- that memo
12 is subject to attorney/client privilege.

13 THE COURT: And your example though, could they
14 get that information from the member of the Commission?
10:45:36 15 If they talked with the legislator?

16 MR. BUCKI: I would submit that a member of the
17 Commission is the same -- is in the same position as --

18 THE COURT: They're not legislators --

19 MR. BUCKI: -- as the education department
10:45:48 20 employee who was being deposed in the campaign for fiscal
21 equity case. There it was in the middle of a deposition
22 and that employee was being asked questions about her
23 interface with the legislature. That employee was being
24 represented by someone from the State Attorney General's
10:46:05 25 Office who raised an objection on the basis of privilege,

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1 and it had to go to State Supreme Court and actually went
2 up to the First Department in 2009. And the person who
3 was taking the deposition said this is someone who works
4 for State Ed, this is someone who works for a state
10:46:21 5 agency, this isn't somebody who's a legislator. But not
6 withstanding, the privilege was so broad that the Court
7 was clear that that person could not be questioned with
8 respect to those communications.

9 THE COURT: Isn't it supposed to be an
10:46:35 10 Independent Redistricting Commission?

11 MR. BUCKI: Well, actually there was a case
12 that went before Albany County Supreme Court, the Leib
13 case wherein it was supposed to be on the ballot in part
14 of the syllabus that was presented to the voters that
10:46:49 15 this was an Independent Redistricting Commission. And in
16 fact the Court held you can't call it an Independent
17 Redistricting Commission in terms of ballot proposal, not
18 withstanding the fact that in the parlance that's
19 developed since then they have called themselves
10:47:03 20 independent, but likewise if somebody committed murder
21 and then goes to their priest for confession and says I
22 confess that I committed this murder, absolutely that
23 would be relevant, but there's an absolute priest
24 penitent privilege in the State of New York. And so
10:47:18 25 likewise, just because something is relevant doesn't mean

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1 that it isn't privilege, and the privilege trumps the
2 relevance every single time. With respect to the
3 Ohrenstein case, they say that's another case that
4 demonstrates the privilege isn't really absolute. That
10:47:33 5 was a case that involved allegations of bribery. There
6 are no allegations of bribe or money changing hands or
7 anything of that nature. And then in fact where I'd like
8 to focus also is on a case that they cite from Illinois
9 which is Burton versus Corn Products Refining Company
10:47:51 10 from 1918. And little more recently from the appellate
11 division in the late 1950's; Reformed Church of Mile
12 Square. And they say here are instances where not
13 withstanding a Speech or Debate Clause, the legislators
14 were brought in and required to testify concerning the so
10:48:10 15 called purpose of legislation. I think it could be
16 argued that intent and purpose could be two totally
17 different things. But setting that aside, what's
18 important to see about those cases is these are cases
19 that involved municipal legislators. So in the Reform
10:48:27 20 Church of Mile Square case, that concerned the prospect
21 of getting discovery from persons who served on the City
22 Council in the City of Yonkers, and with respect to the
23 Burton case that was a case that involved getting
24 discovery from people who served on a City Council in
10:48:42 25 Granite City, Illinois -- I had to look up where that is,

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1 it's just outside of St. Louis -- but what's important is
2 in neither case does it talk about getting discovery from
3 members of the State Legislature or people who interface
4 with members of the State Legislature, and there's a
10:49:02 5 reason for this, because as the Humane Society case that
6 the Petitioners also rely upon makes clear, there is a
7 difference between the jurisprudence that exists with
8 respect to the privilege that -- the legislative
9 privilege that state legislators receive, versus the
10:49:20 10 jurisprudence that exists with respect to the privilege
11 that local legislators receive such as members of a city
12 council or a town board in the State of New York or
13 county legislator. So that is a common law privilege
14 that has been set forth from the courts, and there can be
10:49:36 15 exceptions to the common law privilege. Whereas the
16 privilege for state legislators is an absolute privilege
17 that exists under the State Constitution. And so the
18 bottom line is none of the authorities that the
19 Petitioners, my friends on the other side, have offered
10:49:53 20 in reply would support anything other than an absolute
21 legislative privilege. And if the Petitioners did not
22 want there to be an absolute legislative privilege
23 applied, they could have brought this case prospectively
24 in Federal Court. They talk about the various five
10:50:11 25 factor tests that are applied. That may be true in

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1 Federal court, but we're not in Federal court for the
2 western district of New York, we're not in the United
3 States Supreme Court, we are in the Supreme Court for New
4 York State, Steuben County, and in Steuben County Supreme
10:50:26 5 Court we would submit like anywhere else in New York
6 State Court, there is an absolute privilege that
7 attaches.

8 The last thing I would like to say -- actually
9 two more things. First of all, with respect to the
10:50:39 10 burden.

11 THE COURT: With respect to what?

12 MR. BUCKI: With respect to the burden. Much
13 has been said about the burden by my colleague Mr. Cuti,
14 but I would like to emphasize that if there were to be
10:50:52 15 any kind of discovery demands simply the task of putting
16 together copious privilege logs, not to mention the task
17 of having to search for all the different documents that
18 could potentially be responsive to a request that would
19 eat up the remaining time that we have, this proceeding
10:51:11 20 needs to be decided within one month from tomorrow, and
21 authorizing discovery which the Petitioners acknowledge
22 in saying this petition can be granted today, they're
23 basically acknowledging that they don't really need it.
24 But even if this discovery were to be authorized, simply
10:51:30 25 the litigation that would happen on appeal in terms of a

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1 notice of appeal, the fact that there would be an
2 automatic stay of the discovery under CPLR 5519(a)(1),
3 the fact that then we'd have to go before a special
4 session of the Fourth Department to have to sort this
10:51:44 5 out, every day that goes by is another day that this
6 proceeding is not going to be decided on the merits,
7 which it needs to by April 4th. And so we would submit
8 that the materiality and the necessity that would require
9 not only under CPLR 408 but also CPLR 3101 simply is not
10:52:05 10 there.

11 And the last thing I'll say at this juncture is
12 in as much as the Petitioners say this petition can be
13 granted today, I wanted to make absolutely clear that now
14 that the petition has been amended, it's impossible to
10:52:19 15 grant the petition today. It would be possible to deny
16 the petition today, but to grant it, no, and the reason
17 for that is that the Respondents have not had an
18 opportunity to answer for every petition. There needs to
19 be an answer. And the case on this point is matter of
10:52:36 20 Kickertz, K-I-C-K-E-R-T-Z, versus New York University.
21 It's from the Court of Appeals from about a decade ago,
22 that if the petition is granted without an opportunity
23 for the respondents to answer, then that's going to be
24 overturned on appeal because as a matter of due process
10:52:54 25 the Respondents need an opportunity to answer to -- we

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1 would submit that to take that step of granting a
2 petition at this time, as the Petitioners would invite
3 this court to do, simply is not something that can happen
4 at this juncture.

10:53:06 5 THE COURT: Thank you, Mr. Bucki.

6 MR. BUCKI: Thank you.

7 THE COURT: The Constitution provides both
8 legislative immunity and legislative privilege, however
9 the Courts have found the state legislators do not have
10:53:28 10 an absolute right to legislative privilege. In 2003 in
11 the case of Rodriguez versus Pataki the Court laid out a
12 balancing test to determine what information should be
13 disclosed and what needs to be protected because of the
14 chilling affect it would have on the legislature if the
10:53:46 15 information was disclosed. The Rodriguez court adopted a
16 five-factor test. Under the five prong test the Court
17 finds the request to discovery is relevant, that the
18 relevant discovery is not otherwise available, that the
19 issue of this -- the issues of this case are very
10:54:06 20 serious, and that the Government's role in the case is
21 huge. Further, that limited discovery will not have the
22 potential of chilling legitimate legislative actions in
23 the future. Since this Court only has until April 4th to
24 decide this matter, the Court will grant expedited
10:54:25 25 discovery, however short time period that may be. All

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1 persons asked to provide discovery are to give this his
2 or her highest priority, and to set aside other matters.
3 The Court will permit discovery of legislative
4 respondents as to whether or not the map drawing process
10:54:46 5 was directed and controlled by one political party or the
6 legislative leaders of one political party. This would
7 include whether the Respondents without Republican input
8 directed and/or controlled the map drawing process. The
9 Court will also permit discovery of the legislative
10:55:06 10 Respondents as to any public remarks or statements made
11 by them, any public testimony he or she gave about the
12 redistricting process and/or maps, and any inquiries from
13 and responses to the public or media about the
14 redistricting process and/or maps. This would include
10:55:29 15 public comments made by the Respondents about the
16 Independent Redistricting Commission, and the IRC's
17 action or lack of action. This would include any
18 communication between the Respondent's and third parties
19 about advancing a partisan agenda or any efforts to
10:55:49 20 undermine the constitutional process of having the IRC
21 produce a viable map and/or viable second map. This
22 would also include all documents and communications
23 concerning the work of the Commissioners of the
24 Democratic caucus of the IRC, which documents and
10:56:09 25 communications were received from third parties. Any

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1 discovery from non-legislative persons is not so
2 restricted. The Governor and Lieutenant Governor are not
3 to be considered as non-legislative members. Discovery
4 is to be completed by March 12th, and I know that's
10:56:27 5 tight. I'll be posting an order to this fact and
6 uploading it to NYSEF. Does anyone else wish to be heard
7 on the argument of lack of standing? I know it's been
8 touched upon. Does anybody else need to respond to that?

9 MR. HECKER: I would like to, Your Honor.

10:56:55 10 THE COURT: On behalf of the Senate Majority
11 Leader?

12 MR. HECKER: Hello, again Your Honor, Eric
13 Hecker; Cuti, Hecker and Wang for the Senate Majority.

14 Just very briefly, the case that they rely
10:57:15 15 upon, the Humane Society case from the third department
16 is a case in which the Court denied standing for every
17 Petitioner but one. And the only Petitioner who was
18 allowed to proceed in that case was allowed to proceed
19 precisely because she lived next door to the foie gras
10:57:40 20 farm at issue that she alleged was contaminating her
21 water. Here they put no evidence in when they filed
22 their petition, none. They put belatedly some evidence
23 of where Petitioners live in reply which appellate courts
24 have held you can't do in a special proceeding, period.
10:58:01 25 It can't be cured in reply. But more to the point, there

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1 is still no evidence in the record at all that anybody in
2 this case lives in Long Island, and this is exactly the
3 kind of generalized non-specific claim made by
4 Petitioners with no injury in fact, who are not within
10:58:24 5 the zone of interest. We are in District 23.

6 THE COURT: Is an adjoining district that might
7 be affected by another district, is that in the zone of
8 interest?

9 MR. HECKER: Perhaps. There are many many
10:58:35 10 districts between District 23 and Districts 1, 2 and 3 on
11 Long Island. There's nobody within striking distance of
12 standing. So they have a technical problem that they
13 created by failing to put in any evidence with their
14 petition to establish standing, which my friend
10:58:58 15 Mr. Tseytlin successfully argued before the Supreme
16 Court, it's fatal, and the end of the story, and you
17 can't cure it in reply in the State of New York, but even
18 if you could, this court has no basis to be judging any
19 district based claims in Long Island when nobody in this
10:59:15 20 case lives within striking distance of Long Island.

21 Nobody from one, nobody from two, nobody from three,
22 nobody from four, nobody from five, nobody from six,
23 nobody close to Districts 1 and 2. Just wanted to make
24 that point, Your Honor.

10:59:33 25 MR. TSEYTLIN: May I be heard on standing?

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1 THE COURT: Pardon me?

2 MR. TSEYTLIN: May I be heard on standing?

3 THE COURT: Go ahead, Mr. Tseytlin.

4 MR. TSEYTLIN: A couple of things standing,

10:59:45 5 Your Honor. First of all, with regard to our procedural
6 claim that would knock out the entire map, there's no way
7 to divorce that knockout from any particular district.
8 So with regard to at least a procedural claim there's not
9 even a colorable standing argument. Any person can raise
11:00:02 10 that, that would knock out that.

11 With regard to their reference to the Gill
12 versus Whitford case of the US Supreme Court, I did in
13 fact argue they should not be allowed to cure by having
14 additional plaintiffs, the argument was rejected by the
11:00:19 15 US Supreme Court. The Us Supreme Court sent the case
16 back down to the lower court to allow them to add more
17 plaintiffs, that was way later then what happened here,
18 which is -- we correctly submitted under the
19 constitutional language that any citizen can challenge
11:00:32 20 the map, that's the constitutional language. It was not
21 addressed in the Bay Ridge decision, which was a trial
22 court decision in any event, and it was not addressed.
23 So any citizen language we relied on that to the extent
24 they raised some objections. We then put in sworn
11:00:51 25 affidavits from citizens throughout the state who are

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1 Petitioners, all of the districts are interlinked. If
2 Your Honor strikes down the districts that the
3 Petitioners are in on substantive grounds, the other
4 districts will need be to be changed in creating the
11:01:11 5 remedial map, a partisan interest cannot be advanced as
6 it was in Long Island.

7 Finally with regard to standing, again, I will
8 reiterate that for our procedural claim, there is no
9 colorable argument, and on the others we have citizens
11:01:30 10 all over the state who have submitted competent evidence
11 timely before the return date, which is all the rules
12 require. Thank you.

13 THE COURT: Thank you. Is there anyone else
14 who wishes to be heard on that?

11:01:42 15 MS. MCKAY: Your Honor, may we seek
16 clarification with respect to the discovery ruling, as
17 applied to the Governor and Lieutenant Governor, please?

18 THE COURT: They're considered part of the
19 legislative, so they have the privilege to the extent
11:01:56 20 that I said.

21 MS. MCKAY: Okay, and with respect to Your
22 Honor's rulings as to legislative Respondents need to
23 provide discovery, are you including the Governor and
24 Lieutenant Governor in --

11:02:10 25 THE COURT: Yes.

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1 MS. MCKAY: Thank you for the clarification.

2 THE COURT: Mr. Bucki, I saw you start to get
3 up. Is there anything you wanted to address on the
4 standing issue?

11:02:23 5 MR. BUCKI: I already had the opportunity to
6 talk quite a bit about standing, I just want to second
7 what Mr. Hecker says which is that vast swaths of
8 territory within the State of New York are not
9 represented by any Petitioner, and he mentioned Long
11:02:38 10 Island as a really good example. So even if it could be
11 argued and countenanced, which I don't think it can be,
12 that somehow as long as you live in the district next
13 door that you have standing to challenge the way the
14 district next door is created, well in a lot of cases
11:02:57 15 there is nobody in the district, and there's nobody next
16 door. And so as a consequence this really is in the --
17 more in the nature of a generalized political grievance
18 rather than a situation where the individuals at issue
19 would have standing to challenge the entirety of the map
11:03:16 20 as they claim to do. And with respect to that -- any
21 citizen language the Bay Ridge Community Council case
22 that talked about it in detail about the standing of the
23 person in Long Island -- I should say the lack of
24 standing of that person with respect to challenging the
11:03:29 25 way a district map looks in Queens, that was later

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1 affirmed in a detailed decision from the Appellate
2 Division and then later affirmed on the basis of the
3 Appellate Division opinion at the Court of Appeals. So
4 we would submit that this is more than just a
11:03:45 5 miscellaneous case, this is a case that went all the way
6 up to the Court of Appeals, and the Court of Appeals
7 would agree with the Federal courts from Gill versus
8 Whitford and Hays versus United States that in order to
9 have standing to challenge your district lines, you need
11:03:57 10 to live in the district, and the vast majority of the
11 Petitioners simply do not.

12 THE COURT: But the Petitioners are challenging
13 the map in general, they want everything thrown out.
14 Doesn't any citizen have the right to standing to bring
11:04:12 15 the petition?

16 MR. BUCKI: We would submit that if you have a
17 challenge to your particular district you need to live in
18 the district, and that is the position of the Speaker,
19 and I think that's the position of the Senate Majority
11:04:24 20 Leader as well. And then, second of all, the other
21 reason I was about to rise is I just have a question with
22 respect to the discovery in terms of how things are going
23 to go. I would anticipate once the order is entered that
24 there is going to be a notice of appeal filed certainly
11:04:38 25 on behalf of the Speaker, I would anticipate on behalf of

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1 the Senate Majority Leader. We would submit -- and I'd
2 like to put it on the record now that simply the filing
3 of that notice of appeal stays the discovery order and
4 that's the position that we take. And I leave it to the
11:04:52 5 Petitioners to determine how it is that they're going to
6 respond to that opportunity, so CPLR 5519. But further I
7 would have a procedural question as to when we can expect
8 the transcript to be ready so that that could be included
9 in any record on appeal that could be provided to the
11:05:11 10 Fourth Department.

11 THE COURT: I'll ask for it to be done ASAP.

12 MR. BUCKI: Very well, Your Honor.

13 THE COURT: Thank you, Mr. Bucki.

14 Have I listened to everyone on the standing
11:05:22 15 issue?

16 MR. HECKER: Yes, Your Honor.

17 THE COURT: The motion to dismiss for lack of
18 standing is denied, the amended Constitution gives every
19 citizen the right to commence this action and allege that
11:05:39 20 the maps were drawn with a gerrymandering intent. The
21 case law that predates the 2014 constitutional amendment,
22 which required a Petitioner to be a resident of a
23 particularly aggrieved district is no longer a guide to
24 determining standing because of the additional revision.
11:05:59 25 Petitioners have provided additional affidavits to verify

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1 that in fact these Petitioners encompass a number of
2 districts, and of course any district that abuts their
3 district would also be impacted by any change the Court
4 may make in the dimensions of the district. That's my
11:06:16 5 ruling on that.

6 That brings us now to just the petition, the
7 original petition itself. Honestly, I don't know if I
8 need to hear argument on that today, and I'll tell you
9 why. The Petitioners requested that I stay the election
11:06:41 10 or the current petition gathering process until this
11 matter can be decided. The Court understands that the
12 Petitioners' experts claim the currently enacted maps are
13 the most egregious display of gerrymandering of any of
14 the 5,000 or 10,000 maps that were drawn allegedly in a
11:07:04 15 non-partisan way. It's a serious allegation. However,
16 the Respondents' experts paint an entirely different
17 picture. I've decided that a hearing will be necessary
18 to be conducted to determine where the truth lies between
19 the Petitioners' experts and the Respondents' experts.

11:07:29 20 Until I have heard this testimony I'm not in a position
21 to know whether or not to strike down these maps or
22 uphold these maps. I'm not inclined at this point in
23 time to void the maps simply because the IRC failed to
24 submit a second map. I do not intend at this time to
11:07:53 25 suspend the election process for the following reasons;

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1 Petitioners have an extremely high level of proof to be
2 able to prove that the Respondents acted in an
3 unconstitutional way in creating the Congressional and
4 Senate maps. That proof is beyond a reasonable doubt
11:08:19 5 with the Respondents enjoying a presumption of
6 constitutionality. Two; even if I find the maps violated
7 the Constitution and must be redrawn, it is highly
8 unlikely that a new viable map could be drawn and be in
9 place within a few weeks or even a couple of months,
11:08:44 10 therefore striking these maps would more likely than not
11 leave New York State without any duly elected
12 Congressional delegates. I believe the more prudent
13 course would appear to be to permit the current election
14 process to proceed and then if necessary to require new
11:09:05 15 elections next year if the new maps need to be drawn.
16 I'm not ruling on the Petitioners' procedural argument
17 today. I believe I'm not going to make any rulings on
18 anything until the discovery is done. And I know it's a
19 very short time period for discovery, but we're all under
11:09:35 20 the gun. As I said before, the answer to the amended
21 petition is going to be due by March 10th. Expert
22 testimony is to start on March 14th, and whatever other
23 testimony you wish to present. I'm unavailable
24 March 21st through the 28th and my decision is due by
11:10:03 25 April 4th. Naturally I reserve the right to make a

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1 decision on what I have before me at the time. I think
2 everybody here would love to have a lot more time to
3 pursue this and go through extensive discovery and trial,
4 but we're faced with the fact that we're under a
11:10:30 5 deadline. Any future court hearings here will be also
6 simulcast using the same link and the same password just
7 so everyone knows, so we don't get a multitude of calls
8 about whether there's still the same link or a different
9 link. Is there anything else that needs to be discussed
11:10:55 10 today?

11 MR. BUCKI: Your Honor, if I may just clarify?
12 So then is it true what I'm hearing that testimony from
13 experts is scheduled to commence here on Monday,
14 March 14th?

11:11:08 15 THE COURT: Yes, at 9:30.

16 MR. BUCKI: 9:30 a.m.?

17 THE COURT: And in my mind I'm not telling you
18 how to present your case, but I'd like to hear your main
19 experts. That's important to me. You call it the way
11:11:24 20 you see it, and I don't know if discovery will yield
21 anything or not. We really don't know.

22 MR. BUCKI: So to clarify further, Your Honor,
23 not withstanding what may happen on appeal with respect
24 to the discovery order, the testimony from experts will
11:11:42 25 regardless commence on March 14th no matter what?

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1 THE COURT: Yes.

2 MR. BUCKI: Thank you.

3 THE COURT: Mr. Bucki raised a very good point
4 when he was standing at the podium that, you know and I
11:11:55 5 envision that one side or the other would appeal and
6 they're saying they're going to appeal my decision on the
7 discovery issue which may put a stay on everything here.
8 So I mean I'll leave it to the parties to discuss how you
9 want to deal with that. All I can tell you is my
11:12:14 10 decision is by law due by April 4th, and that's where we
11 are. I'll upload a decision on the discovery issue
12 today, and I'll see everyone on the 14th. Thank you.
13 Certified to be a true and accurate transcript.

14 
15 Laura Bliss Power
11:12:26 16
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**AFFIRMATION OF ERIC HECKER, ESQ., FOR RESPONDENTS SENATE MAJORITY
LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-
COUSINS AND THE NEW YORK STATE SENATE MAJORITY'S APPOINTEES TO THE
NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND
REAPPORTIONMENT, IN OPPOSITION TO PETITIONERS' SUPPLEMENTAL BRIEF
ADDRESSING REMEDIES IN OPPOSITION TO PETITIONERS' ORDER TO SHOW
CAUSE WHY PETITIONERS SHOULD BE GRANTED LEAVE TO SUBMIT
SUPPLEMENTAL BRIEFING ON THE TIMING OF REMEDY, DATED MARCH 21, 2022
[2302 - 2311]**

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

-----X

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,

Steuben County Index
No. E2022-0116CV

Motion Sequence No. 9

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.

-----X

**AFFIRMATION OF ERIC HECKER, ESQ. IN OPPOSITION TO
PETITIONERS' "SUPPLEMENTAL BRIEF ADDRESSING REMEDIES"**

ERIC HECKER, ESQ., hereby affirms under penalty of perjury that the following is
true and correct:

1. I am an attorney duly licensed to practice law in New York State, and a member
of Cuti Hecker Wang LLP, counsel for Respondents Senate Majority Leader and President *Pro
Tempore* of the Senate Andrea Stewart-Cousins and the New York State Senate Majority's
appointees to the New York State Legislative Task Force on Demographic Research and

Reapportionment (collectively, the “Senate Respondents”). I submit this Affirmation in opposition to Petitioners’ “Supplemental Brief Addressing Remedies” dated March 18, 2022. (Dkt. No. 232).

2. Petitioners invite this Court to upset New York’s statutory 2022 election calendar with a stroke of the judicial pen, even though the 2022 election process is already underway. But in pressing for this extraordinary relief, Petitioners fail to acknowledge three critical facts: (1) that any order by this Court finding any infirmities in the congressional and/or Senate plans will be stayed pending appellate review; (2) that if and when an appellate court were to finally decide that there were any infirmities in the congressional and/or Senate plans, the next step would be for the Legislature to be afforded the opportunity to address and correct any such infirmities; and (3) that any order by this Court directing the Board of Elections to stay or delay statutory election dates would itself be stayed pending appellate review. As discussed below, especially taking these three critical facts into account, it is clear that this Court must reject Petitioners’ invitation to upset the 2022 election calendar.¹

3. With respect to the first critical fact that Petitioners fail to mention, there is no doubt that any order by this Court finding any infirmities in the congressional and/or Senate plans would be stayed pending appellate review. Every single New York redistricting challenge

¹ Petitioners’ submission also addresses whether it would be constitutional for the Court to order a special election in 2023. No party has proposed such a remedy at any point in this proceeding.

since 1892 has ultimately been decided by the Court of Appeals,² and there is no basis to doubt that the appellate courts in this case would afford similarly thorough review to any order by this Court finding any aspect of either plan unconstitutional beyond reasonable doubt. Once Respondents file a notice of appeal from any potential order directing the Legislature to redraw any part of any redistricting plan, any such order would be automatically stayed pursuant to CPLR § 5519(a)(1). We do not know whether the ensuing appellate review of any such order (most likely in both the Fourth Department and then in the Court of Appeals) will take days, weeks, or months, but months would appear to be more likely than days or even weeks.

4. With respect to the second critical fact that Petitioners never mention, they ignore that article III, § 5 of the New York Constitution expressly requires that “[i]n the event that a court finds . . . a violation,” the Legislature “shall have a full and reasonable opportunity to correct the law’s legal infirmities.” We do not know when any such process might begin, assuming it ever does – it would begin only after any order finding any infirmity were to become final after all appeals have been exhausted – but courts typically give legislatures thirty days to correct infirmities in a redistricting plan. Whenever one supposes the Fourth Department and the Court of Appeals may complete review of whatever judgment this Court may issue on the merits of this case, the Legislature will then be afforded a reasonable amount of time to make any corrections to the congressional and/or Senate plans that may be deemed necessary.

² See *Carter v. Rice*, 135 N.Y. 473 (1892); *In re Sherill*, 188 N.Y. 185 (1907); *In re Reynolds*, 202 N.Y. 430 (1911); *Burns v. Flynn*, 268 N.Y. 601 (1935); *In re Fay*, 291 N.Y. 198 (1943); *Matter of Orans*, 17A N.Y.2d 7 (1966); *Schneider v. Rockefeller*, 31 N.Y.2d 420 (1972); *Bay Ridge Cmty. Council, Inc. v. Carey*, 103 A.D.2d 280 (2d Dep’t 1984), *aff’d*, 66 N.Y.2d 657 (1985); *Wolpczf v. Cuomo*, 80 N.Y.2d 70 (1992); *Cohen v. Cuomo*, 19 N.Y.3d 196 (2012).

5. After accounting for these two critical facts, the question presented, properly framed, is as follows: given the practical reality that it is going to be at least weeks and likely months before any order striking down any part of either plan becomes final after ensuing appeals, and given that the next step after that would be for the Legislature to enact a replacement plan or plans responding to any such final appellate order, would it be appropriate for this Court to issue an order at this juncture upsetting the statutory 2022 election calendar?

6. The answer to that question is plainly no. The statutory designating petitioning period started three weeks ago. Candidates have been collecting designating petition signatures for weeks in the districts drawn by the enacted plans. Were an appellate court to order in the future that the process start over under new lines, candidates who already have expended scarce campaign resources collecting signatures would have to revisit that process to their detriment.

7. Moreover, Petitioners' casual suggestion that this Court set a new primary date in August ignores a host of practical considerations and the fact that such a change would conflict with a controlling federal court order. The federal Uniformed Overseas Citizens Absentee Voting Act of 1986 ("UOCAVA") requires that ballots be transmitted to overseas military personnel no later than 45 days before a federal election. 52 U.S.C. § 20302(a) (formerly 42 U.S.C. §§ 1973ff(1)-(7), as amended by Pub. L. No. 111-84, subtitle H, 575-589, 123 Stat. 2190, 2318-2335 (2009)). To comply with this requirement in advance of the current June primary election, ballots must be finalized and transmitted to overseas military personnel on or before May 14, 2022. In 2012, United States District Judge Sharpe of the Northern District of New York entered a permanent injunction setting New York's federal primary to occur on the fourth Tuesday in June to permit compliance with the 45-day UOCAVA requirement. *United States v.*

State of New York, No. 10 Civ. 1214 (GLS)(RFT), 2012 WL 254263, at *2 (N.D.N.Y. Jan. 27, 2012). Any attempt to alter the June primary date would risk violating federal law and, at a minimum, would require approval by Judge Sharpe in the Northern District of New York before the change could take effect. U.S. Const., art. VI, cl. 2.

8. This Court has made clear that it understands the realities of the political calendar. During the hearing on March 3, 2022, the Court stated that it “d[id] not intend . . . to suspend the election process” in 2022, explaining that “even if I find the maps violated the Constitution and must be redrawn, it is highly unlikely that a new viable map could be drawn and be in place within a few weeks or even a couple of months.” Tr. at 69-70. “[S]triking these maps,” the Court continued, “would more likely than not leave New York State without any duly elected Congressional delegates.” *Id.* at 70. The Court therefore concluded that “I believe the more prudent course would appear to be to permit the current election process to proceed.” *Id.*³

9. The Court’s eminently reasonable decision is consistent with – and indeed compelled by – legions of state court cases that have held, time and again, that it would be improper for a court to sow confusion and otherwise impermissibly threaten orderly election

³ CPLR 2221(d)-(e) provide that a motion for leave to renew or reargue must be identified specifically as such and must, in the case of a motion to reargue, “be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion,” or in the case of a motion to renew, “be based upon new facts not offered on the prior motion that would change the prior determination” or “demonstrate that there has been a change in the law that would change the prior determination.” *See Quinn-Jacobs v. Moquin*, 201 A.D.3d 1330, 1331 (4th Dep’t 2022); *Ives Hill Country Club, Inc. v. City of Watertown*, 185 A.D.3d 1494, 1497 (4th Dep’t 2020); *Boreanaz v. Facer-Kreidler*, 2 A.D.3d 1481, 1482 (4th Dep’t 2003). Petitioners have improperly failed to identify their brief as a motion to renew or reargue, and they further fail to identify any new facts or changes in the law that would justify asking this Court to revisit its March 3, 2022 on-the-record decision declining to enjoin the 2022 election calendar.

processes, including by interfering with a statutory election calendar, after the election process already has begun. *See In re Khanoyan*, 65 Tex. Sup. Ct. J. 207, 2022 WL 58537 (Jan. 6, 2022) (denying challenge to redistricting for 2022 election because of the timing of the election and nature of the relief sought); *Alliance for Retired Americans v. Secretary of State*, 240 A.3d 45, 54 (Me. 2020) (denying injunctive relief and holding that court should not alter rules on eve of election); *Singh v. Murphy*, Doc. No. A-0323-20T4, 2020 WL 6154223, at *14-15 (N.J. App. Div. 2020) (same); *League of United Latin American Citizens of Iowa v. Pate*, 950 N.W.2d 204, 216 (Iowa 2020) (same); *In re Hotze*, 627 S.W.3d 642, 645-46 (Tex. 2020) (same); *Ohio Democratic Party v. LaRose*, 159 N.E.3d 852, 879 (Ohio 2020) (reversing lower court's grant of injunction shortly before the election and stating that altering the rules close to the election would "fuel distrust in the integrity of the election process"); *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 387 (Fl. 2015) (noting that after lower court found redistricting plan unconstitutional and approved the Legislature's remedial plan, it nevertheless ordered the upcoming 2014 election "to proceed under the unconstitutional 2012 plan due to time constraints"); *Dean v. Jepsen*, 51 Conn. L. Rptr. 111, 2010 WL 4723433, at *7 (Conn. Super. Ct. Nov. 3, 2010) (denying injunctive relief and noting that "by filing her action so close to the election, the plaintiff risks injecting impermissible confusion and disruption in the electoral process"); *Chicago Bar Ass'n v. White*, 386 Ill. App. 3d 955, 961 (2008) ("[W]e agree[] that there are too many obstacles at this late date to alter the method of voting," noting that late changes would "result in voter confusion," and "[a]s an election draws closer, that risk will increase") (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006)); *Quinn v. Cuomo*, 69 Misc. 3d 171, 177-78 (N.Y. Sup. Ct. Queens Cnty. 2020) (refusing to grant injunction where election date

was five weeks away, noting that late-stage reinstatement of special election could lead to “great expense” and “voter confusion” which “in itself, is violative of the very intent and purpose of the Election Law”).

10. New York courts have likewise made clear in the reapportionment context that even when a plan is unconstitutional, a fast-approaching election should nevertheless proceed under the plan, and a new, constitutionally compliant plan should be enacted for future elections. *See Honig v. Bd. of Sup’rs of Rensselaer Cnty.*, 31 A.D.2d 989, 989 (3d Dep’t 1969), *aff’d*, 24 N.Y.2d 861 (1969) (ordering election to proceed under unconstitutional plan given “the imminence of the spring primary election, the first day for signing designating petitions being but three weeks away,” and finding that “if employed as a temporary measure, the plan before us, having been adopted by the representative body, is preferable” to any alternative options at that late stage); *Duquette v. Bd. of Sup’rs of Franklin Cnty.*, 32 A.D.2d 706 (3d Dep’t 1969) (applying same principle); *Pokorny v. Bd. of Sup’rs of Chenango Cnty.*, 59 Misc. 2d 929, 934 (Sup. Ct. Chenango Cnty. 1969) (same); *see also Abate v. Mundt*, 33 A.D.2d 660, 663 (2d Dep’t), *aff’d*, 25 N.Y.2d 309 (1969), *aff’d*, 403 U.S. 182 (1971) (though reapportionment plan was held constitutional, even the dissenting judges in the Second Department and Court of Appeals held that the election should proceed under what they found to be an unconstitutional plan given time exigencies).

11. Courts have repeatedly refused to implement the extreme remedy of enjoining election deadlines. *See Burns v. Flynn*, 155 Misc. 742, 744 (N.Y. Sup. Ct. Albany Cnty. 1935), *aff’d*, 245 A.D. 79 (3d Dep’t 1935), *aff’d*, 268 N.Y. 601 (1935) (refusing to enjoin election even though legislators had entirely failed to reapportion, to avoid violating the rights of voters);

Khanoyan, 65 Tex. Sup. Ct. J. 207, 2022 WL 58537, at *5 (noting that delaying the election would be “an extremely disruptive and fraught judicial imposition”); *see also Honig*, 31 A.D.2d at 989 (election proceeded despite unconstitutional reapportionment plan; remedy was ordered for future elections); *Duquette*, 32 A.D.2d at 706 (same); *Pokorny*, 59 Misc. 2d at 934 (same).⁴

12. Especially in light of this overwhelming authority, there is no basis for this Court to revisit its prior on-the-record conclusion that it would be inappropriate for the Court to enjoin and judicially tinker with the complex set of past and future statutory dates that candidates are relying on as we speak. Indeed, the case for declining Petitioners’ invitation to do so grows stronger with each passing day.

13. This brings us to the third critical fact that Petitioners omit: that any order by this Court directing the Board of Elections to stay or delay statutory election dates would itself be stayed pursuant to CPLR § 5519(a)(1) pending appellate review. The Court has not even ruled on the merits of this case yet, and Petitioners have not come close to meeting their burden of proving that either plan is unconstitutional beyond reasonable doubt. But if the Court disagrees and strikes down any aspect of either plan, and if the Court then goes even further and reverses its March 3, 2022 decision and orders the Board of Elections to alter the statutory election

⁴ Petitioners’ citations to other states’ cases do not support the remedy they ask this Court to order. Indeed, they do not cite a single case in which a trial court, as opposed to a state’s highest court, has moved the date of a primary election. The only authority Petitioners provide in which a state trial court moved *any* deadline is *Legislative Research Commission v. Fischer*, No. 2012-SC-000091 (Ky. Apr. 26, 2012), and there the trial judge only extended the filing deadline for candidates by ten days. For the reasons stated, by the time any appeals will be concluded and, if necessary, the Legislature is given the opportunity to address any infirmities, a far more dramatic extension would be required here.

calendar, then Respondents' ensuing notices of appeal would stay any such order pending appellate review. It is therefore difficult to understand the point of the current debate.

14. There is no doubt that this Court is playing a critical role in this process, including by making a wide range of preliminary rulings in this special proceeding and including especially by determining in the first instance which side has prevailed on the merits. Once the Court makes that decision, the next step will be for the Fourth Department and then most likely the Court of Appeals to determine if this Court got it right. Once that process has concluded, there may or may not be the need to address infirmities in one or both plans, and if there is, only the Legislature may do that in the first instance. Once the Legislature has corrected any infirmities, if any, that may need to be addressed, then this Court may be tasked with evaluating the sufficiency of any such remedial steps taken by the Legislature, and whatever this Court may decide at that juncture may also be appealed. There is no doubt that if this Court rules for Petitioners, the road ahead will take months to complete. There is no basis to think it will be practicable to draw new congressional or Senate lines in time to prepare for and hold the 2022 primary, and there certainly is no basis for the Court to purport to upset the 2022 election calendar right now.

15. I affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

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Dated: March 21, 2022
New York, New York

/s/ Eric Hecker

Eric Hecker, Esq.
CUTI HECKER WANG LLP
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*Attorneys for Respondent Senate
Majority Leader Andrea Stewart-Cousins
and the New York State Senate Majority's
appointees to the New York State Legislative
Task Force on Demographic Research and
Reapportionment*

AFFIRMATION OF HEATHER L. MCKAY, FOR RESPONDENTS GOVERNOR KATHY HOCHUL AND LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, IN OPPOSITION TO ORDER TO SHOW CAUSE WHY PETITIONERS SHOULD BE GRANTED LEAVE TO SUBMIT SUPPLEMENTAL BRIEFING ON THE TIMING OF REMEDY, DATED MARCH 21, 2022 [2312 - 2314]

FILED: STEUBEN COUNTY CLERK 03/21/2022 03:56 PM

NYSCEF DOC. NO. 235

INDEX NO. E2022-0116CV

RECEIVED NYSCEF: 03/21/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

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
VOLANTE,

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.

AFFIRMATION

Index No. E2022-0116CV

McAllister, J.S.C.

HEATHER L. MCKAY, an attorney duly licensed to practice law in the courts of the State of New York, affirms as follows under penalty of perjury:

1. I am an Assistant Attorney General in the Office of LETITIA JAMES, Attorney General of the State of New York, and am fully familiar with this case based upon personal knowledge and review of the file. On behalf of the respondents, Kathy Hochul, Governor of the State of New York, and Brian A. Benjamin, Lieutenant Governor and President of the Senate (collectively, "Executive Respondents"), I make this affirmation in opposition to Petitioners' Supplemental Brief Addressing Remedies, filed on March 18, 2022. NYSCEF 232.

2. Attached hereto and made a part hereof as **Exhibit A** is the Affidavit of Thomas Connolly, the Director of Operations of the New York State Board of Elections, sworn to March 21, 2022.

FILED: STEUBEN COUNTY CLERK 03/21/2022 03:56 PM

NYSCEF DOC. NO. 235

INDEX NO. E2022-0116CV

RECEIVED NYSCEF: 03/21/2022

3. I did not draft, edit, or dictate Director Connolly's affidavit. After receiving it, I determined using word count software that it consists of 2,203 words, excluding the caption, signature block, and notary stamp, in accordance with Rule 202.8-b of the Uniform Rules of Supreme and County Courts. *See Exhibit A.*

4. As explained in **Exhibit A** and the accompanying Memorandum of Law, the Executive Respondents respectfully submit that Petitioners' request "that this Court grant Petitioners' Requested Timing And Scope Of Remedy" should be denied in its entirety.

DATED: Rochester, New York
March 21, 2022

LETITIA JAMES
Attorney General
State of New York
Attorney for Executive Respondents

/s/ Heather L. McKay
HEATHER L. MCKAY
Assistant Attorney General
144 Exchange Blvd., Suite 200
Rochester, New York 14614
Telephone: (585) 546-7430
Heather.mckay@ag.ny.gov

To: All parties of record
(Via NYSCEF)

FILED: STEUBEN COUNTY CLERK 03/21/2022 03:56 PM

NYSCEF DOC. NO. 235

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RECEIVED NYSCEF: 03/21/2022

CERTIFICATION

In accordance with Rule 202.8-b of the Uniform Rules of Supreme and County Courts, the undersigned certifies that the word count in this Affirmation of Heather McKay (excluding the caption, signature block, and this certification), as established using the word count on the word-processing system used to prepare it, is 230 words.

Dated: March 21, 2022
Rochester, NY

/s Heather L. McKay
By: Heather L. McKay
Assistant Attorney General

**EXHIBIT A TO MCKAY AFFIRMATION -
AFFIDAVIT OF THOMAS CONNOLLY,
SWORN TO MARCH 21, 2022 [2315 - 2325]**

FILED: STEUBEN COUNTY CLERK 03/21/2022 03:56 PM

NYSCEF DOC. NO. 236

INDEX NO. E2022-0116CV

RECEIVED NYSCEF: 03/21/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

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.

THOMAS CONNOLLY, being duly sworn, says under penalties of perjury
as follows:

1. I serve as Director of Operations for the New York State Board of
Elections ("State Board"). I have held this position since 2017. From 2011 to
2017, I was Deputy Director of the Public Information Office at the State Board of
Elections. In my previous position I worked with the State Board Counsel's Office

to monitor the transmission of military ballots within the federally mandated time periods and as such am intimately familiar with that transmission system and process. In my current capacity, the Operations Unit of the New York State Board of Elections supports and provides guidance to county boards of elections and the commissioners of each county board of elections pertaining to the administration of elections. Accordingly, I am familiar with state requirements and county board of elections' practices regarding redistricting, election procedures, election district creation, ballot creation, absentee voting, poll sites and poll worker training and assignment. I am fully familiar with the facts and circumstances set forth herein. This affidavit is based on my personal knowledge.

2. I make this affidavit to describe the disruption to the electoral process that would result from altering Congressional or State Senatorial district lines in 2022 for the primary and general election in 2022. The New York State Board of Elections has taken no position in this litigation, so my affidavit is my own and is not made in a representative capacity for the agency.

Ballot Access Is Underway

3. The district boundaries for the offices of Member of United States House of Representatives and New York State Senator ("Legislative Offices") for the primary on June 28, 2022 and general election on November 8, 2022 were

enacted into law on February 3, 2022 as Chapters 13 through 16 of the Laws of 2022.

4. Pursuant to New York's Election Law candidates seeking the nomination of the Democratic, Republican, Conservative and Working Families parties for Legislative Offices obtain access to the primary ballot and ultimately the general election ballot by first filing designating petitions. A valid Congressional designating petition requires 1,250 signatures from enrolled members of the relevant party from the district or the number of signatures that is at least 5% of the enrollees in the district, whichever is less. A State Senate petition requires 1,000 such valid signatures or the signatures of 5% of the party enrollment in the district, whichever is less (Election Law § 6-136).

5. Designating petitioning for statewide offices (Governor, Attorney General, Comptroller) and the Legislative Offices at issue in this proceeding along with many other state and local offices began on March 1, 2022 as provided for in Election Law § 6-134 (4). As of March 1, 2022, parties had endorsed candidates, candidates had printed designating petitions and campaigns had mobilized volunteers and/or paid workers to solicit for signatures.

6. As of Monday March 21, 2022 more than half of the designating petitioning period has elapsed, with only two weeks and two days remaining until the last day to file designating petitions on Thursday April 7, 2022.

7. If the court were to order a halt to the designating process now, it would cause substantial disruption to candidates, political parties and boards of elections. The logistical difficulties would be magnified by the fact that any such order would assuredly be appealed creating a further period of uncertainty.

The Political Calendar

8. As provided by New York law applicable to the June 28, 2022 primary, there are 82 days between the last day to file designating petitions on April 7, 2022 and the date of the June 28, 2022 primary. The latest objections to petitions can be filed is on or about April 11 and specifications and hearings at the state or local boards of elections rapidly to follow. The last day to commence a court challenge to a designating petition is April 21, 2022. The primary election ballot pursuant to Election Law 4-110 *et seq.* must be certified by May 4, 2022, allowing time for boards to then print ballots and begin distribution of absentee ballots. Military and overseas ballots pursuant to law must be sent no later than May 13, 2022. See New York State Political Calendar, <https://www.elections.ny.gov/NYSBOE/law/2022PoliticalCalendar.pdf>.

9. Under ideal circumstances it is difficult for boards of elections to settle the ballot in time for the certification deadline and the military and overseas ballot transmittal deadlines. If the court ordered new district lines to be applicable this year, assuming boards would need multiple weeks to make adjustments to lines and assuming ballot access processes would need to start over again on the new lines (the petition period is typically 37 days and the post-petition review and litigation process takes about a month beyond that), there is no imaginable scenario where the primary could occur on June 28, 2022 for the Legislative Offices as provided for in current law.

10. No planning has been made for any added or alternative primary date. A new, additional primary would require finding poll sites available on the new date as well as early voting sites that would be available for nine days in the lead up to the election and scheduling thousands of poll workers for the postponed or additional primary. If a new additional primary were ordered, boards of elections would need to prepare simultaneously to provide for new ballot access for a new primary, run the June 28, 2022 primary for the state and local offices not impacted by this proceeding and prepare for the running of an additional primary that may not occur depending on the disposition of this case as well as any appeals.

11. While New York had held a federal primary in June pursuant to a federal court order and a separate state and local primary in September for four

federal election cycles prior to and including 2018, New York did not hold two primaries in the same year with intervening redistricting between the dates of the two primaries being necessary. The federal court order giving rise to the bifurcated primary schedule in New York in 2012 was issued in January 2012 before any ballot access procedures had even begun.

12. In 2012, the congressional, state senate and assembly lines were in place by mid-March. Any remedy in this case involving new lines would not be known until much later and would actually stop ballot access procedures already underway for some offices and not others.

13. The majority of the current voter registration systems used by county boards are simply incapable of maintaining multiple sets of the same district, further complicating any effort to prepare for an additional primary.

14. Under normal circumstances, in the context of a special election for Congress, Public Officer's Law § 42 recognizes that a single congressional special election requires at least seventy days lead time and preferably eighty days from the day of the proclamation of the election to have a primary that complies with federal law requirements related to transmission of overseas and military ballot. This timeframe is for a special election reflects only one contest on the ballot and party ballot access is not by petition (a document with hundreds of signatures

subject to objection) but instead by a streamlined party committee nomination (essentially a single document wherein the party notifies the board of elections as to the identity of the candidate), *and* in the special election context the district lines are already established. In contrast a multi-office primary with ballot access by petitions subject to challenge is far more complicated, and alteration of district office lines and election district lines would take additional time (likely weeks) before the actual ballot access process for a new primary could even begin again.

Redistricting Process for Boards of Elections

15. New York is not a top-down state in terms of its voter registration system. Accordingly, each of New York's 58 boards of elections (one board of elections for the City of New York and one for each county outside of the City of New York) is responsible for applying new district lines in their jurisdiction to their voter records and then sending to the statewide voter registration list (NYSVoter) the updated official voter records.

16. When the new lines became effective on February 3, 2022, New York's boards of elections turned their full attention to translating the new district boundaries into their voter registration systems so that New York's 12,982, 819 voters would be assigned to their correct districts. This is necessary to create poll books for elections, allow voters to receive the correct absentee ballots and to

provide data for candidates to create lists of voters from whom to seek petition signatures and to determine the correct number of designating petition signatures required for various offices. This work was largely but not completely done by March 1, 2022.

17. Upon receiving the shapefiles for the new Legislative Office districts, many boards of elections required roughly a month to prepare the local and state registration system for the beginning of petitioning. And in the time since, various latent errors and problems have arisen. Redoing any portion of redistricting introduces the risk of new errors, and the closer to an election event the changes must be made the less likely the problems are to be found and remedied without a disenfranchising impact.

Election Districts

18. For boards of elections, redistricting involves not simply reassigning millions of voter records to the appropriate new political geography, it often involves drawing new election district boundaries before that can occur. Election Districts are drawn by New York's 58 boards of elections.

19. The election district is the foundational unit of political geography that defines a voter's ballot (every general voter in an election district has the same ballot). Each election district is assigned to a poll site, which may have one or

more election districts. There are 15,587 election districts in New York, as of 2021 assigned to 5,354 poll sites managed by New York's 58 boards of elections. Redrawing election districts to reflect redistricting is a significant undertaking.

20. When a larger political subdivision boundary change bisects an existing election district, the election district must be redrawn before voter records can be finally updated. For every bisected election district impacted by redistricting, at least one other adjacent election districts necessarily must also be adjusted or a new additional election district must be designated. This micro-redistricting task of drawing election districts requires considerations of available polling locations, map analysis and consideration of other practicalities related to how voters are impacted.

21. Further, because New York's political parties are comprised of party committees whose representatives are elected from election districts, changes in election districts impact party committees. In many counties petitions are being circulated for member of county committees from election districts. If new Legislative District lines were to be drawn for 2022 some unknown number of election districts will need to be redrawn for the reasons described herein and those election district changes will nullify petitions being circulated for the impacted party positions of member of county committee.

22. Given that so many election related processes depend on the definition of election districts (election district definition defines ballots, defines where a voter votes and defines how party committees are constituted), the normal statutory deadline for altering election district boundaries is one of the earliest deadlines in the unfolding of the political process. Election district changes are required to be made by February 15 of any given year, with certain exceptions. And the last date for local boards to assign poll sites was March 15, 2022. See Election Law § 4-104.

Technical Issues

23. Making changes to the underlying architecture of the voter registration systems of the counties after the election process is underway (as it is now) could impair ballot access and voter registration and absentee ballot assignment functions (absentee voters are applying and being assigned to election districts already). If new lines were ordered at this juncture, it is simply not clear how compliance would be possible without significant risk to the integrity of the electoral process.

Voter and Candidate Confusion

24. Newly registered voters and transferred voters are receiving informational notifications required by law that state their election district and

other district designations and their polling locations. This information will prove false in many instances if a remedy is ordered this year involving altered district lines or a new election.

25. Imminently, as required by Election Law § 4-117, boards of elections will be sending **all** of New York's 11,905,886 active voters an annual informational mailing informing them of their poll site, the primary date and their political geography. A change to district boundaries would create significant voter confusion potentially even requiring these notices to be reissued.

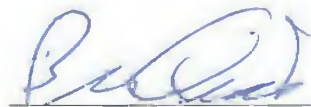
26. At this point hundreds of candidates have engaged in petitioning based on the new lines, created campaign committees and expended funds to seek office based on the new lines.

27. Stopping the ballot access process and restarting it on revised as yet unknown lines and adding an additional primary will cause confusion as well as financial, logistical and administrative burdens on boards of elections.

Dated: March 21, 2022


THOMAS CONNOLLY

*Sworn to before me this
21st day of March 2022*



Notary Public
BRIAN L. QUAIL, Esq.
Notary Public, State of New York
No. 02QU6071886
Qualified in Schenectady County
Commission Expires 8/15/23

**AFFIDAVIT OF TODD D. VALENTINE, CO-EXECUTIVE DIRECTOR OF THE NEW YORK
STATE BOARD OF ELECTIONS, SWORN TO MARCH 22, 2022 [2326 - 2329]**

FILED: STEUBEN COUNTY CLERK 03/22/2022 03:28 PM

NYSCEF DOC. NO. 239

INDEX NO. E2022-0116CV

RECEIVED NYSCEF: 03/22/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

-----X

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

**AFFIDAVIT OF TODD D.
VALENTINE**

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.

-----X

TODD D. VALENTINE, being duly sworn, says under penalty of perjury as follows:

1. I serve as Co-Executive Director for the New York State Board of Elections ("State Board"). I have held this position since 2008. From 1997 to 2008, I was Special Counsel at the State Board of Elections. I am familiar with state requirements and county board of elections' practices regarding redistricting, election procedures, election district creation, ballot creation, absentee voting, poll sites and poll worker training and assignment. I am fully familiar with the facts and circumstances set forth herein.

2. I make this affidavit in my personal capacity and based upon my extensive election experience to describe the ability for the county boards to run a court ordered primary election for

Congressional or State Senatorial district lines in 2022, and to respond to the affidavit of Thomas Connolly, submitted by Respondents on March 21, 2022, *see* NYSCEF No. 236, and if called to testify under oath, I could and would testify to the following facts.

Ballot Access Is Underway

3. The district boundaries for the offices of Members of the United States House of Representatives and New York State Senator (“Legislative Offices”) for the primary on June 28, 2022, and general election on November 8, 2022, were enacted into law on February 3, 2022, as Chapters 13 through 16 of the Laws of 2022.

4. While ballot access for the current 2022 lines is underway, as recently as 2020 executive orders have altered the process at the eleventh hour to address exigent circumstances, then due to a global pandemic. For instance, petition time periods and signature requirements were reduced by executive order of the governor during the recent pandemic.

5. Candidates adjusted to such changes in the past for prior redistricting changes due to court orders, and there is no real reason candidates and election officials cannot be similarly responsive to necessary changes in response to this Court’s remedial decisions.

Redistricting Process For Boards Of Elections

6. With a court order to change the congressional and senate districts lines, New York’s 58 boards of elections will have sufficient time to apply new district lines in their jurisdiction to their voter records.

7. When the new lines became effective on February 3, 2022, New York’s boards of elections turned their full attention to translating the new district boundaries into their voter registration systems. This work was largely but not completely done by March 1, 2022, showing that this process can be completed in less than a month’s time.

The Political Calendar And Change In Primary Dates

8. For a court-ordered August 23, 2022, Congressional and State Senate primary, the ballot access process could be adjusted to be completed no later than June 2, 2022, and the primary held August 23, 2022, this would provide the same 82 days that currently exist in under law for June 28, 2022 primary. This would allow time for the boards to certify the primary ballot and send any military and overseas ballots by July 8, 2022.

9. This would occur while county boards are running the June 28, 2022 primary. Since most ballot access is done at the State Board level for congressional and state senate offices impact on county boards would be minimized.

10. Indeed, although Mr. Connolly contends that “New York is not a top-down state in terms of its voter registration system,” NYSCEF No. 236 ¶ 15, that is largely irrelevant in terms of the election administration issues that would apply to moving back the 2022 primary to accommodate new maps ordered by this Court.

11. County boards would have time to plan for any added or alternative primary date. In some instances, a new, additional primary would require finding poll sites available on the new date as well as early voting sites that would be available for nine days in the lead up to the election and scheduling of poll workers to the additional primary, but county boards have ably made such changes in the recent past in response to court orders, and nothing would preclude them from doing so here.

12. As recently as 2018, New York had held a federal primary in June pursuant to a federal court order and a separate state primary in September for four election cycles.

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13. Moving a primary to August 23, 2022, would allow sufficient time for state and county boards to certify the election by September 15, 2022, and print and send out military and overseas ballots by the federally required 45th day before the general election, September 23, 2022.

14. A change in primary would afford the necessary time for county boards to run a second primary election this year. As noted above, this has been the State's practice until 2018.



TODD D. VALENTINE

Sworn before me
on this 22 day of March, 2022


NOTARY PUBLIC

BRENDAN M. LOVULLO
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01LO6168223
Qualified in Albany County
Commission Expires 6/11/20 23

LETTER FROM BENNET J. MOSKOWITZ, ESQ. AND MISHA TSEYTLIN, ESQ. TO
HONORABLE PATRICK F. MCALLISTER, DATED MARCH 28, 2022 [2330 - 2331]

FILED: STEUBEN COUNTY CLERK 03/28/2022 11:18 AM

NYSCEF DOC. NO. 240

Troutman Pepper Hamilton Sanders LLP
875 Third Avenue
New York, New York 10022

troutman.com

INDEX NO. E2022-0116CV

RECEIVED NYSCEF: 03/28/2022



Bennet J. Moskowitz
bennet.moskowitz@troutman.com

March 28, 2022

VIA NYSCEF

Honorable Patrick F. McAllister
Supreme Court, Steuben County
3 East Pulteney Square
Bath, New York 14810

Re: *Harkenrider, et al. v. Hochul, et al.*, Index No. E2022-0116CV (Sup. Ct. Steuben Cnty.)

Dear Justice McAllister:

We write pursuant to 22 NYCRR 202.8-c to provide the Court notice that on Friday, March 25, 2022, Senior Judge Lynne A. Battaglia of the Maryland Circuit Court for Anne Arundel County in *Szeliga, et al. v. Lamone, et al.*, Nos. C-02-CV-21-001816, C-02-CV-21-001773 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022) issued a memorandum opinion (attached as **Exhibit A** to this letter), together with a declaratory judgment (attached as **Exhibit B** to this letter).

Szeliga declared Maryland's 2021 Congressional Plan to be an unconstitutional partisan gerrymander, while relying upon general provisions in the Maryland Constitution that do not themselves refer explicitly to partisan gerrymandering. Ex. A at 94; Ex. B at 2–3. *Szeliga* also permanently enjoined the Map immediately, while giving the General Assembly less than a week—until March 30, 2022—to adopt a remedial map. Ex. A at 94; Ex. B at 3. *Szeliga* also gave “great weight to the testimony and evidence presented by and discussed by Sean Trende,” including his simulations, gerrymandering index and dotplot analysis. Ex. A at 59–68, 83.

FILED: STEUBEN COUNTY CLERK 03/28/2022 11:18 AM

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Honorable Patrick F. McAllister
March 28, 2022
Page 2

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Sincerely,

A handwritten signature in blue ink, appearing to read "Bennet J. Moskowitz".

Bennet J. Moskowitz

A handwritten signature in blue ink, appearing to read "Misha Tseytlin".

Misha Tseytlin

cc: All Counsel of Record (via NYSCEF)

**EXHIBIT A TO LETTER -
MEMORANDUM OPINION AND ORDER, IN SZELIGA, ET AL. V. LAMONE, ET AL.,
DATED MARCH 25, 2022 [2332 - 2425]**

FILED: STEUBEN COUNTY CLERK 03/28/2022 11:18 AM

NYSCEF DOC. NO. 240

INDEX NO. E2022-0116CV

E-FILED: Anne Arundel Circuit Court

RECEIVED NYSCEF: 03/28/2022

Docket: 3/25/2022 11:34 AM; Submission: 3/25/2022 11:34 AM

KATHRYN SZELIGA, et al.,	*	IN THE
<i>Plaintiffs</i>	*	CIRCUIT COURT
v.	*	FOR
LINDA LAMONE, et al.,	*	ANNE ARUNDEL COUNTY
<i>Defendants</i>	*	CASE NO.: C-02-CV-21-001816
* * * * *	*	* * * * *
NEIL PARROTT, et al.,	*	IN THE
<i>Plaintiffs</i>	*	CIRCUIT COURT
v.	*	FOR
LINDA LAMONE, et al.,	*	ANNE ARUNDEL COUNTY
<i>Defendants</i>	*	CASE NO.: C-02-CV-21-001773
* * * * *	*	* * * * *

MEMORANDUM OPINION AND ORDER

Introduction

Partisan gerrymandering refers to the drawing of districting lines to favor the political party in power, and “[p]artisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence.” *Rucho v. Common Cause*, — U.S. —, 139 S. Ct. 2484, 2499 (2019).¹ *Rucho* is pivotal for the discussion of why this trial court and, potentially, the Court of Appeals² are

¹ Gerrymandering based on race is not an issue in this case, so that statutes such as the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified, as amended, at 52 U.S.C. § 10101, *et seq.*), and cases solely addressing this conundrum are not implicated directly.

(continued . . .)

grappling with the issue of the constitutionality of the 2021 Congressional map, because the Supreme Court demurred in the case from addressing, on the basis of the “political question” doctrine, the lawfulness of partisan gerrymandering. *Id.* at —, 2506–07. Chief Justice Roberts, the author of *Rucho*, suggested, however, that, “[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.” *Id.* at —, 2507.

Background

Two consolidated cases in issue in the instant case are constitutional challenges to the Maryland Congressional Districting Plan enacted in 2021, hereinafter referred to as “the 2021 Plan.” In their Complaint, the 1773 Plaintiffs³ allege violations of Section 4 of Article III of the Maryland Constitution, which provides:

Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions[.]

(. . . continued)

² A direct appeal to the Court of Appeals is available pursuant to Section 12–203 of the Election Law Article, Maryland Code (2002, 2017 Repl. Vol.), which provides:

(a) *In general.* — A proceeding under this subtitle shall be conducted in accordance with the Maryland Rules, except that:

(1) the proceeding shall be heard and decided without a jury and as expeditiously as the circumstances require;

(2) on the request of a party or sua sponte, the chief administrative judge of the circuit court may assign the case to a three-judge panel of circuit court judges; and

(3) an appeal shall be taken directly to the Court of Appeals within 5 days of the date of the decision of the circuit court.

(b) *Expedited appeal.* — The Court of Appeals shall give priority to hear and decide an appeal brought under subsection (a)(3) of this section as expeditiously as the circumstances require.

³ The named Plaintiffs in the consolidated action, Case No. C-02-CV-21-001773, are Neil Parrott, Ray Serrano, Carol Swigar, Douglas Raaum, Ronald Shapiro, Deanna Mobley, Glen Glass, Allen Furth, Jeff Warner, Jim Nealis, Dr. Antonio Campbell, and Sallie Taylor; hereinafter “the 1773 Plaintiffs.” Standing of all of the Plaintiffs has been conceded by the State.

FILED: STEUBEN COUNTY CLERK 03/28/2022 11:18 AM

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RECEIVED NYSCEF: 03/28/2022

MD. CONST. art. III, § 4, as well as Article 7 of the Maryland Declaration of Rights, which declares:

That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

MD. CONST. DECL. OF RTS. art. 7. The 1816 Plaintiffs⁴ also allege violations of Article 7, but also add Article 24 of the Declaration of Rights, which provides:

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land[.]

MD. CONST. DECL. OF RTS. art. 24, as well as Article 40, which declares:

That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege[.]

MD. CONST. DECL. OF RTS. art. 40, and Section 7 of Article I of the Maryland Constitution, which provides:

The General Assembly shall pass Laws necessary for the preservation of the purity of Elections.

MD. CONST. art. I, § 7.

⁴ The named Plaintiffs in Case No. C-02-CV-21-001816 are Kathryn Szeliga, Christopher T. Adams, James Warner, Martin Lewis, Janet Moye Cornick, Rickey Agyekum, Maria Isabel Icaza, Luanne Ruddell, and Michelle Kordell; hereinafter “the 1816 Plaintiffs.” Standing of all of the Plaintiffs has been conceded by the State.

Defendants in both actions are Linda H. Lamone, the Maryland State Administrator of Elections; William G. Voelp, the Chairman of the Maryland State Board of Elections; and the Maryland State Board of Elections, which is identified as the administrative agency charged with “ensur[ing] compliance with the requirements of Maryland and federal election laws by all persons involved in the election process.”⁵

Case No. C-02-CV-21-001816

On December 23, 2021, the 1816 Plaintiffs filed their Complaint for Declaratory and Injunctive Relief. On January 20, 2022, the Democratic Congressional Campaign Committee (“DCCC”) filed a Motion to Intervene in the matter, along with its proposed Answer to the Plaintiffs’ Complaint. On February 2, 2022, the Defendants filed their Motion to Dismiss or, in the Alternative, for Summary Judgment.⁶ The Plaintiffs filed their Opposition to the DCCC’s Motion to Intervene on February 3, 2022 and subsequently filed their Opposition to the Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment, on February 11, 2022. In the meantime, the Defendants also filed their response to the DCCC’s Motion to Intervene. The Court heard argument on the Defendants’ Motion to Dismiss on February 16, 2022 and held the matter *sub curia*. Simultaneously, the Court issued its Memorandum Opinion and Order denying the DCCC’s Motion to Intervene.

Several days later, on February 22, 2022, the Court issued a Consolidation Order, which consolidated Case No. C-02-CV-21-001816 with another similar case, Case No. C-02-CV-

⁵ *About SBE*, THE STATE BD. OF ELECTIONS, <https://perma.cc/9GUT-X5KM> (last visited March 23, 2022).

⁶ It should be noted that the Defendants have asserted that both Case No. C-02-CV-21-001816 and Case No. C-02-CV-21-001773 are non-justiciable “political questions.” The Defendants, however, conceded that should the standards in Article III, Section 4 apply to Congressional redistricting, the matter is justiciable.

21001773, and identified Case No. C-02-CV-21-001816 as the “lead” case. On the same day, the Court denied three requests for special admission of out-of-state attorneys on behalf of the DCCC. On February 23, 2022, the Court ultimately issued its Order disposing of the Defendants’ Motion to Dismiss, or in the Alternative, for Summary Judgment, and dismissed Count II: Violation of Purity of Elections, with prejudice. The counts that remained included Counts I, III, and IV of the 1816 Complaint, which involved violations of Articles 7 (Free Elections), 24 (Equal Protection), and 40 (Freedom of Speech) of the Maryland Declaration of Rights, respectively. The 1816 Plaintiffs ask for a declaration that the 2021 Plan is unconstitutional under Articles 7, 24, and 40 of Maryland’s Declaration of Rights and Section 7 of Article I of the Maryland Constitution. Additionally, Plaintiffs seek to permanently enjoin the use of the 2021 Plan and ask for an order to postpone the filing deadline for candidates to declare their intention to compete in 2022 Congressional primary elections until a new district map is prepared.

Case No. C-02-CV-21-001773

On December 21, 2021, the 1773 Plaintiffs filed their Complaint for Declaratory and Other Relief Regarding the Redistricting of Maryland’s Congressional Districts. On January 20, 2022, the DCCC filed a Motion to Intervene in the matter, along with its proposed Motion to Dismiss the Plaintiffs’ Complaint. The Plaintiffs filed their Opposition to the DCCC’s Motion to Intervene on February 4, 2022. Subsequently, on February 11, 2022, the Plaintiffs filed their Opposition to the Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment, in related Case No. C-02-CV-21-001816. On February 15, 2022, the DCCC filed its Reply in Support of its Motion to Intervene. Several days later, on February 19, 2022, the Defendants filed a Motion to Dismiss the Complaint. The Plaintiffs filed their Opposition to the Motion to

Dismiss on February 20, 2022. On February 22, 2022, the Court issued a Consolidation Order (referenced above) and denied the DCCC's Motion to Intervene and the three requests for special admission of out-of-state attorneys on behalf of the DCCC. A hearing on the Defendants' Motion to Dismiss took place on February 23, 2022. Under this Court's February 23rd Order, which dismissed Count II of the 1816 Complaint, both counts in the 1773 Complaint remained.

The 1773 Plaintiffs ask for a declaration that the 2021 Plan is unlawful, as well as a permanent injunction against its use in Congressional elections. Additionally, the 1773 Plaintiffs ask the Court to order a new map be prepared before the 2022 Congressional primaries or, in the alternative, order that an alternative Congressional district map, which was prepared by the Governor's Maryland Citizens Redistricting Commission,⁷ be used for the 2022 Congressional elections.

The parties submitted proposed findings of fact prior to trial on March 11, 2022. Simultaneously, the 1816 and 1773 Plaintiffs submitted a Joint Motion in Limine as to exclude portions of testimony from Defendants' experts, Dr. Allan J. Lichtman and Mr. John T. Willis. During the first day of trial on March 15, 2022, the parties submitted Stipulations of Fact and the Court admitted the stipulations as Exhibit 1. The Court then placed, on the record, an agreement between the parties about relevant judicial admissions by the Defendants relative to the Defendants' Answer. On the last day of trial on March 18, 2022, the State submitted a stipulation

⁷ The Maryland Citizens Redistricting Commission was established by Governor Lawrence J. Hogan, Jr., in January of 2021. Exec. Order No. 01.01.2021.02 (Jan. 12, 2021). The Commission, pursuant to the Order, was tasked with preparing plans for the state's Congressional districts and its state legislative districts, which would be submitted by the Governor to the General Assembly. *Id.* The Commission submitted its Final Report to the Governor in January 2022. *Final Report of the Maryland Citizens Redistricting Commission*, MD. CITIZENS REDISTRICTING COMM'N (Jan. 2022), <https://perma.cc/UUX5-6J72>.

that the 2021 Plan did, in fact, pair Congressmen Andy Harris and Congressmen Kweisi Mfume in the same district – the Seventh Congressional District.⁸

With respect to the Plaintiffs’ Motion in Limine, which raised the issue of a *Daubert* challenge as well as alleged late disclosure by the Defendants’ experts as to various opinions, the trial judge heard argument during trial and ruled that the allegations regarding late disclosure were denied. With respect to the *Daubert* motion regarding the States’ expert witnesses, it was eventually withdrawn by the Plaintiffs on March 18, 2022.

In addition, the Defendants moved to strike three questions asked by the trial judge of Dr. Thomas L. Brunell, after cross examination and before re-direct and re-cross examination, and the responses thereto. After a hearing in open court on March 18, 2022, the judge denied the motion to strike the three questions of Dr. Brunell and his responses thereto.

The Motion to Dismiss

In evaluating the Constitutional claims posited in Case Nos. C-02-CV-21-001816 and C02-CV-21-001773, the trial court has been guided in its efforts by the words of Chief Judge Robert M. Bell, when he wrote in 2002, that courts “do not tread unreservedly into this ‘political thicket’; rather, we proceed in the knowledge that judicial intervention . . . is wholly unavoidable.” *In re Legislative Districting of State*, 370 Md. 312, 353 (2002). Chief Judge Bell recognized that when the political branches of government are exercising their duty to prepare a lawful redistricting plan, politics and political decisions will impact the process. *Id.* at 354; *id.* at 321 (“[I]n preparing the redistricting lines . . . the process is in part a political one, they may consider countless other factors, including broad political and narrow partisan ones, and they

⁸ See Stipulation No. 60, *infra* p. 57.

may pursue a wide range of objectives[.]”). Yet, the consideration of political objectives “does not necessarily render the process, or the result of the process, unconstitutional; rather, that will be the result only when the product of the politics or the political considerations runs afoul of constitutional mandates.” *Id.* (internal citations omitted).

In considering whether the various counts of the Complaints survived the Motion to Dismiss, the trial court applied the following standard of review⁹:

“Dismissal is proper only if the facts alleged fail to state a cause of action.” *A.J. Decoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 249 (1994). Under Maryland Rule 2-303(b), a complaint must state those facts “necessary to show the pleader’s entitlement to relief.” In considering a motion to dismiss for failure to state a cause of action pursuant to Maryland Rule 2-322(b)(2), a trial court must assume the truth of all well-pleaded relevant and material facts in the complaint, as well as all inferences that reasonably can be drawn therefrom. *Stone v. Chicago Title Ins. Co.*, 330 Md. 329, 333 (1993); *Odyniec v. Schneider*, 322 Md. 520, 525 (1991). Whether to grant a motion to dismiss “depends solely on the adequacy of the plaintiff’s complaint.” *Green v. H & R Block, Inc.*, 355 Md. 488, 501 (1999).

“[I]n considering the legal sufficiency of [a] complaint to allege a cause of action . . . we must assume the truth of all relevant and material facts that are well pleaded and all inferences which can be reasonably drawn from those pleadings.” Mere conclusory charges that are not factual allegations may not be considered. Moreover, in determining whether a petitioner has alleged claims upon which relief can be granted, “[t]here is ... a big difference between that which is necessary to prove the [commission] and that which is necessary merely to allege [its commission][.]”

⁹ The trial court did not apply the “plausibility” standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), commonly referred to as “the *Twombly-Iqbal* standard,” which may be considered a more intense standard of review. The State disavowed that it was positing its application.

Lloyd v. Gen. Motors Corp., 397 Md. 108, 121-22 (2007) (quoting *Sharrow v. State Farm Mutual Ins. Co.*, 306 Md. 754, 768, 770 (1986)) (alterations in original).

There are no provisions in the Maryland Constitution explicitly addressing Congressional districting. The only statutes in Maryland that bear on Congressional redistricting include Section 8-701 through 8-709 of the Election Law Article of the Maryland Code. Section 8-701 states that Maryland's population count is to be used to create Congressional districts, that the State of Maryland shall be divided into eight Congressional districts, and that the description of Congressional districts include certain boundaries and geographic references.¹⁰ Sections 8-702 through 8-709 identify the respective counties included within each of the eight Congressional districts according to the current Congressional map in effect.¹¹ None of the statutory provisions includes standards or criteria by which Congressional districting maps must be drawn.¹²

¹⁰ Section 8-701 of the Election Law Article, Maryland Code (2002, 2017 Repl. Vol.) provides:

(c) *Boundaries and geographic references.* — (1) The descriptions of congressional districts in this subtitle include the references indicated.

(2) (i) The references to:

1. election districts and wards are to the geographical boundaries of the election districts and wards as they existed on April 1, 2020; and

2. precincts are to the geographical boundaries of the precincts as reviewed and certified by the local boards or their designees, before they were reported to the U.S. Bureau of the Census as part of the 2020 census redistricting data program and as those precinct lines are specifically indicated in the P.L. 94-171 data or shown on the P.L. 94-171 census block maps provided by the U.S. Bureau of the Census and as reviewed and corrected by the Maryland Department of Planning.

(ii) Where precincts are split between congressional districts, census tract and block numbers, as indicated in P.L. 94-171 data or shown on the P.L. 94-171 census block maps provided by the U.S. Bureau of the Census and referred to in this subtitle, are used to define the boundaries of congressional districts.

¹¹ MD. CODE ANN., ELEC. LAW §§ 8-701 through 8-709.

¹² During the hearing on the State's Motion to Dismiss, the Court asked the parties to provide supplemental briefings regarding the significance, or not, of two historical laws, which prescribed the application of the (continued . . .)

In ruling on the Defendants' Motion to Dismiss the Complaints, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that the 1773 Complaint stated a claim upon which relief can be granted. Article III, Section 4, of the Maryland Constitution does embody standards by which the 2021 Congressional Plan can be evaluated to determine whether unlawful partisan gerrymandering has occurred. The standards of Article III, Section 4 are applicable to the evaluation of the 2021 Plan based upon the interpretation of the Section's language, purpose, and legislative intent.

With respect to the 1773 Complaint and the 1816 Complaint, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that can reasonably be drawn

(... continued)

"constitution and laws of this state for the election of delegates to the house of delegates," to Congressional elections. The first law, enacted in 1788, in relevant part, provided:

And be it enacted, That the election of representatives for this state, to serve in the congress of the United States, shall be made by the citizens of this state qualified to vote for members of the house of delegates, on the first Wednesday of January next, at the places in the city of Annapolis and Baltimore-town, and in the several counties of this state, prescribed by the constitution and laws of this state for the election of delegates to the house of delegates[.]

1788 Laws of Maryland, Chapter X, Section III (Vol. 204, p. 318). The second law, enacted in 1843, provided:

Sec. 5. And be it enacted, That the regular election of representatives to Congress from this State, shall be made by the citizens of this State, qualified to vote for members to the House of delegates, and each citizen entitled as aforesaid, shall vote by ballot, on the first Wednesday in October, in the year eighteen hundred and forty-five, and on the same day in every second year thereafter, at the places in the city of Baltimore, and in the city of Annapolis, and in the several counties, and Howard District of this State, as prescribed by the constitution and laws of this State, for the election of members to the house of delegates.

1843 Laws of Maryland, Chapter XVI, Section 5 (Vol. 595, p. 13).

The parties' responses, collectively, indicated that they ascribed little or no significance to the language, which suggested that the first Congressional elections in Maryland were conducted via the application of election rules prescribed, in part, in the State Constitution.

therefrom and determined that the strictures of Article III, Section 4 are, alternatively, applicable to the 2021 Plan because of the free elections clause, MD. CONST. DECL. OF RTS. art. 7, as well as with respect to the 1816 Complaint, the equal protection clause, MD. CONST. DECL. OF RTS. art. 24; each, individually, provide a nexus to Article III, Section 4 to determine the lawfulness of the 2021 Plan.¹³

¹³ The trial court ultimately dismissed with prejudice Section 7 of Article I of the Maryland Constitution. Article I, Section 7 provides that, “[t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections.” The 1816 Plaintiffs argued that this provision was violated because the General Assembly failed to pass laws concerning elections that are fair and even-handed, and that are designed to eliminate corruption. *1816 Compl.* ¶ 66. The State took the position that Section 7 of Article 1 was not intended to restrain acts of the General Assembly, but rather, that the provision acted as “an exclusive mandate directed to the General Assembly to establish the mechanics of administering elections in a manner that ensures that those who are entitled to vote are able to do so, free of corruption or fraud.” *1816 Mot. Dismiss* at 31.

The term “purity” in the Section is undefined and therefore, ambiguous. No case referring to the Section has defined what purity means. *Cnty. Council for Montgomery Cnty. v. Montgomery Ass’n, Inc.*, 274 Md. 52 (1975); *Anderson v. Baker*, 23 Md. 531 (1865) (concurring opinion); *see also Hanrahan v. Alterman*, 41 Md. App. 71 (1979); *Hennegan v. Geartner*, 186 Md. 551 (1946); *Smith v. Higinbotham*, 187 Md. 115 (1946); *Kenneweg v. Allegany Cnty. Comm’rs*, 102 Md. 119 (1905). When asked at oral argument to give the term a meaning applicable to elections, Counsel for the 1773 Plaintiffs could only say “purity means purity.”

The phrase “purity” of elections was added to the Maryland Constitution of 1864, where the explicit language directed the General Assembly to preserve the “purity of elections.” MD. CONST. of 1864, art. III, § 41 (directing the General Assembly to “pass laws for the preservation of the purity of elections by the registration of voters”). The provision focused on voter registration, with the purpose of excluding ineligible voters from the election process.

The language of what is now Article I, Section 7, has changed since its enactment in the Maryland Constitution of 1864. Article III, § 41 of the Constitution of 1864, in whole, directed the General Assembly to “pass laws for the preservation of the purity of elections by the registration of voters, and by such other means as may be deemed expedient, and to make effective the provisions of the Constitution disfranchising certain persons, or disqualifying them from holding office.” Article III, § 41, was renumbered in the 1867 amendment, to Article III, Section 42, which provided, [t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections.” MD. CONST. of 1867, art. III, § 42. Article III, § 42, was, again, renumbered and amended by Chapter 681, Acts of 1977, ratified Nov. 7, 1978, to Article I, § 7, which now provides, “[t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections.” MD. CONST. art. 1, § 7.

Cases interpreting Article I, Section 7, have applied the Section to the registration of voters, *Anderson*, 23 Md. at 586 (concurring opinion), improper financial campaigns contributions, *Cnty. Council for Montgomery Cnty.*, 274 Md. at 60–65; *see also Higinbotham*, 187 Md. at 130 (“The Corrupt Practices Act is a remedial measure and should be liberally construed in the public interest to carry out its purpose of preserving the purity of elections.”).

From its legislative history, the language of “purity of elections” referred to questions involving the *individual* candidate and the *individual* voter. The only assumption tendered by the 1816 Plaintiffs to support that partisan gerrymandering affected the “purity” of elections was that such gerrymandering was *ipso facto* corrupt.
(continued . . .)

With respect to the 1816 Complaint, alternatively, this Court assumed the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that the Complaint stated a cause of action under each of the equal protection clause, MD. CONST. DECL. OF RTS. art. 24, and the free speech clause, MD. CONST. DECL. OF RTS. art. 40, which subjects the 2021 Plan to strict scrutiny by this Court.

Alternatively, with respect to the 1773 and 1816 Complaints, this Court assumed the truth of all the well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom and determined that both Complaints stated a cause of action under the entirety of the Maryland Constitution and Declaration of Rights to determine the lawfulness of the 2021 Plan.

The Provisions in the Maryland Constitution and Declaration of Rights

In reviewing whether political considerations have run afoul of constitutional mandates in the instant case, we must undertake the task of constitutional interpretation. “Our task in matters requiring constitutional interpretation is to discern and then give effect to the intent of the instrument’s drafters and the public that adopted it.” *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 53 (2013) (citing *Fish Mkt. Nominee Corp. V. G.A.A., Inc.*, 337 Md. 1, 8–9 (1994)). We first look to the natural and ordinary meaning of the provision’s language. *Id.* If the provision is clear and unambiguous, the Court will not infer the meaning from sources outside the Constitution itself. *Id.* “[O]ccasionally we see fit to examine extrinsic sources of legislative intent merely as a check of our reading of a statute’s plain language,” including “archival legislative history.” *Phillips v. State*, 451 Md. 180, 196–97 (2017). Archival legislative history

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That assumption has not been borne out by review of over 200 cases addressing partisan gerrymandering, none of which characterized the practice as “corrupt.”

includes legislative journals, committee reports, fiscal notes, amendments accepted or rejected, the text and fate of similar measures presented in earlier sessions, testimony and comments offered to the committees that considered the bill, and debate on the floor of the two Houses (or the Convention). *State v. Phillips*, 457 Md. 481, 488 (2018).

The rules of statutory construction are well known. Yet, when applying the rules of statutory construction to the interpretation of constitutional provisions, the approach is more nuanced. That approach was described in *Johns Hopkins Univ. v. Williams*, 199 Md. 382 (1952):

[C]ourts may consider the mischief at which the provision was aimed, the remedy, the temper and spirit of the people at the time it was framed, the common usage well known to the people, and the history of the growth or evolution of the particular provision under consideration. In aid of an inquiry into the true meaning of the language used, weight may also be given to long continued contemporaneous construction by officials charged with the administration of the government, and especially by the Legislature.

Id. at 386–87.

To construe a constitution, “a constitution is to be interpreted by the spirit which vivifies, and not by the letter which killeth.” *Snyder ex rel. Snyder*, 435 Md. at 55 (quoting *Bernstein v. State*, 422 Md. 36, 56 (2011)). Similarly, we do not read the constitution as a series of independent parts; rather, constitutional provisions are construed as part of the constitution as a whole. *Id.* Further, if a constitutional provision has been amended, the amendments “bear on the proper construction of the provision as it currently exists,” and in such a situation, “the intent of the amenders ... may become paramount.” *Norino Properties, LLC v. Balsamo*, 253 Md. App. 226, (2021) (quoting *Phillips*, 457 Md. at 489). We keep in mind that the courts shall construe a constitutional provision in such a manner that accomplishes in our modern society the purpose for which the provisions were adopted by the drafter, and in doing so, the provisions “will be

given a meaning which will permit the application of those principles to changes in the economic, social, and political life of the people, which the framers did not and could not foresee.” *Bernstein v. State*, 422 Md. 36, 57 (2011) (quoting *Johns Hopkins Univ.*, 199 Md. at 386).

We recognize that “a legislative districting plan is entitled to a presumption of validity” but “that the presumption “may be overcome when compelling evidence demonstrates that the plan has subordinated mandatory constitutional requirements to substantial improper alternative considerations.”” *In re Legislative Districting of State*, 370 Md. at 373 (quoting *Legislative Redistricting Cases*, 331 Md. 574, 614 (1993)).

Article III, Section 4 of the Maryland Constitution

Article III, Section 4 of the Maryland Constitution provides:

Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.

MD. CONST. art. III, § 4. The 1773 Plaintiffs assert a direct claim under Article III, Section 4, of the Maryland Constitution and urge that the plain meaning of the term “legislative district” corresponds to any legislative district in the State, which must be subject to the standards of adjoining territory, compactness, and equal population with due regard given to natural boundaries of political subdivisions. The 1773 Plaintiffs allege the new Congressional districts under the 2021 Plan violate the requirements of Article III, Section 4. *1773 Compl.* ¶¶ 93–97.¹⁴

Defendants claim that the text of Article III, Section 4, is limited to State legislative districting because the term “legislative districts” refers “unambiguously to State legislative districts” whenever it appears in other provisions of the Constitution, and that when Congress is referred to the “c” is capitalized. *1773 Defs.’ Mot. Dismiss* at 2. The Defendants argue that although a 1967 constitutional convention proposed a draft that included Constitutional standards for both state districts and Congressional districting, the voters rejected the draft and that the General Assembly drew the current Article III, Section 4 without reference to Congressional redistricting to enable the 1969 amendments to the Constitution to be adopted. *1816 Defs.’ Mot. Dismiss* at 19–22.

¹⁴ The 1816 Plaintiffs do not assert a claim under Article III, Section 4, of the Maryland Constitution. *1816 Opp’n Mot. Dismiss* at 10 n.3.

The term “legislative district” is the gravamen of analysis. There is no definition of the term “legislative district” in the Maryland Constitution or Declaration of Rights. Absent a definition, in light of the differing ways the term could be applied, *i.e.*, as State legislative districts and/or Congressional districts, the language is ambiguous.¹⁵

The “compactness” requirement was added to then extant Article III, Section 4, by the General Assembly in 1969 and ratified by the voters in 1970 (the “1970 Amendment”), as part of a series of amendments to the entirety of Article III. *See* 1969 Md. Laws ch. 785, ratified Nov. 3, 1970 (proposing the repeal of MD. CONST., art. III, §§ 2, 4, 5, and 6, and replacement with new §§ 2 through 6). Its framers recognized that “compactness requirement in state constitutions is intended to prevent political gerrymandering.” *Matter of Legislative Districting of State* (“1984 Legislative Districting”), 299 Md. 658, 687 (1984). Prior to this amendment, Article III, Section 4 required districts to be “as near as may be, of equal population” and “always consist of contiguous territory,” and only applied to the “existing Legislative Districts of the City of Baltimore.” MD. CONST. art. III, § 4 (1969).¹⁶

¹⁵ The State has posited the importance of the exclusion of the word “Congress” in Article III, Section 4 to specifically include reference to Congressional districts. Neither the word Congress nor State, General Assembly, Senate, or House of Delegates appears in Article III, Section 4, unlike other Constitutional provisions or importantly, in Section 4 itself. *See, e.g.*, MD. CONST. art. I, § 6 (using the term “Congress”); art. III, § 10 (using the term “Congress”); art. IV, § 5 (using the term “Congress”); art. XI-A, § 1 (using the term “congressional election”); art. XVII, § 1 (using the term “congressional elections”); art. III, § 3 (using the terms “State,” “Senate” and “House of Delegates”); art. III, § 5 (using the terms “State,” “General Assembly,” “Senate,” and “House of Delegates”); art. III, § 6 (using the terms “General Assembly” and “delegate”); art. III, § 13(b) (using the terms “Legislative” and “Delegate district”); and art. XIV, § 2 (using the terms “General Assembly,” and “Legislative District of the City of Baltimore”).

¹⁶ Prior to 1966, Baltimore City was the only jurisdiction in the State in which Delegates were elected to represent discreet legislative districts; Delegates representing other counties were elected by the voters of those counties at large. *See* MD. CONST. art. III, § 5 (1965) (“The members of the House of Delegates shall be elected by the qualified voters of the Counties, and the Legislative Districts of Baltimore City, respectively”); 1965 Md. Laws special session, chs. 2, 3 (requiring the first time that counties allocated more than eight delegates be divided

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The present complete version of Article III, Section 4 was enacted in 1972 and ratified by the voters on November 7, 1972. In enacting the present version in 1972, the General Assembly “is presumed to have full knowledge of prior and existing law on the subject of a statute it passes.” *Id.*; see also *Bowers v. State*, 283 Md. 115, 127 (1978) (“[T]he Legislature is presumed to have had full knowledge and information as to prior and existing law on the subject of a statute it has enacted.”); *Harden v. Mass Transit Admin.*, 277 Md. 399, 406-07 (1976) (“The General Assembly is presumed to have had, and acted with respect to, full knowledge and information as to prior and existing law and legislation on the subject of the statute and the policy of the prior law.”).¹⁷ With respect to this knowledge, it is clear that they were aware of

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into districts). The “contiguity” or “equal population” requirements of the early Article III, § 4, did not apply to any “legislative district” outside of Baltimore City.

¹⁷ The State agreed during oral argument on the Motion to Dismiss that cases of the Supreme Court in the 1960s regarding redistricting informed the adoption of the present version of Article III, Section 4:

THE COURT: In doing research on Article III, Section 4, of the Maryland Constitution, it has come to the Court’s attention that one of the reasons for enacting this provision was the Legislature’s knowledge—which we presume—of the Supreme Court’s cases. That is my understanding, is it yours?

MR. TRENTO, ON BEHALF OF THE STATE: Yes, Your Honor, the Supreme Court’s cases were in the front and center of the minds of the 1967 Constitutional Convention. In that Convention, the sweep of amendments to Article III, Sections 3 through 6, were expressly undertaken to address the Supreme Court jurisprudence from the 1960s.

Mot. Dismiss Hearing, 02/23/2022. In the 1967 Constitutional Convention, the Supreme Court cases referencing legislative redistricting were prominent. The delegates in the Proceedings and the Debates of the 1967 Constitutional Convention referenced prior Supreme Court jurisprudence on numerous occasions: *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES, Vol. 1, *Debates* 412, 3255; 104 MD. STATE ARCHIVES 2267, 10853. During the 1967 Constitutional Convention, Delegate John W. White, in response to a question regarding his intent regarding a provision stated:

DELEGATE WHITE: What I am trying to do is to have all of Maryland line up with the position of the Supreme Court of the United States, which has said that one person should have one vote.

Proceedings and Debates of the 1967 Constitutional Convention, 104 MD. STATE ARCHIVES 7879,

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Baker v. Carr, 369 U.S. 186 (1962), involving state legislative districts,¹⁸ as well as *Wesberry v. Sanders*, 376 U.S. 1 (1964), a Congressional districting case.¹⁹

With reference to Supreme Court jurisprudence that is the context of the 1967 to 1972 Amendments to Article III, Section 4, one early case—*Baker v. Carr*—involved the apportionment of the Tennessee legislature. The federal district court dismissed the complaint in apparent reliance on the legal process theory of political justiciability, but the Supreme Court reversed. *Baker v. Carr*, 179 F. Supp. 824, 828 (M.D. Tenn. 1959), *rev'd*, 369 U.S. 186 (1962). Importantly, the Supreme Court’s decision only dealt with procedural issues: jurisdiction, standing, and justiciability. *Baker*, 369 U.S. at 198–237. It held by a 6–2 vote that the court had jurisdiction, plaintiffs had standing, and the challenge to apportionment did not present a nonjusticiable “political question.” *Id.* at 204, 206, 209.

The Supreme Court, thereafter, confronted the apportionment of Congressional districts in *Wesberry v. Sanders* in 1964 and held that Congressional apportionment cases were justiciable, noting that there is nothing providing “support to a construction that would immunize state congressional apportionment laws which debase a citizen’s right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction.” 376 U.S. at 6–7. The Court ultimately applied the “one-person, one-vote” rule to apportionment of

(. . . continued)

<https://perma.cc/JG3T-KV3J> (last visited March 23, 2022). During the Proceedings and Debates of the 1967 Constitutional Convention, the delegates proposed constitutional amendments regarding Congressional districting, however, the amendments failed subsequent enactment and were, ultimately, not included in the adopted 1970 and 1972 versions of Article III, Section 4.

¹⁸ *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES, Vol. 1, Debates 412, 499.

¹⁹ *Proceedings and Debates of the 1967 Constitutional Convention*, 104 MD. STATE ARCHIVES 10863–64.

Congressional districts, explaining that “the [Constitutional] command that representatives be chosen by people of the several states means that as nearly as practicable one man’s vote in a Congressional election is to be worth as much as another’s.” *Id.* at 7–8. The Court believed that “a vote worth more in one district than in another would run . . . counter to our fundamental ideas of democratic government.” *Id.* at 8. The opinion rested on the interpretation of the Elections Clause in Article I, Section 4 of the Constitution. *Id.* at 6–7.

On April 7, 1969, another Congressional districting case was decided. In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), a decision involving Congressional districting in Missouri, the Supreme Court held that the “as nearly as practicable” standard “requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.” *Kirkpatrick*, 394 U.S. at 530–31.

The context, therefore, of the 1967 through 1972 amending process of Article III, Section 4, was the Supreme Court cases in which state legislative districts, but also Congressional districts, were decided.

The State posits, however, that the Legislature really intended on omitting Congressional districts in the later versions of Article III, Section 4 enacted in 1969 and 1972 because an earlier version from 1967 of Section 4 included a specific reference to Congressional districts, *see* PROPOSED CONST. OF 1967–68, §§ 3.05, 3.07, 3.08, 605 MD. STATE ARCHIVES 9–10, and another section that had a specific reference to the State, *see* PROPOSED CONST. OF 1967–68, § 3.04, 605 MD. STATE ARCHIVES 9. The failed passage of the earlier draft Constitution, which included these phrases, however, does not have any bearing on the analysis of what the Legislature

intended in adopting the 1970 or 1972 versions of Article III, Section 4, because “[f]ailed efforts to amend a proposed bill, however, are not conclusive proof usually of legislative will. . . . This is because there can be a myriad of reasons that could explain the Legislature's decision not to incorporate a proposed amendment.” *Antonio v. SSA Sec., Inc.*, 442 Md. 67, 87 (2015). Most importantly, “[i]f the framers desired” to exclude Congressional redistricting from Article III, Section 4, “they knew how to do so.” *Schisler v. State*, 394 Md. 519, 594–95 (2006).²⁰

The Legislature, keenly aware of its ability to restrict or expand the application of Article III, Section 4, chose not to explicitly exclude Congressional districts from the purview of Article III, Section 4, nor just reference State legislative districts. As a result, “legislative districts” includes Congressional districts. A claim, thus, has been stated under Article III, Section 4.

²⁰ Interestingly, the early language in a bill introduced in 1972 included the words Senators and Delegates to alter Article III, Section 4:

Each legislative district shall consist of adjoining territory and shall be compact in form. The ratio of the number of Senators to population shall be substantially the same in each legislative district; the ratio of the number of Delegates to population shall be substantially the same in each legislative district. Nothing herein shall be construed to require the election of only one Delegate from each legislative district.

Amendments to Maryland Constitutions, 380 MD. STATE ARCHIVES, 489. The final adopted version contained no mention of, nor reference to, “Senator” or “Delegate.”

Nexus Between Articles 7 and 24 of the Declaration of Rights and Article III, Section 4 of the Constitution

The standards of Article III, Section 4 are also applicable on an alternate basis, to evaluate the constitutionality of the 2021 Plan because the Free Elections Clause, Article 7 of the Maryland Declaration of Rights, which has been alleged in the 1773 and 1816 Complaints, as well as the Equal Protection Clause, Article 24 of the Maryland Declaration of Rights, as averred in the 1816 Complaint, each implicate the use of the Section 4 criteria. Assuming either clause is applicable,²¹ its application to the lawfulness of the 2021 Plan can only be made manifest by use of the standards in Article III, Section 4.

The methodology of drawing a nexus between a “standards” clause and its facilitating constitutional provision is exactly what Judge John C. Eldridge, writing on behalf of the Court, did in *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127 (2003), between the Free Elections Clause and Section 1 of Article I of the Constitution²² as well as the Equal Protection Clause and Section 2 of Article I of the Constitution.²³

²¹ The applicability of the Free Elections Clause and the Equal Protection Clause will be addressed separately, *infra*.

²² Article I, Section 1 of the Maryland Constitution, provides:

All elections shall be by ballot. Every citizen of the United States, of the age of 18 years or upwards, who is a resident of the State as of the time for the closing of registration next preceding the election, shall be entitled to vote in the ward or election district in which he resides at all elections to be held in this State. A person once entitled to vote in any election district, shall be entitled to vote there until he shall have acquired a residence in another election district or ward in this State.

²³ Article I, Section 2 of the Maryland Constitution, provides:

Except as provided in Section 2A of this Article, the General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter

(continued . . .)

Green Party involved the constitutional validity of various provisions of the Election Code which governed the method by which a party, other than a “principal political party,” could nominate a candidate for a Congressional seat. *Id.* at 140. The Green Party, however, had been notified that the name of its candidate could not be placed on the ballot because the Board of Elections was unable to verify a number of signatures on the nominating petition and, as a result, the petition contained less than the number required to vote. *Id.* at 137. The Board posited a number of reasons for denying the adequacy of the number of signatures, but the seminal reason addressed in the opinion was that many of the petition signatures were those who appeared on an inactive voter registry, which did not qualify them to sign a petition as a “registered voter” pursuant to Section 1–101(gg) of the Election Code.

In addressing whether the Free Elections Clause was violated by the provision regarding an inactive voter registry, Judge Eldridge applied the standards in Article I, Section 2 of the Constitution, which, he explained, “contemplates a *single* registry for a particular area, containing the names of *all* qualified voters[.]” *Id.* at 142. (italics in original). Remarking that the statute created a class of “second class” citizens comprised of inactive voters, Judge Eldridge determined that Article 7 had been violated. *Id.* at 150. In so doing, his determination was premised on a line of cases in which adherence with the strictures of the Free Elections Clause was informed by standards set forth in Constitutional Clauses. *Id.* at 144 (citing *Gisriel v. Ocean*

(. . . continued)

held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless the person's name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.

City Bd. of Supervisors of Elections, 345 Md. 477 (1997) (rejecting provision in an Ocean City Charter that failure to vote in two previous elections rendered a person unqualified to vote in municipal elections, based on Sections 1 and 4 of Article of the Constitution and Article 7 of the Declaration of Rights); *State Admin. Bd. of Election Laws v. Bd. of Supervisors of Balt. City*, 342 Md. 586 (1996) (holding that “having voted frequently in the past is not a qualification for voting,” under Article I, Section 1 of the Constitution and Article 7 of the Declaration of Rights); *Jackson v. Norris*, 173 Md. 579 (1937) (recognizing nexus between the Free Elections Clause and the mandate in Section 1 of Article 1 of the Constitution, that “elections shall be by ballot”). Judge Eldridge also utilized the standards in Section 1 of Article I to determine that a registry of inactive voters was “flatly inconsistent” with Article 24 of the Declaration of Rights, the Equal Protection Clause.²⁴ *Id.* at 150.

It is clear, then, that our Free Elections Clause, as well as the Equal Protection Clause implicate the use of standards contained in the Constitution in order to determine a violation of each. So is the case in their application in the instant case, in which implementation of their provisions can be determined in reference to Article III, Section 4.²⁵

²⁴ As discussed, *infra*, Judge Eldridge also utilized the Equal Protection Clause, Article 24, to evaluate whether the requirement that the Green Party, as a non-principle party, was constitutionally required to submit not only 10,000 signatures on a petition to be recognized as a political party and then provide a second petition to nominate its candidate.

²⁵ The Supreme Court of Pennsylvania, in *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1 (2018), utilized a framework similar to that implemented in *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127 (2003), when it looked to standards delineated in Article 2, Section 16 of its Constitution – defining criteria to be used in drawing state legislative districts – in order to measure Congressional District Plan, which had been enacted by its Legislature, complied with the Free Elections Clause contained in Pennsylvania’s Declaration of Rights.

Article 7 of the Maryland Declaration of Rights

Article 7 of the Maryland Declaration of Rights, entitled “Elections to be free and frequent; right of suffrage,” provides:

That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

The 1816 Plaintiffs assert that the 2021 Plan violates the Free Elections Clause in several ways, including that the 2021 Plan “unlawfully seeks to predetermine outcomes in Maryland’s congressional districts.” They also allege that the 2021 Plan violates Article 7, because it is not based upon “well-established traditions in Maryland for forming congressional districts[,]” including compactness, adjoining territory, and respect for natural and political boundaries. They specifically allege that the boundary of the First Congressional District, which they aver is the only district in which a Republican is the incumbent, was redrawn “to make even that district a likely Democratic seat.” As a result, they allege that “the citizens of Maryland, including Plaintiffs, with a right to an equally effective power to select the congressional representative of their choice,” have been deprived of their right to elections, which are “free.” They contend that Article 7 “prohibits the State from rigging elections in favor of one political party[,]” and conclude that, “any election that is poisoned by political gerrymandering and the intentional dilution of votes on a partisan basis is not free.”

The 1773 Plaintiffs assert that the 2021 Plan “subordinate[s]” the requirement, under Article 7 of the Declaration of Rights, that elections be “free and frequent” to “improper considerations,” namely the manipulation of Congressional district boundaries so that they will

be unable “to cast a meaningful and effective vote for the candidates they prefer.” Additionally, these Plaintiffs allege that Congressional district boundaries that are not based on criteria, such as compactness and the minimization of crossing political boundaries, result in elections that are inherently not “free” and, therefore, violate Article 7.

The State, conversely, argued that the 2021 Congressional Plan does not violate the Free Elections Clause of Article 7, because that Section applies only to state elections. The State observes that the capitalization of “L” in “Legislature,” is a direct reference to the General Assembly. Additionally, the State asserts that the legislative history of Article 7, particularly surrounding debates regarding the frequency of elections, indicates that the Free Elections Clause could not apply to federal elections, “for which the State is powerless to control the frequency.”

With respect to the use of a capital “L” in “Legislature,” in the Free Elections Clause, as reflecting only a reference to the state legislature, the State’s contention is belied by its own language. Article 7, as it was originally adopted in 1776, was meant to secure a right of participation:

That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

The language of Article 7 enunciated a foundational right to vote for the only entity for which the citizens of Maryland in 1776 had a participatory ability to elect through voting, the Legislature. The reference to “Legislature,” then, refers to the only entity for which there was any accountability through suffrage.

The purpose of the Free Elections Clause relative to partisanship, as alleged in the complaints, heretofore has not been the subject of judicial scrutiny. During the Constitutional Convention of 1864, however, proposals to amend Article I of the Constitution, to create a registry of voters whereby voters would be required to pledge a loyalty oath as a prerequisite to voting were hotly debated and the effect of “partisan oppression” on free elections was explored. Proponents of the amendments sought to exclude supporters of the Confederacy, who, by the terms of the oath, would be disqualified from voting. *Proceedings and Debates of the 1864 Constitutional Convention*, Volume 1 at 1332. Those opposed to the loyalty oath argued that it would be counter to the purpose of “free elections.” *Id.* at 1332. One delegate noted that the loyalty oath presupposed that,

there are now in the State of Maryland enjoying the right of suffrage under the present constitution, ten distinct classes of persons who deserve to be disfranchised from hereafter exercising that right. They . . . are to be under a government by others, in which they are to have no voice, in which they are not to be allowed to participate in any shape or form.

Id. In the same debate, another delegate, Mr. Fendall Marbury, decried the imposition of a loyalty oath as a means of oppression, in contravention to the right to participate in free elections:

The right of free election lies at the very foundation of republican government. It is the very essence of the constitution. To violate that right, and much more to transfer it to any other set of men, is a step leading immediately to the dissolution of all government. The people of Maryland have always in times past, guarded with more than vestal care this fundamental principle of self-government. By constitutional provisions and legislative enactments, they have sought to provide against every conceivable effort that might be made to suppress the voice of the people. They have spurned the idea of excluding any one on account of his religious or political opinions. Is it not unwise and impolitic to depart from this established policy of the State, by introducing words into our

constitution which are calculated to revive and foster that spirit of crimination and recrimination already existing to an alarming extent between parties in this State? The word loyal has come to be, of late, a word susceptible of such various construction, and has so often been prostituted by the minions of power, to accomplish partizan ends. That to incorporate it into the constitution would be nothing more nor less than creating an engine of oppression, to be used by whatever party might hold for a time the reins of power.

Id. at 1334. Thus, inhibiting the creation of an “engine of oppression” “to accomplish party ends” by “whatever party might hold for a time the reins of power” to “suppress the voice of the people” was a purpose of the Free Elections Clause.

Our jurisprudence in Maryland indicates that the Free Elections Clause has been broadly interpreted to apply to legislation that infringes upon the right of political participation by citizens of the State. In *Jackson v. Norris*, 173 Md. 579 (1937), the Court of Appeals considered whether automated voting machines, which used ballots that restricted the choice of voters to candidates whose names were printed on the ballot, violated the Free Elections Clause. In resolving the applicability of the Free Elections Clause, the Court explained that legislative acts that were “a material impairment of an elector's right to vote[,]” were to be deemed unconstitutional. *Id.* at 585. The Court held that the ballots were violative of the Free Elections Clause, because they constrained the ability of voters to cast their vote for the candidate of their choice and, by extension infringed upon voters’ right to participate in free elections. *Id.* at 603.

The pivotal goal of the Free Elections Clause, to protect the right of political participation in Congressional elections, was emphasized in *Green Party*, 377 Md. at 127, which concerned an attempt by the Green Party to get a candidate on the ballot for election to Congress, in the state’s first congressional district, as discussed, *supra*. In that case, Article 7 was held to protect the right of all qualified voters within the state to sign nominating petitions in support of minor party

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candidates for office, regardless of whether they had been classified as “inactive voters.” In this regard, the decision in *Green Party* recognized that the Free Elections Clause afforded a greater protection of the citizens of Maryland in a Congressional election context, than is provided under the Federal Constitution, in the First, Fifth, Ninth, and Fourteenth Amendments, which also had been alleged in the Complaint. *Green Party*, 377 Md. at 150.²⁶

Clearly, the 1773 and 1816 Complaints, with respect to Article 7 of the Declaration of Rights, the Free Elections Clause, have stated a cause of action and survive the Motion to Dismiss, assuming the truth of all well-pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom.

²⁶ In interpreting similar phraseology that “Elections shall be free and equal,” the Supreme Court of Pennsylvania, in *League of Women Voters of Pa.*, determined that the state’s Free Elections Clause required that “each and every Pennsylvania voter must have the same free and equal opportunity to select his or her representatives.” 645 Pa. at 117. The Court concluded that, in order to comply with the strictures of the Free Elections Clause, Congressional district maps be drawn in order to “provide[] the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people’s power to do so.” *Id.*

Article 24 of the Maryland Declaration of Rights, Equal Protection

Article 24 of the Maryland Declaration of Rights, entitled “Due process,” provides:

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Although Article 24 does not contain language of “equal protection,” the Court of Appeals has long held that “equal protection” is embodied in it: “we deem it settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights. *Att’y Gen. of Md. v. Waldron*, 289 Md. 683 (1981); *Bd. of Supervisors of Elections of Prince George’s Cnty. v. Goodsell*, 284 Md. 279, 293 n.7 (1979) (“[W]e have regularly proceeded upon the assumption that the principle of equal protection of the laws is included in Art. [24] of the Declaration of Rights.”).

The 1816 Plaintiffs assert that the 2021 Plan violates Article 24 by unconstitutionally discriminating against Republican voters, including Plaintiffs, and infringing on their fundamental right to vote. Specifically, these Plaintiffs assert that the 2021 Plan intentionally discriminates against Plaintiffs by diluting the weight of their votes based on party affiliation and depriving them of the opportunity for full and effective participation in the election of their Congressional representatives. These Plaintiffs add that the 2021 Plan unconstitutionally degrades Plaintiffs’ influence on the political process and infringes on their fundamental right to have their votes count fully. The State, in response, asserts that the Plaintiffs have offered no basis for an interpretation broader than that by the Supreme Court of the Fourteenth Amendment

in *Rucho*. The State posits, though, that the scope of equal protection in Maryland is the same as that which is embodied in the federal constitution in the Fourteenth Amendment.

The essence of equal protection is that “all persons who are in like circumstances are treated the same under the laws.” *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 295 Md. 597, 640 (1983). The treatment of similarly situated people under the law, clearly, cannot be denied in Maryland, in derogation of the Fourteenth Amendment; it also is clear that Maryland can afford greater protection to its citizens under Article 24 of the Declaration of Rights. In this regard, we need only look at various cases of the Court of Appeals in which the Court was clear that Article 24 and the equal protection clause of the Fourteenth Amendment are “independent and capable of divergent application.” *Waldron*, 289 Md. at 704; *see also Md. Aggregates Ass’n, Inc. v. State*, 337 Md. 658, 671 n.8 (1995) (explaining the relationship between applications of equal protection guarantees under the Fourteenth Amendment and Article 24 of the Declaration of Rights); *Verzi v. Balt. Cnty.*, 333 Md. 411, 417 (1994) (stating that “a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone.” (quoting *Waldron*, 289 Md. at 715)); *Hornbeck*, 295 Md. at 640 (stating that “the two provisions are independent of one another, and a violation of one is not necessarily a violation of the other.”).

Notably, in *In re 2012 Legislative Districting*, 436 Md. 121 (2013), Chief Judge M. Bell, writing for the Court of Appeals, assumed that Article 24 could embody a greater right than is afforded under the Fourteenth Amendment when he said: “The potential violation of Article 24 of the Maryland Declaration of Rights is not discussed at length in this case because the petitioners do not assert any greater right under Article 24 than is accorded under both the

Federal right and the population equality provision of Article III, § 4 of the Maryland Constitution.” *Id.* at 159 n.25.

The State, however, during argument regarding the Motion to Dismiss, attempted to distinguish what the Court of Appeals said in Footnote 25 in the 2012 redistricting case, by urging that the pivotal quote was addressing only a racial gerrymandering issue, rather than partisan gerrymandering. It is notable, however, that in deriving the notion that Article 24 could embody a greater breadth of protection than is afforded by the Fourteenth Amendment, the Court of Appeals cited to *Md. Aggregates Ass'n, supra*, (quoting *Murphy v. Edmonds*, 325 Md. 342, 354–55 (1992)), neither of which involved any racial differentiation.

Obviously, it cannot be lost to anyone that Article 24 was assumed to be applicable in a redistricting context in the 2012 redistricting case. *Id.* Article 24, moreover, has also been applied in various election and voting right contexts prior to 2012. *See Nader for President 2004 v. Md. State Bd. of Elections*, 399 Md. 681, 686 (2007) (Presidential elections); *DuBois v. City of College Park*, 286 Md. 677 (1980) (election for City Council); *Goodsell*, 284 Md. at 281 (election for County Executive).

Moreover, in *Green Party*, which is of particular significance to the instant case, Judge John C. Eldridge, writing for the Court, addressed whether a statutory scheme comported with equal protection under Article 24 and analyzed the issue using two distinct approaches, both of which are applicable in the instant case.

In 2000, the Maryland Green Party sought to place its candidate on the ballot for the U.S. House of Representatives seat in Maryland’s first congressional district. *Green Party*, 377 Md. at 136. The Green Party needed initially to be recognized as a political party within the state,

which, pursuant to Section 4–102 of the Election Code, required it to submit a petition to the State Board of Elections that included “the signatures of at least 10,000 registered voters who are eligible to vote in the State as of the 1st day of the month in which the petition is submitted.” *Id.* at 135–36. In August of 2000, the Green Party’s petition was accepted, and it became “a statutorily-recognized ‘political party[.]’” *Id.* at 135 n.3 (quoting Section 1–101(aa) of the Election Code).

In order to nominate a candidate, however, the Green Party was then required to submit a second petition to the Board of Elections, which, pursuant to Section 5–703(e) of the Election Code, was to be accompanied by signatures of “not less 1% of the total number of registered voters who are eligible to vote for the office for which the nomination by petition is sought[.]” *Id.* at 137 n.6. “On August 7, 2000, the [Green Party] submitted a timely nominating petition containing 4,214 signatures of voters purporting to be registered in Maryland’s first congressional district,” *id.* at 137, but the petition was rejected by the Board of Elections. Alleging that “it could verify only 3,081 valid signatures, fewer than the 3,411 required by Maryland’s 1% nomination petition requirement,” the Board reasoned that “many signatures were ‘inactive’ voters” and ineligible to sign nominating petitions. *Id.* The basis for the Board’s rationale was that, under the provisions of Section 3–504 of Election Code, if a sample ballot, which “the local boards customarily mail out . . . to registered voters prior to an election[.]” were “returned by the postal service” and the voter then “fail[ed] to respond to [a] confirmation notice,” the voter’s name would be placed on “the ‘inactive voter’ registration list.” *Id.* at 147. Persons on the inactive voter list, pursuant to Sections 3–504(f)(4) of the Election Code, would “not be counted as part of the registry [of voters],” and under Section 3–504(f)(5), their

signatures were not to “be counted . . . for official administrative purposes as petition signature verification[.]” *Id.* at 150.

In addressing the constitutionality of Section 3–504 of the Election Code, which established an inactive voter registry, which essentially disenfranchised voters, Judge Eldridge applied the standards of Section 2 of Article I of the Constitution, which required:

Except as provided in Section 2A of this Article, the General Assembly shall provide by law for a uniform Registration of the names of all the voters in this State, who possess the qualifications prescribed in this Article, which Registration shall be conclusive evidence to the Judges of Election of the right of every person, thus registered, to vote at any election thereafter held in this State; but no person shall vote, at any election, Federal or State, hereafter to be held in this State, or at any municipal election in the City of Baltimore, unless the person's name appears in the list of registered voters; the names of all persons shall be added to the list of qualified voters by the officers of Registration, who have the qualifications prescribed in the first section of this Article, and who are not disqualified under the provisions of the second and third sections thereof.

In applying the standards of Section 2, Judge Eldridge declared Section 3–504 of the Election Code unconstitutional, because that Section “create[d] a group of ‘second-class citizens’ comprised of persons who are ‘inactive’ voters and thus not eligible to sign petitions[.]” and was “flatly inconsistent with Article 24 of the Declaration of Rights. *Id.* at 150. In explaining how the inactive voter list failed to comport with the Constitutional standards, Judge Eldridge explained that Section 2 of Article I, which instructs the General Assembly to create a uniform registry of voters,

contemplates a single registry for a particular area containing the names of all qualified voters, leaving the General Assembly no discretion to decide who may or may not be listed therein, no discretion to create a second registry for inactive voters, and no authority to decree that an “inactive” voter is not a “registered voter” with the rights of a registered voter.

Id. at 143. A nexus between the Equal Protection Clause and a standards clause, therefore, was established.

Judge Eldridge, thereafter, explored another methodology to apply equal protection to evaluate Green Party's claim that the required submission of two petitions in order to nominate its candidate violated Article 24, because it treated principal political parties differently from minor political parties. *Id.* at 159. The Green Party had argued that "once a group has submitted the required 10,000 signatures to receive official recognition as a political party, . . . no further showing of support should be necessary for the name of a minor political party's candidate to be on the ballot." *Id.* at 153. The Board of Elections countered that the second petition was necessary to ensure that a minor party had "a significant modicum of public support," in order to prevent "frivolous" candidates from appearing on ballots. *Id.* at 153–54.

In addressing the question, Judge Eldridge approached the issue through the strict scrutiny lens and required the State to present a compelling interest. In so doing, he determined that the requirement that the Green Party submit one petition to form a political party and then a second petition to nominate a candidate, "discriminates against minor political parties in violation of the equal protection component of Article 24[.]" *Id.* at 156–57. Having identified the two-petition requirement as discriminatory, Judge Eldridge considered "the extent and nature of the impact on voters, examined in a realistic light," in order to determine the appropriate standard of review of the five-year registration requirement. *Id.* at 163 (quoting *Goodsell*, 284 Md. at 288). He then determined that, "the double petitioning requirement set forth by the Maryland Election Code denies ballot access to a significant number of minor political party candidates. On that basis, the challenged statutory provisions' impact on voters is substantial." *Id.*

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Clearly, the 1816 Complaint, with respect to the equal protection principles embodied within Article 24 of the Declaration of Rights, has stated a cause of action to survive the Motion to Dismiss, assuming the truth of all well-pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom.

Article 40 of the Maryland Declaration of Rights

The 1816 Plaintiffs' cause of action under Article 40 of the Maryland Declaration of Rights survived the Motion to Dismiss. Article 40, which pertains to freedom of speech and freedom of the press, provides:

That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.

MD. CONST. DECL. OF RTS. art. 40.

In their Complaint, the 1816 Plaintiffs allege that the 2021 Plan violates Article 40 by “burdening protected speech based on political viewpoint.” Specifically, they allege, the 2021 Plan benefits certain preferred speakers (Democratic voters), while targeting certain disfavored voters (e.g., Republican voters, including Plaintiffs) because of disagreement on the part of the 2021 Plan’s drafters with views Republicans express when they vote. *1816 Compl.* at ¶ 79. Plaintiffs aver that the 2021 Plan subjects Republican voters, including them, to disfavored treatment by “cracking”²⁷ them into specific congressional districts to dilute Republican votes and ensure that they are not able to elect a candidate who shares their views. *1816 Compl.* at ¶ 80. Therefore, Plaintiffs contend that the 2021 Plan has the effect of suppressing their political views and expressions and retaliates against them based on their political speech. *Id.* at ¶ 81.

Defendants argued in their Motion to Dismiss that the Plaintiffs’ claims under Article 40 purport to “parrot” free speech claims that are the same as those offered under the First Amendment to the United States Constitution, which the Supreme Court has rejected in the

²⁷ “A “cracked” district is one in which a party’s supporters are divided among multiple districts, so that they fall short of a majority in each; a “packed” district is one in which a party’s supporters are highly concentrated, so they win that district by a large margin, “wasting” many votes that would improve their chances in others.” *Rucho v. Common Cause*, ___ U.S. ___, ___, 139 S. Ct. 2484, 2492 (2019).

redistricting context. *See Rucho*, 139 S. Ct. at 2506–07. Defendants further assert that the because the Maryland Court of Appeals has generally treated the rights enshrined under Articles 40 as “coextensive” with its federal counterpart and has specifically adhered to Supreme Court guidance regarding partisan gerrymandering claims, the free speech cause of action should have been dismissed. *1816 Mot. Dismiss* at 3; *see generally 1816 Mot. Dismiss*, Section III.C.

Article 40 of the Maryland Declaration of Rights adopted in 1776, preceded its federal counterpart, adopted in 1788, thereby contributing to the foundations of the latter. Article 40 of Maryland’s Declaration of Rights has been generally regarded as coextensive with the First Amendment, but the Court of Appeals has recognized that Article 40 can have independent and divergent application and interpretation. *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 621 (2002) (“Many provisions of the Maryland Constitution . . . do have counterparts in the United States Constitution. We have often commented that such state constitutional provisions are *in pari materia* with their federal counterparts or are the equivalent of federal constitutional provisions or generally should be interpreted in the same manner as federal provisions. Nevertheless, we have also emphasized that, simply because a Maryland constitutional provision is *in pari materia* with a federal one or has a federal counterpart, does not mean that the provision will always be interpreted or applied in the same manner as its federal counterpart.”); *see also State v. Brookins*, 380 Md. 345, 350 n. 2 (2004) (“While Article 40 is often treated *in pari materia* with the First Amendment, and while the legal effect of the two provisions is substantially the same, that does not mean that the Maryland provision will always be interpreted or applied in the same manner as its federal counterpart.” (citing *Dua*, 370 Md. at 621)). The Court of Appeals has not shied away from “departing from the United States Supreme Court’s

analysis of the parallel federal right” when necessary “[to] ensure[] that the rights provided by Maryland law are fully protected.” *Doe v. Dep’t of Pub. Safety & Corr. Servs.*, 430 Md. 535, 550 (2013).

A violation of the free speech provision of Article 40 is implicated when there is interference with a citizen’s right to vote, which is a fundamental right. *Hornbeck*, 295 Md. at 641 (explaining that the right to vote is a fundamental right). We apply strict scrutiny when a legislative enactment infringes upon or interferes with personal rights or interests deemed to be “fundamental.” *Id.* at 641. When a legislative act, such as the 2021 Plan, creates Congressional districts that dilute the influence of certain voters based upon their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here a fundamental right. As a result, this Court, under Article 40, will apply strict scrutiny to the 2021 Plan.

Fundamental Principles Underlying the Maryland Constitution and the Declaration of Rights

The final basis upon which the Plaintiffs have stated a cause of action on which relief can be granted is through the lens of the entirety of our Constitution and Declaration of Rights, which provides a framework to determine the lawfulness of the 2021 Plan based upon their fundamental principles.²⁸ *Snyder ex rel. Snyder*, 435 Md. at 55 (“In construing a constitution, we have stated ‘that a constitution is to be interpreted by the spirit which vivifies[.]’” (quoting *Bernstein*, 422 Md. at 56)).

Plaintiffs argue that partisan gerrymandering is inconsistent with the principles embodied by the Free Elections Clause, the Equal Protection Clause, and the Free Speech Clause of the Declaration of Rights, because it usurps the power of the people to choose those who represent them in government and puts that power solely within the purview of the Legislature. *1816 Compl.* ¶ 2 (“Indeed, the 2021 Plan defies the fundamental democratic principle that voters should choose their representatives, not the other way around.”). They posit that usurping the power of voters to elect members of Congress violates the general principles upon which the structure of Maryland’s Government and its Constitution were founded.

In response, Defendants posit that judicially manageable standards do not exist under the Maryland Constitution, and further, applicable statutes adjudicating claims regarding Congressional districts do not exist in Maryland. *1816 Mot. Dismiss* at 3. As a result, Defendants

²⁸ *Whittington v. Polk*, 1 H. & J. 236, 241 (Md. Gen. 1802), in dictum, established in Maryland the idea of judicial review – that the courts are the primary interpreters and enforcers of the constitution. The General Court of Maryland explained that if an act of the Legislature is repugnant to the constitution, the courts have the power, and it is their duty, so to declare it. *Id.* The General Court realized that the “power of determining finally on the validity of the acts of the legislature cannot reside with the legislature . . . [because] they would become judges of the validity of their own acts, which would establish a despotism, and subvert that great principle of the constitution, which declares that the powers of making, judging, and executing the law, shall be separate and distinct from each other.” *Id.* at 243.

argue that Plaintiffs cannot seek relief under the Maryland Constitution or Declaration of Rights. *Id.* at 45. Instead, the State argues, either Congress or the General Assembly must decide to impose statutory restrictions or adopt constitutional amendments to regulate Congressional districting. *Id.* Until congressional or state action is taken, Defendants aver that Plaintiffs will continue to lack a remedy under the Maryland Constitution or Declaration of Rights. *Id.*

The Constitution and Declaration of Rights must be read together to determine the organic law of Maryland. The courts understood this rule of construction early on, explaining that “[t]he Declaration of Rights and the Constitution compose our form of government, and must be interpreted as one instrument.” *Anderson v. Baker*, 23 Md. 531, 612–13 (1865). Specifically, the court in *Anderson* explained that, “[t]he Declaration of Rights is an enumeration of abstract principles, (or designed to be so,) and the Constitution the practical application of those principles, modified by the exigencies of the time or circumstances of the country.” *Id.* at 627; *see also Bandel v. Isaac*, 13 Md. 202, 202–03 (1859) (“In construing a constitution, the courts must consider the circumstances attending its adoption, and what appears to have been the understanding of those who adopted it[.]”); *and Whittington v. Polk*, 1 H & J 236, 242 (1802) (stating that, “[t]he bill of rights and form of government compose the constitution of Maryland”).

More recently, the Court of Appeals has confirmed this rule of construction. In *State v. Smith*, 305 Md. 489 (1986), the court reiterated that it “bear[s] in mind that the Declaration of Rights is not to be construed by itself, according to its literal meaning; it and the Constitution compose our form of government, and they must be interpreted as one instrument.” *Id.* at 511

(explaining that the Declaration of Rights announces principles on which the form of government, established by the Constitution, is based).

While it is established that the Declaration of Rights and Constitution, together, form the organic law of our State, *Whittington*, 1 H & J at 242, the analysis then requires a review of the text, nature, and history of both documents. The text of the Maryland Constitution recognizes that “all Government of right originates from the people . . . and [is] instituted solely for the good of the whole; and [that citizens] have, at all times, the inalienable right to alter, reform, or abolish their Form of Government in such manner as they may deem expedient.” MD. CONST. DECL. OF RTS. art. 1. Its purpose “is to declare general rules and principles and leave to the Legislature the duty of preserving or enforcing them, by appropriate legislation and penalties.” *Bandel*, 13 Md. at 203. Moreover, it is well understood that the rights secured under the Maryland Declaration of Rights are regarded as very precious ones, to be safeguarded by the courts with all the power and authority at their command. *Bass v. State*, 182 Md. 496, 502 (1943). The framers ensured that the Declaration of Rights would be regarded as precious by enacting subsequent constitutional provisions to safeguard those rights. In that vein, the foundational significance of the right of suffrage is memorialized in the first Article of the Constitution, which pertains to the “Elective Franchise,” MD. CONST. art. I, and Article I of the Declaration of Rights, which locates the source of all “Government” in the people. MD. CONST. DECL. OF RTS. art. 1.

Popular sovereignty dictates that the “Government” of the people which “derives from them,” is properly channeled when our democratic process functions to reflect the will of the people. Although the Maryland Declaration of Rights, like the Constitution, is silent with respect to the right of its citizens to challenge the primacy of political considerations in drawing

legislative districts, the Declaration of Rights does memorialize that the people are guaranteed the right to wield their power through the elective franchise, thereby safeguarding the sacred principle that the government is, at all times, for the people and by the people. MD. CONST. DECL. OF RTS. arts. 1, 7. Specifically, recognizing that the government is for the people and by the people, Article I of the Constitution describes the process of electing persons to represent them in government, which is also embodied in the principles expressed through the Free Elections Clause in Article 7.

Under the principle of popular sovereignty, we bear in mind that the Constitution as a whole “is the fundamental, extraordinary act by which the people establish the procedure and mechanism of their government.” *Bd. of Supervisors of Elections for Anne Arundel Cnty. v. Att’y Gen.*, 246 Md. 417, 429 (1967); *Whittington*, 1 H & J at 242 (“This compact [the Constitution] is founded on the principle that the people being the source of power, all government of right originates from them.”).

The second principle—avoiding extravagant or undue extension of power by the Legislature—was an important limitation on the Legislature, the only entity for which the Maryland citizens could vote in 1776. It is stated that “[t]he Declaration of Rights is a guide to the several departments of government, in questions of doubt as to the meaning of the Constitution, and “a guard against any extravagant or undue extension of power[.]” *Anderson*, 23 Md. at 628. The limitation on “extravagant or undue extension of power” is coextensive with the principle of popular sovereignty. For this purpose, “courts have [the] power and duty to determine [the] constitutionality of legislation.” *Curran v. Price*, 334 Md. 149, 159 (1994).

In Maryland, we have long understood that “[t]he elective franchise is the highest right of the citizen, and the spirit of our institution requires that every opportunity should be afforded to its fair and free exercise.” *Kemp v. Owens*, 76 Md. 235, 241 (1892). In *Kemp*, the Court of Appeals characterized the right to vote as “one of the primal rights of citizenship,” *id.*, as it did in *Nader for President 2004*: “the right of suffrage” guaranteed by our Constitution “is one of, if not, the most important and fundamental rights granted to Maryland citizens as members of a free society.” 399 Md. at 686. To safeguard the Legislature from exerting extravagant or undue extension of power, each citizen of this State is afforded the opportunity to vote and hold the Legislature accountable. MD. CONST. DECL. OF RTS. arts. 7, 24, 40. Similarly, the judicial branch of government has a responsibility to limit the Legislature from exerting extravagant or undue extension of power by enforcing the standards of legislative districting outlined in Article III, Section 4 of the Maryland Constitution and by the avoidance of extreme partisan gerrymandering.

Therefore, assuming the truth of all well pleaded relevant and material facts and all inferences that reasonably can be drawn therefrom, the Plaintiffs have stated a cause of action under the fundamental principles of the Maryland Constitution and Declaration of Rights of popular sovereignty and avoiding extravagant and undue exercise of power by the Legislature.

Findings of Fact

*Stipulations and Judicial Admissions*²⁹

1. Plaintiffs are qualified, registered voters in Maryland.

²⁹ Where stipulations and admissions have overlapped, the trial judge has avoided duplication by adopting the more comprehensive of the two.

2. Plaintiffs in *Szeliga v. Lamone* ("No. 1816") are:

a. Kathryn Szeliga is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. Ms. Szeliga currently serves as a member of Maryland's House of Delegates and has been a member of the House of Delegates since 2011. She is a Republican elected official who represents Maryland citizens in Baltimore and Hartford Counties. She resides in District 7 of the 2021 Plan.

b. Christopher T. Adams is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. Mr. Adams currently serves as a member of Maryland's House of Delegates and has been a member of the House of Delegates since 2015. Mr. Adams is a Republican elected official who represents Maryland citizens in Caroline, Dorchester, Talbot, and Wicomico Counties. He resides in District 1 of the 2021 Plan.

c. James Warner is a citizen of the United States and a resident of and registered voter in Maryland. Mr. Warner is a decorated combat veteran and former prisoner of war. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. He resides in District 2 of the 2021 Plan.

d. Martin Lewis is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for

Republican candidates for elective office, including for the United States House of Representatives. He resides in District 2 of the 2021 Plan.

e. Janet Moya Cornick is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 3 of the 2021 Plan.

f. Ricky Agyekum is a citizen of the United States and a resident of and registered voter in Maryland. He is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. He resides in District 4 of the 2021 Plan.

g. Maria Isabel Icaza is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 5 of the 2021 Plan.

h. Luanne Ruddell is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She currently serves as Chair of the Garrett County Republican Central Committee and President of the Garrett County Republican Women's Club. Additionally, she serves on the Rules Committee for the Maryland Republican Party and is a member of the Maryland Republican Women and the National Republican Women's organizations. She resides in District 6 of the 2021 Plan.

i. Michelle Kordell is a citizen of the United States and a resident of and registered voter in Maryland. She is a registered Republican and plans to vote in the future for Republican candidates for elective office, including for the United States House of Representatives. She resides in District 8 of the 2021 Plan.

3. Plaintiffs in *Parrott v. Lamone* ("No. 1773") are:

a. Plaintiff Neil Parrott is a citizen of Maryland, is registered to vote as a Republican, and resides in the Sixth Congressional District of the new Plan. Mr. Parrott has registered to run for Congress in 2022 in that district. Mr. Parrott is currently a member of the Maryland House of Delegates.

b. Plaintiff Ray Serrano is a citizen of Maryland, is registered to vote as a Republican, and resides in the Third Congressional District of the new Plan.

c. Plaintiff Carol Swigar is a citizen of Maryland, is registered to vote as a Republican, and resides in the First Congressional District of the new Plan.

d. Plaintiff Douglas Raaum is a citizen of Maryland, is registered to vote as a Republican, and resides in the First Congressional District of the new Plan.

e. Plaintiff Ronald Shapiro is a citizen of Maryland, is registered to vote as a Republican, and resides in the Second Congressional District of the new Plan.

f. Plaintiff Deanna Mobley is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fourth Congressional District of the new Plan.

g. Plaintiff Glen Glass is a citizen of Maryland, is registered to vote as a Republican, and resides in the First Congressional District of the new Plan.

h. Plaintiff Allen Furth is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fourth Congressional District of the new Plan.

i. Plaintiff Jeff Warner is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fourth Congressional District of the new Plan. Mr. Warner intends to run for Congress in 2022 in that district.

j. Plaintiff Jim Nealis is a citizen of Maryland, is registered to vote as a Republican, and resides in the Fifth Congressional District of the new Plan.

k. Plaintiff Dr. Antonio Campbell is a citizen of Maryland, is registered to vote as a Republican, and resides in the Seventh Congressional District of the new Plan.

l. Plaintiff Sallie Taylor is a citizen of Maryland, is registered to vote as a Republican, and resides in the Eight Congressional District of the new Plan.

4. Linda H. Lamone is the Maryland State Administrator of Elections.

5. William G. Voelp is the chairman of the Maryland State Board of Elections.

6. The Maryland State Board of Elections is charged with ensuring compliance with the Election Law Article of the Maryland Code and any applicable federal law by all persons involved in the election process. It is the State agency responsible for administering state and federal elections in the State Maryland.

7. Every 10 years, states redraw legislative and congressional district lines following completion of the decennial United States census. Redistricting is necessary to ensure that districts are equally populated and may also be required to comply with other applicable federal and state constitutions and voting laws.

8. The United States Constitution provides that, "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." U.S. CONST. art. I, § 2, cl. 1. It also states that, "[t]he Times, Places and Manner of holding Elections for ... Representatives, shall be prescribed in each State by the Legislature

thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.* § 4, cl. 1. The United States Constitution thus assigns to state legislatures primary responsibility for apportionment of their federal congressional districts, but this responsibility may be supplanted or confined by Congress at any time.

9. Maryland has eight congressional districts.

10. The General Assembly enacts maps for these districts by ordinary statute. While the General Assembly's congressional maps are subject to gubernatorial veto, the General Assembly can, as with any ordinary statute, override a veto.

11. In 2011, following the 2010 decennial census, Maryland's General Assembly undertook to redraw the lines of Maryland's eight congressional districts.

12. To carry out the redistricting process, then-Governor Martin O'Malley appointed the Governor's Redistricting Advisory Committee ("GRAC") in July 2011 by Executive Order. The GRAC was charged with holding public hearings around the State and drafting redistricting plans for the Governor's consideration to set the boundaries of the State's 47 legislative districts and 8 congressional districts following the 2010 Census.

13. To carry out the redistricting process, Governor O'Malley appointed the GRAC to hold public hearings and recommended a redistricting plan. As part of a collaborative approach to developing a congressional map in 2011, Governor O'Malley asked Rep. Steny Hoyer to propose a consensus congressional map among Maryland's congressional delegation.

14. Democratic members of Maryland's congressional delegation, including Representative Hoyer, were involved in developing a consensus map to provide Governor O'Malley in order to assist with the process of developing a new congressional map for Maryland.

15. The GRAC held 12 public hearings around the State in the summer of 2011 and received approximately 350 comments from members of the public concerning congressional and legislative redistricting in the State. Approximately 1,000 Marylanders attended the hearings, which were held in Washington, Frederick, Prince George's, Montgomery, Charles, Harford, Baltimore, Anne Arundel, Howard, Wicomico, and Talbot Counties, and Baltimore City.

16. The GRAC solicited submissions of alternative plans for congressional redistricting prepared by third parties for its consideration. The GRAC also solicited public comment on the proposed congressional plan that it adopted.

17. The GRAC prepared a draft plan using a computer software program called Maptitude for Redistricting Version 6.0.

18. GRAC adopted a proposed congressional redistricting plan and made public its proposed plan on October 4, 2011. No Republican member of the GRAC voted for the congressional redistricting plan that was adopted.

19. The GRAC plan altered the boundaries of district 6 by removing territory in, among other counties, Frederick County, and adding territory in Montgomery County.

20. On October 15, 2011, Governor O'Malley announced that he was submitting a plan that was substantially similar to the plan approved by the GRAC to the General Assembly.

21. One perceived consequence of the Plan was that it would make it more likely that a Democrat rather than a Republican would be elected as representative from District 6.

22. On October 17, 2011, the Senate President introduced the Governor's proposal as Senate Bill I at a special session and it was signed into law on October 20, 2011 with only minor

adjustments (the "2011 Plan"). No Republican member of the General Assembly voted in favor of the 2011 Plan.

23. The 2011 Plan was petitioned to referendum by Maryland voters at the general election of November 6, 2012, pursuant to Article XVI of the Maryland Constitution.

24. On September 6, 2012, the Circuit Court for Anne Arundel County rejected contentions that the ballot language for the referendum question was misleading or insufficiently informative. *See Parrott, et al. v. McDonough, et al.*, No. 02-C-12-172298 (Cir. Ct. for Anne Arundel Cnty.) (the "Referendum Litigation"). On September 7, 2012, the Court of Appeals denied a petition for certiorari by the plaintiffs in that case.

25. The 2011 Plan was approved by the voters in that referendum. The language of the question on the ballot for the referendum stated:

Question 5
Referendum Petition
(Ch. 1 of the 2011 Special Session)
Congressional Districting Plan

Establishes the boundaries for the State's eight United States Congressional Districts based on recent census figures, as required by the United States Constitution.

For the Referred Law
 _ **Against the Referred Law**

26. On July 23, 2014, the Court of Special Appeals affirmed the ruling of the Circuit Court in the Referendum Litigation in an unpublished opinion. *See Parrott, et al. v. McDonough, et al.*, No. 1445, Sept. Tenn 2012 (Md. App. July 23, 2014). A true and

accurate copy of the unpublished opinion in that case is attached hereto as Exhibit XII.³⁰ On October 22, 2014, the Court of Appeals denied a petition for certiorari by the appellants in that case. *See Parrott, et al. v. McDonough, et al.*, No. 382, Sept. Tenn 2014 (Md. Oct. 22, 2014).

27. Republican Roscoe G. Bartlett won election as United States Representative for Maryland's Congressional District 6 in each of the following years, with the indicated margins of victory over his Democratic challenger: 1992 (8.3%); 1994 (31.9%); 1996 (13.7%); 1998 (26.8%); 2000 (21.4%); 2002 (32.3%); 2004 (40.0%); 2006 (20.5%); 2008 (19.0%); 2010 (28.2%).

28. Democrats Goodloe E. Byron (1970-1976) and Beverly Byron (1978-1990) won election United States Representative for Maryland's Congressional District 6 in each of the following years, with the indicated margins of victory over their respective Republican challenger: 1970 (3.3%); 1972 (29.4%); 1974 (41.6%); 1976 (41.6%); 1978 (79.4%); 1980 (39.8%); 1982 (48.8%); 1984(30.2%); 1986(44.4%); 1988(50.7%); 1990(30.7%). *See Election Statistics: 1920 to Present*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://perma.cc/98LQ-8VXK>.

29. The congressional districts created through the 2011 Plan were used in the 2012-2020 congressional elections. Since 2012, a Democrat has held District 6 and Maryland's congressional delegation has always included 7 Democrats and 1 Republican. The margins of victory for the Democrat in District 6 (John Delaney from 2012-2016; David Trone in 2018-2020) have been: 2012 (20.9%); 2014 (1.5%); 2016 (15.9%); 2018 (21.0%);

³⁰ The identification of exhibits attached to this Court's Opinion has been changed from alphabetical identifications, which were previously labeled by the parties in these stipulations, to roman numeral identifications, so as to avoid any confusion between the exhibits admitted at trial and the exhibits attached to this Opinion.

2020 (19.6%). See *ElectionStatistics: 1920 to Present*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://perma.cc/98LQ-8VXK>.

30. Maryland Governor Larry Hogan signed an executive order on August 6, 2015, which created the Maryland Redistricting Reform Commission. A true and accurate copy of the August 6, 2015 executive order is attached hereto as Exhibit I.

31. The Commission was comprised of seven members appointed by the (Republican) Governor, two members appointed by the (Republican) minority leaders in the Maryland Legislature, and two members appointed by the (Democratic) majority leaders in the Maryland Legislature. The Governor's appointees consisted of three Republicans, three Democrats, and one not affiliated with any party. The Legislature's appointments consisted of two Democrats and two Republicans.

32. After several months of soliciting input from citizens and legislators across the State, the Commission observed that Maryland's constitution and laws offer no criteria or guidelines for congressional redistricting, and that the Maryland Constitution is otherwise silent on congressional districting. The Commission recommended, among other things, that districting criteria should include compactness, contiguity, congruence, substantially equal population, and compliance with the Voting Rights Act and other applicable federal laws. The Commission also recommended the creation of an independent redistricting body, whose members would be selected by a panel of officials drawn from independent branches of government such as the judiciary, charged with reapportioning the state's districts every ten years after the decennial census. A true and accurate copy of the Commission's Final Report is attached hereto as Exhibit X.

33. During each regular session of the General Assembly between 2016 and 2020, Governor Hogan caused one or more legislative bills to be introduced that would have established a processes by which State legislative and congressional maps were created in the first instance by a purportedly independent and bipartisan commission, and ultimately by the Court of Appeals in the event that the commission-proposed maps were not approved by the General Assembly or were vetoed by the Governor. These bills were House Bill 458 and Senate Bill 380 introduced in the 2016 regular session of the General Assembly, House Bill 385 and Senate Bill 252 introduced in the 2017 regular session, House Bill 356 and Senate Bill 307 in the 2018 regular session, House Bills 43 and 44 and Senate Bills 90 and 91 in the 2019 regular session, and House Bills 43 and 90 and Senate Bills 266 and 284 in the 2020 regular session. None of these bills was voted out of committee.

34. On January 12, 2021, Governor Hogan issued an executive order establishing the Maryland Citizens Redistricting Commission (MCRC) for the purposes of redrawing the state's congressional and legislative districting maps based on newly released census data. The MCRC was comprised of nine Maryland registered voter citizens, three Republicans, three Democrats, and three registered with neither party. Governor Hogan's Executive Order directed the MCRC to prepare maps that, among other things: respect natural boundaries and the geographic integrity and continuity of any municipal corporation, county, or other political subdivision to the extent practicable; and be geographically compact and include nearby areas of population to the extent practicable. A true and accurate copy of the January 12, 2021 Executive Order is attached heretoas Exhibit XI.

35. Over the course of the following months, the MCRC held over 30 public meetings with a total of more than 4,000 attendees from around the State. The Commission

provided a public online application portal for citizens to prepare and submit maps, and it received a total of 86 maps for consideration.

36. After receiving public input and deliberating, on November 5, 2021, the MCRC recommended a congressional redistricting map to Governor Hogan.

37. On November 5, 2021, Governor Hogan accepted the MCRC's proposed final map and issued an order transmitting the maps to the Maryland General Assembly for adoption at a special session on December 6, 2021.

38. In July 2021, following the 2020 decennial census, Bill Ferguson, President of the Maryland Senate, and Adrienne A. Jones, Speaker of the Maryland House of Delegates, formed the General Assembly's Legislative Redistricting Advisory Commission (the "LRAC"). The LRAC was charged with redrawing Maryland's congressional and state legislative maps.

39. The LRAC included Senator Ferguson, Delegate Jones, Senator Melony Griffith, and Delegate Eric G. Luedtke, all of whom are Democratic members of Maryland's General Assembly. Two Republicans, Senator Bryan W. Simonaire and Delegate Jason C. Buckel, also, were appointed to the LRAC by Senator Ferguson and Delegate Jones. Karl S. Aro, who is not a member of Maryland's General Assembly, was appointed as Chair of the LRAC by Senator Ferguson and Delegate Jones. Mr. Aro previously served as Executive Director of the non-partisan Department of Legislative Services for 18 years until his retirement in 2015, and was appointed by the Court of Appeals to assist in preparing a remedial redistricting plan that complied with state and federal law in 2002.

40. The LRAC held 16 public hearings across Maryland. At the hearings, the LRAC received testimony and comments from numerous citizens.

41. One of the themes that emerged from the public testimony and comments was that Maryland's citizens wanted congressional maps that were not gerrymandered. Other citizens indicated in these comments or public testimony that they did not want to be moved from their current districts. Still others advocated for the creation of majority-Democratic districts in every district of the State. And others requested that districts be drawn so as to eliminate the likelihood that a current incumbent might be reelected.

42. At the conclusion of the public hearings, the Department of Legislative Services ("DLS") was directed to produce maps for the LRAC's consideration.

43. On November 9, 2021, the LRAC issued four maps for public review and comment.

44. In a cover message releasing the maps, Chair Aro wrote: "These Congressional map concepts below reflect much of the specific testimony we've heard, and to the extent practicable, keep Marylanders in their existing districts. Portions of these districts have remained intact for at least 30 years and reflect a commitment to following the Voting Rights Act, protecting existing communities of interest, and utilizing existing natural and political boundaries. It is our sincere intention to dramatically improve upon our current map while keeping many of the bonds that have been forged over 30 years or more of shared representation and coordination."

45. On November 23, 2021, the LRAC chose a final map to submit to the General Assembly for approval (the "2021 Plan"). Neither Republican member of the LRAC supported the 2021 Plan.

46. On November 23, 2021, by a strict party-line vote, the LRAC chose a final map to submit to the General Assembly for approval, referred to as the 2021 Plan. Neither Republican

member of the LRAC supported the 2021 Plan. Senator Simonaire uttered the statement during the LRAC hearing on November 23, 2021, “[o]nce again, I’ve seen politics overshadow the will of the people.”

47. A true and accurate copy of the 2021 Plan is attached as Exhibit I.

48. On December 7, 2021, the Maryland House of Delegates voted to reject an amendment that would have substituted the MCRC's map for the 2021 Plan. Two Democrats joined all of the Republicans in voting to substitute the MCRC's map for the Plan. No Republican member voted against the amendment.

49. On December 8, 2021, the General Assembly enacted the 2021 Plan. One Democratic member voted against the 2021 Plan. No Republican member voted to approve the 2021 Plan.

50. On December 8, 2021, the General Assembly enacted the 2021 Plan on a strict party-line vote. Not a single Republican member of the General Assembly voted to approve the 2021 Plan.

51. According to the Princeton Gerrymandering Project, Democrats now have an estimated vote-share advantage in every single Maryland congressional district.

52. On December 9, 2021, Governor Hogan vetoed the 2021 Plan.

53. On December 9, 2021, the General Assembly overrode Governor Hogan's veto, thus adopting the 2021 Plan into law. One Democratic member of the General Assembly voted against overriding Governor Hogan's veto, while no Republican member of the General Assembly voted in favor of override.

54. After passage of the 2021 Plan, Senator Ferguson and Delegate Jones issued a joint statement emphasizing that the 2021 Plan "keep[s] a significant portion of Marylanders in their current districts, ensuring continuity of representation."

55. Under Maryland's 2021 adopted congressional plan, portions of Anne Arundel County are in Districts 1, 2, and 4, and that District 1 includes population residing on the Eastern Shore and in Anne Arundel County.

56. Under Maryland's 2021 adopted congressional plan, portions of Baltimore City are in Districts 2, 3, and 7.

57. Under Maryland's 2021 adopted congressional plan, portions of Baltimore County are in Districts 2, 3, and 7.

58. Under Maryland's 2021 adopted congressional plan, portions of Montgomery County are in Districts 3, 4, 6, and 8.

59. Under Maryland's 2021 adopted congressional plan, nine counties have population assigned to more than one congressional district.

60. Congressmen Andy Harris, who currently represents the First Congressional District under the Enacted Plan and represented the First Congressional District under the 2011 Plan, was in the Seventh Congressional District, which is the District represented by Kweisi Mfume. Since that time, according to the Board of Elections' registration records, in early February 2022, Congressmen Harris registered to vote at a residence in Cambridge, Maryland, in the First Congressional District, which is on the Eastern Shore at a residence or place where Congressmen Harris has owned since 2009.

61. Exhibit II reports the adjusted population of Maryland's eight congressional districts following the 2010 census under Maryland's 2002 redistricting map. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit II are a true and accurate representation of data derived from government sources.

62. Exhibit III reports the adjusted population of Maryland's eight congressional districts following the 2020 census under the 2011 Plan and under the 2021 Plan. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit III are a true and accurate representation of data derived from government sources.

63. Exhibit IV reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, as of October 17, 2010. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit IV are a true and accurate representation of data derived from government sources.

64. Exhibit V reports the number of eligible active voters and the respective political-party affiliations of those eligible active voters in each of Maryland's eight congressional districts on October 21, 2012. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit V are a true and accurate representation of data derived from government sources.

65. Exhibit VI reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, as of October 17, 2020. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit VI are a true and accurate representation of data derived from government sources.

66. Exhibit VII reports the number of eligible active voters in each of Maryland's eight congressional districts, and the respective political-party affiliations of those registered eligible voters, under the 2021 Plan. The parties stipulate that the matters of fact asserted, stated, or depicted in Exhibit VII are a true and accurate representation of data derived from government sources.

67. Exhibit VIII depicts Maryland's eight congressional districts under the 2011 Plan. The parties stipulate that the matters of fact asserted, stated or depicted in Exhibit VIII are a true and accurate representation of data derived from government sources.

Findings Derived by the Trial Judge from Testimony and Other Evidence Adduced at Trial

Mr. Sean Trende

68. Mr. Sean Trende testified and was qualified as an expert witness in political science, including elections, redistricting, including congressional redistricting, drawing redistricting maps, and analyzing redistricting.

69. Mr. Trende was asked to analyze the Congressional districts adopted by the Maryland Legislature in the recent rounds of redistricting and opine as to whether traditional redistricting criteria was [subordinated] for partisan considerations.³¹

70. Mr. Trende's opinions and conclusions were rendered to a reasonable degree of scientific certainty typical to his field.

71. In deriving his opinions, Mr. Trende conducted a three-part analysis; the first part analyzed traditional redistricting criteria in Maryland, with specific reference to the compactness

³¹ The transcript stated, "whether traditional redistricting criteria was coordinated for partisan considerations," however, the trial judge recalls the correct verbiage was "whether traditional redistricting criteria was *subordinated* for partisan considerations." March 15, 2022, A.M. Tr. 45: 2-7.

of the maps with a comparison to other maps that had been drawn both in Maryland and across the country; he then examined the number of county splits, “the number of times the counties were split up by the maps” and finally, he then conducted a “qualitative assessment” to see how precincts were divided.

72. In the first part, Mr. Trende conducted a simulation analysis. In doing so, he “used the same techniques that were used in Ohio and in North Carolina” and “similar to that which has been used in Pennsylvania.” The purpose of Mr. Trende’s analysis was to analyze “partisan bias of the Maryland 2021 congressional districts.”

73. Mr. Trende’s methodology relied on “shape files.”

74. In analyzing the shape files, he used “widely used statistical programming software called R.”

75. Mr. Trende also conducted an analysis of the county splits for Maryland utilizing the “R” software.

76. Based upon his analysis of the county splits, referring to Exhibit 2-A, Mr. Trende found that the 1972 Congressional map included 8 splits.

77. In 1982, there were 10 county splits in the Congressional map.

78. In 1992, there were 13 county splits in the Congressional map.

79. In 2002, there were 21 county splits in the Congressional map.

80. In 2012, there were 21 county splits in the Congressional map.

81. In the 2021 Plan, there are 17 county splits.

82. The 2021 Plan has a historically high number of county splits compared to other Congressional plans, except the 2011 Map.

83. Mr. Trende testified that “you really only need 7 county splits in a map with 8 districts.”

84. With respect to “compactness” of the 2021 Plan, Mr. Trende used four of the “most common compactness metrics”: the Reock score; the Polsby-Popper score; the Inverse Schwartzberg score; and the Convex Hull score; the lower the score the less compact a Congressional plan is.

85. The four scores were presented to strengthen his presentation as well as to present a different “aspect” of compactness.

86. Exhibits 4-A, 4-B, 4-C, and 4-D reflect the bases for Mr. Trende’s compactness analyses, which included scores for all of Maryland’s congressional districts dating back to 1788.

87. Exhibit 5 reflects the analysis of the four scores using a scale of 0 to 1, where “1 is a perfectly compact district, and 0 is a perfectly non-compact score.”

88. There is no “magic number” that reflects whether a district is not compact. Comparisons to historical data supported Mr. Trende’s conclusion that the 2021 Plan is “an outlier.”

89. Based upon Mr. Trende’s testimony, the Court finds that for “much of Maryland’s history, including for a large portion of the post-*Baker v. Carr* history, Maryland had reasonably compact districts that showed a similar degree of compactness from cycle to cycle.”

90. The Court also finds, based upon Mr. Trende’s analysis that by Maryland’s historic standards, the 2021 Congressional lines are “quite non-compact” regardless of which of the four metrics is used or analyzed.

91. Mr. Trende also analyzed the 2021 Plan with reference to every district in the United States going back to 1972, which is represented by Exhibits 6-A, 6-B, 6-C, and 6-D.

92. Mr. Trende testified that there are a limited number of maps for other states that have lower Reock scores than the 2021 Plan (*see* Exhibit 6-A).

93. Mr. Trende also testified with reference to Exhibit 6-B that there are only “six maps that have ever been drawn in the last 50 years with worse average Polsby-Popper scores than the current Maryland maps.”

94. Mr. Trende further testified with reference to Exhibit 6-C that the 2021 Plan reflects one of the “worst Inverse Schwartzberg score[] in the last 50 years in the United States.”

95. With reference to Exhibit 6-D, Mr. Trende testified that it scored, under the Convex Hull analysis, “very poorly relative to anything that’s been drawn in the United States in the last 50 years.”

96. Mr. Trende testified relative to compactness in the 2002 and 2012 Congressional plans in comparison to the 2021 Plan and concluded that the 2021 Plan is not compact.

97. Mr. Trende testified that relative to Exhibits 7-A, 7-B, 7-C, and 7-D, that the first Congressional district under the 2021 Plan “lower[ed] the Republican vote share in the First” and “[left] the democratic districts or precincts on the bay.” He concluded that the “Democrats have an increased chance of winning this district in a normal or good democratic year.”

98. As to Exhibits 8-A, 8-B, 8-C, and 8-D, he concluded that “almost all of the Republican precincts were placed into District 3 or District 7,” while “[a]lmost all of the democratic precincts were placed into District 1.”

99. Mr. Trende then presented a simulation approach to redistricting utilizing “R” software. The simulation package was dependent on the work of Dr. Imai using an approach that samples maps drawn without respect to politics. In each of Mr. Trende’s simulations he used 250,000 maps all suppressing politics and utilizing two minority/majority districts mandated by the Voting Rights Act; he discarded duplicative maps and arrived at between 30,000 to 90,000 maps to be sampled for each simulation.

100. He then fed various “political data” into the program to measure partisanship.

101. Mr. Trende’s simulations relied upon the correlations between vote shares and Presidential data, because he testified that Presidential data is the most predictive in analyzing election outcomes. Mr. Trende further testified that he used other elections at the Presidential, senatorial, and gubernatorial levels to check his simulation results.

102. In the first set of 250,000 maps, Mr. Trende depended upon population parity or equality and contiguity as well as a “very, very light compactness parameter.” Other traditional redistricting criteria was not considered.

103. The second set of 250,000 maps depended on a “modest compactness criteria,” “drawing without any political information.”

104. The third set of 250,000 maps added respect for county subdivisions.

105. The three analyses are represented in Exhibits 9-A, 9-B, and 9-C.

106. In every one of the maps from which Mr. Trende drew his opinions, there are at least “two majority/minority districts to comport with the Voting Rights Act.”

107. With respect to the first set of maps drawn with very little regard to compactness but regard given to contiguity and equal population, 14,000 of the maps have seven districts that

were won by President Joseph Biden and only 4.4% have eight districts won by President Joseph Biden. Mr. Trende concluded that “it is exceedingly unlikely that if you were drawing by chance, you would end up with a map where President Joe Biden carried all eight districts.”

108. With respect to the application of compactness and contiguity as well as equal population, he concluded that the 2021 Plan would result in eight districts won by President Biden, which he concluded was “an extremely improbable outcome if you really were drawing – just caring about traditional redistricting criteria and weren’t subordinating those considerations for partisanship.”

109. With respect to Exhibit 9-C, which reflects maps drawn with consideration of population equality, contiguity, compactness, and respect for county lines, Mr. Trende testified that “you almost never produce eight districts that Joe Biden carries.” Specifically, Mr. Trende found that of the 95,000 maps that survived the initial sort, 134 of them, or .14%, produced eight districts that President Biden won.

110. Mr. Trende then presented data dependent on box plots, which are reflected in Exhibits 10-A, 10-B, 10-C, 10-D, and 10-E. On the basis of his box plot analysis, Mr. Trende concluded that, “[p]olitics almost certainly played a role” in the 2021 Plan. He also concluded that, “there is a pattern that appears again and again and again, which is heavily democratic districts are made more Republican but still safely democratic. And that, in turn, allows otherwise Republican competitive districts to be drawn out of that Republican competitive range into an area where Democrats are almost guaranteed to have seven districts, have a great shot at winning that eighth District [that being, the First Congressional District].”

111. With respect to his final analysis, he utilized a “Gerrymandering Index,” which is “a number that summarizes, on average, how far the deviations are from what . . . would [be] expect[ed] for a map drawn without respect to politics.”

112. Mr. Trende relied Dr. Imai’s work in his paper on the Sequential Monte Carlo methods.³²

113. Exhibits 11-A, 11-B, and 11-C, illustrate Mr. Trende’s conclusions with respect to the Gerrymandering Index. Lower scores are indicative of greater gerrymandering.

114. Mr. Trende concludes that the 2021 Plan is an outlier with respect to the Gerrymandering Index. In fact, he concludes with respect to Exhibit 11-A, which included considerations regarding contiguity and equal population, that “it’s exceedingly unlikely” that a map would result that would have a larger Gerrymandering Index, because there were only 97 maps of the 31, 316 maps that were consulted that would have a larger gerrymandering index.

115. With respect to Exhibit 11-B in which compact districts are drawn, Mr. Trende concluded that there were only 102 maps with larger gerrymandering indexes than the 2021 Plan: “[i]t’s exceedingly unlikely if you were really drawing without respect to partisanship, just trying to draw compact maps that are contiguous and equipopulous, its exceedingly unlikely you would get something like this.”

116. The final Gerrymandering Index Exhibit, 11-C, reflects compact plans that are contiguous and of equal population and respect county lines (with due consideration to the Voting Rights Act: two majority/minority districts).

³² Kosuke Imai & Cory McCartan, *Sequential Monte Carlo for Sampling Balanced and Compact Redistricting Plans*, HARV. UNIV. 6–17 (Aug. 10, 2021), available at: <https://perma.cc/Z2DT-A2RW>.

117. On the basis of Exhibit 11-C, Mr. Trende concludes that the 2021 Plan is a “gross outlier,” such that of the 95,000 maps under considerations, only one map had a Gerrymandering Index larger than the 2021 Plan.

118. Utilizing the Gerrymandering Index, Mr. Trende concluded that “it’s just extraordinarily unlikely you would get a map that looks like the enacted plan.”

119. Mr. Trende ultimately concluded that “the far more likely thing that we would accept in social science is given all this data is that partisan considerations predominated in the drawing of this map and that as was the case in Pennsylvania, North Carolina, and Ohio and other states where this type of analysis was conducted, traditional redistricting criteria were subordinated to these partisan considerations.”

120. Mr. Trende also concluded that the 2021 Plan has a very high Gerrymandering Index and the same pattern of districts being drawn up in heavily Republican areas made more Democratic, as well as districts drawn down into the Democratic areas made more Republican, even when three majority/minority districts under the Voting Rights Act are conceded in the 2021 Plan.

121. Ultimately, Mr. Trende concludes that the 2021 Plan was drawn with partisanship as a predominant intent, to the exclusion of traditional redistricting criteria.

122. Mr. Trende had no opinion with respect to the Maryland Citizens Redistricting Commission (“MCRC”) Plan.

123. Mr. Trende’s simulations did not account for communities of interest and “double bunking of incumbents” into a single district.

124. Mr. Trende did not consider in his simulations the effect of Governor Hogan's victories in 2014 and 2018.

125. Mr. Trende did not account for unusually strong Congressional candidates running in an election using the 2021 Plan.

126. Mr. Trende used voting patterns rather than registration patterns in his analyses of the 2021 Plan.

127. Mr. Trende testified that the absolute minimum number of county splits in a map with eight congressional districts is seven splits.

128. Mr. Trende, when asked to defined an "outlier," explained that it "means a map that would have a less than 5% chance of being drawn without respect to politics" and that with respect to his simulations, a map that is .00001% is "under any reasonable definition of an extreme outlier."

129. Mr. Trende testified within his expertise to a reasonable degree of scientific, professional certainty, that under any definition of extreme gerrymandering, the 2021 Plan "would fit the bill"; "[i]ts a map that, you know -- if traditional redistricting criteria predominated, would be extraordinarily unlikely to be drawn. You know, with compactness and respect for county lines, .00001 percent. That's extreme."

130. Mr. Trende further opined that the 2021 Plan reflects "the surgical carving out of Republican and Democratic precincts" and that "there are a lot of individual things that tell an extreme-gerrymandering story," and "when you put them all together, it's just really hard to deny it."

131. Mr. Trende further stated that the 2021 Plan was drawn “with an intent to hurt the Republican party’s chances of letting anyone in Congress.”

132. Mr. Trende testified that the 2021 Plan “dilutes and diminishes the ability of Republicans to elect candidates of choice.”

133. Mr. Trende also testified that among the implications of an extreme partisan gerrymandering, that it “becomes harder for political parties to recruit candidates to run for office, because who wants to raise all that money and then be guaranteed to lose in your district.”

134. Mr. Trende did not conduct an efficiency gap analysis in this case.

Dr. Thomas L. Brunell

135. Dr. Brunell testified and was qualified as an expert in political science, including partisan gerrymandering, identifying partisan gerrymandering, and redistricting.

136. Dr. Brunell was asked to examine two Congressional districting maps for the State of Maryland: the 2021 Plan and the MCRC Plan and compare them using metrics for partisan gerrymandering.

137. In his comparison, he looked at city and county splits and compared the outcomes to proportionality regarding the relationship between the statewide vote for each party and the total number of seats in Congress for each party. He also looked at compactness and calculated the efficiency gap regarding statewide elections during the last ten years for both the 2021 Plan and the MCRC Plan.

138. Dr. Brunell testified that the MCRC Map is more compact on average than the eight districts for the 2021 Plan. He testified that the average compactness score using the Polsby-Popper index was lower for the 2021 Plan than the MCRC Plan. Dr. Brunell also

concluded that in comparison to 29 states, the 2021 Plan had a Reock score that was higher than only two other states, Illinois and Idaho. He also concluded that only Illinois and Oregon had a lower Polsby-Popper score than Maryland with respect to the 2021 Plan.

139. Dr. Brunell utilized the actual number of voters in his analysis rather than voter registration.

140. Dr. Brunell testified that with respect to the 2016 Presidential election, similar to the 2012 Presidential election, the Democratic candidate received 64% of the statewide vote in Maryland and the Democrats carried seven of the eight Congressional districts in Maryland under the 2021 Plan. Using the 2020 Presidential data in evaluating the 2021 Plan, Democrats would carry all eight of the Congressional districts under the 2021 Plan. Using the 2012 Senate candidate data in evaluating the 2021 Plan, the Democrats would carry all eight Congressional districts. Using the 2016 Senate elections in evaluating the 2021 Plan, he testified that the Democrats would carry seven of the eight districts. Using the 2018 Senate elections data, the Democrats under the 2021 Plan would carry all eight districts. Using the 2014 and 2018 gubernatorial elections, he concluded that the Democrats would carry three of the eight seats in the Congressional elections under the 2021 Plan.

141. Dr. Brunell conducted an efficiency test to determine wasted votes, *i.e.*, those cast for the losing party and those cast for the winning party above the number of votes necessary to win.

142. In order to determine the efficiency gap, he added all the wasted votes for both parties in the same district to get a measure of who is wasting more votes at a higher rate.

143. A lower number of votes wasted reflects less likelihood of partisan gerrymandering.

144. Dr. Brunell testified that just considering the efficiency gap would not be enough to find that a map is gerrymandered. Dr. Brunell testified that one would need to look at “the totality of the circumstances, use different measures, different metrics, to see if they’re telling you the same thing [or] different things.”

145. Dr. Brunell testified that by using an efficiency gap measure, there was a bias in favor of the Republicans in the MCRC Plan, although that bias was not significant.

146. Dr. Brunell testified that there were many more county segments and county splits in the 2021 Plan than in the MCRC Plan.

147. Dr. Brunell testified that redrawing electoral districts “is a complex process with dozens of competing factors that need to be taken into account, . . . like compactness, contiguity, where incumbents live, national boundaries, municipal boundaries, county boundaries, and preserving the core confirmed districts.”

148. Dr. Brunell only considered compactness of the districts in his analysis of the 2021 Plan.

149. Dr. Brunell did not take into consideration in his analysis the Voting Rights Act or incumbency bias. He testified he did assume population equality and contiguity having been met in the 2021 Plan.

Mr. John T. Willis

150. Mr. Willis testified and was qualified as an expert in Maryland political and election history and Maryland redistricting, including Congressional redistricting.

151. Mr. Willis was asked to evaluate the 2021 Plan and determine if it was consistent with redistricting in the course of Maryland history and to give his opinion as to its validity and whether it was based on reasonable factors.

152. Mr. Willis opined that Maryland's population over time has changed with an east-to-west migration, "in significant numbers."

153. Mr. Willis referred to a series of Maryland maps reflecting population migration every 50 years from 1800 to 2000, admitted into evidence as Exhibit H.

154. Exhibit H had been prepared by Mr. Willis in anticipation of the 2001 redistricting process.

155. Exhibit H shows population migration to the west in Maryland and towards the suburbs of the District of Columbia.

156. Mr. Willis testified regarding Defendants' Exhibit I, admitted into evidence, which reflects concentrations of population during the Fall of 2010.

157. He testified almost 70% of the Maryland population is "in a central core, which is roughly I-95 and the Beltway."

158. Mr. Willis also testified that geography impacts the redistricting process as well as natural boundary lines, "quarters of transportation," the changing nature of the economy, major federal installations and where they are located and their connection to the economy, institutional factors, and migration patterns.

159. With respect to Defendants' Exhibit J, Mr. Willis testified regarding the population changes from 2010 to 2020.

160. Mr. Willis further testified that each district in the 2021 Plan had to have a target population of 771,925.

161. Mr. Willis further testified that in Congressional redistricting the General Assembly starts with the map in existence to avoid disturbing existing governmental relationships.

162. Exhibit K includes all of the Congressional redistricting maps from 1789 to the present 2021 Plan, which includes a set of 17 maps. The last map—map 17—Mr. Willis testified that the district lines in the First District appeared to be based on reasonable factors and are consistent with the historical district lines enacted in Maryland. As the basis for his opinion, Mr. Willis explained that there has always been a population deficit in the First District which requires the boundary to cross over the Chesapeake Bay or to cross north over the Susquehanna River in Harford County and that there have been more crossings over the Chesapeake Bay historically than into Harford County.

163. Mr. Willis further testified regarding regional and county-based population changes over the decades in Maryland since 1790, on a decade basis, reflected in Exhibit L. He testified that the district lines in the Second Congressional District appear to be based upon reasonable factors and are consistent with historical district lines enacted in Maryland and reflects migration patterns relative to Baltimore City.

164. Mr. Willis further testified about the district lines for the Third Congressional District, which he opined were based on reasonable factors and consistent with historical district lines enacted in Maryland.

165. With respect to the liens of the Fourth Congressional District, Mr. Willis testified that the district lines appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland. He testified that the Fourth District is also what is known as a “Voting Rights Act District.”

166. With respect to the district lines of the Fifth Congressional District, he opined that the lines appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland. The district lines are also based on major employment centers and major public institutions.

167. With respect to the district lines of the Sixth Congressional District, following the Potomac River, Mr. Willis testified that the lines reflect commercial and family connections tying the area together since the State was founded. On that basis, he testified that the lines of the Sixth District appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland.

168. Mr. Willis testified that the Seventh Congressional District is another “Voting Rights Act district.”

169. Mr. Willis then testified about the Eighth Congressional District, the lines of which appear to be based on reasonable factors and consistent with historical district lines enacted in Maryland. Mr. Willis attributes the lines to traffic patterns along what is basically State Route 97.

170. He finally testified that the all the district lines as they are drawn in the 2021 Plan appear to be based on reasonable factors and are consistent with historical district lines enacted in Maryland.

171. Mr. Willis testified that for every election prior to 2002 in Congressional District 2, a Republican candidate won the Congressional seat. A Republican candidate also won every election in Congress in District 8 from 1992 to 2000, that being Congresswoman Constance Morella. Thereafter, from 2002 to 2010, no Republican candidate won a Congressional election in District 8. He then testified that in District 2, a Democratic candidate has won the Congressional election every single year since the 2002 map was drawn, *i.e.*, Congressman C.A. Dutch Ruppertsberger.

172. Mr. Willis further testified with respect to the First Congressional District that as a result of a Federal Court decision, District 1 included all of the Eastern Shore and Cecil County as well as St. Mary's County, Calvert County, and part of Anne Arundel County.

173. As a result of the redistricting plan from 2002 to 2010, District 1 was drawn a different way, which included all of the Eastern Shore counties and an area across the Bay Bridge into Anne Arundel County, as well as parts of Harford and Baltimore County.

174. Mr. Willis characterized the Congressional map from 2002 to 2010 as "fraught with politics to favor some candidates over another."

175. He testified that since the Federal Court ordered the drawing of the Congressional districts in Maryland, the First Congressional District has crossed the Chesapeake Bay in southern Maryland, has crossed the Chesapeake Bay in northern Maryland, as well as crossed parts of Cecil, Harford, Baltimore, and Carroll County.

176. Mr. Willis testified that from the 1842 until the 2012 Congressional maps, Frederick County was linked in its entirety with the westernmost counties of Maryland, as well as in the Federal District Court redistricting map.

177. During the Court's questioning, Mr. Willis testified that the biggest "driver" in the redistricting process is populations shifts with gains in population in places like Prince George's County for example, and loss of population, for example, in Baltimore City.

178. He also testified about other factors affecting the redistricting process such as "transportation patterns," preservation of land, federal installations, state institutions, major employment centers, prior history, election history, as well as ballot questions that "show voter attitude." He further testified that incumbency protection might be a factor as well as political considerations.

Dr. Allan J. Lichtman

179. Dr. Allan J. Lichtman testified and was qualified as an expert in statistical historical methodology, American political history, American politics, voting rights, and partisan redistricting.

180. Dr. Lichtman testified that "politics inevitably comes into play" in the redistricting process and that the balance in democratic government is "between political values and other considerations" to include "public policy, preserving the cores of existing districts, avoiding the pairing of incumbents, looking at communities of interest, shapes of the districts, and a balance between political considerations."

181. Dr. Lichtman testified that, "[w]hen you're involved with legislative bodies, it's inevitably a process of negotiation, log rolling, compromise."

182. Dr. Lichtman denied as unrealistic comparing the 2021 Plan with "ensembles of plans with zero – the politics totally taken out."

183. Dr. Lichtman's test of the 2021 Plan, according to his testimony, evaluates whether the 2021 Plan was "a partisan gerrymander based on the balance of party power in the state." His conclusions were that the likely partisan alignment of the 2021 Plan was "status quo, 7 likely Democratic wins, 1 likely Republican win"; that there could be Democratic districts in jeopardy in 2022 because "2022 is a midterm with a Democratic President." In doing his analysis, he looked at other states which were "actually mostly Republican states, where the lead party got 60% or more of the Presidential vote," which he termed are "unbalanced political states." According to Dr. Lichtman, he looked at "gerrymandering" in multiple ways, "all based on real-world considerations, not the formation of abstract models."

184. Using an "S-curve" representation in Exhibit N, he determined that a party with 60% of the vote-share would win all of the Congressional districts. He continued in his testimony to discuss how he determined that the Democratic advantage under the 2021 Plan was likely a 7-to-1 advantage based upon the Cook's Partisan Voter Index ("PVI"), referring to Exhibit R.

185. Dr. Lichtman posited through Exhibit T that traditionally there are many midterm losses by the party of the President.

186. Dr. Lichtman testified that the Democrats could have drawn a stronger First Congressional District for themselves in the 2021 Map than they did to ensure a Republican defeat.

187. Dr. Lichtman testified pursuant to Exhibit U that the Democratic advantage in Maryland in federal elections is in the mid to upper 60% range so that the Democratic seat-share in a "fair" plan would exceed 80% of the seats.

188. With reference to Exhibit V, Dr. Lichtman presented a “trend line” from which he concluded that Maryland’s enacted plan was not a partisan gerrymander because a 7-to-1 seat share was not commensurate with the Presidential vote for the Democratic party in 2020. He concluded that based on the trend line, “you would expect Maryland to be close to 100% of the [Congressional] seats.”

189. Utilizing Exhibit W, he testified regarding “unbalanced states” in which the lead party secured more than 64.2% of the vote in the 2020 Presidential election. He included that the Democrats were performing below expectation in terms of its share of Congressional seats.

190. Dr. Lichtman testified that, in his opinion, “empirically, Maryland’s Congressional seat allocation under the 2021 Plan is exactly what you would expect, assuming a 7-to-1 seat share.”

191. He also testified that the Governor’s plan, otherwise referred to as the MCRC Plan, is indicative of a gerrymander by “packing Democrats.” He also concluded it was a gerrymander because it paired two or more incumbents of the opposition party, which he believed to be indicative of a gerrymander as reflected by Exhibit Z.

192. He testified that when you pair incumbents, “you are forcing them to rescrumble and figure out how to rearrange their next election.”

193. He also testified that the MCRC Plan also “dismantled the core of the existing districts and disrupted incumbency advantage again and the balance between representatives and the represented,” referring to Exhibit AA.

194. Referring to Exhibit AB, he concluded that the MCRC Plan unduly packed Democrats, because in the MCRC Plan, there would be six Democratic districts over 70% and four Democratic districts close to or over 80%.

195. He testified further that the MCRC Plan is a “packed gerrymander.” He testified that the Governor’s Commission developing the plan was “extraordinarily under representative of Democrats” and that the Commission was appointed by a partisan elected official. He also testified that the Governor’s instructions in developing the plan helps explain “why it turns out to be a Republican-packed gerrymander and a paired gerrymander”; “no attention was given to incumbency whatsoever.” Instructions included considerations to include compactness and political subdivisions which he concludes “automatically” plays into, what he calls, partisan clustering. He also testified that the Governor’s Secretary of Planning, Edward Johnson, sat in on deliberations while “there was no comparable Democratic representative sitting in.”

196. Dr. Lichtman was critical of every one of Mr. Trende’s simulation analyses because each one presumed “zero politics.” Dr. Lichtman opined that “when state legislative body creates a plan, political considerations are one element to be balanced with a whole host of other elements and the process of negotiation, bartering, and trading that goes on in the legislative process and a demonstration that politics is not zero, is by not any stretch equivalent to a demonstration that the plan is a partisan gerrymander.” He continued in his criticism of Mr. Trende’s analysis that Mr. Trende did not provide “an absolute standard” and no comparative state-to-state standard. He testified in criticism of Mr. Trende’s simulations not only based on “zero politics,” but also because Mr. Trende’s simulations did not consider “where to place historic landmarks, historic buildings, deciding how to deal with parks or airports or large open

spaces of water.” He concluded that Mr. Trende’s analysis was deficient because “you can’t measure gerrymandering relative to zero politics, you can’t measure gerrymandering without a standard, and you can’t measure gerrymandering when comparing it to unrealistic simulated plans that don’t consider much of the factors that routinely go into redistricting.”

197. Dr. Lichtman attributed the problems of Republicans across the Congressional districts “not [to] the plan,” but rather “the problem is that they are simply not getting enough votes, an absolutely critical distinction in assessing a gerrymander,” based upon his review of Governor Hogan’s two victories in 2014 and 2018 and the Republican vote-share in the 2014 Attorney General’s race.

198. Dr. Lichtman concluded, in criticism of Mr. Trende’s simulation analyses, that, “[a] supposed neutral plan based upon zero politics and supposedly neutral principles when applied in the real world into a place like Maryland, in fact, as demonstrated by this chart, produces extreme packing to the detriment of Democratic voters in the State of Maryland. Votes are extremely wasted for Democrats in at least half and maybe even more than half of the districts.”

199. Dr. Lichtman, with respect to the 2021 Plan, does not dispute Mr. Trende’s use of the four scores beginning with the Reock score, but opines that the scores of compactness reflect an improvement in compactness from the 2012 plan to the 2021 Plan. He then explains that the county splits decreased from the 2012 plan to the 2021 Plan, specifically, from 21 to 17 splits in the latter.

200. Dr. Lichtman further concluded, using the PVI, that the 2021 Plan “may not even be 7–1 in the real world.” It may be “6–2, or even 5–3.”

201. Dr. Lichtman later concludes that the very structure of the 2021 Plan “pretty much assures that Republicans are going to win two districts and that Democrats have wasted huge numbers of votes in the other districts.”

202. In criticizing Dr. Brunell’s analysis, he concludes that the 2021 Plan is not a gerrymander “just like [the] 2002 and 2012 plans were not gerrymanders.”

203. Ultimately, Dr. Lichtman testified that “through multiple analyses -- affirmative analyses in [his] own report and scrutiny of the analyses of experts for the plaintiffs, it’s clear that the Democrats did not operate to create a partisan gerrymander in their favor,” and that “[t]he Governor’s Commission plan is a partisan gerrymander that favors Republicans.”

204. On cross-examination, Dr. Lichtman testified that non-compactness of Congressional districts could be, and it could not be, an indicator of partisan gerrymandering and concluded that “certainly nothing about compactness or municipal splits or county splits proves that a plan is not fair on a partisan basis, but they can be indicators.”

205. On cross-examination, Dr. Lichtman acknowledged that for the past ten years, even when a midterm election occurred during the Democratic presidency of Barack Obama, the Maryland Delegation has been 7–1 Democratic/Republican, so that the Democrats did not lose any seats in any midterm elections, and prior to that, for a number of years, the outcome of Maryland’s Congressional elections had been 6–2 Democratic/Republican, year after year.

206. Dr. Lichtman, during cross-examination, further stated that he had “checked the addresses of the incumbents to make sure there was not an unfair double bunking, which [Mr. Trende] meant the pairing of incumbents in the same districts” and indicated that he did not see any pairings in the 2021 Plan.

207. Dr. Lichtman, during cross-examination, concluded that if the General Assembly was “intent upon destroying a Republican district, they could have done so and didn’t,” which he concludes was a deliberate decision by Democratic leaders, including the Senate President, Bill Ferguson.” He further concluded that the General Assembly “created a district that Andy Harris is overwhelmingly likely to win in the crucial first election under the redistricting plan.”

208. Finally, Dr. Lichtman stated that he had not seen evidence that the General Assembly bumped “Andy Harris into the Seventh District with Kweisi Mfume.”

209. On cross-examination, Dr. Lichtman reiterated that Mr. Trende’s simulations “do not account for all traditional redistricting ideas. A whole host of them – and we’ve gone over that numerous times – are left out,” and that Mr. Trende’s simulation resulted in an “extraordinarily high degree of packing, which wastes large numbers of Democratic votes to the detriment of Democrats in Maryland.”

210. In response to questioning from the Court, based on his opinion to a reasonable degree of professional certainty as to whether the 2021 Plan comports with Article III, Section 4, of the Maryland Constitution, Dr. Lichtman testified that the 2021 Plan comported with Article III, Section 4 because the drafters “actually made the districts-substantially more compact than they had been in 2012 and equally compact as they had been in 2002.” In providing that opinion relative to compactness, Dr. Lichtman testified that “instead of distorting compactness and violating Section 4, they made their district substantially more compact and in line with what compactness had been over long periods of time.” Dr. Lichtman acknowledged that historical compactness is not necessarily the measure of Article III, Section 4 compactness and reiterated that there is no objective standard by which to judge any of the measures utilized by Mr. Trende.

He reiterated that he was “not aware of any study which establishes, on an objective scientific basis, a line you can draw in one or more compactness measures, which would distinguish between compact and noncompact.”

211. In response to the question of whether in his opinion, to a reasonable degree of professional, scientific certainty that the standards of due regard shall be given to the natural boundaries and the boundaries of political subdivisions was met, he acknowledged that he had not done any of his own individual research. He opined, however, that “there has not been the presentation of proof by plaintiffs' experts that it doesn't comply.” He reiterated “Plaintiffs did not prove that the 2021 Plan violates the Constitution.”

212. Dr. Lichtman opined that Article 7 of the Declaration of Rights, dealing with free and frequent elections, Article 24 of the Declaration of Rights, entitled Due Process, as well Article 40, the free speech clause, would not apply to districting because “none of them mentioned districting or anything like that.” He further opined that the free and frequent elections clause “clearly was designed for legislative elections” and that based upon his delineation of its history, that the free speech clause did not apply at all.

213. Dr. Lichtman further opined that he did not think that Article III, Section 4 or any of the provisions in the Maryland Constitution or Declaration of Rights applied to Congressional gerrymandering, nevertheless, even assuming were the standards to apply, partisan considerations would not predominate.

Application of the Law to the Findings of Fact

Applying the law to the findings of fact adduced during a trial with a “battle of the experts” initially requires a trial judge to transparently reflect what weight was given to a particular opinion or sets of opinions and why. Each expert in the instant case was qualified as an expert in particular areas. The qualification of each witness, however, was only the beginning of the analysis.

Whether the expert’s testimony was reliable and helpful to the trier of fact and law, the trial judge herein, informs the weight to be afforded to each of the opinions. Obviously, the newly adopted *Daubert* standard, under *Rochkind v. Stevenson*, 471 Md. 1 (2020), was a point of discussion with respect to the opinions of Mr. Willis and Dr. Lichtman, but that challenge was withdrawn in the end by the Plaintiffs, and the State did not mount a *Daubert* challenge at all. Beyond *Daubert*, then, the weight given to an expert’s opinion depends on many factors including, as well as irrespective, of their qualifications, but based upon a consideration of all of the other evidence in the case, under Maryland Rule 5–702.

In the present case, the trial judge gave great weight to the testimony and evidence presented by and discussed by Sean Trende. His conclusions regarding extreme partisan gerrymandering in the 2021 Plan were undergirded with empirical data that could be reliably tested and validly replicated. He used multifaceted analyses in his studies of compactness and splits of counties and acknowledged the data that he did not consider, such as voter registration patterns, might have yielded additional data, although the reliance on such data had not been studied. He readily acknowledged that he was not yet a PhD, although that title was soon to come, and that he was being paid for his work by the Plaintiffs.

Importantly, although he testified that he was on the Republican side of a number of redistricting cases in which Republican plans had been challenged—*Dickson v Rucho*, No. 11 CVS 16896, 2013 WL 3376658 (N.C. Super. July 08, 2013); *Ohio A. Philip Randolph Inst. v. Smith*, 360 F. Supp. 3d 681 (S.D. Ohio 2018), *vacated sub nom. Ohio A. Philip Randolph Inst. v. Obhof*, 802 F. App'x 185 (6th Cir. 2020); *Whitford v. Nichol*, 151 F. Supp. 3d 918 (W.D. Wis. 2015); *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019); and *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, --- N.E.3d ---, 2022-Ohio-789 (2022)—he apparently learned what would be helpful to a court in evaluating a Congressional redistricting plan, because he clearly relied on methodologies that were persuasive in North Carolina, *Harper v. Hall*, 2022-NCSC-17, 868 S.E.2d 499 (2022), and Pennsylvania, *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 576 (2018).

The impeachment of Mr. Trende's presentation undertaken by Dr. Lichtman was unavailing, in large part, because of the bias that Dr. Lichtman portrayed against simulated maps utilizing "zero politics" and county splits that "happened" to be less in number than what had occurred in a map that had been the subject of criticism in 2012 at the Federal District Court level but not addressed in *Rucho* in 2019. Mr. Trende's presentation was an example of a deliberate, multifaceted, and reliable presentation that this fact finder found and determined to be very powerful.

Dr. Brunell's testimony and evidence in support was much less valuable and helpful to the trial judge, because to evaluate compactness, the efficiency gap, as presented, did not have the power that was portrayed in other cases. *See e.g., Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio) (finding that around 75% of historical efficiency

gaps around the country were between -10% and 10%, and only around 4% had an efficiency gap greater than 20% in either direction, and therefore, noting that several of Ohio's prior elections had efficiency gaps indicative of a plan that was a "historical outlier," including an efficiency gap of -22.4% in its 2012 election and an efficiency gap of -20% in its 2018 election, compared to efficiency gaps in 2014 and 2016 that were -9% and -8.7%, respectively). Dr. Brunell's presentation was murky and lacking in sufficient detail. He made no attempt to establish the interaction of an efficiency gap analysis with other types of testing for compactness and certainly, no basis to believe that allocating Republicans two of eight Congressional seats is appropriate, let alone reliable or valid.

The opinions of Mr. Willis, while of interest, to gain a perspective as to what legislators considered in 2002, 2012, and possibly may have considered in 2021 to draw the various Congressional boundaries, such as natural boundary lines, "quarters of transportation," the changing nature of the economy, major federal installations and where they are located and their connection to the economy, institutional factors, major employment centers, preservation of land, political considerations, and migration patterns, may in fact be "reasonable," but not, in any way, helpful in the determination of whether "constitutional guideposts" have been honored in the 2021 Plan. As Chief Judge Robert M. Bell from the Maryland Court of Appeals, in 2002 in *In re Legislative Districting of State*, eloquently stated in opinion regarding the influence of such criteria on Constitutional redistricting standards:

Instead, however, the Legislature chose to mandate only that legislative districts consist of adjoining territory, be compact in form, and be of substantially equal population, and that due regard be given to natural boundaries and the boundaries of political subdivisions. That was a fundamental and deliberate political decision that, upon ratification by the People, became part of the organic

law of the State. Along with the applicable federal requirements, adherence to those standards is the essential prerequisite of any redistricting plan.

That is not to say that, in preparing the redistricting plans, the political branches, the Governor and General Assembly, may consider only the stated constitutional factors. On the contrary, because, in their hands, the process is in part a political one, they may consider countless other factors, including broad political and narrow partisan ones, and they may pursue a wide range of objectives. Thus, so long as the plan does not contravene the constitutional criteria, that it may have been formulated in an attempt to preserve communities of interest, to promote regionalism, to help or injure incumbents or political parties, or to achieve other social or political objectives, will not affect its validity.

On the other hand, notwithstanding that there is necessary flexibility in how the constitutional criteria are applied – the districts need not be exactly equal in population or perfectly compact and they are not absolutely prohibited from crossing natural or political subdivision boundaries, since they must do so if necessary for population parity – those non-constitutional criteria cannot override the constitutional ones.

370 Md. at 321–22.

Finally, this trial judge gave little weight to the testimony of Dr. Allan J. Lichtman. Dr. Lichtman's presentation was dismissive of empirical studies presented by Mr. Trende because of their "zero politics" and disavowed their use because of their lack of absolute standards or comparative standards to guide what an outlier is. Juxtaposed against Mr. Trende's use of reliable valid measures that have been accepted in other state courts, such as simulations in North Carolina and Pennsylvania, Dr. Lichtman's own data urged the "realities" of Maryland politics, as he used a "predictive" model to address alleged Democratic concerns about losing not only one, but two or three seats in the midterm election in 2022, because of having a Democratic President in power; in fact the realities of Maryland politics, in the last ten years, under Republican as well as Democratic Presidents, as well as a Republican Governor, have been that the Congressional delegation has stayed essentially the same—7 Democrats to 1 Republican.

Dr. Lichtman’s denial of the fact that the 2021 Plan, as enacted, actually “pitted” Congressman Andy Harris against Congressman Kweisi Mfume in the Seventh Congressional District when the 2021 Plan did so, reflects a lack of thoughtfulness and deliberativeness that a trial judge would expect of experts. The fact that only a short period of time was afforded for the development of Dr. Lichtman’s report does not excuse that it would have taken a review of the 2021 Plan as enacted in December of 2021, rather than in February of 2022, to know that Congressman Harris had to move to Cambridge to reside in the First Congressional District to avoid being “paired” in the 2021 Plan with a Democratic Congressional incumbent in the Seventh Congressional District.

Finally, although a cold record does not always reflect the nuances of a witness’s demeanor, it is apparent from the words Dr. Lichtman used that he was dismissive of the use of a normative or legal framework to evaluate the “structure,” as he called it, of redistricting. He began his discussion by referring to legal “machinations” in referring to his testimony discussing a challenge by the plaintiffs in *Vieth v. Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769 (2004) against the redistricting plan of Pennsylvania for Congress, and ended with what amounted to a refrain of an “apologist” of the work of politicians.

There is no question that map-making is an extremely difficult task, but like most of the complexities of the modern world, justifications of map-making must be evaluated by the application of principles—here, the organic law of our State, its Constitution and Declaration of Rights.

Analysis and Conclusion

Application of the legal tenets that survived the Motion to Dismiss, as articulated heretofore, to the Joint Stipulations, Judicial Admissions and the stipulation orally presented by the State at the end of the trial, with consideration of the weight afforded to the evidence presented by the experts yields the conclusion that the 2021 Congressional Plan in Maryland is an “outlier,” an extreme gerrymander that subordinates constitutional criteria to political considerations. In concluding that the 2021 Congressional Plan is unconstitutional under Article III, Section 4, either on its face or through a nexus to the Free Elections Clause, MD. CONST. DECL. OF RTS. art. 7, the trial judge recognized that the 2021 Plan embodies population equality as well as contiguity, as Dr. Brunell acknowledged. The substantial deviation from “compactness” as well as the failure to give “due regard” to “the boundaries of political subdivisions” as required by Article III, Section 4, are the bases for the constitutional failings of the 2021 Plan, which has been challenged in its entirety.

In evaluating the criteria of compactness required under Article III, Section 4, it is axiomatic that it and contiguity, but particularly compactness, “are intended to prevent political gerrymandering.” *1984 Legislative Districting*, 299 Md. at 675 (citing *Schrage v. State Bd. of Elections*, 88 Ill.2d 87 (1981); *Preisler v. Doherty*, 365 Mo. 460 (1955); *Schneider v. Rockefeller*, 31 N.Y.2d 420 (1972); *Opinion to the Governor*, 101 R.I. 203 (1966)). With respect to compactness, while it is true that our cases do not “insist that the most geometrically compact district be drawn,” *In re Legislative Districting of State*, 370 Md. at 361, we recognized that compactness must be evaluated by a court in light of all of the constitutional requirements to

determine if all of them “have been fairly considered and applied in view of all relevant considerations.” *Id.* at 416.

The task of evaluating whether “compactness” and other constitutional requirements have been fairly considered by the Legislature is informed by the various analyses performed by Mr. Trende. Initially, by application of each of the four “most common compactness metrics,” *i.e.*, the Reock score; the Polsby-Popper score; the Inverse Schwartzberg score; and the Convex Hull score, the districts included in the 2021 Plan are “quite non-compact” compared to prior Maryland Congressional maps and to other Congressional maps in other states based upon a comparison of the scores achieved with reference to the four metrics. It is notable that the 2021 Plan reflects compact scores that range from a “limited” number of state maps worse than Maryland, to only six other maps with worse scores, to the worst Inverse Schwartzberg score in the last fifty years in the United States, to “very poorly relative to anything drawn in the last fifty years in the United States.”

The simulations conducted by Mr. Trende, of the type already accepted in North Carolina and Pennsylvania, when infused with the same constitutional criteria as embodied in Article III, Section 4 and allowing for two Voter Rights districts, result in only .14% or 134 maps of the 95,000 reflected produce a victory for President Biden in all eight Congressional districts in Maryland, based upon predictive Presidential votes, as acknowledged by the experts. Importantly, Exhibit 11-C, the Gerrymandering Index exhibit, which embodies all of the constitutional mandates and two Voting Rights districts, reflects that the 2021 Congressional Plan is a “gross outlier”, as Mr. Trende opined, “such that of the 95,000 maps under consideration, only one map had a Gerrymandering Index larger than the 2021 Plan. It is

extraordinarily unlikely that a map that looks like the 2021 Plan could be produced without extreme partisan gerrymandering.” As a result, the notion that the 2021 Plan is compact is empirically extraordinarily unlikely, a conclusion that utilizes comparative metrics and data throughout the various states. The notion that a plan must pass an absolute standard, as Dr. Lichtman suggested, is without merit, for the test is whether the constitutional conditions, especially compactness, are met.

With respect to county splits, it is clear that the number of crossings over county lines are 17 in the 2021 Plan, which is a historically “high number” of splits since 1972, only less than the 21 splits in 2002 and 2012. The importance of the due regard to political subdivisions language is a reflection of the importance of counties in Maryland, as recognized in *Md. Comm. for Fair Representation v. Tawes*, 229 Md. 406 (1962):

The counties of Maryland have always been an integral part of the state government. St. Mary’s County was established in 1634 contemporaneous with the establishment of the proprietary government, probably on the model of the English shire . . . Indeed, Kent County had been established by Claiborne before the landing of the Marylanders . . . We have noted that there were eighteen counties at the time of the adoption of the Constitution of 1776. They have always possessed and retained distinct individualities, possibly because of the diversity of terrain and occupation. . . . While it is true that the counties are not sovereign bodies, having only the status of municipal corporations, they have traditionally exercised wide governmental powers in the fields of education, welfare, police, taxation, roads, sanitation, health and the administration of justice, with a minimum of supervision by the State. In the diversity of their interests and their local autonomy, they are quite analogous to the states, in relation to the United States.

Id. at 411–12. In dissent in *Legislative Redistricting Cases*, 331 Md. 574 (1993), Judge Eldridge reiterated the pivotal governing function of counties:

Unlike many other states, Maryland has a small number of basic political subdivisions: twenty-three counties and Baltimore City. Thus, “[t]he counties in Maryland occupy a far more important position than do similar political divisions in many other states of the union.”

The Maryland Constitution itself recognizes the critical importance of counties in the very structure of our government. See, e.g., Art. I, § 5; Art. III, §§ 45, 54; Art. IV, §§ 14, 19, 20, 21, 25, 26, 40, 41, 41B, 44, 45; Art. V, §§ 7, 11, 12; Art. VII, § 1; Art. XI; Art. XI-A; Art. XI-B; Art. XI-C; Art. XI-D; Art. XI-F; Art. XIV, § 2; Art. XV, § 2; Art. XVI, §§ 3, 4, 5; Art. XVII, §§ 1, 2, 3, 5, 6. After the State as a whole, the counties are the basic governing units in our political system. Maryland government is organized on a county-by-county basis. Numerous services and responsibilities are now, and historically have been, organized at the county level.

The boundaries of political subdivisions are a significant concern in legislative redistricting for another reason: in Maryland, as in other States, many of the laws enacted by the General Assembly each year are public local laws, applicable to particular counties. See *Reynolds v. Sims*, 377 U.S. 533, 580–[81, 84 S.Ct. 1362, 1391, 12 L.Ed.2d 506, 538 (1964) (“In many States much of the legislature’s activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions”).

Id. at 620–21.

Due regard for political subdivision lines is a mandatory consideration in evaluating compliance with constitutional redistricting, as Chief Judge Bell noted in the 2002 Legislative districting case, *In re Legislative Districting of State*, 370 Md. at 356, such that fracturing counties to the extent accomplished in the 2021 Plan does not even give lip service to the historical and constitutional significance of their role in the way Maryland is governed. To say that the 2021 Plan is four splits better than the 2002 and 2012 Plans (which have never been examined in a State court, let alone sanctioned), and so must be lawful, is a fictitious narrative, because it is inherently invalid; in 2002, Chief Judge Bell, writing on behalf of the Court, rejected similar justifications offered by the experts on behalf of the Defendants in this case. “There is simply an excessive number of political subdivision crossings in this redistricting plan .

...” The State has failed to meet its burden to rebut the proof adduced that the constitutional mandate that due regard to political subdivision lines was violated in the 2021 Plan.

To the extent that Dr. Lichtman and Mr. Willis discussed and prioritized a myriad of considerations that Dr. Lichtman called “political” and Mr. Willis called “reasonable factors,” would require that this Court accept their implicit bias that constitutional mandates can be subordinated to politics and/or “reasonable factors.” Again, Chief Judge Bell, more eloquently and precedentially than this judge could, addressed the same justifications offered by the State, then and now, when in 2002, he said,

[b]ut neither discretion nor political considerations and judgments may be utilized in violation of constitutional standards. In other words, if in the exercise of discretion, political considerations and judgments result in a plan in which districts: are non-contiguous; are not compact; with substantially unequal populations; or with district lines that unnecessarily cross natural or political subdivision boundaries, that plan cannot be sustained. That a plan may have been the result of discretion, exercised by the one entrusted with the responsibility of generating the plan, will not save it. The constitution “trumps” political considerations. Politics or non-constitutional considerations never “trump” constitutional requirements.

Id. at 370.

Mr. Trende’s analysis of the 2021 Plan with respect to its extreme nature and its status as an “outlier” reflects the realities of the 2021 Plan: an “outlier means a map that would have a less than five percent chance . . . of being drawn without respect to politics” and with respect to his simulations, a map that is .00001% is “under any reasonable definition of an extreme outlier,” therefore, the 2021 Plan “would fit the bill”; “[i]ts a map that, you know -- if traditional redistricting criteria predominated, would be extraordinarily unlikely to be drawn. You know,

with compactness and respect for county lines, .00001 percent. That's extreme.” This trial judge agrees; the 2021 Plan is an outlier and a product of extreme partisan gerrymandering.

With regard to the violations of the of the Articles of the Maryland Declaration of Rights, the 2021 Plan fails constitutional muster under each Article.

With regard to Article 7 of the Maryland Declaration of Rights, the 2021 Congressional Plan, the Plaintiffs, based upon the evidence adduced at trial, proved that the 2021 Plan was drawn with “partisanship as a predominant intent, to the exclusion of traditional redistricting criteria,” *Findings of Fact, supra*, ¶ 121, accomplished by the party in power, to suppress the voice of Republican voters. The right for all votes of political participation in Congressional elections, as protected by Article 7, was violated by the 2021 Plan in its own right and as a nexus to the standards of Article III, Section 4.

Alternatively, Article 24, the Maryland Equal Protection Clause, applicable in redistricting cases, was violated under the 2021 Plan. The application of the Equal Protection Clause requires this Court to strictly scrutinize the 2021 Plan and balance what the State presented under a “compelling interest” standard. It is clear from Mr. Trende’s testimony that Republican voters and candidates are substantially adversely impacted by the 2021 Plan. The State has not provided a “compelling state interest” to rationalize the adverse effect.


Alternatively, the same rationale holds true for the violation of Article 40 of the Maryland Declaration of Rights, the Free Speech Article, which requires a “strict scrutiny” analysis because a fundamental right is implicated, a citizen’s right to vote. In many respects, all of the testimony in this case supports the notions that the voice of Republican voters was diluted

and their right to vote and be heard with the efficacy of a Democratic voter was diminished. No compelling reason for the dilution and diminution was ever adduced by the State.

Finally, with respect to the evaluation of the 2021 Plan through the lens of the Constitution and Declaration of Rights, it is axiomatic that popular sovereignty is the paramount consideration in a republican, democratic government. The limitation of the undue extension of power by any branch of government must be exercised to ensure that the will of the people is heard, no matter under which political placard those governing reside. The 2021 Congressional Plan is unconstitutional, and subverts that will of those governed.

As a result, this Court will enter declaratory judgment in favor of the Plaintiffs, declaring the 2021 Plan unconstitutional, and permanently enjoining its operation, and giving the General Assembly an opportunity to develop a new Congressional Plan that is constitutional. A separate declaratory judgment will be entered as of today's date.

3/25/2022
Date


LYNNE A. BATTAGLIA
Senior Judge

**EXHIBIT B TO LETTER -
DECLARATORY JUDGMENT, PERMANENT INJUNCTION, AND ORDER OF REMAND,
IN SZELIGA, ET AL. V. LAMONE, ET AL., DATED MARCH 25, 2022 [2426 - 2428]**

FILED: STEUBEN COUNTY CLERK 03/28/2022 11:18 AM

NYSCEF DOC. NO. 240

INDEX NO. E2022-0116CV

RECEIVED NYSCEF: 03/28/2022

KATHRYN SZELIGA, et al.,

Plaintiffs

v.

LINDA LAMONE, et al.,

Defendants

* * * * *

NEIL PARROTT, et al.,

Plaintiffs

v.

LINDA LAMONE, et al.,

Defendants

* * * * *

**DECLARATORY JUDGMENT, PERMANENT INJUNCTION, AND ORDER OF
REMAND**

WHEREAS, two Complaints were filed challenging the 2021 Enacted Congressional Districts, hereinafter “the 2021 Plan,” and consolidated for further proceedings on February 22, 2022; and

WHEREAS, both Complaints sought declaratory and injunctive relief, among other requests; and

WHEREAS, after hearings were held on February 16, 2022 and February 23, 2022 regarding Motions to Dismiss each Complaint filed by the Defendants, Count I, alleging a violation of Maryland’s Free Election Clause under the Maryland Declaration of Rights, Art. 7, Count III, alleging a violation of Equal Protection under the Maryland Declaration of Rights, Art. 24, and

Count IV, alleging a violation of Freedom of Speech under the Maryland Declaration of Rights, Art. 40, in the 1816 Complaint survived, as well as Counts I and II of the 1773 Complaint, alleging violations of Maryland's Free Election Clause under the Maryland Declaration of Rights, Art. 7 and Article III, Section 4 of the Maryland Constitution, respectfully, survived; and

WHEREAS, after a four-day trial on the merits held from March 15 to March 18, 2022, the matter was held *sub curia*.

NOW, THEREFORE, IT IS, by this Circuit Court for Anne Arundel County, Maryland, this 25th day of March, 2022, DECLARED, ADJUDGED, and ORDERED, for reasons set forth in the accompanying Memorandum Opinion:

(1) That the 2021 Plan is not consistent with the requirements of Article III, Section 4 of the Constitution that "[e]ach legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population" and that "[d]ue regard shall be given to natural boundaries and the boundaries of political subdivisions" and for that reason, the 2021 Plan is in violation of the Maryland Constitution and is invalid; and

(2) That the 2021 Plan is violative of Maryland's Free Election Clause, Article 7 of the Maryland Declaration of Rights, and for that reason, the 2021 Plan is in violation of the Maryland Constitution and Declaration of Rights and is invalid; and

(3) That the 2021 Plan is violative of Maryland's Equal Protection Clause, Article 24 of the Maryland Declaration of Rights, and for that reason, the 2021 Plan is in violation of the Maryland Constitution and Declaration of Rights and is invalid; and

(4) That the 2021 Plan is violative of Maryland's Free Speech Clause, Article 40 of the Maryland Declaration of Rights, and for that reason, the 2021 Plan is in violation of the Maryland Constitution and Declaration of Rights and is invalid; and

(5) That the 2021 Plan injures the Plaintiffs and is violative of the Maryland Constitution and Declaration of Rights and is invalid; and it is further

(6) **ORDERED**, that the declaratory judgment is hereby issued and entered determining that the 2021 Plan violates the Maryland Constitution and Declaration of Rights, totally, and in various Articles, such that the Plaintiffs have been injured and are entitled to equitable relief from implementation of the 2021 Plan; and it is further

(7) **ORDERED**, that in order to grant appropriate relief, pursuant to Section 15-502 of the Maryland Code, the Plaintiffs are hereby granted a permanent injunction refraining and enjoining the Defendants, their agents, officers, and employees from using, applying, administering, enforcing, or implementing the 2021 Plan in any future election in Maryland, including but not limited to the 2022 primary and general elections for Congress; and it is further

(8) **ORDERED**, that the 2021 Plan is remanded to the General Assembly to develop a new Congressional Plan that comports with Article III, Section 4 of the Maryland Constitution and the Voting Rights Act by March 30, 2022; and it is further

(9) **ORDERED**, that a hearing on the newly drawn Congressional Plan for review by this Court for its compliance with the Maryland Constitution and Declaration of Rights shall take place on April 1, 2022, at 9:00 a.m; and it is further

(10) **ORDERED**, that Plaintiffs' request for attorneys' fees and costs is **DENIED**; and it is further

(11) **ORDERED**, that this Court retains jurisdiction to issue any and all further orders necessary to comply with the mandates set forth herein.

3/25/2022
Date


LYNNE A. BATTAGLIA
Senior Judge

LETTER FROM BENNET J. MOSKOWITZ, ESQ. AND MISHA TSEYTLIN, ESQ. TO
HONORABLE PATRICK F. MCALLISTER, DATED MARCH 30, 2022

Troutman Pepper Hamilton Sanders LLP
875 Third Avenue
New York, New York 10022

troutman.com



Bennet J. Moskowitz
bennet.moskowitz@troutman.com

March 30, 2022

VIA NYSCEF

Honorable Patrick F. McAllister
Supreme Court, Steuben County
3 East Pulteney Square
Bath, New York 14810

Re: Harkenrider, et al. v. Hochul, et al., Index No. E2022-0116CV (Sup. Ct. Steuben Cnty.)

Dear Justice McAllister:

As a follow-up to our March 28, 2022 letter, we write pursuant to 22 NYCRR 202.8-c to provide the Court notice that earlier today, March 30, 2022, the Maryland General Assembly enacted a law (Senate Bill 1012) establishing a new congressional districting plan in response to the March 25, 2022 order by Senior Judge Lynne A. Battaglia of the Maryland Circuit Court for Anne Arundel County in *Szeliga, et al. v. Lamone, et al.*, Nos. C-02-CV-21-001816, C-02-CV-21-001773 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 30, 2022). Attached to this letter as **Exhibit A** is a copy of the defendants' response to the March 25, 2022 order in *Szeliga*.

Sincerely,

A handwritten signature in blue ink, appearing to read "Bennet J. Moskowitz".

Bennet J. Moskowitz

A handwritten signature in blue ink, appearing to read "Misha Tseytlin".

Misha Tseytlin

cc: All Counsel of Record (via NYSCEF)

**EXHIBIT A TO LETTER -
DEFENDANTS' RESPONSE TO DECLARATORY JUDGMENT, PERMANENT
INJUNCTION AND ORDER OF REMAND, IN IN SZELIGA, ET AL. V. LAMONE, ET AL.,
DATED MARCH 30, 2022 [2430 - 2435]**

KATHRYN SZELIGA, et al., <i>Plaintiffs,</i>	*	IN THE
	*	CIRCUIT COURT
v.	*	FOR
	*	ANNE ARUNDEL COUNTY
LINDA H. LAMONE, et al., <i>Defendants.</i>	*	No. C-02-CV-21-001816

* * * * *

NEIL PARROTT, et al., <i>Plaintiffs,</i>	*	IN THE
	*	CIRCUIT COURT
v.	*	FOR
	*	ANNE ARUNDEL COUNTY
LINDA LAMONE, et al., <i>Defendants.</i>	*	No. C-02-CV-21-001773

* * * * *

**DEFENDANTS' RESPONSE TO DECLARATORY JUDGMENT, PERMANENT
INJUNCTION AND ORDER OF REMAND DATED MARCH 25, 2022**

Pursuant to the Court's Declaratory Judgment, Permanent Injunction and Order of Remand dated March 25, 2022 (the "Order"), in which the Court remanded the enacted 2021 Plan¹ and directed the General Assembly to "develop a new Congressional Plan that comports with Article III, § 4 of the Maryland Constitution and the Voting Rights Act by March 30, 2022," Order at 3, Defendants respectfully submit for the Court's review Senate

¹ The "2021 Plan" has the meaning set forth in the Court's March 25, 2022 Order.

Bill 1012 of the current 2022 Session of the Maryland General Assembly establishing a new congressional districting plan in response to the Court’s Order (attached as Exhibit A hereto), as well as an accompanying map illustrating the boundaries of the new congressional districting plan (attached as Exhibit B hereto, and, together with SB 1012, the “2022 Plan”).²

The 2022 Plan comports with the Court’s Order that any new congressional districting plan adopted by the General Assembly conform to the requirements of Article III, § 4. Its proposed congressional districts are compact. Not only is this apparent from a visual comparison between the 2022 Plan and the 2021 Plan (attached hereto as Exhibit F), it is confirmed by the 2022 Plan’s compactness scores and how they compare with the scores for prior Maryland congressional plans. Exhibit C sets out the scores for each of the districts in the 2022 Plan under the Reock, Polsby-Popper, Inverse Schwartzberg, and Convex Hull metrics, as well as plan averages for each of those metrics.³ The 2022 Plan’s

² This submission shall not be construed to constitute a waiver or withdrawal of any arguments made or defenses asserted by Defendants in this matter, and Defendants expressly reserve the right to appeal this Court’s rulings. Section 4 of Senate Bill 1012 makes its effectiveness contingent upon the outcome of any appeal, by providing that the legislation “shall be void and of no further effect” if “the Circuit Court’s judgment that Chapter 32 (House Bill 1) of the Acts of the General Assembly of the 2021 Special Session is unconstitutional is not upheld on appeal, or if the appeal is not otherwise dismissed.” *See Ex. A.*

³ These scores were calculated by Kim Brace, of Election Data Services, Inc., and its employees working under his direction. If necessary, Mr. Brace is available to testify via Zoom at the hearing scheduled for April 1, 2022, as to his method for producing these calculations.

mean Reock score (.32) is roughly equal to that of the congressional map in effect between 1992 and 2000, and is higher than any subsequent map's score. *See* Pls.' Ex. 6A (attached hereto as Exhibit D-1). Meanwhile the 2022 Plan's mean Polsby-Popper (.26), Inverse Schwartzberg (.50), and Convex Hull (.70) scores *exceed* those for *any* Maryland congressional map since (and including) 1970, *see* Pls.' Exs. 6B-6D (attached hereto as Exhibits D-2 to D-4), and potentially going all the way back to 1792, *see* Pls.' Ex. 5 (attached hereto as Exhibit E). Moreover, these mean scores compare favorably to the distribution of mean scores of other plans across the country, as calculated by Plaintiffs' own expert, Sean Trende. *See* Pls.' Exs. 6A-6D (Exs. D-1 to D-4). As to the Polsby-Popper, Inverse Schwartzberg and Convex Hull metrics, the 2022 Plan's scores are equal to or better than those in the middle of Mr. Trende's distribution of average plan scores across the country.

The 2022 Plan also gives due regard to natural boundaries and political subdivisions. The plan's First Congressional District does not cross the Chesapeake Bay. Instead, it extends into and occupies all of Harford County from Cecil County, and makes up its remaining population deficit by extending farther west into a portion of Baltimore County. *See* Ex. B; *compare* Pls.' Ex. 1-A (map of the 2021 Plan) (attached hereto as Exhibit F). It also minimizes the number of county crossings.⁴ Under the 2021 Plan enacted last

⁴ *See In re Legislative Districting of State*, 370 Md. 312, 375 (2002) (explaining that the Court's 2002 remedial plan showed due regard for political subdivision boundaries by reducing the number of "shared senatorial districts" that had been in the enacted plan); *In*

December, nine counties had multiple congressional districts within their boundaries, including five counties with two districts (Carroll, Frederick, Harford, Howard, Prince George's), three counties with three districts (Baltimore City, Baltimore, and Anne Arundel), and one county with four districts (Montgomery). *See* Ex. F. Under the 2022 Plan, by contrast, only six counties have multiple congressional districts within their boundaries, including three counties with two districts (Anne Arundel, Baltimore City, and Carroll), and three counties with three districts (Baltimore, Montgomery, and Prince George's).⁵ *See* Ex. B. This is comparable to the only alternative plan referenced by any of the plaintiffs in this case, under which three counties would have had two districts within their boundaries (Anne Arundel, Calvert and Prince George's), and two counties would have had three districts within their boundaries (Baltimore County and Montgomery).⁶ All told, there are 9 county splits in the 2022 Plan, down from 17 in the 2021 Plan, 21 in both the 2012 and 2002 plans, and 13 in the 1992 plan, and comparable to the 10 and 8 splits found in the 1982 and 1972 plans, respectively. *See* Mem. Op. & Order at 60. The

re 2012 Legislative Districting, 436 Md. 121, 136 (2013) (describing the 2002 Court remedial plan's reduction of shared senatorial districts as a reduction of "the number of political subdivision crossings").

⁵ One of the three districts in Prince George's County is District 8, but only to the *de minimis* extent of 18 voters.

⁶ *See* Pls.' Ex. 27 (comparing the 2021 Plan to the Maryland Citizens Redistricting Commission Plan) (attached hereto as Exhibit G).

2022 Plan has a historically *low* number of splits as compared to prior enacted congressional plans.

Finally, and consistent with the Court's Order, the 2022 Plan preserves the majority-minority character of Maryland's Voting Rights Act districts, District 4 and District 7. As evidenced by the demographic data included on Exhibit B, African-Americans comprise approximately 55% and 53% of the residents of these districts, respectively.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court declare that the 2022 Plan complies with the Maryland Constitution and Declaration of Rights and grant such other and further relief as appropriate.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/ Andrea W. Trento

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March 30, 2022

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that, on this 30th day of March, 2022, the foregoing was filed and served electronically by the MDEC system on all persons entitled to service.

/s/ Andrea W. Trento

Andrea W. Trento

CIVIL HEARING MINUTES [2436 - 2440]

FILED: STEUBEN COUNTY CLERK 03/31/2022 02:40 PM

NYSCEF DOC. NO. 242

INDEX NO. E2022-0116CV

RECEIVED NYSCEF: 03/31/2022

Civil Hearing

Index # E2022-0116CVReporter Tara MacNaughtonClerk Kelly VanSkiver

At a Trial and Special Term of the Supreme Court, held in and for the State of New York, County of Steuben, in Courtroom 4, on the 14 day of March, 2022.

HON. Patrick F. McAllister
Acting Supreme Court Justice

SUPREME COURT, STEUBEN COUNTY

Tim Harkinrider, Guy C. Brought,
Lawrence Canning, Patricia Clairino,
George Dooher, Jr., Stephen Evans,
Linda Fanton, Jerry Fishman, Jay Frantz,
Lawrence Garvey, Alan Newpew,
Susan Rowley, Josephine Thomas, and
Marianne Volante

VS.

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

Attorneys for Petitioners

Bennet J. Moskowitz, Esq.
Misha Tseytlin, Esq.
George H. Winner, Jr., Esq.
Robert Browne, Esq.
Mary Dirago, Esq.

Attorneys for Respondents

Heather L. McKay, AAG
Muditha Halliyadde, AAG
Michele Crain, AAG

Senate Majority:

Eric Hecker, Esq.
Alexander Goldenberg, Esq.
Alice Reiter, Esq.
Daniel Mullkoff, Esq.
John R. Cuti, Esq.

Speaker of the Assembly

Craig Bucki, Esq.
Daniel Chill, Esq.
Elaine Reich, Esq.

This cause having been reached on a regular call of the calendar and having been moved by the Petitioner's attorney, was ordered to hearing and was tried by the Court. The following named witnesses were called and sworn:

WITNESSES

For Petitioners

3-14-22 Sean Patrick Trende3-14 & 15-22 Claude A. Lavigna

For Respondents

3-15-22 Michael Barber3-15-22 Stephen Ansolabehere3-15 & 16-22 Kristopher Tapp3-16-22 Jonathan Katz3-16-22 Todd A. Breitbart

MINUTES

INDEX # E2022-0116CV

Harkinrider, Et. Al.

VS. Governor Kathy Hochul, Et. Al.

TIME

NOTES

3-14-22 All parties present and ready to proceed with hearing.

9:53 am Court convenes. Court addressed five Order to Show Causes filed. Court grants first two Order To Show Causes. Three Order to Show Causes adjourned to be argued March 16, 2022, am.

10:05 am Petitioner's case commences with testimony. Trende sworn and qualified as an Expert with no objection. Trende questioned by Attorney Moskowitz.

10:58 am Recess.

11:13 am Court reconvenes. Cross examination of Trende by Attorney Hecker.

12:22 pm Recess for lunch.

1:38 pm Court reconvenes. Testimony continues. Cross examination of Trende by Attorney Chill.

Cross examination of Trende by AAG McKay. No redirect.

2:52 pm Recess.

3:05 pm Court reconvenes. Lavigna sworn and qualified as an Expert with no objection. Lavigna questioned by Attorney Browne. Cross examination by Attorney Chill.

3:58 pm Recess.

4:05 pm Court reconvenes. Testimony continues.

4:28 pm Court adjourned.

3-15-22 All parties present and ready to continue hearing.

9:40 am Court convenes. Lavigna resworn. Cross examination by Goldenberg.

11:01 am Recess.

11:17 am Reconvene. Petitioners rest. Speakers of Assembly call first witness. Barber sworn and qualified as an Expert with no objection. Barber questioned by Attorney Bucki.

12:24 pm Recess for lunch.

1:41 pm Court reconvenes. Cross examination of Barber by Attorney DiRago. Redirect examination by Attorney Hecker. Redirect examination by Attorney Bucki. Recross by Attorney DiRago.

MINUTES

INDEX # E2022-0116CVHarkinrider, Et. Al.VS. Governor Kathy Hochul, Et. Al.

TIME

NOTES

3-15-22 Continued-----

2:26 pm Recess.

2:38 pm Court reconvenes. Ansolabehere sworn and qualified as an Expert, over objection. Direct examination of Ansolabehere by Attorney Reiter.

3:46 pm Recess.

3:57 pm Court reconvenes. Cross examination of Ansolabehere by Attorney Browne.

4:12 pm Recess.

4:20 pm Court reconvenes. Tapp sworn and qualified as an Expert. Direct examination by Attorney Mullkoff.

4:29 pm Court adjourned.

3-16-22 All parties present and ready to continue hearing.

9:31 am Court convenes. Court addresses three Order to Show Causes. Attorney Tseytlin argues OSCs regarding striking portions of Katz and Tapp's Report and supplemental brief. Attorney Hecker, Attorney Bucki and AAG McKay respond with argument. Court reserves on Katz and denies Tapp to be stricken. Court grants supplemental brief for both sides. File by March 18, 2022 by 4:00 pm. Attorney Winner argues Adverse Inferences/Discovery Sanction OSC. Attorney Cutie responds with argument. Attorney Bucki argues. AAG McKay speaks. Attorney Tseytlin responds. Attorney Cutie responds. Court denies OSC.

10:58 am Recess.

11:14 am Court reconvenes. AAG McKay and Attorney Hecker requests briefs be filed later. Court makes staggered filing schedule. Court strikes congressional part of Katz's report. Court strikes congressional part of Tapp's report. Tapp resworn. Direct examination continues by Attorney Mullkoff.

12:32 pm Recess for lunch.

MINUTES

INDEX # E2022-0116CV

Harkenrider, Et. Al.

VS.

Governor Kathy Hochul, Et. Al.

TIME

NOTES

3-16-22 Continued-----

1:47 pm Court reconvenes. Testimony continues. Cross examination of Tapp by Attorney Dirago.
Redirect examination by Attorney Mullkoff.

2:18 pm Katz sworn and qualified as an Expert, with no objection. Direct examination of Katz by
Attorney Mullkoff.

3:15 pm Recess.

3:29 pm Court reconvenes. Cross examination of Katz by Attorney Tseytlin. Redirect examination by
Attorney Mullkoff.

3:42 pm Breitbart sworn and qualified as an Expert, with no objection. Direct examination of Breitbart by
Attorney Goldenberg. Cross examination of Breitbart by Attorney Tseytlin.

4:33 pm Scheduling matters discussed on the record. Court to reconvene March 31, 2022 at 10:00 am for
Closing Arguments. Court keeps received exhibits.

4:41 pm Court adjourned.

Court Reporter, Deb Suydam

3-31-22 Attorneys Tseytlin, Winner, AAG McKay, AAG Halliyadde, Attorneys Hecker, Reiter,
Goldenberg, Bucki all present and ready to proceed with Closing Arguments.

10:01 am Court Convenes. Attorney Tseytlin makes closing argument for Petitioners. Attorney Hecker
makes closing argument for The Senate Majority.

11:36 am Recess.

11:45 am Court reconvenes. Attorney Bucki makes closing argument for The Speaker of Assembly.

12:48 pm Recess for lunch.

2:00 pm AAG McKay makes closing argument for Governor and Lieutenant Governor. Court Reserves
Decision. Court keeps exhibits.

2:24 pm Court adjourned.

FILED: STEUBEN COUNTY CLERK 03/31/2022 02:40 PM

INDEX NO: E2022-0116CV

NYSCEF DOC. NO. 242

RECEIVED NYSCEF: 03/31/2022

EXHIBIT LIST

Index # E2022-0116CV

Case Name Harkenrider, Et. Al.

Atty: Bennet Moskowitz, Esq. -----

VS. Governor Kathy Hochul, Et. Al.

Atty: Heather L. McKay -----

Reporter: Tara MacNaughton

Clerk: Kelly VanSkiver

#	Petitioners Exhibits	ID	Rec'd	#	Respondents Exhibits	ID	Rec'd
1	Trende's Initial Report	X	X	S1	Sequential Monte Carlo Paper	X	X
2	Trende's Reply Report	X	X	S2	Redistricting Maps	X	X
3	Lavigna's Initial Report	X	X	S3	Enacted 2022 Congressional Plan	X	X
4	Lavigna's Rebuttal Report	X	X	S4	Alarm Project - Sample Plans	X	X
				S5	West Law Print Out - Constitution	X	
				A1	Information on Jewish Community	X	
				S6	Cook Political Report - Print Out	X	Object Sustain
				S7	Dr. Ansolabehere Report	X	X
				S8	Google Map	X	
				S9	Suffolk County Congressional District Map 2012	X	
				S10	Brooklyn Map of Concentration Yiddish Speaking	X	Object Sustain
				S11	Brooklyn Map of Asian Population	X	Object Sustain
				S12	Testimony of Link - Dr Wah Lee	X	X
				S13	Brooklyn Map of Hispanic Population	X	Object Sustain
				A2	Barber's Affidavit (Report)	X	X
				S14	Table - Census Data	X	Object Sustain
				S15	Kristopher Tapp CV	X	X
				S16	Tapp's Initial Report	X	X
				S17	Objection in part, sustained as to congressional part Tapp's Second Report	X	X
				S18	Jonathan Katz CV	X	X
				S19	Katz's Report	X	Senate Analysis Only X
				S20	Breitbart's Report (affidavit)	X	X
				S21	Exhibits to S20	X	X

**TRANSCRIPT OF SPECIAL PROCEEDINGS,
DATED MARCH 3, 2022 [2441 - 2512]**

1

1 STATE OF NEW YORK COUNTY OF STEUBEN
2 SUPREME COURT

3 -----X

4 TIM HARKENRIDER et al., : Index No.

5 : Petitioners, : E2022-0116CV

6 -vs- :

7 :

8 GOVERNOR KATHY HOCHUL et al., :

9 Respondents. : Special Proceedings

10 ----- X

11 Hall of Justice
12 Bath, New York
13 March 3, 2022

BEFORE:

13 HON. PATRICK F MCALLISTER
14 Acting Supreme Court Justice

APPEARANCES:

15 TROUTMAN PEPPER
16 875 Third Avenue
17 New York, New York 10022
18 By: BENNET MOSKOWITZ, ESQ.
MISHA TSEYTLIN, ESQ.
Attorneys for Petitioners

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21 Elmira, New York 14901
By: GEORGE H WINNER, ESQ.
Attorney for Petitioner

22 STATE OF NY, OFFICE OF ATTORNEY GENERAL
23 Rochester Region
144 Exchange Boulevard
24 Rochester, New York 14614
By: MICHELE R CRAIN, ESQ.
HEATHER MCKAY, ESQ.
25 MUDITHA J HALLIYADDE, ESQ.
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5 Attorney for Speaker Heastie

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7 305 Broadway, Ste. 607
8 New York, New York 10007
9 By: JOHN R. CUTI, ESQ.
10 ERIC HECKER, ESQ.
11 ALEXANDER GOLDENBERG, ESQ.
12 ALICE REITER, ESQ.
13 Attorneys for Senate Majority Leader
14
15
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23 REPORTED BY:

24 LAURA BLISS POWER
25 Official Court Reporter

Harkenrider et al. - v - Governor Hochul et al.

1 THE COURT: This is the matter of Tim
2 Harkenrider, et al. Versus Governor Kathy Hochul, et al.
3 Just a word before we start today, I see everybody has
4 got their mask on. Masks are still required in the state
09:31:41 5 courtrooms. When you move outside the courtroom, that's
6 the county and they don't have a mask requirement, but
7 when you're in here, all masks are required. The only
8 exception to that is if the attorneys are speaking at the
9 podium I'll allow them to take down their masks to speak.
09:32:03 10 I'm a little hard of hearing, I'm going to ask you all to
11 speak up, and we'll use the podium for argument. This is
12 being simulcast, and that way people will be able to see
13 you.

14 Let's find out who's here today. Do we have
09:32:20 15 any of the Petitioners here?

16 *(No indication.)*

17 THE COURT: Not present, but their attorneys
18 are. I'm going to ask the attorneys to put their
19 appearances on the record. We'll start with Petitioners.

09:32:38 20 MR. MOSKOWITZ: Bennet Moskowitz; Troutman
21 Pepper.

22 THE COURT: Thank you, Mr. Moskowitz.

23 MR. TSEYTLIN: Misha Tseytlin; Troutman,
24 Pepper.

09:32:47 25 THE COURT: Misha Tseytlin. Am I saying that

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1 correctly?

2 MR. TSEYTLIN: Yes, Your Honor.

3 MR. WINNER: George H Winner Junior,
4 Petitioner.

09:32:56 5 THE COURT: Mr. Winner.

6 All right on behalf of Governor Kathy Hochul,
7 attorneys?

8 MS. MCKAY: Heather McKay of The New York State
9 Attorney General's Office.

09:33:06 10 THE COURT: Was that Heather McKay?

11 MS. MCKAY: Yes.

12 MS. CRANE: Michele Crane from the New York
13 State Attorney General's Office.

14 THE COURT: What's the name again?

09:33:14 15 MS. CRANE: Michele Crane.

16 THE COURT: Michele Crane.

17 MS. HALLIYADDE: Muditha Halliyadde for
18 Attorney General's Office.

19 THE COURT: I'm sorry?

09:33:28 20 MS. HALLIYADDE: Muditha Halliyadde.

21 THE COURT: Thank you.

22 On behalf of the Senate Majority Leader?

23 MR. HECKER: Eric Hecker from Cuti, Hecker,
24 Wang.

09:33:42 25 THE COURT: Eric Hecker?

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1 MR. HECKER: Yes.

2 MR. CUTI: John Cuti from Cuti, Hecker, Wang.

3 THE COURT: John, what's the last name?

4 MR. CUTI: Cuti.

09:33:54 5 MR. GOLDENBERG: Alexander Goldenberg for Cuti,
6 Hecker, Wang.

7 MS. REITER: And Alice Reiter from --

8 THE COURT: Alex Reiter?

9 MS. REITER: Alice Reiter.

09:34:14 10 THE COURT: Alice Reiter.

11 Are the same attorneys here on behalf of the
12 Speaker of the Assembly?

13 MR. BUCKI: No, Your Honor, I'm here on behalf
14 of Speaker Heastie. My name is Craig Bucki, last name
09:34:24 15 spelled, B-U-C-K-I from The Law Firm of Phillips Lyte in
16 Buffalo.

17 THE COURT: Thank you, Mr. Bucki.

18 Anyone else here on behalf of the Speaker of
19 the Assembly?

09:34:36 20 MR. BUCKI: No.

21 THE COURT: Is there anyone here on behalf of
22 The New York State Board of Elections? Is there anyone
23 here on behalf of the New York State Legislative Task
24 Force on Demographic Research and Reapportionment?

09:34:52 25 MR. HECKER: Your Honor, each house of the

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1 legislature has two appointees to Lot 4, so collectively
2 the attorneys for the Senate Majority Leader and the
3 Assembly Speaker effectively represent Lot 4.

4 THE COURT: Very good, thank you.

09:35:11 5 We have several matters on this morning. We're
6 going to start with the motion to dismiss brought by the
7 Governor and Lieutenant Governor. Which attorney for the
8 Governor/Lieutenant Governor would like to present that?

9 MS. MCKAY: Heather McKay, Your Honor.

09:35:32 10 THE COURT: Okay, Ms. McKay, please proceed.

11 MS. MCKAY: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MS. MCKAY: I don't want to -- there's been
14 extensive briefing on our motion to dismiss. I don't
09:35:50 15 want to belabor the points. I'm sure that Your Honor is
16 familiar with our arguments as detailed in those papers.
17 I want to touch on a couple of highlighting points here,
18 and I'm happy to answer any questions that Your Honor may
19 have. First, I want to discuss the jurisdictional defect
09:36:10 20 that we've raised in our papers. The retroactive service
21 attempts do not in fact cure the jurisdictional defect,
22 and I believe our papers make abundantly clear that no
23 email service occurred, nor was it actually agreed to by
24 the Governor and Lieutenant Governor --

09:36:33 25 THE COURT: But they did receive notice, did

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7

1 they not?

2 MS. MCKAY: Notice -- we certainly are able --
3 we're able to access the papers, those are publicly filed
4 documents. So to the extent that we can access NYSEF, we
09:36:46 5 certainly have access to it. However these rules are in
6 place for very important reasons, and that's how the
7 Court obtains jurisdiction over the Respondents and with
8 respect to any discussion of waiver, the docket makes
9 abundantly clear that the Executive Respondents did not
09:37:05 10 appear until the time of our filed motion in which
11 obviously we were raising the issue. With respect to the
12 Lieutenant Governor it appears the Petitioners have
13 abandoned any purported claim against him by failing to
14 address that in their opposition papers to our motion.
09:37:27 15 With respect to the Governor herself there's still no
16 competent evidence. Our memo of law cites extensive
17 cases that establish that in a proceeding such as this, a
18 special proceeding, the Petitioners have a burden of
19 providing competent proof, and here there's absolutely no
09:37:50 20 proof whatsoever with respect to Governor Hochul's
21 involvement.

22 THE COURT: But, Ms. McKay, doesn't the law
23 require the Governor and the Lieutenant Governor to be
24 served in this type of matter?

09:38:01 25 MS. MCKAY: Yes, absolutely.

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1 THE COURT: How do I let them out? They're
2 necessary parties, aren't they?

3 MS. MCKAY: Well, I don't believe that's what
4 Unconsolidated Laws 4221 says. That provision is
09:38:11 5 indicating that service need to be made on them, amongst
6 many others, and not all of those entities are named in
7 this action because that provision does not pertain to --
8 it doesn't establish a basis for bringing a legal claim
9 against any of them individually. And here there's
09:38:34 10 nowhere -- there's no allegations as to her involvement
11 in the actual drawing of redistricting lines.

12 THE COURT: She had to approve it.

13 MS. MCKAY: Sure.

14 THE COURT: Correct?

09:38:43 15 MS. MCKAY: Absolutely. The Governor pursuant
16 to the Constitution does play a role the same way that
17 she does with any legislative act that she signed it into
18 law, and she certainly did. So here however what we're
19 left with then is a quasi-legislative act that's entitled
09:39:04 20 to absolute legislative immunity. So that's why she
21 should be released from this case. The first cause of
22 action fails as a matter of law the attempts at having
23 the -- that the IRC needs to take the first and second
24 attempts at creating a plan. The fact that that shall be
09:39:29 25 the redistricting process does not automatically equate

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1 to failure of the IRC agreeing, then transforms what is a
2 fundamental legislative function and always has been into
3 a -- frankly a judicial one. The legislature -- that the
4 legislature has the authority to draw the maps is
09:39:51 5 absolutely clear and unambiguous even after the 2014
6 amendments and even if there were an ambiguity in the
7 constitutional provisions, including the 2014 amendments,
8 Petitioners' suggested interpretation of intent behind
9 the 2014 amendment to take that quintessential
09:40:14 10 legislative function and remove it entirely leads to
11 absurd results. Certainly the 2021 legislation is
12 permissible because it doesn't contradict anything in the
13 2014 amendment. So obviously all these arguments are
14 very intertwined. If you buy into the concept that
09:40:39 15 Petitioners are advocating here that the legislature in
16 first proposing the 2014 amendments and then the people
17 in approving them -- if you buy into the concept that
18 that meant that the legislature no longer has the
19 authority, and that the IRC can essentially hold everyone
09:41:01 20 hostage, at which point it has to be now drawn by a
21 Court, then you're necessarily going to find that the
22 2021 legislation did not fill in a gap that's there. So
23 these things really rise and fall together.

24 THE COURT: Did the 2021 legislation pass
09:41:22 25 basically what was proposed and voted down in the

Harkenrider et al. - v - Governor Hochul et al.

10

1 constitutional amendment?

2 MS. MCKAY: Well I'm glad Your Honor asked
3 about that because the arguments that Petitioner's make
4 on this are -- they're borderline misleading. First, the
09:41:39 5 2021 legislation was fully approved by both houses of the
6 legislature in June of 2021, so that predates the failure
7 of Ballot Proposal 1. In addition to that, while Ballot
8 Proposal 1 did contain language that clarified this issue
9 of an IRC stalemate, it was only one tiny part of that
09:42:05 10 overall ballot proposal which is why I've included the
11 ballot proposal in our papers from the Board of
12 Elections' public website which shows that there were
13 numerous matters in that proposed ballot initiative that
14 would absolutely have required constitutional amendment.
09:42:25 15 Changing quorum requirements, changing timing, those are
16 things that would truly have changed the terms in the
17 2014 amendments, and therefore did absolutely need a
18 constitutional amendment approved by the voters. This
19 aspect of the IRC stalemate, which essentially just
09:42:45 20 clarified what was already the process, was not something
21 that actually needed to be in a constitutional amendment,
22 it would be great if it was, but it could be accomplished
23 by legislation.

24 Finally, as to the second and third causes of
09:43:05 25 action, the Governor doesn't have an expansive amount of

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1 arguments to present in that, other than indicating that
2 Petitioners really have not satisfied their extremely
3 high burden of demonstrating a con -- that the maps are
4 unconstitutional beyond a reasonable doubt. Given the
09:43:28 5 Governor's extremely minimal role -- excuse me -- in just
6 merely signing the maps, we are not prepared -- excuse me
7 one moment.

8 THE COURT: You're fine.

9 MS. MCKAY: We would primarily rely on the
09:43:48 10 arguments of our Co-Respondents in terms of the
11 substantive maps as they've been drawn.

12 And finally, as to the motions to amend, I'm
13 happy to address those now. We have very minimal --
14 primarily we would rely on our papers. Again these were
09:44:02 15 extensively briefed, and unless Your Honor has any
16 questions for us --

17 THE COURT: In regards -- I'd like to go back
18 to the legislative immunity. I mean, isn't that really
19 qualified immunity under the Pataki and Cuomo cases?

09:44:21 20 MS. MCKAY: No. It is right conferred under
21 the Constitution in New York State, and it's not -- it
22 is -- in fact the cases that we've cited do indicate that
23 it is an absolute right with respect to the -- especially
24 the particular tasks that are alleged here by Governor
09:44:40 25 Hochul. Just in terms of signing, it's very limited, the

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1 actual factual allegations against her, and given that
2 very limited nature this can be a basis for dismissal,
3 not just obviously a basis for opposing discovery
4 requests and all of that, which here you couldn't
09:45:01 5 envision much more broad discovery demands than we have
6 here. But that's why that's included in our motion is
7 because given the limited nature of the factual
8 allegations against the Governor, those are absolute
9 immunity she's entitled to under the cases that we've
09:45:18 10 provided.

11 THE COURT: Thank you.

12 MS. MCKAY: Thank you, Your Honor.

13 THE COURT: I may call you back up, Ms. McKay,
14 on the motion to amend. We'll deal with that separately.

09:45:27 15 MS. MCKAY: Okay, thank you.

16 THE COURT: Who'd like to answer this on behalf
17 of the Petitioners?

18 MR. TSEYTLIN: Thank you, Your Honor.
19 Misha Tseytlin on behalf of the Petitioners.

09:45:43 20 First, briefly on the service issue. As we
21 pointed out in our papers, service of a petition is
22 governed by CPLR 403 not 2214, that was reflected in this
23 Court's order to show cause, which directed us to serve
24 in the manner of a summons, that's docket 18 -- docket
09:46:05 25 11. We followed that to a T. To the extent my friends

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1 wanted the papers at the Rochester office for some reason
2 we did serve them their as a courtesy. They received
3 services in their reply brief filed last night. Their
4 only objection to that was while they claimed that that
09:46:23 5 was violative of this Court's order to show cause, the
6 initiating one, again that's docket 11, that orders us to
7 deliver the -- to serve it consistent with a summons, not
8 under 2214. So the issue is not only frivolous, but it's
9 also moot. Further, Counsel for the Governor did in fact
09:46:45 10 waive this entire issue by participating in the court
11 ordered meet and conferral process. I think almost
12 every --

13 THE COURT: Didn't they bring a motion to
14 dismiss? Isn't that -- the motion to dismiss for lack of
09:46:55 15 jurisdiction and proper service right off the bat cover
16 that?

17 MR. TSEYTLIN: They participated in that
18 conference before they filed that. I think almost every
19 attorney here was on that call. Counsel for the Governor
09:47:08 20 participated and quite aggressively making multiple
21 points that a conferral occurred consistent, and by the
22 direction of this Courts on its order to show cause.
23 Finally under the controlling O'Brien case any defect
24 here is a technical defect under CPLR 2001 and so there
09:47:33 25 is no jurisdictional defect at all with regard to

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1 O'Brien. The service there wasn't made at all on the
2 Governor at all, not to the claim drawing office. And
3 yet the fourth division said that because that case --
4 the Board of Elections was represented, there was no
09:47:54 5 prejudice, no substantial rights were violated under
6 2001. Here of course the Board of Elections represented
7 by separate counsel, all the legislative respondents
8 represented by separate counsel, Governor's counsel
9 appearing here, no prejudice. So if there was some sort
09:48:12 10 of error, which absolutely clearly there wasn't, it would
11 be just a technical issue that is not jurisdictional at
12 all under 2001. Unless Your Honor has any questions
13 about that I would move on to the other points.

14 THE COURT: Go ahead.

09:48:29 15 MR. TSEYTLIN: With regard to the Governor as a
16 Defendant -- and the only thing I would add to Your
17 Honor's question is the Governor has been a Respondent or
18 a Defendant in virtually every single redistricting
19 challenge in the state's history, that's because not only
09:48:42 20 does the Governor sign the maps, the Governor also is
21 above the Board of Elections, which needs to administer
22 the elections. Now of course I agree with my friends
23 that because we did in fact name the Board of Elections,
24 if the Governor was dismissed including on this by
09:49:00 25 submission -- frivolous service issue, the case could

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1 fully go on and we could have binding injunction
2 prohibiting the Board of Election represented by separate
3 counsel from administering the elections on any of these
4 unconstitutional maps.

09:49:14 5 THE COURT: Doesn't there have to be some
6 allegations against the Governor and Lieutenant Governor
7 to hold it in there?

8 MR. TSEYTLIN: First of all, we do have an
9 allegation against the Governor that she promised to do
09:49:25 10 the very egregious gerrymandering that occurred.

11 THE COURT: Which they say was taken out of
12 context.

13 MR. TSEYTLIN: I leave it to Your Honor to lead
14 that article and see if that is a credible articulation
09:49:36 15 of what she said. But in any event, for example, the
16 Board of Elections, we don't have any allegation that
17 they did anything wrong, but there's no gainsaying that
18 they can be named as a respondent here because we need
19 them here to obtain effective relief. We are seeking an
09:49:51 20 injunction against administering elections under
21 unconstitutional maps. So the Board of Elections is a
22 proper Respondent because we need them for full relief,
23 they're a necessary party. The Governor is in this case
24 for the same reason. Now, again, because we did name the
09:50:10 25 Board of Elections, the Governor is not an essential

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1 party, but it is entirely appropriate to name the
2 Governor because she oversees the Board of Elections, and
3 an injunction stopping elections from happening under
4 these unconstitutional maps should certainly bind both
09:50:28 5 the Board of elections and the Governor.

6 Now moving on to the procedural argument and
7 the substantive argument. I don't know to the extent
8 that Your Honor would like me to fully opine on why we
9 think we are not only -- defeat their motion to dismiss,
09:50:44 10 but in fact on the papers before Your Honor, Your Honor
11 should with respect today enter a judgment in our favor
12 and injunction in our favor on the procedural argument.
13 Now --

14 THE COURT: Well Ms. McKay covered it somewhat.
09:50:57 15 So you can respond.

16 MR. TSEYTLIN: Okay the text of the
17 Constitution is clear and my friends don't engage with it
18 at all. It says that the process shall govern
19 redistricting. The process involves two rounds of maps
09:51:12 20 coming out from the IRC and the legislature voting on it,
21 only thereafter does the legislature get to enact a map.

22 THE COURT: It's not a complete process, is it?
23 It's part of the process?

24 MR. TSEYTLIN: The process, there's definite --

09:51:27 25 THE COURT: That's in the Constitution, but --

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17

1 MR. TSEYTLIN: Right.

2 THE COURT: But it is not the complete process,
3 is it?

4 MR. TSEYTLIN: The --

09:51:35 5 THE COURT: It still takes the Governor and the
6 legislature to pass it.

7 MR. TSEYTLIN: Your Honor, that's also in the
8 Constitution.

9 THE COURT: That is.

09:51:43 10 MR. TSEYTLIN: And the problem for them is the
11 process wasn't followed. They don't engage with that
12 cautious language. To the extent I think I understand
13 the argument -- it's hard to follow -- is what they're
14 saying is if that process isn't followed, we get to
09:52:00 15 default to a different process, the process used before
16 2014, but that's not what the Constitution says. The
17 Constitution could have said if this process doesn't work
18 then go to the pre-2014 process, that is not what it
19 says. In fact, what the Constitution says -- I'll read
09:52:20 20 this language, it's very short and I think it settles
21 this issue and it's so straight forward that I think both
22 Congressional and Senate maps should be struck down to
23 short order. Quote, "The process for redistricting
24 congressional and state legislatures shall be established
09:52:42 25 by this section and section 5, and it shall govern

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1 redistricting in the state except to the extent that a
2 court is required to order the adoption or changes to a
3 redistricting plan as a remedy". So what does that mean?
4 There is one exclusive process. The process there is one
09:53:00 5 and only one exception when courts order a fix. There is
6 no off-ramp for a different process, if the IRC doesn't
7 pass the map such that the legislature can't enact any
8 maps. The legislature understood this, which is why they
9 attempted to put this ballot measure before the People.
09:53:23 10 I heard my friend for the Governor say, well there were
11 other provisions in that, fair enough, but why do they
12 put that provision in there before the People --

13 THE COURT: But is your argument that the
14 Commission absolutely has to send a first set of maps?
09:53:39 15 If they're turned down they have to submit a second set
16 of maps? Is that the argument?

17 MR. TSEYTLIN: That's exactly --

18 THE COURT: That's the procedural argument.

19 MR. TSEYTLIN: That's exactly --

09:53:47 20 THE COURT: What if in good faith they can't
21 come to an agreement on that? We don't have an election?

22 MR. TSEYTLIN: That's right, Your Honor. That
23 it could be the same as if the Governor and the
24 legislature couldn't agree on a map. You know if --
09:54:02 25 let's say you had -- in good faith the Assembly can't

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1 agree to a replacement map with the Senate or the
2 Governor, that happened in the last cycle, in the 2012
3 cycle with regard to the Congressional maps. So what
4 happens then? The old map still governs, if the old map
09:54:18 5 is still constitutional. Let's say there weren't any
6 population changes, you can hold an election under the
7 old map. If the old map is now unconstitutional because
8 it's mal apportioned then it becomes the duty of the
9 courts to correct this. This is not unusual. Again,
09:54:32 10 when the mandatory constitutional process for enacting a
11 new map fails and the old map is unconstitutional, the
12 courts always step in. But again, the old map is still
13 the law of the lands, the one that was enacted in 2012.
14 And an election can be held under that map unless someone
09:54:52 15 challenged that map in court. We have challenged those
16 maps in court.

17 THE COURT: I see that.

18 MR. TSEYTLIN: So both the 2012 map is
19 unconstitutional because it's mal apportioned and the
09:55:02 20 2022 map is unconstitutional because they didn't follow
21 the exclusive process in the same way as if they can't --
22 under the old system if they didn't follow the process of
23 getting by cameralism of presentment. It's just an ultra
24 vires act, and it becomes the duty of the courts to enjoy
09:55:20 25 any actions under that act, and then a court will need to

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1 adopt a remedial map. In -- and the reason the Court
2 needs to adopt a remedial map is because the Constitution
3 provides the legislature with the opportunity to -- a
4 reasonable opportunity to fix any errors. But when the
09:55:35 5 error is procedural, there's no way that error can be
6 fixed. It would be as if the legislature -- only one
7 house of the legislature passed a new map. That before
8 2014 was the exclusive process for enacting redistricting
9 legislation. One house didn't pass it or two houses
09:55:53 10 passed it, but the Governor vetoed, that was an ultra
11 vires law. In the same way if the commission does not do
12 a necessary step in the exclusive redistricting process,
13 the output is an ultra vires act, which is not the law of
14 the lands. The law of the lands currently is the 2012
09:56:13 15 maps, but again we have challenged those as
16 unconstitutional, and my friends have not argued to the
17 contrary, they have conceded by silence that those maps
18 are now unconstitutional even though they were
19 constitutional when a federal court adopted the 2012
09:56:28 20 congressional map and a legislature with the Governor's
21 signature adopted the Senate map.

22 THE COURT: Are you claiming that the 2021
23 legislation is unconstitutional?

24 MR. TSEYTLIN: It is absolutely
09:56:39 25 unconstitutional. We put that in our briefs and we put

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1 that in our petition. The reason for that is it attempts
2 to create an additional process. Again the Constitution
3 provided that there's only a single process for adopting
4 replacement redistricting maps, and it provides only one
09:56:56 5 exception, a textual exception where a court can order
6 some change. What they attempted to do with Section 633
7 was create an additional process, and again I will
8 emphasize, they knew that this couldn't be done without
9 constitutional amendment which is why they also passed
09:57:17 10 the constitutional amendment and put it before the People
11 because they knew they were changing the process, the
12 process that was exclusive in the Constitution. Now of
13 course if the constitutional amendment had passed, then
14 the legislation -- then it would be under a different
09:57:31 15 constitutional footing. There's all kind of legislation
16 that's passed that reenforce constitutional amendments.
17 In fact they have legislation that codifies the 2014
18 process. But upon -- but because the People rejected
19 that amendment resoundingly, the legislation that they
09:57:52 20 drafted in view of that amendment is unconstitutional.

21 THE COURT: Anything further?

22 MR. TSEYTLIN: I do have obviously extensive
23 arguments on the substantive aspect of our challenge.
24 However, Counsel for the Governor only addressed that
09:58:07 25 briefly, so perhaps I'll reserve that until --

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22

1 THE COURT: How about legislative immunity or
2 qualified immunity?

3 MR. TSEYTLIN: Your Honor, do you mean with
4 regard to the Governor being a Defendant or with regard
09:58:19 5 to discovery?

6 THE COURT: Well, both.

7 MR. TSEYTLIN: With regard to the Governor
8 being a Defendant, again we have explained -- and I've
9 explained this morning that the Governor is a Defendant
09:58:33 10 in large part for the same reason the Board of Elections
11 is a Governor -- is an enforcer of the elections in the
12 state. Again, the Board of Elections is the primary
13 enforcer, but the Governor, she sits above the Board of
14 Elections and there's no legislative immunity to not be
09:58:49 15 enjoyed, not to enforce unconstitutional law. The
16 Governor is sued all the time. There was a pretty big
17 case maybe about a year ago where Governor Cuomo was sued
18 to not enforce certain restrictions on places of worship.
19 You know, he was sued because he would have been
09:59:07 20 enforcing those restrictions. This kind of thing
21 happened all the time. Now with regard to legislative
22 privilege, as Your Honor pointed out, that's a qualified
23 privilege. What we're seeking here is the -- and we've
24 quoted case law from New York that says that the New York
09:59:25 25 Speech and Debate Clause is parallel to the Federal

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1 Speech and Debate Clause. We now have many years of
2 experience with the federal courts treatment of
3 legislative immunity in the partisan gerrymandering
4 context. What the Federal courts have said is this is a
09:59:41 5 qualified privilege and there's five factors that need to
6 be determined whether to set aside. Those factors are
7 readily satisfied in partisan redistricting cases,
8 because a significant portion of the evidence of a
9 partisan gerrymandering -- of gerrymandering purpose is
10:00:00 10 exclusively in the hands of the legislature or the
11 Governor, and the need for it is great. The issues are
12 very serious and because partisan gerrymandering is
13 unconstitutional, it wouldn't have any sort of chilling
14 affect. So the New York Speech and Debate Clause is
10:00:17 15 parallel to the Federal one, and all the Federal cases
16 that have been cited to Your Honor apply this five factor
17 test, only thing we're asking is for the very standard
18 form of discovery that's always given to Plaintiffs in
19 partisan gerrymandering cases here -- Petitioners, things
10:00:34 20 like did they look at political data which could be
21 unconstitutional, did they speak --

22 THE COURT: I won't have you get into the
23 discovery because we'll cover that soon.

24 MR. TSEYTLIN: Yes, Your Honor. So that's the
10:00:45 25 extent of what I'll say on that.

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1 THE COURT: All right, thank you.

2 MR. TSEYTLIN: Thank you.

3 THE COURT: With regard to the Governor and

4 Lieutenant Governor's motion to dismiss for lack of

10:00:59 5 proper service and not mentioning anything in the

6 paperwork, there's some -- as regards to Governor,

7 nothing that I saw as regards to Lieutenant Governor.

8 I'm still denying the motion for the following reasons.

9 The New York Unconsolidated Law Section 4221 requires

10:01:17 10 service of the petition on the Governor and the

11 Lieutenant Governor. I believe they're necessary

12 parties. CPLR 403 is controlling, it doesn't specify

13 service upon the nearest office of the Attorney General,

14 and while CPLR 2214 does refer to services of an order to

10:01:38 15 show cause upon the nearest Attorney General's office,

16 that is specifically in reference to motions and not the

17 commencement of an action which we have here. In

18 addition, the Governor and Lieutenant Governor admit they

19 received notice, and I've heard no argument that anyone

10:01:56 20 was prejudiced by it. So that's my ruling on that

21 motion.

22 And that's going to move us to the Petitioner's

23 order to show cause to add the New York Senate

24 redistricting to the action. Who will be arguing that on

10:02:16 25 behalf of the Petitioner? Mr. Tseytlin?

25

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1 MR. TSEYTLIN: Yes, Your Honor. I'm going to
2 be very brief on this. Leave to amend is freely granted,
3 there's really two considerations, one; whether it would
4 basically be so insubstantial as to be dismissed. I've
10:02:40 5 already explained why our procedural argument is not only
6 substantial, but sure to win. We also have a substantive
7 argument and the procedural argument applies to the same
8 extent to the Congressional and Senate, they use the same
9 procedure.

10:02:58 10 With regard to the substantive arguments we
11 haven't developed those this morning, but Your Honor can
12 see in the papers that the process that was used was
13 justice partisan, which is a major consideration in
14 substantive partisan gerrymandering allegations and our
10:03:15 15 experts methodology which is wildly accepted by courts
16 around the country including most recently by the Ohio
17 Supreme Court showing that the senate map was more
18 pro-democrat than 5,000 computer generated maps, is
19 powerful evidence of substantive gerrymandering. We also
10:03:33 20 have an expert based specific discussion about specific
21 senate districts that were gerrymandered to favor the
22 Democrats. So we can discuss those things in more
23 detail, but that certainly survives that low barrier for
24 it's so insubstantially dismissed.

10:03:49 25 The only other inquiry on the motion on an

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1 amendment is prejudice. There's clearly no prejudice
2 here. We filed our initial petition within a couple of
3 hours of the Governor signing the maps. We filed the
4 motion to amend, I think three business days later. The
10:04:08 5 reason we did that is during the legislative process they
6 revealed the Congressional map first, so we had more time
7 to analyze it. The Senate map didn't get put out to the
8 world until a little bit later, so we needed more time to
9 look at it. There was absolutely no prejudice to anyone
10:04:27 10 by the way that we did this.

11 THE COURT: Are you saying the Senate map came
12 out after the Congressional maps?

13 MR. TSEYTLIN: Yes, it came out to the world.
14 They were signed together, but it came out to the world
10:04:38 15 later. And given the complexity of how many districts
16 there are, we needed a couple more days to analyze.
17 There was absolutely no prejudice. The procedural
18 arguments are entirely identical, so there's no -- you
19 know, those rise and fall together. With regard to the
10:04:52 20 substantive arguments, you know, we have the Trende
21 Report which applies the same methodology to both. They
22 presumably have the same critique of the Trende Report
23 with regard to the Senate and the Congressional. In
24 fact, in their opposition to leave to amend, they just
10:05:13 25 repurposed our expert criticism of the Trende approach to

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1 the Senate map.

2 So now -- and then the only other aspect is the
3 discussion of the specific Senate districts. They chose
4 not to put anything in writing responding to that, but I
10:05:31 5 will note that even when they contemplated[sic] to contest
6 the specific congressional districts, they didn't put in
7 any competent evidence to rebut our showing. They put in
8 an expert report from this Harvard professor from
9 Mesiti[sic], looks like he may have never been to the
10:05:48 10 State of New York, let alone certainly had no expertise
11 in New York to be able to talk about New York's district.
12 So even if they had responded to the Senate specific
13 districts, they presumably would have put in the same
14 expert who has no ability to testify on New York
10:06:06 15 communities of interest and that sort.

16 In any event the Court can strike down the
17 Senate districts today on the procedural arguments and
18 during remedial process they can be given the opportunity
19 to make any supplemental submission to the substantive
10:06:21 20 challenges to the Senate districts which would permit
21 this whole case to wrap up within the 60-day window that
22 the Constitution provides.

23 THE COURT: Thank you.

24 On behalf of the Governor?

10:06:36 25 MS. CRANE: Good morning, Your Honor.

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1 THE COURT: Good morning.

2 MS. CRANE: I'm Michele Crane from the Attorney
3 General's Office, Your Honor. The jurisdictional
4 argument which we raised with regard to the motion to
10:06:50 5 dismiss was also raised with respect to this motion to --
6 for leave to amend, the petition and given the fact that
7 this is a motion and that they made a motion to amend
8 their original pleading, then we would say that the CPLR
9 provision 2214 does apply here, and therefore they do not
10:07:09 10 have jurisdiction over the Governor or Lieutenant
11 Governor. I know you've already discussed this in
12 detail, and I think you're familiar with the arguments,
13 so I just want to make the distinction here with respect
14 to that issue. We also raised in this motion or our
10:07:23 15 opposition to the motion to amend the legislative
16 immunity and non-justiciability arguments, we'd like to
17 reiterate those to the Court. I think the Court is
18 familiar with those and lastly, Your Honor, we do believe
19 that allowing this amendment to occur would significantly
10:07:40 20 interfere with the election cycle and in the declaration
21 of Mr. Brown from our office, he specifically sets forth
22 the dates upon which everything needs to be accomplished,
23 and I would really ask the Court to look at those dates.

24 THE COURT: I did.

10:07:54 25 MS. CRANE: And to consider the impact that

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1 this amendment may have. The Attorney General's Office
2 on behalf of the Governor and Lieutenant Governor have
3 not responded or answered the petition yet. We would
4 need time to do that. If the Court allows discovery
10:08:06 5 there would be a --

6 THE COURT: You've had it for 20 days or so,
7 haven't you?

8 MS. CRANE: Well, we still need to put --

9 THE COURT: I understand.

10:08:13 10 MS. CRANE: It needs to be approved by Counsel
11 and the Governor's office before we submit, Your Honor,
12 we didn't really have this. There's a dispute about how
13 this was served obviously, and our office was not
14 assigned to represent the Governor and Lieutenant
10:08:27 15 Governor until fairly late in the game. Our focus was on
16 the papers that are before you today. We have not spent
17 the time answering the petition, so we will need time to
18 accomplish that.

19 THE COURT: The amended petition?

10:08:42 20 MS. CRANE: Yes, the amended petition. And so
21 that will need to be done. If the Court allows
22 discovery, that will need to be done, and all of this
23 now -- these cases are in jeopardy for this election
24 cycle to occur. So based on that, we would ask the Court
10:08:57 25 to deny the motion to amend the petition.

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1 THE COURT: Thank you, Ms. Crane.

2 MS. CRANE: Thank you.

3 THE COURT: On behalf of the Senate Majority
4 Leader will you be speaking on behalf of the Senate
10:09:08 5 Majority Leader and Senate Minority Leader there?

6 MR. HECKER: Assembly Speaker
7 there(indicating), Senate Majority Leader.

8 THE COURT: Very good.

9 MR. HECKER: Good morning, Your Honor, Eric
10:09:20 10 Hecker from Cuti, Hecker, Wang for the Senate Majority
11 Leader. I'll be very brief because I expect our
12 discussion to be extensive when we get to the petition
13 itself.

14 As we said in our papers we acknowledge
10:09:33 15 generally speaking that leave to amend is granted
16 liberally in a usual case. This is an unusual case for
17 three reasons. First of all, they've put in expert
18 testimony that fatally undermines their theory.
19 Mr. Trende has shown unmistakably and unequivocally that
10:09:53 20 in literally every single one of his thousands of
21 simulations, there are more Republican majority districts
22 in the Senate plan than in the enacted Senate plan --

23 THE COURT: He disputes that in the reply
24 though, doesn't he?

10:10:08 25 MR. HECKER: He doesn't actually. We can get

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1 into all that. I would respectfully suggest when we get
2 into the petition, but suffice it to say, we have that
3 futility argument.

4 Also as the Attorney General's Office is
10:10:20 5 arguing, we have a significant time problem. There is no
6 amended petition. Your Honor, we've been working very
7 hard on this case, we haven't taken days off in weeks,
8 it's taken everything we have to rebut the evidence both
9 statistically and also in terms of actually how the lines
10:10:40 10 were drawn. And if we have to go back and amend the
11 answer, the amended petition -- which we certainly will
12 if we're directed to, it's going to take time. And then
13 beyond that, as the Attorney General also emphasized, the
14 election season is already underway. The designating
10:10:56 15 petition period started two days ago. It would sew
16 confusion in the extreme for this Court to enjoin
17 anything, which is why in almost every case where there's
18 ever been a really bona fide argument of
19 unconstitutionality at this stage of the process, you
10:11:18 20 stick with what you've got, and you address whatever
21 arguments there are for the next cycle. So for those
22 three reasons, we think there's no reason to grant the
23 amended petition, and I look forward to addressing the
24 merits of the petition when we get to that motion.

10:11:32 25 THE COURT: But there has been a time crunch

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1 for you, for them, the Petitioner, for everybody. I
2 mean, the maps just got passed here, what? Three
3 weeks -- a month ago?

4 MR. HECKER: Correct, and we've now burned half
10:11:45 5 of the 60 days that Your Honor has jurisdictionally
6 because they didn't bother to challenge the Senate map
7 when they could have. They were passed together. The
8 Congressional map was announced 24 hours before the
9 Senate map, several days before they were enacted
10:12:00 10 simultaneously. They didn't bother to put it in their
11 petition, and we lost a month. Thank you, Your Honor.

12 THE COURT: Thank you.

13 Assembly Leader?

14 MR. BUCKI: Good morning, Your Honor, we would
10:12:23 15 second the arguments that were put forth by Counsel for
16 the Senate Majority Leader. We would agree with the
17 futility of the amendment, and in particular what I would
18 note from the evidence that is before the Court, in
19 particular the expert reports, is that typically when you
10:12:39 20 would do all of these various simulations, which
21 Mr. Trende did 5,000 simulations, we would submit
22 pursuant to the experts that we've offered that in fact
23 50,000 simulations would be a more appropriate sample
24 size, specifically in order to draw any kind of
10:12:58 25 conclusions concerning these maps. But what would

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1 specifically be expected, given the Partisan makeup of
2 the voters of the State of New York, is that you would
3 have a map with 63 senate districts with between 51 and
4 53 being more likely to elect a Democrat to the State
10:13:18 5 Senate. And in fact when you look at the map, only about
6 49 of the districts could be expected to have an
7 advantage for a democrat. So as our experts, both from
8 the Assembly side and the Senate side have demonstrated,
9 actually there is a Republican advantage to these maps
10:13:36 10 rather than a Democratic vantage. So we would submit
11 that given that evidence that we provided to the Court,
12 given the expertise that we've offered from our
13 experts -- I would note that in particular Mr. Trende is
14 a graduate student, he's never published anything that's
10:13:51 15 been subject to peer review. Mr. LaVigna is well -- very
16 much an expert in the field of communications, he worked
17 in communications for the State Senate, but he doesn't
18 claim to be a statistician, he doesn't claim to have any
19 kind of particular background that would give him the
10:14:08 20 authority to be able to give a proper statistical opinion
21 as to the propriety of these maps because when you get
22 down to it, evaluating these maps is a matter of social
23 science and a matter of evaluating mathematically whether
24 in fact there is an unfair partisan advantage that's been
10:14:28 25 given to one party or another. So we would submit that

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1 the petition is lacking in merit. The proposed amended
2 petition is lacking in merit.

3 The other thing I'd like to say, and I'm going
4 to touch on it briefly now, but I do anticipate

10:14:41 5 discussing it in greater detail later on if we do get to
6 argument on the merits of the actual petition, is the
7 issue of standing. We only have a limited number of

8 Petitioners in this case and there is no proposal to add
9 any Petitioners in the amended petition. And we would

10:15:00 10 submit that the law is clear both from the United States

11 Supreme Court as it's been put forth in the Gill versus

12 Whitford case which Mr. Tseytlin had the opportunity to

13 argue before the Supreme Court. This is true under the

14 Hays versus United States case, and in the State of New

10:15:16 15 York. It's true under the Bay Ridge Community Council

16 versus Carey case from the mid 1980's, is that in order

17 to challenge the lines of a particular district the

18 Petitioner needs to have standing, and the person who

19 would have standing is a person who actually lives in

10:15:34 20 that district. There are 63 Senate districts that are

21 proposed in this redistricting plan from throughout the

22 State of New York, and many fewer petitioners than 63.

23 And what the Court will find is that the vast majority of

24 districts are not represented by any Petitioner in the

10:15:53 25 amended petition.

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1 THE COURT: Let me ask you something.

2 MR. BUCKI: Yes.

3 THE COURT: The case law seems to indicate that
4 prior to predating the 2014 constitutional amendment that
10:16:06 5 required a Petitioner to be a resident of the district
6 before he would have standing, but wasn't that changed by
7 the constitutional amendment? Doesn't anyone have the
8 standing to challenge it?

9 MR. BUCKI: No, it was not, and I'm glad Your
10:16:20 10 Honor brought this up because we looked into this
11 yesterday, and in preparation for today. And in
12 particular the key case is the Bay Ridge Community
13 Council case that determined that in order to have
14 standing you need to live, for state constitutional
10:16:34 15 purposes, in a district. And the language that
16 Mr. Tseytlin cites from the state Constitution that says
17 any citizen may challenge a map, that very language was
18 not added to the Constitution in the 2014 amendment. In
19 fact, that language was in the state Constitution as it
10:16:55 20 existed in the mid 1980's when Bay Ridge Community
21 Council was decided. So as a consequence, just because
22 it says any citizen may challenge a map -- it's true any
23 citizen may challenge a map, but there's an additional
24 requirement that's unstated expressly in Article 3 of the
10:17:13 25 Constitution. But that is a requirement that comes to us

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1 from the tradition of the common law which is that in
2 order for a citizen to challenge, that citizen needs to
3 have standing. So that language was in the Constitution
4 in the mid 1980's, and not with understanding that -- Bay
10:17:29 5 Ridge Community Council at the Supreme Court level, as
6 affirmed by the appellate division, as affirmed by the
7 Court of Appeals on the decision that are rendered by the
8 Appellate Division, determined that there was no standing
9 on part of a gentleman who I believe lived in Long Lake
10:17:44 10 in Hamilton County who was trying to allege that somehow
11 there was an improper gerrymander on racial grounds in
12 Queens, and the Supreme Court said a person in Long Lake
13 cannot challenge what goes on in terms of how a map is
14 drawn in Queens. And that was true even though the state
10:18:06 15 constitution said then as it does now that any citizen
16 can make a challenge. So we would submit that with
17 respect to the amended petition, the vast majority of
18 Senate districts are unrepresented by the Petitioners,
19 and so as a consequence, the amended petition would lack
10:18:21 20 merit in that the vast majority -- in that the
21 Petitioners themselves cannot challenge the vast majority
22 of the districts that have been put forth in the Senate
23 map.

24 And then of course we would second the
10:18:35 25 contentions made by the counsel for the Senate Majority

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1 Leader with respect to the prejudice if this amendment
2 were to be granted, in that, for example, there are
3 deadlines with respect to issuing ballots under the
4 UOCAVA, U-O-C-A-V-A statute that are coming upon us as
10:18:55 5 soon as the middle of May, not to mention the fact that
6 this proceeding needs to be completed by April 4th. And
7 so for all of those reasons, we oppose the motion for
8 leave to amend.

9 THE COURT: Thank you, Mr. Bucki.

10:19:07 10 Is there anyone else I haven't called on yet?

11 *(No response.)*

12 THE COURT: The issues in both the petition and
13 the amended petition seem to be the same. The parties
14 are the same, the requested relief is almost identical.
10:19:36 15 I don't see any prejudice. I'm going to grant leave to
16 amend the petition to add the New York State Senate
17 redistricting. I'm directing that the answer to the
18 amended petition be filed by March 10th which is
19 Thursday. That brings us to the Petitioner's order to
10:20:03 20 show cause for expedited discovery, and it's been touched
21 upon, but let's revisit it. Who will be arguing that on
22 behalf of the petitioner? Mr. Tseytlin?

23 MR. TSEYTLIN: Thank you, Your Honor, I did
24 touch upon this earlier. What we've requested here is
10:20:29 25 the standard discovery that partisan gerrymandering

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1 Plaintiff's do readily obtain in cases around the
2 country. The only case they've cited that denied the
3 discovery, only did so after there was already a holding
4 that the case was lacking in merit. Now just to be clear
10:20:48 5 on our procedural argument, which I think can be ruled
6 upon today or as soon as Your Honor is able, we do not
7 need discovery in our procedural argument. That is just
8 a matter of straight constitutional text. We are -- on
9 our substantive argument, we do think we have put before
10:21:06 10 Your Honor more than sufficient evidence for us to
11 prevail. Having said that, just because we put enough
12 evidence for us to prevail doesn't mean we're not
13 entitled to the full scope of evidence including --
14 because I'm sure that one way or the other this matter is
10:21:19 15 going to get appealed.

16 THE COURT: Subject to qualified privilege?

17 MR. TSEYTLIN: Sorry?

18 THE COURT: Subject to qualified --

19 MR. TSEYTLIN: Of course, Your Honor. If Your
10:21:29 20 Honor things this aspect of our request is overbroad or
21 subject to that privilege, we would certainly be open to
22 a narrowing of our discovery request.

23 THE COURT: Well, your request seemed a little
24 overbroad to me. It was just sort of open ended.

10:21:45 25 Anything relating to the redistricting, that's pretty

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1 broad.

2 MR. TSEYTLIN: If Your Honor thinks that's too
3 broad, Your Honor, we would not oppose Your Honor
4 narrowing that or striking that paragraph.

10:21:57 5 The primary thing that we do want is to find
6 out what political data -- what political information
7 they looked at and what communications that they had with
8 the IRC or other third parties which are all deeply
9 relevant to when we get to the substantive aspect of our

10:22:16 10 petition. The courts are -- around the country look at
11 three categories of information when deciding whether
12 there was partisan intent, which is the only thing that
13 would be -- that we need to prove. We don't need to
14 prove some sort of other things, partisan intent. So

10:22:34 15 they look at statistical evidence of partisan bias, we've
16 talked about that. If you look at the individual
17 specific lines and see which communities of interest have
18 been broken up for what. Don't necessarily need
19 discovery on that, but they also look at the process.

10:22:51 20 Did the map drawers look at political data? Had -- did
21 they consult with a third party? Did they get
22 behind-the-scenes directions from the state party?

23 THE COURT: I assume you're looking for
24 something that shows somebody directed the Commission not
10:23:07 25 to make any decisions on this thing? Am I right?

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1 MR. TSEYTLIN: That would certainly be a
2 relevant consideration in determining whether the process
3 was directed towards the goal of drawing a partisan map.
4 Under standard intent case law the overall process --

10:23:28 5 THE COURT: Wouldn't that be relevant if that's
6 what you were seeking? Wouldn't that be relevant to your
7 procedural argument?

8 MR. TSEYTLIN: I think it would be more
9 relevant to our substantive argument because even if they
10:23:39 10 hadn't attempted to break the process -- which you know
11 with discovery will reveal if they did -- the bottom line
12 is they just didn't follow the exclusive process. So
13 certainly that kind of evidence would show why their
14 argument must be wrong. That the ability to tell those
10:24:00 15 that you appoint, don't pass anything so we can go back
16 to doing the business exactly how we did in 2014, you
17 know, that is an absurd result of what they're arguing,
18 but we don't need to prove that in any way to prevail in
19 our procedural argument. The reason for that is that's
10:24:17 20 just like -- because the commission didn't pass out a
21 second set of maps, that's just like under the prior
22 system if the assembly didn't pass out a map. It's just
23 a necessary part of the law making process that did not
24 occur. However if they did act to undermine the
10:24:35 25 committee the commission process in service of a map that

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1 left, right and center, everyone -- I mean, I heard my
2 friend say, this is a Pro-Republican, that's silly.
3 Left, right and center. Everyone recognizes this is an
4 egregious partisan gerrymandering. If in service of that
10:24:55 5 they told the IRC, don't pass anything because we don't
6 want to have the political accountability of rejecting a
7 Commission map because we want to jam through this
8 egregious gerrymandering to fulfill the Governor's
9 promise to advance the interest of the national
10:25:12 10 democratic party to fulfill the -- one of the Democratic
11 leaders point that they wanted to gerrymander New York or
12 they did gerrymander New York to get revenge for what
13 Republicans are doing in Texas and North Carolina
14 allegedly in service of that, they communicated with
10:25:33 15 those individuals, they communicated with the IRC, that
16 would be relevant evidence of partisan intent, which is
17 what's illegal. Intent is a fact specific inquiry.
18 While we do have overwhelming evidence of it already,
19 certainly those kind of communications would further
10:25:49 20 bolster our showing of partisan intent. And that's why
21 it's deeply irrelevant under the five-part test that
22 courts use to analyze the qualified Speech and Debate
23 privilege. But again, I will reiterate, if Your Honor
24 thinks some of those later requests we have in our five
10:26:09 25 requests are overbroad, anything to do with

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1 redistricting, you know we certainly would welcome Your
2 Honor narrowing that to get to the nub of what we're
3 really trying to get to, which is the political data they
4 looked at, and the communications they had with third
10:26:22 5 parties about the obvious gerrymander -- the obvious
6 embarrassing gerrymander they've imposed on the state of
7 New York.

8 THE COURT: Thank you, MR. TSEYTLIN.

9 On behalf of the Governor?

10:26:32 10 MS. MCKAY: Yes, Your Honor. Heather McKay,
11 again.

12 First of all, I want to emphasize that as our
13 papers made clear, this kind of a special proceeding
14 which Petitioners themselves have selected here,
10:26:56 15 generally disfavors discovery. And that in particular in
16 order to justify discovery in a case such as this one
17 that it makes them -- it even more necessary that the
18 demands that they need to obtain a court order for, need
19 to be appropriately narrow, and it's not Your Honor's job
10:27:20 20 to narrow those. The requests are completely overbroad,
21 and should therefore be denied in the sense that
22 Petitioner's have to obtain this is different than a
23 regular preliminary action. Petitioners have to obtain a
24 court order to get their discovery and what they've
10:27:37 25 provided to Your Honor is vastly overbroad and again,

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1 it's not Your Honor's job to narrow the scope of those
2 demands. With respect to the first cause of action,
3 Petitioners have conceded that they are raising a purely
4 legal question. I do want to touch just briefly though
10:28:00 5 upon the fact that they continue to insist that they need
6 a discovery with respect to the IRC process. That's
7 absolutely untrue. They need to justify that as relevant
8 material and necessary to prove their claims. And given
9 that all parties agree on the facts surrounding the
10:28:22 10 evidence in the IRC, the IRC could not reach an agreement
11 that's undisputed. They don't need to do a pointless
12 fishing expedition into the IRC process. And that's just
13 one example of how vastly overbroad these are, as
14 presented. And it's the Petitioners' obligation to
10:28:42 15 appropriately narrow any of their requests they've --

16 THE COURT: Wouldn't it be relevant if someone
17 did touch base with the Commission or any member of that
18 Commission to say, you know, then you're doing your job,
19 but don't come up with a set of maps?

10:29:00 20 MS. MCKAY: To be honest, Your Honor, I'm not
21 entirely sure it would be particularly relevant here. We
22 obviously have Democrats and Republicans pointing the
23 finger at each other saying --

24 THE COURT: Wouldn't that sort of tend to
10:29:12 25 indicate someone intentionally not following the process?

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1 MS. MCKAY: Well, I think the only relevance
2 that it could have would be establish that the breakdown
3 of communications -- which again is undisputed between
4 all the parties, they couldn't reach an agreement, so
10:29:28 5 their argument says that necessarily the legislature no
6 longer has any role in the redistricting process and has
7 to completely turn to the judicial branch, and our
8 argument is that of course that's preposterous. If they
9 have the ability to freely change or amend the maps, that
10:29:45 10 would be passed by the IRC in the first place, then
11 obviously they have the ability to create maps when
12 there's an IRC stalemate. As to the second and third
13 causes of action, again our arguments fall back on the
14 principles that we've already covered which is that these
10:30:09 15 claims are not implicating the Governor and now they're
16 essentially admitting here in court that she's named in
17 the same way that the Board of Elections is named, to
18 obtain the relief that they're seeking. Well, now
19 they've completely eviscerated any claims of necessity of
10:30:26 20 discovery from the Governor. They're not seeking any
21 discovery from the Board of Elections, and we've also
22 already -- my colleague has gone into the issues of
23 timing, in particular this motion is where that's
24 relevant because the discovery demands, the document
10:30:47 25 demands, and the number of depositions that they're

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1 proposing to hold of very high ranking statewide
2 officers, would significantly delay the proceedings and
3 not allow resolution within the constitutional confines.
4 And finally I think that we've covered a lot on
10:31:09 5 privileges today, so I'm not going to get further into
6 that, but obviously we're reserving our rights to raise
7 specific privileges as to specific demands, if any are in
8 fact served. Those are absolutely going to bar the
9 discovery in the first place which will mean that we've
10:31:26 10 delayed only to come to that conclusion, and they will
11 not have access to the materials that they're seeking
12 because of the importance of the legislative process and
13 the executive's need to be able to do her job. Thank
14 you.

10:31:46 15 THE COURT: Thank you, Ms. McKay.

16 On behalf of the Senate Majority Leader?

17 MR. CUTI: Thank you, Your Honor, John Cuti.

18 THE COURT: Good morning.

19 MR. CUTI: Good morning. A lot to cover.

10:32:05 20 Let's start with CPLR 408. The standard is not
21 relevance, as Your Honor's questions reflected, it is
22 whether discovery should be allowed in, and the standard
23 for that is whether it's essential. Now Petitioner's
24 counsel has gotten up here today and said that Your Honor
10:32:23 25 should enter judgment on the merits today on their

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1 procedural claim. So obviously discovery is not
2 essential for that claim even on their view. He just
3 told you a few minutes ago, counsel for Petitioner, that
4 they have with respect to their second claim the
10:32:46 5 substantive claim, overwhelming evidence already. So if
6 they already have overwhelming evidence, then discovery
7 by definition is not essential, for that reason alone you
8 should deny leave. Related to another reason to deny
9 leave is the inevitable delay. Now, no discovery
10:33:11 10 requested have yet been propounded. The issue before you
11 is whether they should be allowed to, and as Your Honor
12 noted, they're rather dramatically overbroad. So one
13 assumes if leave is granted they would serve some sort of
14 narrowed requests. But then -- and here I want to talk
10:33:28 15 about absolute legislative privilege. There is going to
16 be intensive litigation both here and depending on Your
17 Honor's rulings interlocutory in the Fourth Department.
18 Now Petitioner's counsel either misunderstands the law of
19 the Speech or Debate Clause or he mislead, Your Honor.
10:33:47 20 The federal cases that apply a qualified privilege do not
21 involve the Speech or Debate Clause. Let me just take a
22 few minutes to unpack that. The United States
23 Constitution has a Speech or Debate Clause. And there's
24 a long line of decisions beginning in the 1940's and
10:34:05 25 running through the 80's where the court in opinion after

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1 opinion stresses that the privilege is absolute based on
2 the plain language of the clause. The Members of the
3 House and Senate shall not be questioned in any other
4 place with respect to their legislative conduct. Now,
10:34:28 5 New York's Constitution has a virtually verbatim clause
6 and the New York Court of Appeals has held in Ohrenstein
7 that the New York Speech or Debate Clause provides at
8 least as much protection as the Federal clause does to
9 members of the Federal Congress, and that privilege is
10:34:49 10 absolute. The law is crystal clear that members of the
11 legislature cannot be questioned about their motives or
12 their intentions or their work they do at the
13 subcommittee or anything that is directly related to the
14 legislative process. Drawing maps is a quintessential
10:35:10 15 legislative function, and the case law from the Supreme
16 Court -- and again there are cases cited in our papers
17 that make clear that the Federal cases construing the
18 Speech or Debate Clause are persuasive authority. The
19 privilege doesn't just apply to the elected members, but
10:35:26 20 to their aides, even to consultants, anyone who is
21 performing legislative functions. It's a functional
22 analysis, it doesn't turn only to the title of the
23 person.

24 And so where does the notion of a qualified
10:35:40 25 privilege come from? I'll explain. There are many

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1 redistricting litigations where state maps are challenged
2 in cases filed in Federal Court. Now one of the main
3 reasons there are two main foundations for the absolute
4 nature of the Speech or Debate Clause privilege, one is
10:36:01 5 respect for the independence of the legislator and
6 legislature, and relatedly respect for the separation of
7 powers. The executive and judiciary are not permitted
8 ever to question what members are doing with respect to
9 their legislative conduct. But when a Federal Court has
10:36:22 10 state legislators before it, there are no separation of
11 powers concerns, it's two different governments. The
12 Federal Court isn't telling a Federal legislator what she
13 can do. There are federalism concerns, but that cuts in
14 favor of the federal government because of supremacy
10:36:41 15 clause. And so when those federal district courts and
16 circuit courts are talking about a qualified privilege,
17 they're not applying the speech or debate clause at all.
18 How could they? The Federal Speech or Debate Clause
19 doesn't apply to state legislators, it says Senators or
10:37:00 20 representatives. A Federal District Court is not going
21 to apply the New York Constitution or the Pennsylvania
22 Constitution. What they do in all the cases, including
23 in every single case they cite for the proposition
24 applies what's called the Federal common law. The
10:37:15 25 Federal common law has long respected legislative

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1 privilege, but when a Federal court's applying the
2 Federal common law, they're bound by Federal Rule Civil
3 Procedure 501, and that rule says; we respect common law
4 privileges, but you must construe them narrowly. The
10:37:34 5 Speech or Debate jurisprudence is the polar opposite,
6 case after case from the Supreme Court says it must be
7 broadly construed to protect the independence of
8 legislators. So this is -- the five-factor test is not
9 applicable at all, not even for illustrative purposes.
10:37:54 10 The cases that matter are cases like Eastland and Graves
11 and Brewster and Helstoski, all Supreme Court cases that
12 stress the privilege is absolute and the core of the
13 privilege protects the motivations and the intentions of
14 legislators. There is what Justice Harlan said in
10:38:17 15 Johnson that is precisely what the Speech or Debate
16 privilege protects. And so yes, intent can be an issue,
17 but it can be proved in many ways. It can be proved by
18 objective evidence. We all know that to prove murder in
19 the second degree in New York you have to prove intent,
10:38:36 20 and while motive is not an element, it's certainly
21 relevant. But you can't ask the Defendant what he
22 intended because he has an absolute privilege, but you
23 can still try to prove the case. Now they say they've
24 already proved their case, so they don't need this
10:38:52 25 discovery at all, but even were they allowed to seek

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1 discovery, they can't have Your Honor order legislators
2 to answer questions or produce documents about their
3 correlative functions. You don't have the power to do
4 that under the Constitution. And for them to tell you
10:39:09 5 that it's a qualified privilege is either really a poor
6 reading of the law or something worse. So if Your Honor
7 has any questions, I'm happy to answer them.

8 THE COURT: Thank you. Thank you. Appreciate
9 it, sir.

10:39:22 10 Mr. Bucki?

11 MR. BUCKI: Thank you, Your Honor. Of course
12 we would agree with counsel for the State Senator
13 Majority as to the absolute nature of the privilege, and
14 as much as it would apply to State Senators it would also
10:39:43 15 apply to Members of the Assembly. We would further agree
16 that just by the nature of the papers that have been
17 offered by the Petitioners, they have offered statistical
18 evidence, they have offered evidence of so called public
19 statements by the Governor. And as Mr. Cuti said, there
10:40:00 20 are other ways to prove partisan intention with the
21 Petitioners' claim is their objective, and I would submit
22 that a good synonym for the word intent -- and this
23 phrase partisan intent comes directly from their motion
24 for leave to engage in discovery. A synonym for intent
10:40:18 25 is motive. And matter of Maron versus Silver from the

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1 Court of Appeal from about a decade ago is clear, that
2 there is no place to require state legislators to answer
3 for their motivations in terms of how it is that they
4 come to enact a certain piece of legislation. And we
10:40:37 5 would agree that enacting a new proposed map for the
6 congressional lines and State Senate lines is
7 quintessentially a legislative act. Where I would like
8 to focus is with respect to the reply papers that were
9 served by the Petitioners on Tuesday, March 1st which we
10:40:57 10 did not have an opportunity to respond to in writing.
11 And in response to the ample authority that demonstrates
12 the absolute nature of the legislative privilege, the
13 Petitioners offer several cases wherein they claim that
14 in fact the privilege is not absolute, and I think it's
10:41:18 15 really important to go through each one of those cases to
16 demonstrate the distinctions such that the argument that
17 the Petitioners' offer does not have merit.

18 So first of all they cite to a case called
19 Larabee versus Governor of the State of New York which
10:41:34 20 eventually went up on appeal under the matter of Maron
21 versus Silver case. They said Larabee demonstrates that
22 in fact the privilege is not absolute. That's not the
23 case. What Larabee was about was the issue of
24 legislative immunity, because there -- what was alleged
10:41:51 25 was that the state legislators had violated their

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1 constitutional requirement to raise the pay of the judges
2 in the State of New York, and the response that was given
3 by state legislators is, well, we cannot be held to
4 account for that on account of legislative immunity. And
10:42:09 5 in fact what eventually was held, in matter of Maron
6 versus Silver was that while legislators could not be
7 required to pay out of their own pockets for additional
8 amounts to be allocated for salaries for judges, a
9 declaratory judgment to be issued such that it could be
10:42:25 10 held that in fact the Constitution had been violated in
11 as much as under the separation of powers doctrine, the
12 legislature had not done its job to give proper
13 compensation to the State Court Judges. So they could do
14 their job. But on appeal when the Larabee case went up
10:42:44 15 with Matter of Maron versus Silver, Maron versus Silver
16 was clear when it got to a paragraph talking about the
17 privilege issue rather than the immunity issue as to the
18 absolute nature of the legislative privilege because
19 under the Speech or Debate Clause in the State
10:43:00 20 Constitution, it could not be more clear, that for any
21 speech or debate in either House of the Legislature, the
22 members shall not be questioned in any other place. And
23 over time this clause has been construed by the courts.
24 And in particular I would note the campaign for fiscal
10:43:19 25 equity case, that was a case where the person who was

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1 being deposited was a staffer at The State Education
2 Department. And that staffer in the deposition was
3 starting to be asked, well what is the nature of your
4 communications with folks in the State Legislature with
10:43:34 5 respect to school funding. And so we would submit that
6 that's a very similar kind of inquiry that the
7 Petitioners are looking to pursue with respect to, oh
8 legislators, what were the nature of your communications
9 that you had with members of the Independent
10:43:50 10 Redistricting Commission and there in campaigned for
11 fiscal equity. The Court said this privilege is so broad
12 that it isn't simply a privilege that can be invoked by
13 state legislators. It can be invoked by the staff, by
14 the people who work with them, by the consultants, by
10:44:06 15 people who work for other state agencies with respect to
16 the interface that takes place with state legislators
17 both orally and in terms of their written communications
18 as well. And we would submit that that same privilege
19 applies, and no matter how much Petitioners may say that
10:44:22 20 they could try to make their request a bit more narrow,
21 and as much as they make -- they offer that invitation to
22 the Court, we would submit that the privilege issue would
23 still apply and we could continue to raise it such that
24 none of -- that no discovery demand that the Petitioners
10:44:41 25 could ever create as to the motivations or partisan

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1 intent could ever be countenanced under the absolute
2 legislative privilege. And Your Honor made a point, well
3 isn't it relevant that in fact say a State Legislator had
4 some communication with a member of the Independent
10:45:00 5 Redistricting Commission, and I would say that under the
6 law, privilege has superiority over relevance all the
7 time. So for example, if an attorney is counseling a
8 polluter with respect to bad documents that exist in the
9 polluter's files about some kind of toxic tort
10:45:22 10 allegations, documents that would not be helpful if they
11 were to see the light of day, that document -- that memo
12 is subject to attorney/client privilege.

13 THE COURT: And your example though, could they
14 get that information from the member of the Commission?
10:45:36 15 If they talked with the legislator?

16 MR. BUCKI: I would submit that a member of the
17 Commission is the same -- is in the same position as --

18 THE COURT: They're not legislators --

19 MR. BUCKI: -- as the education department
10:45:48 20 employee who was being deposed in the campaign for fiscal
21 equity case. There it was in the middle of a deposition
22 and that employee was being asked questions about her
23 interface with the legislature. That employee was being
24 represented by someone from the State Attorney General's
10:46:05 25 Office who raised an objection on the basis of privilege,

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1 and it had to go to State Supreme Court and actually went
2 up to the First Department in 2009. And the person who
3 was taking the deposition said this is someone who works
4 for State Ed, this is someone who works for a state
10:46:21 5 agency, this isn't somebody who's a legislator. But not
6 withstanding, the privilege was so broad that the Court
7 was clear that that person could not be questioned with
8 respect to those communications.

9 THE COURT: Isn't it supposed to be an
10:46:35 10 Independent Redistricting Commission?

11 MR. BUCKI: Well, actually there was a case
12 that went before Albany County Supreme Court, the Leib
13 case wherein it was supposed to be on the ballot in part
14 of the syllabus that was presented to the voters that
10:46:49 15 this was an Independent Redistricting Commission. And in
16 fact the Court held you can't call it an Independent
17 Redistricting Commission in terms of ballot proposal, not
18 withstanding the fact that in the parlance that's
19 developed since then they have called themselves
10:47:03 20 independent, but likewise if somebody committed murder
21 and then goes to their priest for confession and says I
22 confess that I committed this murder, absolutely that
23 would be relevant, but there's an absolute priest
24 penitent privilege in the State of New York. And so
10:47:18 25 likewise, just because something is relevant doesn't mean

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1 that it isn't privilege, and the privilege trumps the
2 relevance every single time. With respect to the
3 Ohrenstein case, they say that's another case that
4 demonstrates the privilege isn't really absolute. That
10:47:33 5 was a case that involved allegations of bribery. There
6 are no allegations of bribe or money changing hands or
7 anything of that nature. And then in fact where I'd like
8 to focus also is on a case that they cite from Illinois
9 which is Burton versus Corn Products Refining Company
10:47:51 10 from 1918. And little more recently from the appellate
11 division in the late 1950's; Reformed Church of Mile
12 Square. And they say here are instances where not
13 withstanding a Speech or Debate Clause, the legislators
14 were brought in and required to testify concerning the so
10:48:10 15 called purpose of legislation. I think it could be
16 argued that intent and purpose could be two totally
17 different things. But setting that aside, what's
18 important to see about those cases is these are cases
19 that involved municipal legislators. So in the Reform
10:48:27 20 Church of Mile Square case, that concerned the prospect
21 of getting discovery from persons who served on the City
22 Council in the City of Yonkers, and with respect to the
23 Burton case that was a case that involved getting
24 discovery from people who served on a City Council in
10:48:42 25 Granite City, Illinois -- I had to look up where that is,

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1 it's just outside of St. Louis -- but what's important is
2 in neither case does it talk about getting discovery from
3 members of the State Legislature or people who interface
4 with members of the State Legislature, and there's a
10:49:02 5 reason for this, because as the Humane Society case that
6 the Petitioners also rely upon makes clear, there is a
7 difference between the jurisprudence that exists with
8 respect to the privilege that -- the legislative
9 privilege that state legislators receive, versus the
10:49:20 10 jurisprudence that exists with respect to the privilege
11 that local legislators receive such as members of a city
12 council or a town board in the State of New York or
13 county legislator. So that is a common law privilege
14 that has been set forth from the courts, and there can be
10:49:36 15 exceptions to the common law privilege. Whereas the
16 privilege for state legislators is an absolute privilege
17 that exists under the State Constitution. And so the
18 bottom line is none of the authorities that the
19 Petitioners, my friends on the other side, have offered
10:49:53 20 in reply would support anything other than an absolute
21 legislative privilege. And if the Petitioners did not
22 want there to be an absolute legislative privilege
23 applied, they could have brought this case prospectively
24 in Federal Court. They talk about the various five
10:50:11 25 factor tests that are applied. That may be true in

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1 Federal court, but we're not in Federal court for the
2 western district of New York, we're not in the United
3 States Supreme Court, we are in the Supreme Court for New
4 York State, Steuben County, and in Steuben County Supreme
10:50:26 5 Court we would submit like anywhere else in New York
6 State Court, there is an absolute privilege that
7 attaches.

8 The last thing I would like to say -- actually
9 two more things. First of all, with respect to the
10:50:39 10 burden.

11 THE COURT: With respect to what?

12 MR. BUCKI: With respect to the burden. Much
13 has been said about the burden by my colleague Mr. Cuti,
14 but I would like to emphasize that if there were to be
10:50:52 15 any kind of discovery demands simply the task of putting
16 together copious privilege logs, not to mention the task
17 of having to search for all the different documents that
18 could potentially be responsive to a request that would
19 eat up the remaining time that we have, this proceeding
10:51:11 20 needs to be decided within one month from tomorrow, and
21 authorizing discovery which the Petitioners acknowledge
22 in saying this petition can be granted today, they're
23 basically acknowledging that they don't really need it.
24 But even if this discovery were to be authorized, simply
10:51:30 25 the litigation that would happen on appeal in terms of a

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1 notice of appeal, the fact that there would be an
2 automatic stay of the discovery under CPLR 5519(a)(1),
3 the fact that then we'd have to go before a special
4 session of the Fourth Department to have to sort this
10:51:44 5 out, every day that goes by is another day that this
6 proceeding is not going to be decided on the merits,
7 which it needs to by April 4th. And so we would submit
8 that the materiality and the necessity that would require
9 not only under CPLR 408 but also CPLR 3101 simply is not
10:52:05 10 there.

11 And the last thing I'll say at this juncture is
12 in as much as the Petitioners say this petition can be
13 granted today, I wanted to make absolutely clear that now
14 that the petition has been amended, it's impossible to
10:52:19 15 grant the petition today. It would be possible to deny
16 the petition today, but to grant it, no, and the reason
17 for that is that the Respondents have not had an
18 opportunity to answer for every petition. There needs to
19 be an answer. And the case on this point is matter of
10:52:36 20 Kickertz, K-I-C-K-E-R-T-Z, versus New York University.
21 It's from the Court of Appeals from about a decade ago,
22 that if the petition is granted without an opportunity
23 for the respondents to answer, then that's going to be
24 overturned on appeal because as a matter of due process
10:52:54 25 the Respondents need an opportunity to answer to -- we

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1 would submit that to take that step of granting a
2 petition at this time, as the Petitioners would invite
3 this court to do, simply is not something that can happen
4 at this juncture.

10:53:06 5 THE COURT: Thank you, Mr. Bucki.

6 MR. BUCKI: Thank you.

7 THE COURT: The Constitution provides both
8 legislative immunity and legislative privilege, however
9 the Courts have found the state legislators do not have
10:53:28 10 an absolute right to legislative privilege. In 2003 in
11 the case of Rodriguez versus Pataki the Court laid out a
12 balancing test to determine what information should be
13 disclosed and what needs to be protected because of the
14 chilling affect it would have on the legislature if the
10:53:46 15 information was disclosed. The Rodriguez court adopted a
16 five-factor test. Under the five prong test the Court
17 finds the request to discovery is relevant, that the
18 relevant discovery is not otherwise available, that the
19 issue of this -- the issues of this case are very
10:54:06 20 serious, and that the Government's role in the case is
21 huge. Further, that limited discovery will not have the
22 potential of chilling legitimate legislative actions in
23 the future. Since this Court only has until April 4th to
24 decide this matter, the Court will grant expedited
10:54:25 25 discovery, however short time period that may be. All

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1 persons asked to provide discovery are to give this his
2 or her highest priority, and to set aside other matters.
3 The Court will permit discovery of legislative
4 respondents as to whether or not the map drawing process
10:54:46 5 was directed and controlled by one political party or the
6 legislative leaders of one political party. This would
7 include whether the Respondents without Republican input
8 directed and/or controlled the map drawing process. The
9 Court will also permit discovery of the legislative
10:55:06 10 Respondents as to any public remarks or statements made
11 by them, any public testimony he or she gave about the
12 redistricting process and/or maps, and any inquiries from
13 and responses to the public or media about the
14 redistricting process and/or maps. This would include
10:55:29 15 public comments made by the Respondents about the
16 Independent Redistricting Commission, and the IRC's
17 action or lack of action. This would include any
18 communication between the Respondent's and third parties
19 about advancing a partisan agenda or any efforts to
10:55:49 20 undermine the constitutional process of having the IRC
21 produce a viable map and/or viable second map. This
22 would also include all documents and communications
23 concerning the work of the Commissioners of the
24 Democratic caucus of the IRC, which documents and
10:56:09 25 communications were received from third parties. Any

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1 discovery from non-legislative persons is not so
2 restricted. The Governor and Lieutenant Governor are not
3 to be considered as non-legislative members. Discovery
4 is to be completed by March 12th, and I know that's
10:56:27 5 tight. I'll be posting an order to this fact and
6 uploading it to NYSEF. Does anyone else wish to be heard
7 on the argument of lack of standing? I know it's been
8 touched upon. Does anybody else need to respond to that?

9 MR. HECKER: I would like to, Your Honor.

10:56:55 10 THE COURT: On behalf of the Senate Majority
11 Leader?

12 MR. HECKER: Hello, again Your Honor, Eric
13 Hecker; Cuti, Hecker and Wang for the Senate Majority.

14 Just very briefly, the case that they rely
10:57:15 15 upon, the Humane Society case from the third department
16 is a case in which the Court denied standing for every
17 Petitioner but one. And the only Petitioner who was
18 allowed to proceed in that case was allowed to proceed
19 precisely because she lived next door to the foie gras
10:57:40 20 farm at issue that she alleged was contaminating her
21 water. Here they put no evidence in when they filed
22 their petition, none. They put belatedly some evidence
23 of where Petitioners live in reply which appellate courts
24 have held you can't do in a special proceeding, period.
10:58:01 25 It can't be cured in reply. But more to the point, there

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1 is still no evidence in the record at all that anybody in
2 this case lives in Long Island, and this is exactly the
3 kind of generalized non-specific claim made by
4 Petitioners with no injury in fact, who are not within
10:58:24 5 the zone of interest. We are in District 23.

6 THE COURT: Is an adjoining district that might
7 be affected by another district, is that in the zone of
8 interest?

9 MR. HECKER: Perhaps. There are many many
10:58:35 10 districts between District 23 and Districts 1, 2 and 3 on
11 Long Island. There's nobody within striking distance of
12 standing. So they have a technical problem that they
13 created by failing to put in any evidence with their
14 petition to establish standing, which my friend
10:58:58 15 Mr. Tseytlin successfully argued before the Supreme
16 Court, it's fatal, and the end of the story, and you
17 can't cure it in reply in the State of New York, but even
18 if you could, this court has no basis to be judging any
19 district based claims in Long Island when nobody in this
10:59:15 20 case lives within striking distance of Long Island.

21 Nobody from one, nobody from two, nobody from three,
22 nobody from four, nobody from five, nobody from six,
23 nobody close to Districts 1 and 2. Just wanted to make
24 that point, Your Honor.

10:59:33 25 MR. TSEYTLIN: May I be heard on standing?

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1 THE COURT: Pardon me?

2 MR. TSEYTLIN: May I be heard on standing?

3 THE COURT: Go ahead, Mr. Tseytlin.

4 MR. TSEYTLIN: A couple of things standing,
10:59:45 5 Your Honor. First of all, with regard to our procedural
6 claim that would knock out the entire map, there's no way
7 to divorce that knockout from any particular district.
8 So with regard to at least a procedural claim there's not
9 even a colorable standing argument. Any person can raise
11:00:02 10 that, that would knock out that.

11 With regard to their reference to the Gill
12 versus Whitford case of the US Supreme Court, I did in
13 fact argue they should not be allowed to cure by having
14 additional plaintiffs, the argument was rejected by the
11:00:19 15 US Supreme Court. The US Supreme Court sent the case
16 back down to the lower court to allow them to add more
17 plaintiffs, that was way later than what happened here,
18 which is -- we correctly submitted under the
19 constitutional language that any citizen can challenge
11:00:32 20 the map, that's the constitutional language. It was not
21 addressed in the Bay Ridge decision, which was a trial
22 court decision in any event, and it was not addressed.
23 So any citizen language we relied on that to the extent
24 they raised some objections. We then put in sworn
11:00:51 25 affidavits from citizens throughout the state who are

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1 Petitioners, all of the districts are interlinked. If
2 Your Honor strikes down the districts that the
3 Petitioners are in on substantive grounds, the other
4 districts will need be to be changed in creating the
11:01:11 5 remedial map, a partisan interest cannot be advanced as
6 it was in Long Island.

7 Finally with regard to standing, again, I will
8 reiterate that for our procedural claim, there is no
9 colorable argument, and on the others we have citizens
11:01:30 10 all over the state who have submitted competent evidence
11 timely before the return date, which is all the rules
12 require. Thank you.

13 THE COURT: Thank you. Is there anyone else
14 who wishes to be heard on that?

11:01:42 15 MS. MCKAY: Your Honor, may we seek
16 clarification with respect to the discovery ruling, as
17 applied to the Governor and Lieutenant Governor, please?

18 THE COURT: They're considered part of the
19 legislative, so they have the privilege to the extent
11:01:56 20 that I said.

21 MS. MCKAY: Okay, and with respect to Your
22 Honor's rulings as to legislative Respondents need to
23 provide discovery, are you including the Governor and
24 Lieutenant Governor in --

11:02:10 25 THE COURT: Yes.

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1 MS. MCKAY: Thank you for the clarification.

2 THE COURT: Mr. Bucki, I saw you start to get
3 up. Is there anything you wanted to address on the
4 standing issue?

11:02:23 5 MR. BUCKI: I already had the opportunity to
6 talk quite a bit about standing, I just want to second
7 what Mr. Hecker says which is that vast swaths of
8 territory within the State of New York are not
9 represented by any Petitioner, and he mentioned Long
11:02:38 10 Island as a really good example. So even if it could be
11 argued and countenanced, which I don't think it can be,
12 that somehow as long as you live in the district next
13 door that you have standing to challenge the way the
14 district next door is created, well in a lot of cases
11:02:57 15 there is nobody in the district, and there's nobody next
16 door. And so as a consequence this really is in the --
17 more in the nature of a generalized political grievance
18 rather than a situation where the individuals at issue
19 would have standing to challenge the entirety of the map
11:03:16 20 as they claim to do. And with respect to that -- any
21 citizen language the Bay Ridge Community Council case
22 that talked about it in detail about the standing of the
23 person in Long Island -- I should say the lack of
24 standing of that person with respect to challenging the
11:03:29 25 way a district map looks in Queens, that was later

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1 affirmed in a detailed decision from the Appellate
2 Division and then later affirmed on the basis of the
3 Appellate Division opinion at the Court of Appeals. So
4 we would submit that this is more than just a
11:03:45 5 miscellaneous case, this is a case that went all the way
6 up to the Court of Appeals, and the Court of Appeals
7 would agree with the Federal courts from Gill versus
8 Whitford and Hays versus United States that in order to
9 have standing to challenge your district lines, you need
11:03:57 10 to live in the district, and the vast majority of the
11 Petitioners simply do not.

12 THE COURT: But the Petitioners are challenging
13 the map in general, they want everything thrown out.
14 Doesn't any citizen have the right to standing to bring
11:04:12 15 the petition?

16 MR. BUCKI: We would submit that if you have a
17 challenge to your particular district you need to live in
18 the district, and that is the position of the Speaker,
19 and I think that's the position of the Senate Majority
11:04:24 20 Leader as well. And then, second of all, the other
21 reason I was about to rise is I just have a question with
22 respect to the discovery in terms of how things are going
23 to go. I would anticipate once the order is entered that
24 there is going to be a notice of appeal filed certainly
11:04:38 25 on behalf of the Speaker, I would anticipate on behalf of

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1 the Senate Majority Leader. We would submit -- and I'd
2 like to put it on the record now that simply the filing
3 of that notice of appeal stays the discovery order and
4 that's the position that we take. And I leave it to the
11:04:52 5 Petitioners to determine how it is that they're going to
6 respond to that opportunity, so CPLR 5519. But further I
7 would have a procedural question as to when we can expect
8 the transcript to be ready so that that could be included
9 in any record on appeal that could be provided to the
11:05:11 10 Fourth Department.

11 THE COURT: I'll ask for it to be done ASAP.

12 MR. BUCKI: Very well, Your Honor.

13 THE COURT: Thank you, Mr. Bucki.

14 Have I listened to everyone on the standing
11:05:22 15 issue?

16 MR. HECKER: Yes, Your Honor.

17 THE COURT: The motion to dismiss for lack of
18 standing is denied, the amended Constitution gives every
19 citizen the right to commence this action and allege that
11:05:39 20 the maps were drawn with a gerrymandering intent. The
21 case law that predates the 2014 constitutional amendment,
22 which required a Petitioner to be a resident of a
23 particularly aggrieved district is no longer a guide to
24 determining standing because of the additional revision.
11:05:59 25 Petitioners have provided additional affidavits to verify

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1 that in fact these Petitioners encompass a number of
2 districts, and of course any district that abuts their
3 district would also be impacted by any change the Court
4 may make in the dimensions of the district. That's my
11:06:16 5 ruling on that.

6 That brings us now to just the petition, the
7 original petition itself. Honestly, I don't know if I
8 need to hear argument on that today, and I'll tell you
9 why. The Petitioners requested that I stay the election
11:06:41 10 or the current petition gathering process until this
11 matter can be decided. The Court understands that the
12 Petitioners' experts claim the currently enacted maps are
13 the most egregious display of gerrymandering of any of
14 the 5,000 or 10,000 maps that were drawn allegedly in a
11:07:04 15 non-partisan way. It's a serious allegation. However,
16 the Respondents' experts paint an entirely different
17 picture. I've decided that a hearing will be necessary
18 to be conducted to determine where the truth lies between
19 the Petitioners' experts and the Respondents' experts.
11:07:29 20 Until I have heard this testimony I'm not in a position
21 to know whether or not to strike down these maps or
22 uphold these maps. I'm not inclined at this point in
23 time to void the maps simply because the IRC failed to
24 submit a second map. I do not intend at this time to
11:07:53 25 suspend the election process for the following reasons;

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1 Petitioners have an extremely high level of proof to be
2 able to prove that the Respondents acted in an
3 unconstitutional way in creating the Congressional and
4 Senate maps. That proof is beyond a reasonable doubt
11:08:19 5 with the Respondents enjoying a presumption of
6 constitutionality. Two; even if I find the maps violated
7 the Constitution and must be redrawn, it is highly
8 unlikely that a new viable map could be drawn and be in
9 place within a few weeks or even a couple of months,
11:08:44 10 therefore striking these maps would more likely than not
11 leave New York State without any duly elected
12 Congressional delegates. I believe the more prudent
13 course would appear to be to permit the current election
14 process to proceed and then if necessary to require new
11:09:05 15 elections next year if the new maps need to be drawn.
16 I'm not ruling on the Petitioners' procedural argument
17 today. I believe I'm not going to make any rulings on
18 anything until the discovery is done. And I know it's a
19 very short time period for discovery, but we're all under
11:09:35 20 the gun. As I said before, the answer to the amended
21 petition is going to be due by March 10th. Expert
22 testimony is to start on March 14th, and whatever other
23 testimony you wish to present. I'm unavailable
24 March 21st through the 28th and my decision is due by
11:10:03 25 April 4th. Naturally I reserve the right to make a

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1 decision on what I have before me at the time. I think
2 everybody here would love to have a lot more time to
3 pursue this and go through extensive discovery and trial,
4 but we're faced with the fact that we're under a
11:10:30 5 deadline. Any future court hearings here will be also
6 simulcast using the same link and the same password just
7 so everyone knows, so we don't get a multitude of calls
8 about whether there's still the same link or a different
9 link. Is there anything else that needs to be discussed
11:10:55 10 today?

11 MR. BUCKI: Your Honor, if I may just clarify?
12 So then is it true what I'm hearing that testimony from
13 experts is scheduled to commence here on Monday,
14 March 14th?

11:11:08 15 THE COURT: Yes, at 9:30.

16 MR. BUCKI: 9:30 a.m.?

17 THE COURT: And in my mind I'm not telling you
18 how to present your case, but I'd like to hear your main
19 experts. That's important to me. You call it the way
11:11:24 20 you see it, and I don't know if discovery will yield
21 anything or not. We really don't know.


22 MR. BUCKI: So to clarify further, Your Honor,
23 not withstanding what may happen on appeal with respect
24 to the discovery order, the testimony from experts will
11:11:42 25 regardless commence on March 14th no matter what?

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1 THE COURT: Yes.

2 MR. BUCKI: Thank you.

3 THE COURT: Mr. Bucki raised a very good point
4 when he was standing at the podium that, you know and I
11:11:55 5 envision that one side or the other would appeal and
6 they're saying they're going to appeal my decision on the
7 discovery issue which may put a stay on everything here.
8 So I mean I'll leave it to the parties to discuss how you
9 want to deal with that. All I can tell you is my
11:12:14 10 decision is by law due by April 4th, and that's where we
11 are. I'll upload a decision on the discovery issue
12 today, and I'll see everyone on the 14th. Thank you.
13 Certified to be a true and accurate transcript.

14 
11:12:26 15 Laura Bliss Power
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TRANSCRIPT OF BENCH TRIAL,
DATED MARCH 14, 2022 [2513 - 2733]

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF STEUBEN : SUPREME CALENDAR

-----x

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,

Petitioners,

-versus-

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, CARL
HEASTIE, NEW YORK STATE BOARD OF
ELECTIONS, AND THE NEW YORK STATE
LEGISLATIVE TASK FORCE ON DEMOGRAPHIC
RESEARCH AND REAPPORTIONMENT,

Respondents.

Index No:
E2022-0116CV

BENCH TRIAL

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Steuben County Courthouse
Bath, New York
March 14, 2022

P r e s i d i n g :

THE HONORABLE PATRICK F. McALLISTER
Judge

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Attorneys for Senate Majority

I N D E X T O W I T N E S S E S

<u>For the Petitioners:</u>	<u>D</u>	<u>X</u>	<u>RD</u>	<u>RX</u>
Sean P. Trende	11-51	52-132	--	--
	--	133-156	--	--
	--	157-160	--	--
Claude A. Lavigna	161-174	175-220	--	--

I N D E X T O E X H I B I T S

<u>For the Petitioners:</u>	<u>ID</u>	<u>EVD</u>
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2 Trende reply report	4	20
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4 Lavigna rebuttal report	4	163
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1 (Petitioners' Exhibits 1 and 2 were marked
2 for identification.)

3 THE COURT: This is the matter of Timothy
4 Harkenrider et al. versus Governor Kathy Hochul et
5 al. I'm going to have counsel note their
6 appearances. We'll start with Petitioners.

7 MR. MOSKOWITZ: Bennet Moskowitz, Troutman
8 Pepper.

9 THE COURT: Thank you, Mr. Moskowitz.

10 MR. WINNER: George Winner, Keyser,
11 Maloney & Winner.

12 THE COURT: Thank you, Mr. Winner.

13 MR. TSEYTLIN: Misha Tseytlin, Troutman
14 Pepper.

15 THE COURT: Thank you, Mr. Tseytlin.

16 All right. On behalf of Respondent
17 Governor Kathy Hochul and, I believe, Lieutenant
18 Governor Brian Benjamin?

19 MS. MCKAY: Yes, your Honor. Heather McKay
20 and Muditha Halliyadde from the New York State
21 Attorney General's Office.

22 THE COURT: All right. Thank you.

23 On behalf of the Senate Majority Leader,
24 Andrea Stewart-Cousins?

25 MR. HECKER: Good morning, your Honor.

1 Eric Hecker from Cuti Hecker Wang.

2 MR. CUTI: John Cuti from Cuti Hecker Wang.

3 THE COURT: Thank you, Mr. Cuti.

4 MR. GOLDBERG: Alexander Goldenberg from
5 Cuti Hecker Wang.

6 THE COURT: One second. Okay.

7 MS. REITER: Alice Reiter from Cuti Hecker
8 Wang.

9 THE COURT: Thank you.

10 MR. MULLKOFF: Daniel Mullkoff, Cuti Hecker
11 Wang.

12 THE COURT: Thank you.

13 On behalf of the Speaker of the Assembly,
14 Carl Heastie?

15 MR. CHILL: Channing Daniel Chill from
16 Graubard Miller for the Speaker.

17 THE COURT: Thank you, Mr. Chill.

18 MS. REICH: Elaine Reich, Graubard Miller.

19 THE COURT: Is it Reich?

20 MS. REICH: Reich, R-e-i-c-h.

21 THE COURT: Reich. Thank you, Ms. Reich.

22 MR. BUCKI: Craig Bucki, B-u-c-k-i, from
23 Phillips Lytle in Buffalo.

24 THE COURT: Thank you, Mr. Bucki.

25 Is there any appearance on behalf of the

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1 New York State Board of Elections?

2 (No response.)

3 THE COURT: Any appearance on behalf of the
4 New York State Legislative Task Force on Demographic
5 Research and Reapportionment?

6 (No response.)

7 THE COURT: All right. I think I'll begin
8 with the two orders to show cause filed by the
9 petitioners to admit two attorneys pro hac vice.

10 Would you like to be heard on that,
11 Petitioners?

12 MR. MOSKOWITZ: Yes, your Honor. Bennet
13 Moskowitz. Barring any objections, given that my
14 colleagues who are here today, Robert Browne and
15 Molly DiRago, have submitted all papers that are
16 necessary to their admission and their intention
17 subject to that admission to participate in these
18 hearings, we respectfully request that your Honor
19 enter those orders at the start now.

20 THE COURT: All right. Is there any
21 objection by any of the respondents?

22 MR. CUTI: Not from the Senate, your Honor.
23 No objection from the Senate.

24 THE COURT: On behalf of the Governor and
25 Lieutenant Governor?

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1 MS. McKAY: No objection, your Honor.

2 THE COURT: On behalf of the Assembly?

3 MR. CHILL: No objection.

4 THE COURT: All right. It's admitted.

5 Robert E. Browne, Mary -- Molly S. DiRago, both
6 admitted for purposes of this matter.

7 That brings us to -- and I think,
8 Ms. McKay, you had indicated in letter form that you
9 were renewing your motion to dismiss that was brought
10 previously but did not request oral argument. Is
11 that correct?

12 MS. McKAY: That's correct, your Honor. We
13 will rely on our papers and our prior arguments.

14 THE COURT: I'm going to rule the same as
15 in the previous argument on that matter. The
16 motion's denied and on the same basis as previously
17 put on the record by the Court.

18 That brings us to three orders to show
19 cause that were just filed. To be frank with you, I
20 haven't hardly had time to go over them yet. One is
21 Petitioners' order to show cause to strike portions
22 of the expert reports of Professor Jonathan Katz and
23 Dr. Kristopher R. Tapp for late filing of the expert
24 reports, the second one is Petitioners' order to show
25 cause requesting an adverse inference in regards to

1 the respondents and their agents for failure to
2 appear for noticed depositions, and the third one is
3 Petitioners' order to show cause for leave to submit
4 supplemental briefing on the timing of the remedy in
5 this case. I did sign the orders to show cause, but
6 I put in there that the respondents have until 4:30
7 on -- on Tuesday, I'm sorry, this coming Tuesday,
8 tomorrow, to respond to those orders to show cause,
9 and we'll put it down for oral argument on Wednesday
10 morning at 9:30.

11 That brings us to witnesses for today.
12 Petitioners ready to proceed?

13 MR. MOSKOWITZ: Your Honor, if I may, my
14 colleague, Mr. Tseytlin, has just a couple of
15 preliminary matters that I think impact the
16 presentation of witnesses, so if I may turn it over
17 to him just for a moment.

18 THE COURT: Mr. Tseytlin?

19 MR. TSEYTLIN: Yes. Thank you, your Honor.
20 Just very briefly. One, Mr. Trende is going to be
21 our first witness called. He does have to be in
22 trial tomorrow in Maryland, where he's also a
23 witness, so we're going to hope to put him on first
24 today, and then he's going to have to go to his trial
25 tomorrow in Maryland. We hope -- we do not know if

1 your Honor intended to finish all the witnesses today
2 or not, but Mr. Trende will be going first, with your
3 indulgence, given that he has to be in Maryland
4 tomorrow.

5 THE COURT: I appreciate that. As you
6 know, we're under time constraints here.

7 MR. TSEYTLIN: Yes, your Honor.

8 THE COURT: I didn't anticipate -- and I
9 don't know how the testimony will go. I don't know
10 if Mr. Trende will be on all day or more than one day
11 or for two hours. I just don't know that, but it
12 brings up the point that we are under time
13 constraints here. I'm asking all counsel to make
14 your points and move on. Keep the matter moving.
15 That's important. So we'll start with that.

16 MR. TSEYTLIN: Absolutely, your Honor. The
17 second point is just to ask for clarification from
18 the Court, whether the experts that are not
19 testifying will be able to be in the room or whether,
20 perhaps preferably, they would be outside the room
21 during the testimony.

22 THE COURT: Well, how do you expect the
23 adverse experts to be able to answer your experts if
24 they're not listening to the testimony?

25 MR. TSEYTLIN: That's fair enough, your

1 Honor. They're going to be testifying based on the
2 expert reports that were submitted, and so -- but
3 obviously it's your Honor's discretion. We just
4 wanted to know how --

5 THE COURT: I will let the experts, if
6 they're going to be responding to the expert -- your
7 expert, to sit in the room. However, your experts --
8 the other experts should be outside the room.

9 MR. TSEYTLIN: I understand.

10 THE COURT: Do you understand what I mean?

11 MR. TSEYTLIN: Yes.

12 THE COURT: And it's the same for the
13 respondents. In other words, opposing experts --
14 opposing experts can sit in to listen to your experts
15 if you have more than one expert, which you do.

16 MR. GOLDENBERG: Understood, your Honor.

17 THE COURT: You understand?

18 MR. GOLDENBERG: Yes. Thank you.

19 THE COURT: All right. Very good.

20 Anything further, Mr. Tseytlin?

21 MR. TSEYTLIN: No, nothing your Honor.

22 Nothing further.

23 THE COURT: All right. Mr. Moskowitz?

24 MR. MOSKOWITZ: Thank you, your Honor.

25 Petitioners call Sean Trende.

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1 SEAN P. TRENDE,
2 called herein as a witness, having been first duly sworn,
3 was examined and testified as follows:

4 THE DEPUTY: State your name and spell it
5 for the Court, please.

6 THE WITNESS: It is Sean Patrick Trende,
7 S-e-a-n, P-a-t-r-i-c-k, T-r-e-n-d-e.

8 THE COURT: All right. Dr. (sic) Trende,
9 have a seat. I'm going to ask you to keep your voice
10 up. You seem to have a loud voice. I could hear you
11 plainly, but I am a little hard of hearing, so I'm
12 asking everyone to speak up when you talk. And you
13 have a microphone there, but I think I could hear you
14 even without that, so let's proceed.

15 Mr. Moskowitz?

16 MR. MOSKOWITZ: Thank you.

17 DIRECT EXAMINATION

18 BY MR. MOSKOWITZ:

19 Q. Good morning, Mr. Trende. Can you please tell
20 the Court what your educational background is?

21 A. I received a --

22 Q. Let me stop you right there.

23 MR. MOSKOWITZ: Your Honor, do you want him
24 to take his mask off?

25 THE COURT: You're allowed to take your

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1 mask off when you're testifying, or the attorneys
2 that are standing at the podium.

3 MR. MOSKOWITZ: Thank you, your Honor.

4 Q. So let me just ask the question again.

5 Mr. Trende, can you please tell the Court what your
6 educational background is?

7 A. Yes. I received a bachelor's degree from Yale
8 University with a double major in history and political
9 science. A few years later I attended Duke University for
10 law school. And Duke had a joint degree program, so while
11 I was getting my JD, I also earned a master's degree in
12 political science with an emphasis on American politics.
13 I clerked for a federal judge on the Tenth Circuit for a
14 year, then practiced law for eight years before finding my
15 true calling as someone who writes about and analyzes
16 elections, which I've been doing for the past decade.

17 In 2016 I enrolled in a doctoral program in
18 political science at the Ohio State University. And while
19 I was there, my advisors looked at my background in
20 statistics and urged me, rather than going through the
21 department's statistics program, to go over to the
22 department of statistics and earn a master's in applied
23 statistics, which, about 40 credit hours later, I did. I
24 earned that.

25 I finished the coursework and passed

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1 comprehensive exams for my master's in applied statistics
2 in March of 2019. My dissertation I finished in -- passed
3 comprehensive exams in political science with both
4 comprehensive exams in American politics and methodology,
5 so all that is remaining is my dissertation. My
6 dissertation advisor has approved my application to
7 graduate, so hopefully this will all be over in a couple
8 months.

9 Q. So you have four degrees, is that correct, and
10 you're working on your fifth?

11 A. I'm actually unsure whether Ohio State gives you
12 a second master's degree when you finish your coursework
13 but certainly four.

14 Q. At least four degrees --

15 A. Yeah.

16 Q. -- working on your fifth, perhaps your sixth?

17 A. That's right.

18 Q. Thank you.

19 And, Mr. Trende, can you please tell the Court,
20 what do you do for a living?

21 A. I'm the senior elections analyst for
22 RealClearPolitics.

23 Q. What is RealClearPolitics?

24 A. So RealClearPolitics is a company of about 50
25 people mostly located in Washington, DC, that produces

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1 original content, analyzing elections, and also
2 aggregating content on elections.

3 Q. So you said your title is senior elections
4 analyst. What is your role in connection with that title?

5 A. A lot of things: analyzing how districts are
6 drawn and how they unfold; getting a sense of how they're
7 likely to play out in elections; following polling;
8 following the candidates; basically all aspects of
9 elections.

10 Q. Is RealClearPolitics partisan?

11 A. It is not. We actually go to great lengths. If
12 you go to our front page, there will be a series of
13 articles that we aggregate. We go out of our way to try
14 to get an article -- if there's a conservative viewpoint
15 on an issue, pairing it with the left-of-center viewpoint
16 on an issue so the reader can decide.

17 Q. And does any of this work that you've been
18 describing concern redistricting?

19 A. It does. Following -- if you want to understand
20 how congressional elections are likely to play out, you
21 have to know how the districts are being drawn. So both
22 in the 2010 cycle and this cycle, a great degree of care's
23 paid to -- and attention's paid to how the districts are
24 drawn.

25 Q. And are you affiliated with any think tanks?

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1 A. I'm a visiting scholar at the American
2 Enterprise Institute and have been for about four years.

3 Q. And have you authored any books?

4 A. Yes. So I wrote a book called The Lost
5 Majority: Why the Future of Government Is Up for Grabs
6 and Who Will Take it. I was a co-author for the 2014
7 American -- Almanac of American Politics, which my role
8 there was to examine the 2012 redistricting for a little
9 more than half of the states, including the State of
10 New York; learning the political economy and political
11 geography of the districts, how they were drawn. And
12 then, you know, there's a second section, which I did not
13 write, that was candidate specific describing who the
14 candidates were. I've also, every two years -- Larry
15 Sabato's a political scientist at the University of
16 Virginia who runs a place called the Center for Politics.
17 After every election he puts out a book -- a compendium of
18 articles in book form from scholars explaining what
19 happened in the election, and I think I've done that going
20 back to 2014.

21 Q. And have you ever spoken on the topic of
22 elections analysis?

23 A. I regularly speak on elections to trade groups.
24 I've been asked by the United States Embassies in Sweden,
25 Spain, and Italy, to travel and speak to university groups

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1 and government groups, academic groups in those countries.
2 I've been asked multiple times by the ambassador to the
3 European Union to speak before the ambassadors for the
4 member countries on American elections and how they're
5 likely to play out.

6 Q. Have you ever taught?

7 A. I have. I taught a course at Ohio Wesleyan
8 University on Mass Media and American Democracy, and then
9 at Ohio State I've taught Intro to American Politics, I
10 think, four times. I also teach a class that's kind of my
11 own class on voter participation and turnout. I'm in my
12 third time teaching that, and we're getting ready to start
13 our section on gerrymandering after the students get back
14 from spring break.

15 Q. Have you ever appeared on television as an
16 elections expert?

17 A. I routinely appear on television sites across
18 the spectrum, Fox News, MSNBC, CNN.

19 Q. And have you ever appeared as an elections
20 expert on radio?

21 A. Yes. NPR, a variety of channels.

22 Q. Have any major news publications ever cited you
23 in your capacity as an elections expert?

24 A. Yes. I get cited in The New York Times, The
25 Washington Post, The Wall Street Journal pretty routinely.

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1 Q. And do you sit on any advisory panels?

2 A. Yes, I sit on the advisory panel. It's called
3 States of Change. It started out as a joint product
4 between the American Enterprise Institute and the
5 Brookings Institution. It was later taken over solely by
6 the Bipartisan Policy Center, and it seeks to examine
7 demographic change in the United States and how it's
8 likely to impact elections going forward.

9 Q. Have you ever done any work in Arizona?

10 A. Yeah, so when I was appointed by the Arizona
11 Independent Redistricting Commission as Voting Rights Act
12 expert to counsel in those cases.

13 Q. And have any courts ever appointed you to act in
14 any special capacity?

15 A. So two actually. The Supreme Court of Belize
16 appointed me as their expert in their kind of version of
17 Baker v. Carr. They asked me to analyze their existing
18 plans to determine if they comported with existing
19 international standards of fairness and democracy and, if
20 not, to draw proposed remedial plans.

21 The second time and more recently, I was
22 appointed along with Bernie -- Dr. Bernie Grofman from UC
23 Irvine by the Supreme Court of Virginia. After their
24 Independent Redistricting Commission deadlocked, the two
25 of us were asked to redraw their congressional districts,

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1 their state Senate districts, and their House of Delegates
2 districts for the upcoming decade.

3 Q. Have you ever previously served as an expert
4 witness on matters concerning redistricting?

5 A. I've testified in many cases, including both
6 cases that went to the Supreme Court of the United States.

7 Q. Which cases were those?

8 A. The captions changed, but it was the Gill v.
9 Whitford and Rucho -- it's the Rucho case. I can't
10 remember who the defendant was.

11 Q. Thank you.

12 MR. MOSKOWITZ: Your Honor, Petitioners
13 offer Mr. Trende as an expert in elections analysis
14 with particular knowledge of redistricting.

15 MR. HECKER: Subject to cross-examination,
16 we have no objection.

17 THE COURT: I'm qualifying him as an
18 expert.

19 MR. MOSKOWITZ: Thank you.

20 BY MR. MOSKOWITZ:

21 Q. Mr. Trende, have you been retained as an expert
22 in this matter?

23 A. Yes, I have.

24 Q. And who retained you?

25 A. Your law firm. I believe it's now Troutman

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1 Pepper.

2 Q. I believe so too.

3 Are you being paid for your services?

4 A. I am.

5 Q. And is any part of your compensation dependent
6 on the outcome of this case?

7 A. Absolutely not.

8 Q. And what were you asked to do?

9 A. I was asked to analyze the congressional maps
10 and state Senate maps passed by the New York State
11 Legislature and to write an expert report summarizing
12 conclusions.

13 Q. And did you render any written reports in
14 connection with this work?

15 A. I've written two expert reports.

16 MR. MOSKOWITZ: Your Honor, I'd like to
17 show the witness -- and I believe there are copies
18 for your Honor and some for opposing counsel, though
19 I'm sure they have them -- what's been marked -- and
20 I would just do both at once to be efficient here --
21 for identification as Petitioners' Exhibits 1 and 2.

22 THE COURT: Are they his reports and his
23 reply?

24 MR. MOSKOWITZ: Yes, your Honor.

25 MR. HECKER: No objection, your Honor.

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1 THE COURT: Anyone else?

2 (No response.)

3 THE COURT: Admitted.

4 (Petitioners' Exhibits 1 and 2 were
5 received in evidence.)

6 MR. MOSKOWITZ: May I approach, your Honor?

7 THE COURT: You may.

8 BY MR. MOSKOWITZ:

9 Q. Mr. Trende, can you please look at what's been
10 marked and submitted into evidence as Petitioners'
11 Exhibit 1 and tell me, what is that document?

12 A. This doesn't have the markings on it, but I
13 believe it is the expert report that I filed, the initial
14 expert report.

15 Q. Okay. And can you please look at what's been
16 put into evidence as Petitioners' Exhibit 2 and tell us,
17 what is that document?

18 A. That would be the reply report.

19 Q. Great.

20 And what method did you use to perform the
21 analysis that you just described?

22 A. I used the redist package in R that's been used
23 in several of the cases in which I've been involved.

24 Q. Can you please explain to the Court, what is
25 that?

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1 A. So R is a statistical programming language.
2 It's routinely used in political science and statistics
3 data analysis. And so one of the kind of nice things
4 about R is that responsible users can write their own
5 packages that can implement different statistical
6 techniques. And so this is a package of commands that can
7 generate sample redistricting plans that was authored by
8 an extremely well-respected professor at Harvard.

9 Q. So this is a computer program?

10 A. Yes.

11 Q. And what data do you actually use in connection
12 with that program?

13 A. So I downloaded what are called shapefiles of
14 the New York congressional districts and the precincts in
15 New York. So to understand a shapefile, you can just
16 think of an Excel spreadsheet, and the Excel spreadsheet
17 would have rows for each precinct and then columns for
18 data. So population data, racial data, political data
19 would be the columns. So you would have cell entries for
20 every precinct, what the number of votes cast for governor
21 were, what the population of each precinct is.

22 What makes them different from just a regular
23 spreadsheet, though, is that the last column is a geometry
24 column that will contain a series of points that delineate
25 the boundaries of the precinct. So you can then tell R,

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1 the programming software, to take the shapefiles and put
2 them in spacial form, to make maps of them, and it can
3 assess which of the precincts are contiguous to each
4 other, which congressional districts are contiguous to
5 each other. And so that's the building blocks of this
6 analysis.

7 Q. And do other experts in your field employ the
8 method that you just described?

9 A. Yes.

10 Q. And is the method you just described reliable?

11 A. It's been accepted by courts in Ohio and
12 North Carolina. A couple of other courts it's pending
13 before.

14 Q. Did you conduct your analysis in such a way as
15 to yield an accurate response?

16 A. Yes.

17 Q. And did you form any conclusions based on this
18 analysis?

19 A. Yes. The conclusions are summarized on Page 7
20 of the expert report, but it's -- the maps were clearly
21 drawn to discourage competitive districts, to disfavor the
22 Republican Party at the expense of the -- disfavoring the
23 Republican Party and favoring the Democratic Party.

24 Q. Do you hold those opinions to a reasonable
25 degree of professional certainty?

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1 A. Yes.

2 Q. Mr. Trende, I'd like to discuss with you some of
3 your specific findings that led to those opinions. If you
4 can please turn to Page 14 of your initial report, which
5 is Petitioners' Exhibit 1. And I note, sir, that there's
6 a graphic there that's labeled Values of Gerrymandering
7 Index. Do you see that?

8 A. I do.

9 Q. And please explain to the Court, what is this
10 graphic?

11 A. So to understand this graphic, it's probably
12 more useful to understand the map on Page 15 -- or the
13 graph on Page 15 first.

14 Q. Okay. Let's turn to Page 15. Are you referring
15 to this graphic that's labeled Democratic Vote Share by
16 Simulated District?

17 A. That's right.

18 Q. Okay. And please explain to the Court, what is
19 this graphic?

20 A. Okay. So the way that the redist package works
21 is taking the shapefile and, understanding which precincts
22 are adjacent to each other, it will draw random maps of
23 the state. You can cause it to draw a variety of randomly
24 generated congressional districts, full maps subject to
25 certain constraints. So here the simulations were

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1 instructed to draw reasonably compact districts, they were
2 instructed to be close to equipopulous, and they were
3 instructed to be contiguous. Note that it was not given
4 any political data. That's not included in our list of
5 information that's fed into the package. And so you then
6 ask it to do it several thousand times, in this case 5,000
7 times. It will draw a map each time that it's instructed
8 to do so.

9 What you can then do is take all 5,000 maps and
10 have the program calculate some measure of partisanship
11 for each one of those districts in every 5,000 maps. So
12 for this report I downloaded a compendium of elections
13 from a site called ALARM, which is a, again, commonly used
14 repository of elections. It has a bunch of statewide
15 elections from New York that are listed in the report over
16 the couple -- last couple cycles. Those elections were
17 averaged. And so if you look at the left side, or the
18 y-axis, in this report, this percent Democratic is the
19 average statewide Democratic vote share in each -- in the
20 districts.

21 So -- and this is where it gets a little bit
22 technical, but it's also important -- what you can then do
23 is say, for each of those 5,000 maps, okay, I want to
24 know, using this index, what the most Republican district
25 looks like, pull those districts out. And for each of

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1 those districts, it'll generate a plot. Where the column
2 says 1 on the very far left side of the chart, each of
3 those little dots represents the most Republican district
4 in each of the 5,000 maps. And so as you can see, the
5 most Republican district typically spans from about 42
6 percent Democratic in our index up to about 48 percent.
7 Okay. So if you're drawing without respect to politics,
8 according to the simulation software, you would expect the
9 most Republican districts to be between 42 and 48 percent,
10 probably closer to 45 given how dense the plot gets around
11 there. Okay. What does the second most Republican
12 district look like? So it'll pull all the second most
13 Republican districts from each -- all 5,000 of the random
14 maps in the ensemble and plot their partisanship, and
15 so --

16 Q. Let me stop you right there.

17 A. Yes.

18 Q. What's an ensemble?

19 A. The ensemble is the collection of the maps that
20 are generated by the program. And so if you were drawing
21 without respect to politics, you'd expect the second most
22 Republican district to land somewhere between 45 percent
23 Republican -- or Democratic to 51 percent Democratic with,
24 you know, a kind of center of mass where it gets really
25 dense somewhere around 47 percent and so forth. So you do

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1 that for the third most Republican district, fourth most
2 Republican district, and it gives you a sense of what
3 these maps would look like if you really were drawing
4 without respect to politics because political information
5 isn't fed into the program until after the maps are
6 finalized.

7 Q. So I note here, sir, that some of the colors are
8 a little scattershot-looking and some are kind of packed
9 tight. What's the significance of that?

10 A. So some districts are just going to be drawn
11 about the same way no matter what. So you can see the
12 thirteenth most Republican district. It has a pretty
13 narrow band between about 57 and 60 percent Democratic.
14 And so to kind of understand what's going on there, you
15 can say, like the Staten Island district, about 500,000
16 people, if you're drawing compact districts that don't
17 want to split counties, about 500,000 people are going to
18 be drawn in Richmond County into a single district every
19 single time. It kind of has to be drawn that way. And
20 then it's going to cross over into Southwestern Brooklyn.
21 There just aren't that many ways, at least politically
22 speaking, to draw that district.

23 If you're drawing a district on Manhattan,
24 there's a lot of ways to draw it, but it's always going to
25 be heavily Democratic because there just aren't that many

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1 Republicans on the Island of Manhattan. Other places,
2 like you'll note the sixteenth most Republican district,
3 there's a wide range in how that district could naturally
4 be drawn. There's a lot of political outcomes that you
5 could wind up with, with the sixteenth most Republican
6 district, anywhere from like -- anywhere from about 58
7 percent Democratic up to almost 80 percent Democratic. So
8 naturally speaking, with drawing districts without respect
9 to politics, that sixteenth most Democratic district just
10 naturally can have a wide range of political outcomes.

11 Q. Have you heard of the term packing?

12 A. I have.

13 Q. And what's packing?

14 A. So packing, it arises in the political
15 gerrymandering context, also in the racial gerrymandering
16 Shaw v. Reno cases, VRA cases. That's when you take a lot
17 of members of a group, whether it's a racial group or a
18 political group, and you place them all into as few
19 districts as possible.

20 Q. And have you heard of the term cracking?

21 A. So cracking is kind of the reverse side of
22 packing. Cracking is when you take members of a group and
23 you spread them out over a large number of districts so
24 that they'll be ineffective; they won't be able to impact
25 elections as much as you would expect.

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1 Q. Sir, drawing your attention to the dots below
2 the line on the left-hand-most side of the chart, what's
3 the significance of those on the low end?

4 A. So the dots represent the --

5 THE COURT: The black dots?

6 THE WITNESS: Yes, your Honor.

7 THE COURT: Okay.

8 A. The black dots represent the enacted plan.
9 These are the dots for the congressional district that was
10 passed by the Legislature and signed by the Governor. And
11 so what this shows us is that where you would expect that
12 second most Republican district to be, somewhere around 47
13 percent Republican, the Legislature draws it down to 42
14 percent Democratic. I'm sorry. I got that backwards.
15 You would expect it to be about 48 percent Democratic.
16 They draw it down to 42 percent Democratic.

17 For the third most Republican district, where
18 the Legislature would expect it to be -- where you would
19 expect a map drawn without respect to politics, without
20 political information, to be about 49 percent Democratic,
21 the Legislature has drawn that down to 45 percent
22 Democratic. That is the packing. That is the DNA of a
23 gerrymander right there. What the Legislature did and
24 what this shows is they plainly used political information
25 to take as many Republicans as they could, for example, in

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1 that 2nd District in Southern Long Island, takes as many
2 Republicans as they can, and puts them into as few
3 districts as they can to make those districts far more
4 Republican than you would expect them to be if they were
5 drawn without respect to politics.

6 Q. Thank you.

7 And does any information on this chart implicate
8 what you discussed as cracking?

9 A. Yes. So if you then shift over to
10 Districts 5 through 11, you can see there the dots from
11 the Legislature fall above the ensemble. That's the wages
12 of packing. By taking as many Republicans as you can --
13 again, I'll use the 2nd District as an example. By taking
14 as many Republicans as you can and putting them into that
15 Southern Long Island district, you've taken them out of
16 the adjoining districts and those districts become more
17 Democratic than you would expect. And so what ends up
18 happening is where we'd expect to have a number of
19 Republican-leaning or competitive districts in that 5 to
20 10 range, the Legislature's just obliterated them, gotten
21 rid of the competitive districts you would expect to see
22 in New York, and turned them into districts that will
23 almost always elect a Democrat. That's the
24 gerrymandering.

25 And you can see, then, as you get into this

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1 range where it really doesn't matter, where, you know, you
2 would expect to get heavily Democratic districts no matter
3 what, the Legislature's map falls right within the ranges
4 of what we'd expect, and that makes sense because it
5 didn't -- they didn't have to use political information
6 for drawing those districts. They were going to get a
7 heavily Democratic district no matter what. The only
8 place they really deviate is in that key area where you'd
9 expect to get districts that lean Republican or are
10 competitive, that they push up to be more Democratic
11 because they packed the Republicans into these four
12 districts.

13 Q. So your chart here indicates four Republican
14 districts?

15 A. That's right. Well, it's four districts that
16 are 50 percent -- where statewide Democratic candidates
17 have averaged less than 50 percent of the vote. That
18 doesn't necessarily mean that when you get to 50.1 percent
19 Democratic in the index, the district automatically starts
20 electing Republicans. The difference between a 49.9
21 percent Democratic district where statewide Democrats have
22 averaged 49.9 percent and a district where Democrats have
23 averaged 50.1 percent is really inconsequential. For all
24 intents and purposes, everyone who studies elections
25 understands that those districts have the same probability

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1 of electing a Republican to Congress.

2 Q. So what is the import of the 50 percent
3 threshold to elections analysts?

4 A. It's a useful thing. I mean, it's an obvious
5 missing thing given the ranges that are plotted on the
6 districts. It plots naturally 40, 60, and 80 percent, so
7 we plotted 50 percent on it as just a reference point.

8 Q. What does the 50 percent threshold tell you in
9 terms of analyzing elections with regard to a particular
10 district?

11 A. Again, it's something you can look at and see,
12 okay, this is around 50 percent. Like I said, whether
13 it's 50 percent or 50.1 percent or 50.2 percent, those
14 districts all have about the same probability of electing
15 a Republican to Congress. Now, if you want to ask me the
16 difference between a district that is 50.1 percent
17 Democratic and 58 percent Democratic for statewide elected
18 Democrats, that's a huge difference. That people would
19 latch onto and say, yeah, that's significant.

20 Q. So going back to the four dots below the line,
21 is that good for Republicans if there are four?

22 A. You may look at this and think, well, that was
23 nice of Democrats to make these districts even safer for
24 Republicans, and that's why it's important to kind of look
25 at the graph in its totality. I mean, yes, they make

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1 these districts way more Republican than they need to be.
2 Realistically in New York, once you're below 50 percent
3 statewide Democratic votes, the districts almost always
4 elect Republicans no matter what, so dropping it down to
5 42 percent doesn't help Republicans. It just wastes a lot
6 of their votes, and it does so -- the key is it does so at
7 the expense of these districts that would otherwise be
8 highly competitive or favored to elect a Republican.

9 Q. I believe you said earlier when I asked you
10 about the first graphic that it would be helpful to turn
11 to the second one first. If I can, sir, please go back to
12 the first graphic labeled Values of Gerrymandering Index.
13 Now with all of that context from the second graph, can
14 you please explain to the Court what this gerrymandering
15 index represents?

16 A. That's right. So the gerrymandering index is a
17 summary of the deviations that you see. So what the
18 gerrymandering index does, it gets a little complicated in
19 the math, but basically for every one of these bins in the
20 plot on Page 15, the most Republican district, the 2nd, it
21 calculates the average for each of those ranks from our
22 ensemble and then measures within our ensemble how far
23 each district in each map falls from that average. It
24 gets back to that intuition that I was describing earlier,
25 that some districts are just naturally -- some places it's

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1 naturally okay to wind up far away from the average
2 because a map drawn with respect to politics gives you a
3 really, really wide range of possible outcomes. In some
4 areas it's really not okay to get far away from the
5 average because a map drawn without respect to politics
6 would give you a very narrow range of outcomes.

7 So what we do, to summarize, is we sum up for
8 all the maps all the deviations that we see from the
9 average, and you summarize them in this gerrymandering
10 index. And so each one of these bars represents a count
11 of how much just kind of naturally occurring deviation
12 from the average you get. So on the far left you can see
13 that there is a map that like hardly deviates from the
14 average of what we would expect, about 4, maybe 5 points,
15 on the very far left of those bar graphs. It actually
16 looks like there's two maps that do that.

17 At the other extreme there are a handful of maps
18 that have pretty -- that naturally occur drawn without
19 respect to politics that have some pretty large deviations
20 from the average expected value, something around .15.
21 You can see it's almost like a little L on the far -- a
22 gray L. Okay. That's the range -- the overall range of
23 deviations you would expect for maps drawn without respect
24 to politics in our sample. Then that red line -- I did
25 the exact same thing for the enacted map. How far does it

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1 deviate from the average expected value? And as you can
2 see, it's an extreme outlier. It has a larger total
3 expected -- it has a larger total deviation than any of
4 the 5,000 maps drawn without respect to politics in our
5 ensemble. It's about twice the average and about 6
6 standard deviations out. And a standard deviation is just
7 kind of a measure of natural spread.

8 THE COURT: Which map is that? Is that the
9 congressional or the state Senate?

10 THE WITNESS: Oh, these are all
11 congressional, your Honor. I'm sorry.

12 THE COURT: Okay.

13 Q. And, Mr. Trende, I see on Page 17 of your report
14 there's another graphic. It's labeled Average
15 Polsby-Popper Scores. What is a Polsby-Popper score?

16 A. So the Polsby-Popper -- there are a variety --
17 so after you draw the maps, you want to kind of do sanity
18 checks to make sure that the ensemble is not doing
19 something just far off-kilter. So the following charts
20 represent those. We wanted to make sure that when we're
21 drawing compact districts that we're doing them about --
22 comparable to what the Legislature was doing, in other
23 words, this outcome isn't just an artifact of whatever
24 parameter you choose for compactness.

25 And so the Polsby -- there have been a variety

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1 of proposed compactness metrics. There's probably 100 of
2 them. The Polsby-Popper is one of the most commonly
3 utilized ones. It runs on a range from 0 to 1, where 1
4 would be a perfectly round district and 0 would be a
5 perfectly non-compact district, which is kind of hard
6 to -- it'd be a district with a lot of --

7 THE COURT: Zigzags?

8 A. -- zigzags and, for Polsby-Popper, a lot of arms
9 sticking out of it, if you will. And so for all the 5,000
10 draws in the ensemble, we calculated the average
11 Polsby-Popper score. The red line reflects the enacted
12 plan. And so the ensemble is performing comparably to the
13 enacted plan in terms of compactness.

14 Q. And did you do any other sanity checks?

15 A. So yes. We wanted to make sure that we weren't,
16 you know, obliterating minority-majority districts
17 accidentally with our ensemble, and so we counted the
18 number of minority-majority districts in the ensemble, we
19 looked at the enacted plan, and kind of did the same
20 thing. And --

21 THE COURT: You're on Page 18 now?

22 THE WITNESS: Yes, your Honor.

23 THE COURT: Okay.

24 A. And as you can see, the ensemble draws nine,
25 ten, eleven, or twelve minority-majority districts. The

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1 enacted plan has nine. So, again, it's performing
2 comparably.

3 Q. And did you examine county splits?

4 A. Yes, your Honor. If you turn to Page 19, we
5 wanted to make sure that the map wasn't just, you know,
6 splitting -- a whole bunch of county splits, the ensemble
7 wasn't, you know, getting the score it was getting because
8 we weren't paying sufficient attention to county lines.
9 It actually performs quite a bit better than the simulated
10 maps. But, again, it does at least as well as the enacted
11 plan when it comes to county splits. We actually split
12 very few counties.

13 Q. And his Honor understandably asked you to
14 confirm that everything we've been discussing concerns
15 congressional maps. Did you also analyze New York's 2022
16 state Senate map?

17 A. Yes, your Honor. We went on and did a separate
18 round of analyses for the state Senate maps and --

19 Q. And what did you -- sorry. Go ahead.

20 A. That begins on Page 19 of the initial report.

21 Q. And did you form any conclusions about the state
22 Senate map?

23 A. Yes. So I won't -- it's the same process. You
24 interpret these plots in the same way, which I won't
25 rehash. But on Page 20 you can see the gerrymandering

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1 indexes for the enacted plan versus the gerrymandering
2 indexes for the ensemble that we draw. And, again, it's
3 just an extreme outlier. That red bar is far outside the
4 range you would expect from these maps drawn without
5 respect to politics.

6 Q. Did you perform the same sanity checks that you
7 did for the congressional map analysis --

8 A. Yes.

9 Q. -- with respect to the Senate map analysis?

10 A. Yes. So if you turn to Page 21, you can see the
11 dot plots. And, again, it's the exact same pattern we see
12 in the congressional maps. The places where you'd expect
13 to get heavily Democratic districts naturally, the enacted
14 plans fall exactly within the ranges that our maps drawn
15 without political information expect because the mapmakers
16 wouldn't have to pay attention to political data to draw
17 heavily Democratic districts on -- you know, in Downtown
18 Rochester or in Manhattan. So they drew the districts
19 they wanted there.

20 It's when you get, again, down into this range
21 of competitive districts that the DNA of the gerrymander
22 shows up again. You get -- you expect to start getting
23 districts where statewide Democrats won 50 to 55 percent,
24 which is a range that Republicans can win districts in,
25 that they'll at least be competitive, and the Legislature

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1 pushes those districts up towards the 59, 60 percent
2 range, where Republicans just don't win much in New York.
3 That's accomplished by packing these districts in the
4 ranges from 4 to 13. Those districts are heavily packed,
5 made much more heavily Republican than they need to be, so
6 the remaining Republicans can be spread out over a bunch
7 of districts and rendered ineffective.

8 For the sanity checks, you know, those are
9 included on the following pages. And, again, the test is
10 whether you're performing comparably to what the
11 Legislature did, and these maps have comparable
12 compactness, comparable minority-majority districts, and a
13 comparable number of county splits.

14 Q. Sir, were you also asked to analyze population
15 deviations for the 2012 New York congressional and Senate
16 maps?

17 A. I was.

18 Q. And what did you conclude, if anything?

19 A. So the -- this is the table on Page 24. And as
20 we would expect, because New York is losing a
21 congressional district, the congressional districts are
22 all badly -- all -- with the exception of 5 and 8 -- well,
23 I guess 5, 8, 10, and 12, are all badly underpopulated, as
24 large as a 10 percent deviation from perfect population
25 equality.

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1 Q. Have you heard of the term malapportioned?

2 A. Yes. That's what a large portion of my beliefs
3 were dedicated to.

4 Q. And is what you were just describing with
5 respect to the 2012 congressional and state Senate maps
6 considered malapportionment?

7 A. Yes. Under -- I mean under US law, without a
8 good reason, they have to be perfectly equipopulous. So
9 these 10.5 -- 10.7 percent deviations are gross
10 malapportionment.

11 Q. Are you aware, sir, that Respondents submitted
12 expert reports in this matter?

13 A. Yes. And, of course, on Page 25 I did the exact
14 same analysis for the state Senate, which doesn't lose --
15 which is just as badly malapportioned. At least under the
16 Supreme Court of the United States law, you're allowed to
17 be plus or minus 5 percent. And as you can see, like
18 District 52 is 11.4 percent off, so the existing Senate
19 districts in 2012 to 2020 as of today are badly
20 malapportioned as well.

21 Q. Thank you.

22 A. And, yes, I am aware that they filed responsive
23 memos.

24 Q. Thank you.

25 Did you read Dr. Barber's report?

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1 A. I did.

2 Q. Do you know Dr. Barber?

3 A. I do.

4 Q. How do you know him?

5 A. Dr. Barber and I have worked together on a
6 couple cases.

7 Q. Did you read Dr. Tapp's report?

8 A. I did.

9 Q. Do you know Dr. Tapp?

10 A. I do not know Dr. Tapp. I think he appeared as
11 a plaintiff in a case I was an expert. But other than
12 that, no.

13 Q. And did you read Dr. Ansolabehere's report?

14 A. I did.

15 Q. And do you know Dr. Ansolabehere?

16 A. I do. We served together as advisors for the
17 Arizona Independent Redistricting Commission.

18 Q. Let's turn now, sir, to Petitioners' Exhibit 2,
19 your second report. Please tell us, what was the purpose
20 of this report?

21 A. So having read the response reports and the
22 criticisms that were raised in them, we had an opportunity
23 to address them, and so that's what the reply is focused
24 around.

25 Q. Okay. And if you go to Page 2, I see there's an

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1 Introduction and Executive Summary. In the first bullet
2 you write, Respondents' experts' reports all miss the mark
3 badly. What did you mean by that, sir?

4 A. I honestly thought, you know, when you looked at
5 the arguments made by the respondents' experts, when you
6 looked at them and analyze them, the analysis actually
7 made the petitioners' case stronger, which doesn't happen
8 that often.

9 Q. And please explain, why do you have that
10 opinion?

11 A. Well, if you -- let's take, for example, they
12 have criticism, but there's other constitutional
13 considerations that were not drawn into the initial round
14 of maps. And my first reaction was, well, they're all
15 capable of running these simulations. They've all done
16 it, at least two of them -- well, at least two of them
17 have either written about it or done them in other cases.

18 THE COURT: And the same methodology?

19 THE WITNESS: I don't believe Dr. Tapp uses
20 redist, but Dr. Barber uses it in cases.

21 A. So why didn't they run the simulations with
22 those constraints and see what comes out of it? But
23 lacking that, I went ahead and reran the simulations,
24 including the various proposed constraints. It was
25 actually helpful because, even when you do it in a way

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1 that's incredibly generous to Respondents, you end up with
2 the exact same results.

3 So, for example, there was a criticism that we
4 didn't take municipal splits sufficiently seriously, so
5 the most generous way I could think of was, okay, if the
6 enacted plans kept a municipality intact, we will keep --
7 in all the draws we'll keep it intact, so the exact same
8 choices they make we'll replicate. Even keeping those
9 municipalities intact, you get the same. You can look on
10 Page 15 of the reply, and it's the exact same pattern. It
11 makes no difference. They had an objection -- it's
12 reasonable -- that the Voting Rights Act isn't just a draw
13 majority -- minority-majority districts. It's a more
14 intensive analysis than that.

15 So the most generous way to do that that I could
16 think of was say, okay, the way the Legislature drew every
17 ability-to-elect district in New York, we're going to
18 freeze those districts in place. So in all 5,000 of the
19 ensembles, we're going to have, you know, the district
20 drawn -- in the Bronx drawn the exact same way as the
21 Legislature, just concede that those districts have to be
22 drawn that way. That guarantees we're respecting the
23 ability to elect at least as well as the enacted plan
24 does. It also concedes a fair amount of ground because it
25 concedes that that district that goes from Yonkers to

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1 Yorktown has to be drawn that way even though it takes in
2 a lot of Republicans up around Yorktown and it concedes
3 that the Republicans in Southeast Brooklyn should be split
4 between the two minority-majority districts there.

5 But even making that concession, you can see the
6 plots on Page 17 and 18, and they do the exact same thing.
7 So the plot -- these look different because the -- when
8 you freeze all those districts, it makes the map
9 noncontiguous, so you have to break the analysis into
10 chunks. So the map on Page 17 is the remaining chunk,
11 which is the four districts on Long Island, I guess, and
12 then looping around in part of Westchester County. But
13 you see the exact same pattern.

14 Even making this concession to Respondents, the
15 first -- the most Republican district, which would be the
16 2nd District, is made far more Republican than you would
17 expect it to be, and it comes at the expense of the
18 districts -- the second and third most Republican
19 districts being pushed from a range in the mid to low 50s
20 up towards 60 percent. So it has the same packing and
21 cracking pattern even making these concessions to the
22 respondents.

23 If you look on Page 18, so this is the 10th,
24 11th, and 12th, so it's the Staten Island district,
25 Nadler's district -- Representative Nadler's district and

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1 Representative Maloney's district, and here it's really
2 plain that that Staten Island district, you would expect
3 it to land somewhere between 50 and 55 percent Democratic.
4 Defining Democratic as the average statewide Democratic
5 vote share, they've drawn it up to 62 percent, taking it
6 out of a range that Republicans would routinely be able to
7 win, pushed it into something where Republicans would have
8 almost no chance of winning. It's done so, if you look at
9 the other two districts, by making those two districts
10 less Democratic than you would expect from a map drawn
11 without respect to politics.

12 And then, finally, on Page 18 you can see the
13 districts in Upstate New York. And, again, it's the same
14 basic pattern. Three districts are drawn more Democratic
15 than you would expect them to be, which then allows
16 Districts 4, 5, and 6 to be pushed either outside --
17 completely outside of what we would expect or towards the
18 far extreme of what we would expect, making them far more
19 Democratic than a map drawn without respect to politics,
20 doing away with what we would expect to be a
21 Republican-leaning district or at the very least a very
22 competitive district.

23 So then, you know, there's another concern about
24 core retention, pay attention to the district core, so we
25 did the same thing: froze the municipalities in place,

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1 froze the ability-to-elect districts in place on the
2 respondents' terms, and then programmed in a constraint
3 for the redistricting simulation to take into account
4 existing district cores. And as you can see on Page -- I
5 won't rehash everything, but as you can see on Pages 19
6 and 20, it's the exact same pattern, most Republican
7 districts made far more Republican than you would expect,
8 which turns around and makes the remaining districts more
9 Democratic at the expense of leaning-Republican
10 competitive districts.

11 Q. Mr. Trende, do you recall that certain
12 Respondents' experts criticize the number of simulations
13 you rely upon in your report?

14 A. Yes.

15 Q. And what's your response to that?

16 A. So for -- the assertion was that 5,000 draws
17 weren't enough. For this we did 10,000 draws. When
18 Dr. Barber wrote his report, he did 50,000 draws and got
19 similar results. So, you know, by doubling the number of
20 draws, I think we -- even without respect to Dr. Barber's
21 report, I think we answered that, but yeah.

22 Q. So running twice as many simulations didn't
23 change anything?

24 A. It did not change anything.

25 Q. And why did you rely upon 5,000 simulations in

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1 your initial report?

2 A. So this program is written by a political
3 scientist at Harvard who does a fair amount of expert
4 testimony and, in cases where he has run his software and
5 courts have accepted it, he's used 5,000.

6 Q. Mr. Trende, do you recall that Respondents'
7 experts claim that the enacted maps actually have a
8 pro-Republican bias?

9 A. Yes.

10 Q. And what is your response to that?

11 A. I mean, I don't find that particularly credible.

12 Q. And why not, sir?

13 A. Well, they make two foundational mistakes. You
14 know, there's kind of common sense to me that this is
15 drawn by the Democratic Legislature probably not to help
16 Republicans. But when you look at the argument that they
17 make for why this is a pro-Republican map, what they're
18 doing is they're taking a district where the average
19 statewide Democrat won less than 50 percent of the vote
20 and just calling it Republican. They're taking districts
21 where the average statewide Democrat won more than 50
22 percent of the vote whatever -- whether it's 90 percent or
23 50.0001 percent, and labeling it Democrat and comparing
24 that to the ensemble.

25 And that's just not a very good way to think

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1 about elections. If the average statewide Democrat, you
2 know, runs one vote below 50 percent versus if the average
3 statewide Democrat runs one vote above 50 percent, that
4 makes no difference in how likely it is that that district
5 is going to elect a Republican to Congress, and that's
6 part of the insight on why these simulation
7 interpretations are structured the way that they are.

8 These aren't -- the political index is not
9 expected congressional results. It's the statewide
10 Democrats' average run. So you can see how those votes,
11 which are the ones that are actually available to the
12 Legislature when they're drawing the districts, they --
13 you can see how they've been manipulating those partisan
14 vote shares.

15 Another way to think about it is that if you
16 look at -- if you go back -- I guess we have the reply
17 open, so we can turn to Page 15, and you can see that in
18 ordered District Number 5 --

19 THE COURT: Let me catch up.

20 THE WITNESS: I'm sorry, your Honor.

21 THE COURT: That's all right. Okay.

22 A. You can see in ordered District Number 5 that
23 there's a lot of districts that are drawn right around
24 that 50.1 percent Democratic, right? The big bulk is
25 really close to that 50/50 line. And, again, the reason I

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1 put that dotted line there is so we could have this
2 conversation. Otherwise we'd really be swanking. It will
3 treat -- the respondents' experts' approach will treat
4 that district right at the line the same way as the
5 enacted district, which goes up to around 55 percent
6 Democratic, and that's just not a sensible way to think
7 about elections.

8 A district where statewide Democrats have won 55
9 percent or, as you get further out on this map, 60
10 percent, it's just fundamentally different from a district
11 where statewide Democrats have won 50.1 or 52 percent of
12 the votes. Republicans win in those districts around 50
13 or 51 or 52 percent. They don't win in districts where
14 statewide Democrats have won 58 or 59 percent of the
15 votes. Taken literally, the respondents' experts would
16 treat a district where statewide Democrats got 50.1
17 percent of the vote the exact same way that they would
18 treat a district where statewide Democrats averaged 90
19 percent of the vote. Again, that's just not a good way to
20 think about elections. So that's one reason.

21 The other reason -- and this is something I've
22 been alluding to as I've spoke. You know, I've been kind
23 of asserting that Republicans win in 50.1 percent
24 districts. So if you turn to Page 10 of my report. So
25 this is --

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1 THE WITNESS: Sorry, your Honor.

2 THE COURT: One second. Okay.

3 A. So this is the existing congressional districts,
4 and the next column you can see is index, which is, again,
5 our average statewide Democratic vote share in the
6 districts. The remaining three --

7 THE WITNESS: You're on the right page,
8 your Honor.

9 A. The remaining three columns are the
10 congressional results for those districts in 2020, 2018,
11 and 2016, the last three cycles. Those are actually
12 pretty good cycles for Democrats. Republicans won the
13 popular vote by a point in 2016. They lost by, I think, 8
14 points in 2018, and then they lost by 3 points in 2020.
15 So this doesn't include Republican wave years like 2014 or
16 2010. Regardless, if you look at this, in the four
17 districts that are -- that have an index of less than 50
18 percent, Antonio Delgado has managed to win in the 22nd
19 District, but otherwise Republicans have won usually
20 handily in districts where the index falls below 50
21 percent.

22 Okay. When you go over into this 50.39 percent
23 district, things don't magically change and all of a
24 sudden Democrats start winning. As a matter of fact,
25 Republicans have won that 1st District sometimes by pretty

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1 substantial margins even though the average statewide
2 Democrat has won 50.39 percent of the vote. The 19th
3 District -- actually, I'm sorry, the 22nd isn't Delgado.
4 That's Claudia Tenney's district that she lost in the
5 waiver year of 2018. The 19th is Delgado, which is 50.44,
6 and the Republicans won it in 2016, and then he won it the
7 last two cycles.

8 Then you get to the 2nd District, which has an
9 index of 50.176, and Republicans have won it all three
10 cycles, including an open race after Peter King retired.
11 The 11th District, which is the Staten Island district,
12 has -- the existing Staten Island district has an index of
13 52.05. And, again, it doesn't magically become
14 Democratic. Republicans win there regularly. Up until
15 about 55, 56 percent, Republicans are able to win those
16 districts or at the very least are competitive in them,
17 and then the districts become increasingly reliably
18 Democratic.

19 Again, this is -- and that's the range that the
20 Democrats are pushing the districts into, this 57, 58, 59
21 percent average Democratic statewide vote share. They
22 know this. And so that is why you don't want to use the
23 50 percent -- if you were to try to boil things down to
24 Republican or Democratic, the 50 percent threshold would
25 not be the threshold a serious elections analyst would use

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1 to try to categorize these.

2 MR. MOSKOWITZ: No further questions, your
3 Honor.

4 THE COURT: All right. On behalf of the
5 Governor, questions?

6 MS. MCKAY: The respondents have conferred,
7 and in interest of efficiency, if we can switch the
8 order in which we will conduct cross-examinations, I
9 think that it will limit it and prevent repetition.

10 THE COURT: Who would like to go first?

11 MR. HECKER: Your Honor, I would. And if
12 the Court will permit, can we just take a very short
13 recess so we can mark a couple of exhibits and use
14 the restroom?

15 THE COURT: Yes, we can. It's about time
16 anyway. It's almost 11:00 o'clock. We'll take 10
17 minutes, 15 minutes, and we'll start again at about a
18 quarter after. Thank you.

19 MR. HECKER: Thank you, your Honor.

20 MS. MCKAY: Thank you, your Honor.

21 (A recess was taken.)

22 (Respondents' Exhibits S-1 through S-5 were
23 marked for identification.)

24 THE COURT: All right. Let's proceed with
25 cross-examination. Mr. Cuti -- Cuti?

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1 MR. HECKER: Hecker.

2 THE COURT: I'm sorry. Mr. Hecker.

3 MR. HECKER: Good morning, your Honor.

4 CROSS-EXAMINATION

5 BY MR. HECKER:

6 Q. I'm Eric Hecker from Cuti Hecker Wang, and with
7 my colleagues I represent the Senate Majority.

8 Mr. Trende, in your report you refer to a few
9 cases from Ohio, North Carolina, and Pennsylvania in which
10 redistricting simulation analysis has been used, correct?

11 A. I think that's right. Yes.

12 Q. And you alluded to -- but I don't believe you
13 mentioned his name in your direct testimony -- Dr. Kosuke,
14 K-o-s-u-k-e, Imai, I-m-a-i, right?

15 A. Right.

16 Q. And he's the Harvard guy you mentioned, right?

17 A. That's right.

18 Q. And he's one of the leading experts in
19 redistricting simulations, correct?

20 A. That's correct.

21 Q. And there's another gentleman named Jonathan
22 Mattingly at Duke, who's another person who testified in
23 some of the cases that you've alluded to, right?

24 A. Dr. Mattingly's testified, yes.

25 Q. And Dr. Maddingly, likewise, is one of the

1 leading experts in redistricting simulations, correct?

2 A. He shows up in a lot of these papers. Yes.

3 Q. He's one of the leading experts, right?

4 A. I suppose.

5 Q. And, sir, I don't doubt your credentials as an
6 expert in election law or in redistricting. Would it be
7 fair to say that you don't consider yourself to be at the
8 same level professionally as Dr. Imai with respect to
9 simulations?

10 A. When it comes to writing simulations, certainly
11 not.

12 Q. Dr. Imai writes his own algorithm code, correct?

13 A. That's correct.

14 Q. And you don't, right?

15 A. That's right.

16 Q. And you've never testified in any case before
17 about redistricting simulations, have you?

18 A. I think the Rucho case involved simulations,
19 Dr. Chen's simulations.

20 Q. Did you testify in the Rucho case about
21 redistricting simulations as an expert, sir?

22 A. On the remand is when they did most of the
23 simulations. I'd have to see my report. But I think it
24 was in -- mostly in response to Dr. Chen.

25 Q. Did you run any simulations in the Rucho case?

1 A. No. No, I did not do that.

2 Q. Have you ever testified in a case before in
3 which you've run redistricting simulations?

4 A. I don't think so.

5 Q. You didn't write the code for the algorithm that
6 was used in the redistricting simulations that you did in
7 this case, did you?

8 A. For the algorithm, no.

9 Q. You relied on the algorithm code that Dr. Imai
10 and some of his colleagues developed?

11 A. Anyone who uses R is relying on packages -- not
12 anyone. Almost everyone who uses R is relying on packages
13 that other people have written, just like someone using
14 Excel is relying upon the back end of that program. But
15 that is correct.

16 Q. You didn't write the algorithm code in this
17 case, did you?

18 A. Not the algorithm code. That is correct.

19 Q. You relied on Dr. Imai's algorithm code, right?

20 A. That's right.

21 Q. Until relatively recently the state-of-the-art
22 algorithm for redistricting simulations was called Markov
23 chain Monte Carlo, right?

24 A. That's correct.

25 Q. Is that still the state-of-the-art?

1 A. I think Dr. Imai's redist sequential Monte Carlo
2 approach, at least in these cases, is becoming
3 state-of-the-art because it's the one that consistently
4 shows up in court cases. I can't speak to how
5 mathematicians view it.

6 Q. You mentioned sequential Monte Carlo. That's a
7 different algorithm than Markov chain Monte Carlo,
8 correct?

9 A. It is.

10 Q. And sequential Monte Carlo is the algorithm you
11 chose to use in this case to run your simulations, right?

12 A. Right.

13 Q. You could have used Markov chain Monte Carlo,
14 but you chose to use sequential Monte Carlo, correct?

15 A. Just like Dr. Barber, yes.

16 Q. And sequential Monte Carlo is a new algorithm,
17 right?

18 A. That's right.

19 Q. It's a proposed algorithm, isn't it?

20 A. It's a proposed algorithm that's been accepted
21 repeatedly by courts. Yes.

22 Q. But you do agree it's a proposed algorithm,
23 right?

24 A. It's a proposed algorithm that's been accepted
25 repeatedly by courts. Yes.

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1 Q. You refer in your expert report to a paper in
2 which Dr. Imai and his co-author announce and discuss
3 their proposed sequential Monte Carlo algorithm, correct?

4 A. Correct.

5 Q. And that's a draft paper, right?

6 A. It has not been published yet. That's correct.

7 Q. It's a draft paper, right?

8 A. It has not been published. That's correct.

9 Q. Is it a draft, or is it not a draft?

10 A. It has not yet been published. That's correct.
11 My understanding is it's been submitted.

12 MR. HECKER: Your Honor, I've pre-marked as
13 Exhibit S-1 a copy of this paper and, with the
14 Court's permission, would like to give the witness
15 and the Court a copy.

16 Q. Mr. Trende, the document that's been pre-marked
17 as S-1 is a 26-page document that's entitled sequential
18 Monte Carlo for Sampling Balanced and Compact
19 Redistricting Plans, right?

20 A. That's right.

21 Q. You've read this paper, right?

22 A. Yes.

23 Q. And this is the paper that you cite in your
24 report, correct?

25 A. Yes.

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1 MR. HECKER: Your Honor, I offer this into
2 the record.

3 THE COURT: Petitioners?

4 MR. MOSKOWITZ: No objection, your Honor.

5 THE COURT: It's admitted without
6 objection.

7 (Respondents' Exhibit S-1 was received in
8 evidence.)

9 BY MR. HECKER:

10 Q. Mr. Trende, I direct your attention to the third
11 sentence of the abstract on the first page.

12 MR. HECKER: Your Honor, you have a copy,
13 right?

14 THE COURT: I do.

15 Q. The sentence reads, for successful application,
16 sampling methods must scale to large maps with many
17 districts, incorporate realistic legal constraints, and
18 accurately and efficiently sample from a selected target
19 distribution. Did I read that correctly?

20 A. You did.

21 Q. Do you agree with that statement?

22 A. Yes.

23 Q. And then the next sentence reads, unfortunately
24 most existing methods struggle in at least one of these
25 areas. Do you see that?

1 A. Yes.

2 Q. Do you agree with that statement?

3 A. I don't really have a strong opinion one way or
4 the other on that.

5 Q. You don't have a strong opinion on whether the
6 Markov chain Monte Carlo algorithm struggles in that
7 regard? You don't have an opinion about that?

8 A. I don't.

9 Q. Okay. And you see that the next sentence
10 begins, we present a new sequential Monte Carlo algorithm
11 (SMC), correct?

12 A. That's right.

13 Q. And we're on the same page that this is a new
14 algorithm, right?

15 A. That's right.

16 Q. And the first date of this draft towards the top
17 is July 2020, right?

18 A. Correct.

19 Q. And then the second date of the draft is
20 August 10, 2021, right?

21 A. That's right.

22 Q. And the authors use that word draft, don't they?

23 A. Yes.

24 Q. Can you take a look at Page 14 of this draft
25 paper? Do you see Section 6.2?

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1 THE COURT: One second.

2 MR. HECKER: Take your time, your Honor.

3 THE COURT: Go ahead.

4 Q. Section 6.2 is a section of this draft paper in
5 which the authors have used the section heading Comparison
6 with a State-of-the-Art MCMC Algorithm. Do you see that?

7 A. Yes.

8 Q. And that's a reference to the Monte -- the
9 Markov chain Monte Carlo algorithm, correct?

10 A. Yes.

11 Q. And the authors refer to that as
12 state-of-the-art, right?

13 A. It's the state-of-the-art MCMC algorithm. I
14 think state-of-the-art is probably modifying MCMC.

15 Q. And if you could just go back a few pages to
16 Page 6. Do you recognize that the authors of this draft
17 paper refer to their algorithm in the section heading of
18 Section 4 as the proposed algorithm?

19 A. That's right.

20 Q. And then if you just skip ahead to Section --
21 I'm sorry -- to Page 17, Section 7, Concluding Remarks,
22 I'd like to direct your attention to the last sentence of
23 the first paragraph in the Concluding Remarks section, and
24 that sentence reads, unfortunately existing approaches --
25 and could you just read the whole sentence to yourself and

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1 tell me if you agree that the words existing approaches
2 are a reference to redistricting simulation algorithms
3 prior to or other than the sequential chain -- the
4 sequential Monte Carlo algorithm? That's what existing
5 approaches is referring to, right?

6 A. Yeah. It's probably referring to both the MCMC
7 and the constructive Monte Carlo -- or the constructive,
8 yeah, algorithms.

9 Q. And that sentence reads, unfortunately existing
10 approaches often struggle when applied to real-world
11 problems, owing to the scale of the problems and the
12 number of the constraints involved. Do you agree with
13 that sentence?

14 A. Maybe from a mathematician's viewpoint. But,
15 again, some of those -- the constructive Monte Carlo
16 approaches still get accepted by courts. And the MCMC,
17 Pennsylvania used them. I can't remember if they relied
18 on them in North Carolina or not. But for mathematics'
19 purposes, I don't have any reason to disagree with it.

20 Q. So you agree that those algorithms struggle with
21 real-world approaches, right?

22 A. Again, from a mathematician standpoint, perhaps,
23 but they've performed well enough for courts to employ
24 them repeatedly in evaluating plans, which is what, as an
25 expert, you're looking at.

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1 Q. Mr. Trende, do the algorithms struggle with
2 real-world approaches or not?

3 A. Again, from a mathematician's perspective,
4 perhaps. From actual employment, being actually employed
5 and deployed in the real world, they've been accepted.

6 Q. And this is your first time, though, in any case
7 employing these approaches to a redistricting simulation
8 method, right?

9 A. Oh, that's right.

10 Q. And then let's look at the last paragraph of
11 this section. The first sentence reads, future research
12 should explore the possibility of improving several design
13 choices in the algorithm. That's a reference to the
14 sequential Monte Carlo algorithm that you used in this
15 case, right?

16 A. That's right.

17 Q. Future research should explore the possibility
18 of improving several design choices in the algorithm to
19 further increase its efficiency. Do you agree with that?

20 A. You always want to do better, so yeah.

21 Q. And then in the last sentence it says, further
22 improvements in either of these areas, which refers back
23 to some issues that were alluded to in the prior
24 sentences -- further improvements in either of these areas
25 should allow us to better sample and investigate

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1 districting plans over large maps and with even more
2 complex sets of constraints. Do you agree with that
3 statement?

4 A. Again, I'm sure there are improvements that can
5 be made that make it do even better.

6 Q. Would you agree that it is more difficult to use
7 redistricting simulations to draw conclusions when you're
8 working with large maps than small maps?

9 A. Yes.

10 THE COURT: Are you talking about a large
11 number of maps?

12 MR. HECKER: Fair question, your Honor.
13 Let me clarify.

14 Q. Fundamentally, when you're engaging in the
15 redistricting simulation exercise, you're building a map
16 on a precinct-by-precinct basis, correct?

17 A. Yeah. I think when he's talking about large
18 maps, he's talking about the number of precincts involved.

19 Q. And the more precincts involved, the more
20 complicated things get in terms of accurately using
21 redistricting simulations to draw conclusions, right?

22 A. So as -- yes. I mean, certainly when he's
23 talking about efficiency, it gets much more cumbersome and
24 difficult to draw the districts because there's
25 exponentially more choices as you add precincts.

1 Q. Could you look at 12, Mr. Trende? You see
2 Section 5 is entitled An Empirical Validation Study in
3 this draft paper?

4 A. That's right.

5 Q. How many precincts did Dr. Imai and his
6 co-author use in this draft paper for their Empirical
7 Validation Study?

8 A. They use a 50-precinct map that was derived in
9 an earlier article that's been used to kind of test out
10 these maps, because in the 50-precinct map they've been
11 able to identify all the possible combinations of the
12 districts, and so you actually know what the correct
13 answer is and you can test to see how well you actually
14 replicate those maps. So that's why they test it on a
15 50-precinct map.

16 Q. And New York has over 1,400 precincts, right?

17 A. That's probably written in my report, but I
18 don't have a reason to disagree with you on that.

19 Q. How many do you think there are in New York?

20 A. Off the top of my head, I honestly could not
21 tell you, but 1,400 is certainly a reasonable number.

22 Q. More than 1,400, right?

23 A. I told you I don't know.

24 Q. And then looking at the conclusion again on
25 Page 17, that last sentence talks about the complexity of

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1 large maps, meaning maps with lots and lots of precincts,
2 right?

3 A. That's right. As you add precincts, it becomes
4 more complex.

5 Q. And then it says, and with even more complex
6 sets of constraints, right?

7 A. That's right.

8 Q. And that's a reference to the fact that if the
9 inputs that actual real-life redistrictors are using are
10 more complex, that makes it harder to use your or
11 Dr. Imai's redistricting simulation methodology to draw
12 conclusions about the process, right?

13 A. Right. That's one of the benefits for when
14 we're imposing constraints. You can hard code a
15 constraint for Voting Rights Act into the program, but if
16 you just kind of accept what the state has done and pull
17 those precincts out and freeze them, you're not adding a
18 constraint that way. If you just freeze the
19 municipalities that the state has done, you don't add the
20 constraint that way. So the way it was done in the report
21 minimizes the number of constraints placed upon it down to
22 kind of the fundamental constraints that the algorithm
23 imposes upon it, like compactness.

24 Q. Mr. Trende, when it comes to the criteria that
25 actual map drawers actually use in actually constructing a

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1 redistricting plan in the State of New York, the set of
2 constraints is complex, wouldn't you agree?

3 A. It can be, which is part of why we just concede
4 a large number of those constraints to the state.

5 Q. The fundamental exercise that we're doing here
6 in trying to determine whether the redistricting
7 simulations do or do not enable us to draw reasonable
8 conclusions in this case is we're comparing, as best as we
9 can, the approach that the actual map drawers actually
10 took with the approach that you told the computer to take
11 with the simulations, right?

12 A. That's a really long question, but I think the
13 answer is yes.

14 Q. And if we are successful in controlling all of
15 the criteria that the actual map drawers actually did,
16 other than alleged partisan considerations, and we see
17 differences between what actually happened and what
18 happened in the computer simulations, we can infer
19 partisan intent, correct?

20 A. That statement is true. Yes.

21 Q. And if we don't adequately control for all of
22 the constraints that the actual map drawers actually used,
23 other than alleged partisan intent, the methodology
24 becomes less reliable, doesn't it?

25 A. To a certain degree. I mean, I think at a

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1 certain point you look at it and say, well, we wanted to
2 keep this one town together. It's not really going to
3 make an impact on the outcome -- the partisan outcome of
4 it. So I guess less reliable, sure. But what we mean by
5 less is going to depend a lot upon the supposed constraint
6 that was missed or not programed in.

7 Q. Mr. Trende, the more that you adequately control
8 all of the variables that the actual mapmakers actually
9 used, the more you can infer intent, and the less you
10 adequately control for those variables, the less you can
11 infer intent, right?

12 A. In an abstract sense, yeah, that's right.

13 Q. Well, in an actual sense. That's not abstract,
14 is it? That's actually what we're doing. We're trying to
15 control for those variables because if you don't, you
16 can't infer anything; isn't that right?

17 A. When I said "abstract," I was referring to your
18 less or more, because less and more can mean a lot of
19 things. You're right. If there's like a town that the
20 Legislature really cared about that we -- well, we would
21 have kept it intact because we told it to, but it's not
22 going to have a huge impact; it's not going to affect the
23 quality of our inferences, but I suppose it would make a
24 marginal decrease in it, decline in it, yeah.

25 MR. HECKER: Your Honor, I'd like to show

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1 Mr. Trende what's been pre-marked, somewhat
2 confusingly, as S-5 because I forgot to pre-mark it
3 during the break at first. Your Honor, this is just
4 a demonstrative exhibit. It's a printout from
5 Westlaw of some of the relevant sections of the
6 Constitution.

7 THE COURT: Thank you.

8 MR. HECKER: I'm not going to offer it. I
9 just want Mr. Trende and the Court to have the
10 language in front of them.

11 Q. Mr. Trende, you're familiar with Article 3,
12 Section 4, of the New York Constitution, correct?

13 A. That's right.

14 Q. Your redistricting simulations are designed to
15 mimic exactly what actual redistrictors actually consider
16 when they draw actual maps except for alleged
17 partisanship, correct?

18 A. They attempt to do what the map drawers were
19 doing.

20 Q. And it's important, when trying to use
21 redistricting simulations to define intent, to control for
22 all of the constraints prescribed in the Constitution
23 other than partisanship, right?

24 A. As best you can, yes. For example, the
25 districts never say that they're going to be exactly

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1 equipopulous because, using precinct-level data, you can't
2 draw exactly equipopulous districts. And a real map
3 drawer -- when I sat down to draw maps, once you get your
4 precinct layout, you start looking for blocks that would
5 make it exactly equipopulous. The issue is if you get
6 within 1,000 inhabitants, moving those 1,000 inhabits out
7 of a 750,000-person district isn't going to affect the
8 partisanship that much. So that's an example of where
9 failure to precisely mimic exactly what's in the
10 constitutional language really doesn't affect our
11 inferences whatsoever because moving 500 people around in
12 a 750,000-person district is not going to affect the
13 partisanship. So when I'm quibbling with him about some
14 of this stuff, I'm really not trying to be disagreeable.
15 There are instances where it really doesn't matter if you
16 don't get precisely what the Legislature is doing.

17 MR. HECKER: Your Honor, I'm not going to
18 formally move to strike the nonresponsive part of
19 that answer because this is a bench hearing and we're
20 doing expert testimony.

21 Q. But, Mr. Trende, we're trying to move this
22 along. I would appreciate it if you would do your best to
23 reasonably limit your responses to my questions. Let's --

24 MR. MOSKOWITZ: I would just like to lodge
25 an objection to that. I mean, first of all, if there

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1 was no motion, I don't know what the purpose of that
2 statement was, and I think the witness, for the
3 record, has been doing his best to answer the
4 questions asked.

5 THE COURT: Let's proceed.

6 Q. Mr. Trende, can we look at Section 4(c)(3) --
7 withdrawn. Can we look at Section 4(c)(4) of the
8 Constitution, which is on Page 3 of this demonstrative
9 exhibit? Do you see that?

10 A. That's right.

11 Q. It says, each district shall be as compact in
12 form as practicable. Do you see that?

13 A. Yes.

14 Q. Would you agree with me that that is a mandatory
15 requirement?

16 A. Yeah.

17 Q. Because the Constitution uses the word shall,
18 right?

19 A. Yes.

20 Q. But the Constitution clearly gives map drawers,
21 actual map drawers, discretion in how to apply that
22 standard, right? It says --

23 A. As practicable.

24 Q. -- as practicable, right?

25 A. Right. So a perfectly compact district would be

1 a circle, and you obviously can't draw a bunch of circles
2 in New York. So, yeah, there has to be some wiggle room.

3 Q. So you have to draw reasonably compact
4 districts, but map drawers who are actually drawing them
5 have significant wiggle room about how compact a district
6 should be, right?

7 A. They certainly have wiggle room. You know, you
8 don't want to make it so significant that the term gets
9 written out of the Constitution. But, yeah, they have
10 discretion there.

11 Q. And they have discretion and wiggle room because
12 the compactness requirement often competes with other
13 mandatory requirements, doesn't it, Mr. Trende?

14 A. Right, and so that's why we did the sanity
15 checks, to make sure that our algorithm was performing
16 comparably to the enacted plan when it came to
17 compactness.

18 Q. So let's just talk about what you did to address
19 compactness. There's nothing in either of your reports
20 that explains exactly how you told the computer to draw
21 districts as compactly as practicable, right?

22 A. I'll, for sake of argument, accept your
23 assertion. Yes.

24 Q. All right. So here we are. How'd you do it?

25 A. The SMC algorithm, as Dr. Barber and Dr. Tapp

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1 intuited, runs the best with a compactness parameter of 1,
2 so I ran it with the compactness parameter of 1,
3 checked -- performed our sanity check to make sure that
4 that approximated what the Legislature was doing, which
5 happily it did, and ran it that way.

6 Q. What do you mean, it "runs the best" when you
7 set it to 1?

8 A. It becomes inefficient the more you move off of
9 that 1, because I believe if you look at the target
10 distribution, the compactness parameters -- the
11 Polsby-Popper too -- or I mean it's the Polsby-Popper too,
12 that parameter. So 1 is just a repetition.

13 Q. So just so the Court understands what we're
14 talking about, to take a step back, you have an underlying
15 algorithm that someone else wrote; that you used redist, a
16 package, to put parameters in that are designed to
17 approximate, as best as you can, the parameters the actual
18 map drawers use, right?

19 A. That's right.

20 Q. And then Dr. Imai's proposed algorithm from his
21 draft paper does the math, right?

22 A. That's right.

23 Q. And so we're now talking about one of several
24 ways in which you used the redist package to tell the
25 computer how to actually do these simulated

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1 redistrictings, right?

2 A. That's right.

3 Q. And for compactness you had a range of choices
4 from 0 to 1. You could have picked .25, you could have
5 picked .5, you could have picked .75, and you could have
6 picked 1, right?

7 A. I think you can go beyond 1, but yeah.

8 Q. Okay. And you picked 1 because you were aware
9 that in the algorithm that Dr. Imai announced in his draft
10 paper, there are performance issues with the algorithm if
11 you use any number other than 1, right?

12 A. That is the reason we started with that. And
13 then when we performed our sanity check, it
14 approximated --

15 Q. Mr. Trende --

16 A. I'm answering your question.

17 Q. -- I'm not talking about your --

18 MR. MOSKOWITZ: Objection, your Honor.

19 Q. I just want to ask you about how you picked your
20 number.

21 THE COURT: Answer the question.

22 Q. You picked number 1 because the other choices
23 don't work very well, right?

24 A. That's not right, your Honor. I picked number 1
25 because -- in part because the other choices don't work

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1 well. That's where I started. Then I looked to see if it
2 approximated what the Legislature did. And as we saw on
3 the sanity check, it ends up in the exact same range, and
4 so it worked.

5 Q. Mr. Trende, I promise you we'll get to the
6 sanity checks. I'm talking about when you started
7 programming, telling the computer what constraints to use.
8 When you sat down and told the computer that you wanted to
9 use Compactness Level 1, that represented effectively a
10 value choice, didn't it?

11 A. So when I sat down and selected 1, yes, it's
12 because I know that's what has been used in a lot of these
13 cases in the past and that's where the program works the
14 best.

15 Q. So when actual redistrictors are sitting down to
16 actually draw an actual map, they have to make a series of
17 decisions, many, many decisions, across the map about how
18 to weigh and balance compactness with other criteria,
19 right?

20 A. That is certainly my experience.

21 Q. And actual map drawers who are doing that are
22 making value judgments about how to trade off compactness
23 with other competing concerns, right?

24 A. Again, that's my experience. Certainly.

25 Q. And when you picked 1, you caused the

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1 simulations to come out a way that was different than if
2 you had picked .25 or 5 or 6 or 11 or .78, right?

3 A. That's right.

4 Q. Mr. Trende, on Page 22 of your report, where you
5 go through the Polsby-Popper scores --

6 THE COURT: His first report?

7 MR. HECKER: Yes, your Honor.

8 THE COURT: Page what?

9 MR. HECKER: Page 22.

10 BY MR. HECKER:

11 Q. You see that on the top of Page 22 of your
12 original report, you have the Polsby-Popper scores for all
13 of the simulated Senate maps?

14 A. That's correct. Yes.

15 Q. Does anything look weird to you about that
16 chart?

17 A. It's how the districts came out. No.

18 Q. Well, I know it's how they came out. Does how
19 they came out look weird to you? Doesn't it look like
20 there's two very significant clusters, one around the .23
21 range and the other about the .26 range?

22 A. It's a standard bimodal distribution, yes.

23 Q. What do you mean by "standard bimodal
24 distribution"?

25 A. There are two humps.

1 Q. Is it your testimony that there's nothing
2 noteworthy about that?

3 A. Not without going through the maps and looking
4 at them individually.

5 Q. Did you go through the maps and look at them
6 individually?

7 A. No.

8 Q. I want to direct your attention in the
9 Constitution to Subsection 5. The second sentence begins
10 that when you're actually drawing actual districts, you
11 shall consider the maintenance of cores of existing
12 districts, right?

13 A. That's correct.

14 Q. Would you agree with me that it's really
15 important when you're doing redistricting simulations to
16 adequately account for that variable? Right?

17 A. You do it as well as the existing maps do.

18 Q. I was asking you if it's important. Is it
19 important or unimportant?

20 A. It's important to do it about as well as the
21 enacted maps did.

22 Q. Okay. And how did you do it? You told me that
23 with respect to compactness, you type 1 into Dr. Imai's
24 package. How did you do this with respect to cores? How
25 did you make sure that your simulations adequately

1 simulated what the actual mapmakers were doing?

2 A. So you can program in a constraint that tells
3 the package to pay attention to cores, and you can look to
4 see the percentage of cores that are retained and see if
5 it's comparable to what the enacted plan did.

6 Q. And your report -- neither your report nor your
7 reply report tells us exactly what you did when you told
8 the computer to look at cores, right?

9 A. That's right.

10 Q. So here we are. What did you do?

11 A. I don't remember the exact line in the code.

12 Q. You don't remember the exact line in the code.

13 Is the code that you used in the record in this
14 case?

15 A. I have no idea.

16 Q. If the code that you used is not in the record
17 in this case and you can't tell us today, would it be fair
18 to say that we just don't know how you programmed this
19 package to account for cores when you were simulating what
20 the actual map drawers did?

21 A. Beyond the description that I just gave and
22 what's in the report, you wouldn't know any more than
23 that.

24 Q. And would you agree with me that, just as
25 compactness, if you use 7, you get a different result than

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1 if you use .07? How you actually programmed the computer
2 to run these simulations with respect to cores would be an
3 important thing to know in evaluating whether your
4 simulations accurately mimicked what the actual
5 redistrictors actually did, right?

6 MR. MOSKOWITZ: Objection, your Honor.

7 There was a lot of references to "you," and I don't
8 understand the question of -- whether it was
9 regarding us as attorneys, the Court. Can we get
10 some specificity?

11 THE COURT: Overruled. But if he needs
12 clarification, he can ask for it.

13 Q. Mr. Trende, did you understand that question?

14 A. Not anymore. I might have at the time.

15 MR. HECKER: Can I ask the court reporter
16 to read it back, please?

17 (The record was read back by the court
18 reporter.)

19 BY MR. HECKER:

20 Q. It was a long question. Would you like me to
21 break it down?

22 A. I think that would help us.

23 Q. You weren't cavalier about what you told the
24 computer to do with respect to the cores of prior
25 districts, were you?

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1 A. I don't think so.

2 Q. You recognized that whatever value you told the
3 computer to assign to preserving the cores of prior
4 districts was important, right?

5 A. I mean, it can be important. I don't know that
6 moving it one or two one direction or another will
7 actually affect the outcome of it, but it is something to
8 consider. Yes.

9 Q. What about moving it much more than one or two?
10 What about moving it a lot? Wouldn't it be important to
11 consider whether or not to move the cores figure a lot in
12 one direction or another?

13 A. Again, I think you do -- it's something to
14 consider, which is why I think you do the same type of
15 sanity check of seeing if you preserved district cores
16 roughly as well as the enacted plan did.

17 Q. Mr. Trende, if you went back right now and
18 changed the core figure that you used by moving it a lot,
19 you would expect the simulations to come out different,
20 wouldn't you?

21 A. Well, they would certainly change at least some,
22 yeah.

23 Q. And we don't know what figure you used, do we?

24 A. Well, to give an example, like I said, in my
25 initial report we didn't consider cores at all. In the

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1 follow-up reports we considered all -- we did consider
2 cores among other things, and it doesn't change the
3 answer. So going from no consideration to consideration
4 that roughly replicates what the enacted plan does doesn't
5 change the answer. I guess it's conceivable that if I
6 moved it one way or the other a substantial amount that
7 you'd get something different, but I don't know that I
8 have a reason to believe that.

9 THE COURT: My question is --

10 THE WITNESS: Yes, your Honor.

11 THE COURT: -- if you're giving a value to
12 the cores and it varies widely with what the enacted
13 maps are, do you change your value to come up with
14 something that's analogous to the enacted maps?

15 THE WITNESS: I mean, you can do it that
16 way because you want to try to follow what the
17 enacted maps are doing. We got it right the first
18 time. Frankly, we got it right without considering
19 cores.

20 BY MR. HECKER:

21 Q. You didn't do that in this case, Mr. Trende, did
22 you? Like with compactness, you didn't run a sanity check
23 that involved analyzing the compactness scores -- and
24 there's lots of different measures -- in the enacted plan
25 and then go back and try a different number other than 1.

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1 You didn't do that, right?

2 A. Because when you use the number 1, you get the
3 same Polsby-Popper scores -- Popper-Polsby --
4 Polsby-Popper scores as the enacted map shows. We got it
5 right the first time; so, no, I wasn't interested in what
6 happens if you use a compactness score of .01 because
7 we're already doing what the Legislature did when it did
8 its enacted map.

9 Q. How many different ways are there of measuring
10 compactness, sir?

11 A. Well, there are a lot of metrics out there.

12 Q. And Polsby-Popper's just one of them, right?

13 A. It's one of the most widely utilized ones, but
14 yes.

15 Q. Isn't the generally accepted methodology among
16 redistricting experts when measuring compactness to look
17 at different measures and see how they all shape up?

18 A. You can look at different measures. That's
19 right.

20 Q. Isn't it the generally accepted way of doing it,
21 to look at more than one compactness measure? Right?

22 A. I know people who look at a variety. I know
23 people who have their favorite compactness measure that
24 they do. If there's something wrong with some of the
25 other compactness measures, you have four experts who are

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1 perfectly capable of running the scores and saying it's
2 off.

3 Q. Let's talk about county splits. On Page 11 of
4 your report -- I'll just read it to you. I don't think
5 it's controversial -- you say, I instructed the simulation
6 to create 5,000 districts that respect county
7 subdivisions. That's what you did, right?

8 A. Which -- I'm sorry.

9 Q. I'm in your original report at Page 11.

10 A. Okay.

11 Q. At the bottom it says, I instructed the
12 simulation to create 5,000 sets of 26 reasonably compact
13 districts, right?

14 A. Yes.

15 Q. And we're talking about the congressional
16 districts, right?

17 A. That's correct. Yeah.

18 Q. How did you tell the computer to draw reasonably
19 compact districts? Your report doesn't tell us how you
20 did it, right?

21 A. I think I just explained that to you. The
22 compactness parameter's set at 1, and it replicated what
23 the enacted plan does.

24 Q. I confused myself, sir, and I apologize. Let's
25 look at Page 11 --

1 A. Yes, sir.

2 Q. -- and I'll slow it down for you. All right.
3 You know what, forget about the report because I'm not
4 sure where it is. You would disagree with me generally
5 that you instructed the computer to respect county
6 subdivisions?

7 A. That's right. Yes.

8 Q. And how did you do that?

9 A. That is a built-in parameter. You -- in the
10 shapefiles you assign a code for each county in New York,
11 and there is a command, county equals whatever you labeled
12 that column, and it'll respect county lines.

13 Q. When you say "respect county lines," you don't
14 mean it won't cause county lines to be split, do you?

15 A. You have to split county lines.

16 Q. Right. So you're not respecting county lines;
17 you are trading off one criterion, which is trying to
18 minimize county splits as much as you can, with the other
19 equally important redistricting criteria prescribed in the
20 Constitution, right?

21 A. That's right.

22 Q. And that requires a balancing, fundamentally,
23 doesn't it, Mr. Trende?

24 A. Again, that's why we do things and make sure
25 they come out -- you know, the other criteria come out

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1 roughly to what the Legislature was doing.

2 Q. Mr. Trende, just --

3 A. We perform comparably.

4 Q. -- just try and stick with me because you didn't
5 answer my question. It either does or doesn't require a
6 balancing. When an actual map drawer is trying to heed
7 the constitutional command about respecting county lines,
8 what the actual map drawer is doing is balancing that
9 criterion with other competing criteria, right?

10 A. That's my experience.

11 Q. Did you instruct this algorithm to balance the
12 goal of respecting county lines with other applicable
13 criteria?

14 A. You don't directly -- you don't directly tell it
15 to do that. That's why you perform the sanity checks of
16 going back and making sure that the other criteria are
17 respected, similar to what the enacted plan did.

18 Q. You don't do that because you can't do it,
19 right, Mr. Trende? There's no balance button in
20 Dr. Imai's algorithm, is there?

21 A. That's right.

22 Q. It's a toggle. You either turn respect counties
23 on or you turn it off. Those are the two choices in the
24 algorithm that you used, right?

25 A. That's right. There is a parameter where you

1 can tell it -- where you can affect the weights placed on
2 county traversals but --

3 Q. Did you do that?

4 A. No, I didn't.

5 Q. You didn't do that?

6 A. No.

7 Q. Let's talk about communities of interest. The
8 New York Constitution requires actual map drawers who are
9 actually drawing actual districts to consider communities
10 of interest, right?

11 A. That's right.

12 Q. There's no discretion not to do that, right?
13 You have to consider communities of interest if you are
14 actually drawing an actual plan, right?

15 A. You have to consider them, yes.

16 Q. And that's what you did in Virginia with
17 Professor Grofman, right, one of the things you did?

18 A. I think that's right. Yes.

19 Q. You and Dr. Grofman together drew the Virginia
20 districts, all three maps, late last year, right?

21 A. That's right.

22 Q. And you guys sat down, and you looked at the
23 Virginia constitutional requirements, and you marshaled
24 your decades of collective experience in redistricting,
25 and you did your best to apply the Virginia criteria

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1 reasonably, right?

2 A. That's right.

3 Q. And then you collectively wrote a report to the
4 Virginia Supreme Court telling them what you and
5 Dr. Grofman had done and why what you did was appropriate
6 and should be adopted, right?

7 A. That's right.

8 Q. And the Virginia Supreme Court did, in fact,
9 bless and adopt what you and Dr. Grofman did together in
10 Virginia, correct?

11 A. That's right.

12 MR. HECKER: Your Honor, we've marked as
13 S-2 a document that I'd like to show the witness and
14 the Court.

15 THE COURT: What's it -- S what?

16 MR. HECKER: S-2.

17 THE COURT: Thank you.

18 BY MR. HECKER:

19 Q. Mr. Trende, this is a 55-page document dated
20 December 7, 2021, right?

21 A. That's right.

22 Q. This is a copy of the memo or report, whatever
23 label you want to give it, that you and Dr. Grofman
24 submitted to the Virginia Supreme Court explaining why you
25 felt that the Virginia Supreme Court should adopt the plan

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1 that you -- the plans that you and Professor Grofman drew,
2 correct?

3 A. This is the first memo, yes. There were two.

4 MR. HECKER: Your Honor, I'd like to offer
5 this into evidence.

6 THE COURT: Petitioners?

7 MR. MOSKOWITZ: No objection.

8 THE COURT: It's admitted.

9 (Respondents' Exhibit S-2 was received in
10 evidence.)

11 BY MR. HECKER:

12 Q. Now, Mr. Trende, just to jump sideways for a
13 second, my colleague just reminded me that I misspoke
14 earlier when we were discussing the number of precincts in
15 New York. Dr. Imai's validation testing was on 50
16 precincts. Do you remember we had talked about that?

17 A. Yes.

18 Q. And I believe I had said that New York has 1,400
19 precincts. I'm now being told it has 14,000. Does that
20 number surprise you?

21 A. As I said when you asked me, I don't know as I
22 sit here how many. I'll accept -- I mean, for purposes of
23 stipulation, I don't see a reason to disagree.

24 Q. Now, in your reply report you say that -- well,
25 why don't I just quote you rather than try and paraphrase

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1 you. Can we look at your reply report at Page 19?

2 MR. HECKER: And, your Honor, this is the
3 reply report now.

4 THE COURT: Very good. I'm with you.

5 A. I'm sorry. We're on the reply?

6 Q. Yes. I'm jumping around a little bit.

7 THE COURT: Page 19.

8 Q. I'll try and get back on track. At the top of
9 Page 19, you say that communities of interest are a
10 notoriously difficult concept to nail that -- withdraw and
11 let me try it again. You say in the first sentence on
12 Page 19 that communities of interest are a notoriously
13 difficult concept to nail down, right?

14 A. Yes.

15 Q. But you did do your best with Dr. Grofman to
16 identify and heed communities of interest in Virginia when
17 you drew the Virginia map, right?

18 A. Yes.

19 Q. Okay. Take a look at Page 7 of Exhibit 2. And
20 if you just flip back to Page 6, you see this is a section
21 of the report that you authored with Dr. Grofman that
22 addresses communities of interest, right?

23 A. That's right.

24 Q. And so in the first full paragraph on Page 7 you
25 say, in particular, we were mindful -- that's a reference

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1 to you and Dr. Grofman, right?

2 A. That's right.

3 Q. -- we were mindful of the Blue Ridge Mountains
4 as an important geographic divider in Virginia's history,
5 right?

6 A. That's right.

7 Q. So when you and Dr. Grofman were drawing the
8 districts, one thing that you were considering was drawing
9 districts that respected the Blue Ridge Mountains as an
10 important geographic divider, right?

11 A. That's right.

12 Q. And you also considered, turning to the second
13 sentence, the cores of the Shenandoah Valley, right?

14 A. That's the same thing as the Blue Ridge
15 Mountains, but yeah.

16 Q. And you considered the federal definition of
17 Appalachia, right?

18 A. That's right.

19 Q. And you considered the historic importance of
20 Southside Virginia, right?

21 A. Right.

22 Q. And the Piedmont region in general, right?

23 A. Yes.

24 Q. And the Fall Line, right?

25 A. That's right.

1 MR. HECKER: Capital F. Capital L.

2 Q. What's the Fall Line?

3 A. So if you're doing the geography of the south,
4 there's a point where the Appalachian -- so the
5 Appalachian Mountains kind of come off to the east, and
6 then there's a little escarpment that actually runs the
7 length of the south and creates waterfalls. It creates
8 waterfalls. That's why it's called the Fall Line. Past
9 that you're into the Coastal Plain.

10 Q. And that's an important geographical marker,
11 right?

12 A. Right.

13 Q. And you and Dr. Grofman also heeded that
14 important geographical marker when you were drawing
15 districts, right?

16 A. As best we could, yeah.

17 Q. You also were mindful when you were drawing the
18 Virginia districts of Virginia's major metropolitan areas,
19 right?

20 A. That's right.

21 Q. You wouldn't just willy-nilly upset major
22 metropolitan areas with district lines, would you?

23 A. No.

24 Q. I could go on. But wouldn't you agree with me,
25 Mr. Trende, that if you and Dr. Grofman had been

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1 instructed not to pay any attention whatsoever to
2 communities of interest, the lines that you and he drew in
3 Virginia and recommended to that state's high court would
4 look very differently than if you had heeded those
5 communities of interest?

6 A. I'm really not trying to be disagreeable.

7 Q. Well, then just agree with me.

8 A. They would have looked different. Some parts of
9 Virginia -- like Appalachia's all concentrated in the
10 Virginia panhandle. So if you're trying to draw compact
11 districts, you're going to draw an Appalachia district and
12 you're going to tend to draw a district that pays
13 attention to the Blue Ridge Mountains. But I think what
14 you're getting at, they would have been different in some
15 ways.

16 Q. And if you and Dr. Grofman were asked to draw
17 the districts in New York State for this cycle, you would
18 have similarly tried in good faith to identify basic
19 communities of interest in New York, right?

20 A. I think that's right.

21 Q. And if you hadn't, that would have been
22 unlawful, right?

23 A. I mean, there are certainly communities of
24 interest that naturally get respected because of
25 New York's unique geography but --

1 Q. Well, it goes much farther than that, doesn't
2 it, Mr. Trende? It's not just the unique geography; it's
3 also, for instance, New York has major metropolitan areas,
4 doesn't it, Albany, Syracuse, Rochester, Buffalo? If you
5 and Dr. Grofman were going to draw the Upstate districts
6 for the congressional delegation, you would think about
7 not just New York's unique geography but also, among other
8 things, its major metropolitan sectors, wouldn't you?

9 A. Yes. You wouldn't want to draw from like
10 Niagara Falls to Watertown, for an example.

11 Q. When you sat down to tell the computer to do
12 what it did with these simulations, did you give any
13 consideration to what the commissioners on the commission
14 had done in Round 1 of the commission process?

15 A. No.

16 Q. Are you generally aware that in theory there
17 were supposed to be two rounds of commission
18 recommendations to the Legislature?

19 A. That's my understanding. Yes.

20 Q. And you're generally aware that the second step
21 didn't happen? There was no proposed final set of plans
22 submitted to the Legislature by the commission, right?

23 A. I think the commission deadlocked here. Yeah.

24 Q. But the commission did make a first set of
25 recommendations, correct?

1 A. I thought the Republican and Democratic
2 commissioners each made them, but maybe they came together
3 in the first round.

4 Q. Oh, I didn't mean to mislead you, sir. I'm not
5 saying that they came together, but they did make
6 recommendations. There were two plans that each received
7 the same number of votes and were submitted to the
8 Legislature, correct?

9 A. That's my understanding. Yes.

10 Q. And you're aware, generally speaking, that
11 Plan A is the plan that was submitted by the Democrat
12 appointees and Plan B was submitted by the Republican
13 appointees?

14 A. That sounds familiar. Yes.

15 Q. And when you sat down to code the computer,
16 you're saying you didn't pay any attention to what any of
17 those commissioners had done in their proposals for the
18 first round during the commission?

19 A. That's right.

20 Q. Have you read any of the testimony before the
21 commission in connection with your work in this case?

22 A. I did not.

23 Q. Do you know one way or the other whether there
24 was any testimony in the approximately two dozen hearings
25 before the commission about communities of interest?

1 A. I don't.

2 Q. Do you know what the Southern Tier is?

3 A. There's a strip of counties along the southern
4 border of New York and Pennsylvania. They are referred to
5 as the Southern Tier.

6 Q. And what counties are generally understood to
7 comprise the Southern Tier?

8 A. I couldn't list all the counties for you. I
9 know there's some disagreement as to whether, say,
10 Allegany County's included or not, but generally I think
11 it runs from this county eastward to Broome.

12 Q. Does it also run westward towards Jamestown?

13 A. That's why I said I think -- my understanding
14 when I did New York, there was some disagreement over the
15 western tip of the southern districts on whether they
16 get -- always get included or not, but I think generally
17 they do.

18 Q. During the first round before the commission,
19 was there any general consensus between the Democrats and
20 Republicans on the commission about how to draw the
21 Upstate region?

22 A. I don't know.

23 Q. Was there any general consensus among the
24 Democrats and Republicans on the commission about how to
25 treat the so-called Southern Tier?

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1 A. I don't know.

2 MR. HECKER: Your Honor, could we show
3 Mr. Trende what we've marked as S-3, and the Court,
4 of course?

5 THE COURT: Thank you.

6 Q. By the way, Mr. Trende, one of the things about
7 the simulation methodology that you used is it starts from
8 a blank page, doesn't it?

9 A. Yes. Yes.

10 Q. When your simulations start, they don't start
11 from the prior enacted plan; they start from a blank page,
12 right?

13 A. That's right.

14 Q. Mr. Trende, I'm showing you what's been marked
15 as Exhibit S-3. This is a four-page district (sic), and
16 the first page shows --

17 THE WITNESS: I'm sorry. Does this need to
18 be --

19 (A discussion was held off the record with
20 the court reporter.)

21 BY MR. HECKER:

22 A. Oh, I'm sorry. I'm sorry. I was just trying to
23 be helpful. I'll stop.

24 Q. No problem.

25 The first page depicts the enacted congressional

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1 plan, and for demonstrative purposes Districts 20, 22, 25,
2 and 26 are in dark gray and District 23 is in light gray;
3 and then the second and third pages show the same thing
4 for Plan A and Plan B; and then the fourth page puts them
5 all on the same page.

6 A. That's right. Yeah.

7 Q. Let me ask you a question: On the first page --
8 and I'm just going to ask you some questions about Steuben
9 County and Schuyler County, and I just want to know if you
10 know where those are, if you need me to point to them --
11 do you know where Steuben County is on this map?

12 A. I believe it is the third from the left on the
13 bottom.

14 Q. It's the fourth from left.

15 And do you know where Schuyler County is?

16 A. I do not.

17 Q. Schuyler County is the small county immediately
18 to the northeast.

19 MR. HECKER: Your Honor, may I approach the
20 witness and just show him Schuyler County?

21 THE COURT: Yes. I think that would be
22 better.

23 Q. So that's Steuben, that's Chemung, and that's
24 Schuyler (indicating).

25 A. Okay.

1 Q. I'm just going to ask you to look at the Plan A
2 plan, which is the second page, the Plan B plan, which is
3 the third page, and, if it's helpful, the fourth page,
4 which shows them all together. Would you agree with me
5 that this document shows that there was a pretty strong
6 consensus among the Democrats and the Republicans on the
7 commission about how to approach the major metropolitan
8 areas of Albany, Syracuse, Rochester, and Buffalo?

9 A. Yeah. The Plan A and Plan B look roughly the
10 same, yeah.

11 Q. Remarkably close for a commission that
12 ultimately deadlocked, right?

13 A. They look -- I don't know about -- I don't know
14 about the comparison, but they are very close.

15 Q. And then same question with respect to the
16 Southern Tier. You could see that over towards the
17 Binghamton area in Plan A and Plan B, there's a jag in
18 Plan B that looks different and the northern border of
19 these proposed District 23s are certainly not identical.
20 But would it be fair to say that these maps show there was
21 a general consensus even among and between Republicans and
22 Democrats on the commission that the way to approach
23 Upstate New York, the way to balance, respect what's
24 there, respect for communities of interest, preserving the
25 prior cores, balancing compactness, achieving population

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1 equality, all of that, there seems to have been a general
2 consensus about how you treat the four Upstate urban
3 centers and, generally speaking, what you do with the
4 Southern Tier, right?

5 A. There was a lot in that question, so I will
6 summarize it. It does look like the four urban cores you
7 describe and the Southern Tier districts are substantially
8 similar.

9 Q. And a couple of minutes ago, you suggested that
10 one way to think about the Southern Tier reasonably might
11 be Steuben and everything to the east, correct?

12 A. Yes.

13 Q. But this shows that there's another way to think
14 about the Southern Tier, which is the entirety of the
15 Southern Tier from the west part of New York all the way
16 across the Pennsylvania border, right?

17 A. It shows that's how the Republicans and
18 Democrats both thought of it, yes.

19 MR. HECKER: Your Honor, I'd like to offer
20 this into the record.

21 THE COURT: Petitioners?

22 MR. MOSKOWITZ: No objection, your Honor.

23 THE COURT: It's admitted.

24 (Respondents' Exhibit S-3 was received in
25 evidence.)

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1 THE COURT: About how much longer on this
2 witness, Mr. Hecker, just so I can get sort of an
3 idea of when we can take lunch?

4 MR. HECKER: The most honest answer, I
5 don't know, but I think I'm more than halfway. In
6 fact, I'm highly confident I'm more than halfway. I
7 just don't know.

8 THE COURT: Would this be a good place to
9 take a break, or do you want another 15 minutes
10 before we break?

11 MR. HECKER: Your Honor --

12 THE COURT: I have to give staff an hour's
13 lunch.

14 MR. HECKER: -- I would really like to keep
15 going if that's okay.

16 THE COURT: Pick a spot in the next 15
17 minutes or so.

18 MR. HECKER: Okie doke.

19 BY MR. HECKER:

20 Q. I don't believe I got as far as talking about
21 S-4. I'd like to show the witness and the Court what
22 we've pre-marked as Exhibit S-4.

23 THE COURT: Thank you.

24 Q. Mr. Trende, you talked on your direct exam about
25 the ALARM Project, right?

1 A. That's right.

2 Q. And the ALARM Project is Dr. Imai's project at
3 Harvard, right?

4 A. That's right.

5 Q. You have respect for their work, right?

6 A. Yes.

7 Q. In fact, you downloaded the data that you used
8 to generate your partisan index from the ALARM Project's
9 website, right?

10 A. That's right.

11 Q. And the ALARM Project's website does more than
12 just offer that data; it also offers data about
13 simulating -- simulation plans that Dr. Imai and his team
14 have done for a variety of jurisdictions, right?

15 A. Correct.

16 Q. And one of those jurisdictions is New York,
17 correct?

18 A. It looks that way. Yes.

19 Q. Did you not look at what Dr. Imai did with his
20 algorithm in New York in connection with preparing your
21 report in this case?

22 A. I did not.

23 Q. You used the same algorithm he did, right?

24 A. If you're saying that he used SMC for the sample
25 plans that are before me, then yes.

1 Q. So this exhibit was taken from Dr. Imai's
2 website, or the ALARM Project website. The URL is at the
3 bottom of the exhibit. And this is how he or his team
4 depicts the enacted congressional plan and what I assume
5 is a random sample of three of the thousands of
6 redistricting simulations that he ran for New York. Do
7 you see that?

8 A. Yes.

9 Q. Do you see that none of the three samples
10 preserves the Southern Tier the way the Democrats and the
11 Republicans on the commission appear to have been jointly
12 proposing that it be preserved?

13 A. That seems right. Yes.

14 Q. Take a look at Sample Plan Number 1 and sort of
15 juxtapose it with where I told you Steuben and Schuyler
16 Counties are. Do you see that there's this quite
17 non-compact, large congressional district in Sample Plan 1
18 that goes -- it's pink. It's one of the pink districts.
19 There are three. It goes all the way from the
20 northeastern part of the state to the southwest towards
21 Steuben, right?

22 A. That's right.

23 Q. And it ends -- or one of the places it ends is
24 in Schuyler County, right?

25 A. That's right.

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1 Q. And do you know how far we are right now from
2 Schuyler County?

3 A. I don't.

4 Q. I'll just tell you it's about 18 miles down the
5 road. First town is Tyrone. Is Schuyler County part of a
6 community of interest -- well, withdrawn. If you look at
7 this district that I'm directing your attention to, do you
8 see that in the very northwestern part of the state,
9 there's kind of a panhandle that ticks to the south in the
10 Prattsburgh area?

11 MR. HECKER: Your Honor, may I approach the
12 witness?

13 THE COURT: Northeastern you're talking
14 about?

15 MR. HECKER: Say that again.

16 THE COURT: Did you say northwestern?

17 MR. HECKER: I meant to say northeastern.

18 THE COURT: That's what I thought. Okay.

19 MR. HECKER: Did I misspeak?

20 THE COURT: Yeah.

21 BY MR. HECKER:

22 Q. Withdrawn and let me try again. If you look at
23 Sample Plan 1, to the northeasternmost area that has pink,
24 do you see that panhandle where that oddly shaped district
25 that runs to the northeast from Schuyler County kind of

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1 panhandles to the south?

2 A. I see the panhandle. Yes.

3 Q. I represent to you that that's Franklin County.
4 Is Franklin County part of a community of interest with
5 Schuyler County, sir?

6 A. I doubt it.

7 Q. What we're trying to do here, fundamentally, is
8 mimic what actual map drawers who actually would neutrally
9 and reasonably apply New York's redistricting criteria
10 would actually do if they were acting in a nonpartisan
11 way, right?

12 A. Yes.

13 Q. Mr. Trende, would anybody in their right mind
14 neutrally applying New York's redistricting criteria draw
15 a district that looks like this one in Sample Plan 1
16 connecting Schuyler County to Franklin County?

17 A. It seems about as crazy as drawing one from
18 Niagara Falls to Watertown, so however you want to
19 categorize that. Sure.

20 Q. I'll accept your characterization. You're
21 saying that district looks crazy to you, right?

22 A. I think -- I think --

23 Q. Would it be fair to say that it's not the only
24 crazy district you've ever seen, but that is among the
25 array of crazy districts you've seen?

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1 A. That's not a pretty district.

2 Q. Is it a crazy district?

3 A. It's not pretty.

4 Q. How about this, Mr. Trende: If you were trying
5 to predict what an actual map drawer actually applying
6 New York's actual criteria would do in this apportionment,
7 you wouldn't predict that they would draw a district like
8 that, would you?

9 A. That probably isn't one that would come to mind.
10 No.

11 Q. Did you, as part of your, quote/unquote, sanity
12 check exercise, go through your simulated maps and call
13 out the ones that, in your significant experience drawing
14 actual districts, didn't look to you, in your discretion,
15 like districts that an actual map drawer actually applying
16 New York's actual criteria would actually do?

17 A. I did not go through the 5,000 maps, no.

18 Q. Are any of the maps in your ensemble in the
19 record in this case?

20 A. No.

21 Q. If I want to go and look at Dr. Imai's maps that
22 he developed in the ALARM Project when he simulated
23 New York, I could go to the ALARM Project website and
24 download the information, including the shapefiles, right?

25 A. Yes.

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1 Q. But if I want to or if the Court wants to or if
2 anybody else wants to evaluate whether the districts that
3 your simulations drew were crazy, we can't do that, can
4 we?

5 A. No, no more than in any of the other cases where
6 SMC's been accepted.

7 MR. HECKER: I think this is a good time to
8 take lunch.

9 THE COURT: Okay. This is the spot. We'll
10 take lunch. It's a little after 20 after. We'll get
11 back together at 1:35 to pick up again. 1:35. Okay?

12 MR. CUTI: Thank you, your Honor.

13 (A recess was taken.)

14 THE COURT: All right. Mr. Trende, you're
15 still under oath.

16 Mr. Hecker?

17 MR. HECKER: Thank you, your Honor. One
18 housekeeping item: I was told on the break by the
19 court reporter that Exhibits S-1, S-2, and S-3 have
20 been received into evidence in the record but that
21 S-4 has not as of yet, so I would just like to move
22 S-4 into the record.

23 THE COURT: Petitioners?

24 MR. MOSKOWITZ: Your Honor, I need a
25 reminder from our colleague here which document we're

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1 looking at. Okay. Yes. No objection, your Honor.

2 THE COURT: S-4 was...

3 MR. HECKER: The ALARM Project.

4 THE COURT: Dr. Imai's?

5 MR. HECKER: Yes.

6 THE COURT: No objection?

7 MR. MOSKOWITZ: No objection.

8 THE COURT: It's admitted without
9 objection.

10 (Respondents' Exhibit S-4 was received in
11 evidence.)

12 CROSS-EXAMINATION (CONT'D)

13 BY MR. HECKER:

14 Q. Good afternoon, Mr. Trende.

15 I want to ask you a couple of questions that are
16 specific to the Senate, and I wanted to start by asking
17 you how your simulated plans on the Senate side treat town
18 splitting. What is the average number of towns in your
19 ensemble of Senate plans that are split, if you know?

20 A. I don't know.

21 Q. But some of your ensemble of Senate plans splits
22 some towns, correct?

23 A. I would assume, but I actually don't know.

24 Q. What is your basis for assuming that some of
25 your simulated Senate plans split towns?

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1 A. Well, you -- I mean, actually, yes. If we
2 consider New York City a town, it has to be split because
3 its population exceeds that of a Senate district, and
4 there are probably other cities in New York City about
5 which that -- or in New York about which that's true.

6 Q. Well, New York City's a city, not a town, right,
7 sir?

8 A. It's a municipality, but yeah.

9 Q. Well, there's different kinds of municipalities
10 enumerated in the Constitution, right? There's counties,
11 there's cities, and there's towns, and the Constitution
12 doesn't treat them the same way, does it?

13 A. It shall consider the maintenance of cores,
14 existing -- existence of preexisting political
15 subdivisions, including counties, cities, and towns.

16 Q. Mr. Trende, let me direct your attention to
17 Section 4(a) of the Constitution on the first page of
18 demonstrative Exhibit S-5. Take a look at that long first
19 full paragraph, and look at the last five lines. Do you
20 see that on the fifth line from the bottom of the first
21 full paragraph of Section 4(a) of the Constitution, it
22 says, no towns, except a town having more than a --

23 A. I'm sorry. Where are we? We're five lines from
24 the bottom?

25 MR. HECKER: Your Honor, may I approach?

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1 THE COURT: Yes.

2 Q. Right there (indicating). The Constitution
3 says, no town, except a town having more than a full ratio
4 of apportionment, and no block in a city inclosed by
5 cities, streets, or public ways shall be divided in the
6 formation of Senate districts. Do you see that?

7 A. Yes.

8 Q. What does it mean for a town to have more than a
9 full ratio of apportionment?

10 A. I'm assuming that's the towns whose population
11 is greater than the Senate district plus 5 percent.

12 Q. Can you name the towns in the State of New York
13 that have more than a full ratio of apportionment?

14 A. No.

15 Q. Can you tell me where they are?

16 A. No.

17 Q. Can you tell me what region of the state
18 contains them?

19 A. No.

20 Q. Are there any towns in the Upstate region of
21 New York that contain more than a full ratio of
22 apportionment?

23 A. I don't know.

24 Q. So you don't know what the Constitution of the
25 State of New York says about which towns can or cannot be

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1 split, right?

2 A. I mean, I think you showed me what it said, but
3 I don't know what towns those are, what it translates to.

4 Q. Would you agree with me that that constitutional
5 rule is mandatory and unequivocal for towns that do not
6 have a full ratio of apportionment?

7 A. Staying away from actual legal analysis, that's
8 my read of it.

9 Q. Well, you're a lawyer aren't you, sir?

10 A. I am, and that's why I know that when you're
11 doing statutory interpretation, you don't just look at the
12 language and move on.

13 Q. Well, let's just take it slow because I think
14 it's pretty clear. It says, no town, except a town having
15 more than a full ratio of apportionment, shall be divided.
16 Is there anything unclear about that, sir?

17 A. I see that. But, look, I'm not trying to be
18 difficult. I'm just saying that for all I know, there is
19 some case out there that has some different
20 interpretation. As someone just reading it here on the
21 stand, it looks pretty straightforward.

22 Q. Fair enough. I'll give you that. There could
23 be a case out there that says, no town, except a town
24 having more than a full ratio of apportionment, shall be
25 divided, holding that it means something else, but you'll

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1 agree with me, as an attorney, that that language is
2 pretty clear and unequivocal, right?

3 MR. MOSKOWITZ: Objection, your Honor.

4 He's here as an expert witness. He's not -- he's not
5 here acting as an attorney.

6 MR. HECKER: Your Honor, he's here --

7 THE COURT: He's already answered the
8 question, I think.

9 Q. Okay. Mr. Trende, part of your role --
10 withdrawn. Mr. Trende, the essence of your role is to
11 cause the redistricting simulation algorithm to generate
12 an ensemble of representative maps that follow all of the
13 New York redistricting criteria except those -- except
14 partisanship, right?

15 A. The essence of my job here is to answer a
16 question before the Court and opine on the partisanship of
17 the districts. And if there is something that your
18 experts believe or that you believe is missing that makes
19 a difference -- they think makes a difference, they can do
20 it. I addressed this in the congressional districts. It
21 didn't make a difference. I have no reason to believe it
22 will be any different for the Senate districts.

23 Q. You don't know one way or the other, do you?

24 A. I don't know.

25 Q. You didn't code the computer for your Senate

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1 simulations to avoid the splitting of towns that have less
2 than a full ratio of apportionment, right?

3 A. That's correct.

4 Q. Mr. Trende, what's the "town on border" rule?

5 A. I don't know.

6 Q. What's the "block on border" rule?

7 A. I don't know.

8 Q. I'll represent to you that the "block on border"
9 rule and the "town on border" rule are contained in the
10 last three sentences of the paragraph we're looking at.
11 Can you just read those sentences and tell us if you could
12 describe what the "town on border" and "block on border"
13 rules are?

14 A. Do you want me to read them out loud or read
15 them and try to summarize?

16 Q. No, just to yourself.

17 Mr. Trende, would it be fair to say that you're
18 having trouble telling us what those rules mean on the fly
19 because they're complex?

20 A. It's a convoluted sentence. Yes. The rule
21 itself may actually be pretty straightforward.

22 Q. Your simulations on the Senate side made no
23 effort to comply with the "town on border" or the "block
24 on border" rules, right?

25 A. That's right.

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1 Q. Let's go to your original report, Page 15.

2 MR. HECKER: And, your Honor, I assume you
3 have a colored version of this with the blue and the
4 red.

5 THE COURT: I do. I'm sorry. Are you
6 talking about his report?

7 MR. HECKER: Yeah, Mr. Trende's original
8 report.

9 THE COURT: No. I'm sorry. I don't.

10 MR. HECKER: Oh. Could we get the judge a
11 colored version of that?

12 THE COURT: I have the report, but it's all
13 black and white.

14 MR. HECKER: The color's really important.
15 Your Honor, may I approach?

16 THE COURT: You may.

17 MR. HECKER: I just have copies of his --

18 THE COURT: Thank you.

19 MR. HECKER: -- regular report and reply
20 report in color.

21 THE COURT: Very good.

22 BY MR. HECKER:

23 A. I do not.

24 Q. Oh, let's get you a colored one too.

25 A. I don't have any copy --

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1 THE CLERK: The original exhibits are right
2 there with the blue --

3 Q. Mr. Trende, you testified on direct at some
4 length about what the chart on Page 15 of your original
5 report shows, right?

6 A. That's right.

7 Q. And same thing with Page 21, the chart about the
8 Senate, right?

9 A. That's right.

10 Q. What you're doing in those two charts is
11 calculating the partisanship of the districts in the newly
12 enacted congressional and Senate plans, right?

13 A. Yes, that's part of it. Yes.

14 Q. And you calculated the partisanship of the newly
15 enacted districts by using an index of statewide results
16 from recent prior elections, right?

17 A. Right, average Democratic statewide performance
18 in these districts.

19 Q. And that's a generally accepted methodology
20 that, leaving aside exactly which statewide races you use
21 in exactly which years, every expert who uses simulations
22 agrees you use to measure the partisanship of a
23 legislative district, right?

24 A. I assume everyone does it, yes. It's certainly
25 widespread.

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1 Q. You've never heard of anybody doing it a
2 different way in a redistricting simulation case, have
3 you?

4 A. I don't think so. No.

5 Q. And what you did on this chart is you took each
6 of the legislative districts in the newly enacted plan,
7 and for those that had a partisanship that you calculated
8 to be less than 50 percent Republican based upon the index
9 you used, you drew it in red, right?

10 A. No. The enacted plan is all in black.

11 Q. Forgive me. I misspoke. My bad. What you did
12 is you took all of your simulated congressional districts,
13 and the ones that had a partisanship of less than 50
14 percent Republican according to the index you used, you
15 marked in red, right?

16 A. That's right.

17 Q. And for all of the districts in your simulations
18 that had a partisanship that you calculated to be more
19 than 50 percent Democrat, you marked in blue, right?

20 A. Right.

21 Q. There are good reasons why no expert would
22 calculate the partisanship of a newly enacted legislative
23 district based upon what we call endogenous district data,
24 right?

25 A. Give me some examples.

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1 Q. Well, first of all, an endogenous district is a
2 district -- is data from a district that is the district
3 you're trying to measure, correct?

4 A. Okay.

5 Q. Is that right or wrong?

6 A. That is right. That's what endogeneity means.

7 Q. And so there's uniform consensus among the
8 experts who have testified about redistricting simulations
9 in prior cases that you wouldn't calculate the
10 partisanship of a newly enacted district by using
11 endogenous data about that district, right?

12 A. Right. You can't calculate the underlying
13 partisanship of the district by saying, hey, in the
14 past -- you know, in the past -- yeah, that's right.

15 Q. You testified in the Ohio case, right?

16 A. Which one? Actually, I don't think I ever
17 testified in either of the Ohio cases.

18 Q. I meant you gave a deposition. Withdrawn.

19 A. I don't think I gave a -- I gave a deposition in
20 the first Ohio -- well, you withdrew.

21 Q. You're familiar with Dr. Jowei Chen, J-o-w-e-i,
22 right?

23 A. Yes.

24 Q. Let me just read a few sentences from his
25 redistricting simulation expert report in Ohio and just

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1 see if you agree with them. Recent statewide elections
2 provide reliable bases for comparisons of a precinct's
3 partisan tendencies because in any statewide election the
4 anomalous candidate-specific effects that shape the
5 election outcome are equally present in all precincts
6 across the state. You agree with that, right?

7 A. Oh, yeah. Yeah. The statewide elections give a
8 good baseline for how it goes, yeah, but they don't
9 correspond one to one.

10 Q. And let's see if you agree with this: Statewide
11 elections are a better basis for comparison than the
12 results of congressional, or endogenous, elections because
13 the particular outcome of any congressional election may
14 deviate from the long-term partisan voting trends of that
15 district due to factors idiosyncratic to the district as
16 currently constructed. You agree with that, right?

17 A. Can you repeat that quote?

18 MR. HECKER: Can you read that back?

19 (The record was read back by the court
20 reporter.)

21 BY MR. HECKER:

22 Q. Statewide elections are a better basis for
23 comparison than the results of congressional, or
24 endogenous, elections because the particular outcome of
25 any congressional election may deviate from the long-term

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1 partisan voting trends of that district due to factors
2 idiosyncratic to the district as currently constructed.

3 A. Right. So like Antonio Delgado might win a
4 district that otherwise is pretty Republican. Yeah,
5 that's right.

6 Q. Such factors can include the presence or absence
7 of a quality challenger, anomalous differences between the
8 candidates and campaign efforts or campaign finances,
9 incumbency advantage, or candidate scandals. You agree
10 with that, right?

11 A. Sure.

12 Q. That's why or at least that's some of the
13 reasons why everybody who does what you did in this case
14 measures the partisanship of the newly enacted legislative
15 districts based upon statewide prior election results,
16 right?

17 A. Yeah. That's why I used the statewide prior
18 elections. Yeah. Absolutely.

19 Q. Could we switch to your reply brief and just
20 look at a couple of charts in your reply brief? Oh.
21 Before I do, I'm sorry, I just want to confirm that we're
22 on the same page, which would require you to look at
23 Page 21 for us literally to be on the same page.

24 THE COURT: Of the reply?

25 MR. HECKER: Sorry, your Honor. I wanted

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1 to finish with the initial report --

2 THE COURT: Okay. That's fine.

3 MR. HECKER: -- Page 21 of the initial
4 report.

5 BY MR. HECKER:

6 Q. I think I know the answer, but just to make sure
7 we're all on the same page, so to speak, with respect to
8 the Senate plan, when you calculated the partisanship of
9 each new Senate district, you similarly -- withdraw. I
10 made the same mistake.

11 A. It's complicated stuff.

12 Q. When you calculated the partisanship of all of
13 the legislative districts in your Senate simulations using
14 the index you used, you marked them as red if they were
15 less than 50 percent Republican-leaning based on the index
16 you used and you marked them as blue if they were more
17 than 50 percent Democratic-leaning based on the index you
18 used, right?

19 A. Right.

20 Q. Same index that everybody uses methodologically,
21 right?

22 A. Same basic concept, yes.

23 Q. Okay. Now we're going to turn to the reply
24 brief for real, the reply report. Let's look at Page 17.
25 The bottom of Page 17 shows the results after you froze

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1 the majority-minority districts, right?

2 A. Yes.

3 Q. So the bottom of Page 17 of your reply is
4 showing the partisanship that you calculated of the four
5 Long Island districts, Districts 1, 2, 3, and 4, right?

6 A. Yes.

7 Q. And the results of the simulations that you ran
8 on the congressional side show that every single one of
9 the thousands of simulations you ran drew at least three
10 out of four congressional districts that leaned Democrat
11 based on the index you used, right?

12 A. So this is where we get off-kilter, is that I --

13 Q. Is it true or false?

14 A. It's false. You're -- this is where -- as I
15 said, this is where --

16 Q. I said based on the index you used.

17 MR. MOSKOWITZ: Objection. He's trying to
18 answer.

19 Q. Well, isn't it true based on the index you used,
20 sir?

21 THE COURT: Let him answer. You asked him
22 the question. Let him answer the question.

23 Q. I'll rephrase the question. Isn't it true --

24 MR. MOSKOWITZ: The question is pending.
25 He was trying to answer. He got cut off.

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1 THE COURT: I'm going to let him answer the
2 question.

3 MR. HECKER: Fair enough.

4 A. As I said, this is where we're getting a little
5 off-kilter, which is my way of saying I kind of disagree
6 with you, because I don't categorize the districts based
7 entirely directly on this partisan share because I know
8 that Republicans win districts that are above 50 percent
9 plus 1 routinely in New York, so I'm not going to concede
10 that everything that falls above 50 percent, as I think I
11 explained at length in my direct, is not -- is anything
12 other than a -- you know, some of these districts do lean
13 Republican, including some of those dots you see for
14 Line 2 and probably ordered District Number 3.

15 Q. Let me ask a different question, then, and see
16 if we could find some common ground. Every single
17 simulation you ran drew at least three out of four
18 Long Island districts in which the partisanship of the
19 district was more than 50 percent Democrat based upon the
20 index you used?

21 A. Three of the four districts have an average
22 Democratic statewide vote share in excess of 50 percent in
23 every simulation, yes.

24 Q. And that's the way you calculated the
25 partisanship of those districts, right?

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1 A. That's the underlying district partisanship,
2 yes.

3 Q. And the vast majority of the thousands of
4 simulations that you ran drew all four districts in
5 Long Island in which a majority of the district was
6 Democrat according to the index you used to calculate the
7 partisanship, right?

8 A. The index which shows the average Democratic
9 vote share is above 50 percent in a majority of the
10 districts, yes.

11 Q. Can we go a little bit farther than a majority?
12 Can we say the vast majority, sir? Isn't that what this
13 chart shows, the vast majority? Don't give it up if it's
14 not true.

15 A. Well, no. I'm trying to think -- I'm trying to
16 remember how I answered -- exactly how I answered the
17 question, but yes.

18 THE COURT: We're talking about four
19 districts here?

20 MR. HECKER: We're talking about the four
21 Long Island districts, and we're looking at the first
22 bar on the left of the chart on the bottom of
23 Page 17 --

24 THE COURT: Right.

25 MR. HECKER: -- which I think is

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1 overwhelmingly blue and barely red. And he said a
2 "majority" when I asked the "vast majority," and I'm
3 just trying to see if he'll agree with me.

4 BY MR. HECKER:

5 Q. Calling balls and strikes, the vast majority of
6 your simulations drew all four districts more than 50
7 percent Democrat according to the index that you used to
8 calculate the partisanship of those districts; isn't that
9 fair, Mr. Trende?

10 A. We may have different understandings of exactly
11 what vast means, but yes. A supermajority of the maps
12 drawn show the average Democratic statewide vote share
13 above 50 percent in all four districts, yes.

14 Q. And let's look at the top of Page 18. Now we're
15 talking about Districts 10, 11, and 12, correct?

16 A. Yes.

17 Q. Would it be fair to say that literally every
18 single one of the thousands of simulations you drew,
19 without exception, drew districts in which the
20 partisanship of the district as you measured it with your
21 index was more than 50 percent Democrat?

22 A. Almost certainly every single one. The average
23 statewide Democratic vote share, which is how I
24 measured -- how I constructed my index, is above 50
25 percent.

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1 Q. Let's talk about the gerrymandering index. The
2 idea behind the gerrymandering index is that if you
3 isolate through the simulations all of the redistricting
4 criteria that were actually applied by actual people
5 drawing the actual lines except for alleged partisanship,
6 then the delta between the results you see in the
7 simulated plans and actual plans is what goes into the
8 gerrymandering index, right?

9 A. The average -- the difference between the
10 average partisanship and the actual partisanship at each
11 rank is what goes into the gerrymandering index.

12 Q. But this is what I'm confused about, Mr. Trende:
13 Are you measuring partisanship, or are you just measuring
14 differences between your ensemble and the actual map,
15 including partisan differences and nonpartisan
16 differences? Isn't the gerrymandering index composed of
17 both types of differences?

18 A. I don't understand your question.

19 Q. Well, let me ask it to you this way:
20 Hypothetically, if there are no differences whatsoever
21 between the inputs that you put into your simulations and
22 what the actual mapmakers actually did and the way you
23 code it gets it completely right, including with respect
24 to how the computer balances the often-competing criteria
25 that must be balanced, then there would be no

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1 gerrymandering index if there was no partisanship in
2 either the enacted or the simulated plans, right? Are you
3 following me?

4 A. I think so, and I think the answer is that's not
5 right. There would still be a gerrymandering index
6 because these ensemble plans all generate gerrymandering
7 indexes. What you'd be likely to get is a gerrymandering
8 index that falls well within the range of gerrymandering
9 indexes produced by the ensemble.

10 Q. Let me ask you this hypothetical: If there was
11 absolutely no partisan intent in the enacted plan and the
12 actual mapmakers didn't have access to the data, didn't
13 think about partisanship at all, and you ran simulations
14 that instructed the computer to keep population deviations
15 within the 30 percent range, but the actual mapmakers had
16 0 population deviation, that would create a gerrymandering
17 index, right?

18 I know you wouldn't do it, Mr. Trende. It's
19 absurd. But I'm trying to illustrate the point through a
20 hypothetical. If you code the computer to treat equal
21 population at plus or minus 30 percent and the people who
22 were actually drawing the lines keep it at 0 percent,
23 you'd have a gerrymandering index. That's significant,
24 right?

25 A. It would depend on the partisanship of your

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1 enacted districts, but I suppose it probably would.

2 Q. Well, wouldn't it throw the whole partisanship
3 off precisely because you're doing it a different way than
4 the mapmakers actually did?

5 A. Look, I'm not going to tell you what the outcome
6 of a hypothetical simulation I've never done would be
7 because you might get the same basic distribution.
8 New York City, it doesn't really matter what you do.
9 You're just going to end up with a bunch of Democratic
10 districts except maybe the one on Staten Island. So I
11 don't know what happens if you do something absurd like
12 that.

13 Q. If you --

14 A. You're always going to get a gerrymandering
15 index in an ensemble of 5,000 because there's randomness
16 built in. I don't know what the magnitude of the
17 gerrymandering index becomes if you make the deviations
18 plus or minus 30.

19 Q. You told us before lunch that you set the
20 compactness input to 1 in your simulations, right?

21 A. Right.

22 Q. And you said you could have made it maybe 7 if
23 you wanted, right?

24 A. Right.

25 Q. If you went back and changed the compactness

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1 input from a 1 to a 7, that would change the
2 gerrymandering index, wouldn't it?

3 A. It might. I mean --

4 Q. How can you say "it might"? Of course it would.

5 A. Because we ceded to you half -- a third of the
6 districts drawn in New York and we got the same basic
7 output. I mean, given that, I'm not going -- or we
8 decided to keep intact the same municipalities that you
9 did, and we got the same basic output. Those are major
10 changes in constraints that didn't really affect anything.
11 So without having actually done the work, I'm not going to
12 concede to you definitively what's going to happen. It
13 could happen. I can see how it could happen but --

14 Q. And the reason why it could happen is because
15 what you call the gerrymandering index measures
16 gerrymandering when there's gerrymandering, but it also
17 could measure other differences between what you did and
18 the actual mapmakers did if there are such differences,
19 right?

20 A. I'm sorry. Again, that was a lot built into
21 that question.

22 Q. I'm trying to get at whether the gerrymandering
23 index that you call it -- by the way, has any expert in
24 any case ever talked about the gerrymandering index in the
25 context of redistricting simulations?

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1 A. I don't know about that.

2 Q. So you would agree with me that you've never
3 heard the gerrymandering index discussed by any --

4 MR. MOSKOWITZ: Objection. He just said he
5 didn't know.

6 MR. HECKER: He said, "I don't know about
7 that."

8 THE COURT: If he doesn't know -- if he
9 knows, he can answer.

10 Q. You can't name a case in which any redistricting
11 expert has ever used the gerrymandering index in a
12 redistricting simulation exercise, can you?

13 A. I can't name one, no.

14 Q. I want to talk about this 53 percent stuff. In
15 your reply report you talk about a 53 percent threshold
16 that -- I think what you're saying is that there is some
17 basis for you to believe that when a district has a
18 partisanship calculated according to the statewide index
19 that you and everybody else uses is around 53 percent
20 Democrat, that's more or less where there's parity between
21 the two parties. Is that the essence of what you're
22 getting at in your reply brief about the 53 percent
23 summary?

24 A. I think that's a fair summary.

25 Q. But you didn't arrive at that number in a

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1 statistically or mathematically rigorous way, did you?

2 A. I mean, I did a regression of the congressional
3 vote share on the index that gave about that answer, and
4 sometimes you can just look at the data like in the table,
5 in Table 1, and it's plain as punch.

6 Q. Did your regression account for -- withdrawn.
7 Did your regression account for incumbency?

8 A. It did not.

9 Q. Wouldn't you agree with me that it's important
10 for a regression to account for incumbency if the purpose
11 of a regression is to compare past statewide election
12 results to a prediction of the partisanship of a
13 legislative district?

14 A. I mean, that's a consideration that you can
15 certainly build into your model. This model explained 91
16 percent of the variants, which is a pretty good outcome.
17 If one of your four experts thinks you would get a
18 different answer accounting for incumbency, I'd be
19 interested to see it.

20 Q. I'm not asking you if you could do it. I'm
21 asking you if it's important. You'd agree with me that
22 you'd want to account in your regression for all factors
23 that you thought were statistically important, right?

24 A. Right. So --

25 Q. So I want to know if this one is important. Was

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1 it or was it not important to try to account for
2 incumbency in this regression?

3 A. So when I did the classification question in
4 Wisconsin, as a matter of fact, when you included
5 incumbency, it didn't return a significant value, so I'm
6 not going to say with definitiveness here that accounting
7 for it would make a difference.

8 Q. I'm not saying whether it would or wouldn't have
9 made a difference. You did it in Wisconsin because it was
10 important to do, right?

11 MR. MOSKOWITZ: Objection. He's been asked
12 three times now.

13 MR. HECKER: And he hasn't answered it
14 once.

15 THE COURT: I think you did ask whether it
16 would make a difference.

17 MR. HECKER: No, I asked whether -- with
18 respect, your Honor, I didn't. I didn't ask whether
19 it would make a difference. I asked whether it was
20 important that he did or didn't do it, and he told me
21 he did it in Wisconsin.

22 THE COURT: He said he -- I think he said
23 it wouldn't make a difference or it may not make a
24 difference. I don't know. Go ahead. Ask it one
25 more time and let's move on.

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1 BY MR. HECKER:

2 Q. Are you aware of any redistricting expert in any
3 case ever who has attempted to opine on how to calculate
4 the partisanship of an enacted legislative district based
5 upon a prior index of statewide results by doing a
6 regression analysis that did not account for incumbency
7 other than you in this case?

8 A. Me in Wisconsin, and I think it is not
9 necessarily important. If it doesn't make a difference,
10 it's not important. So I was actually curious to see if
11 one of your experts would run it and find it made a
12 difference. If it doesn't make a difference -- sorry,
13 your Honor.

14 Q. Last question: Other than you, are you aware of
15 anybody who's ever done a regression like that in any case
16 ever without accounting for incumbency?

17 A. No.

18 Q. Almost done, Mr. Trende.

19 The 55.6 percent ceiling. You seem to be
20 suggesting that there's a ceiling of competitiveness in
21 the State of New York in congressional elections at 55.6
22 percent. Is that the gist of what you're testifying?

23 A. I'm saying it's somewhere around there. Based
24 on the data I have, I used that as a cutoff, but it's not
25 like there's a cliff that everything drops off at 55.6

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1 percent.

2 Q. And the data that you use to put that number in
3 your testimony in this case is the chart on Page 10 of
4 your reply brief, right?

5 A. That's right.

6 Q. Your reply report. I'm sorry.

7 A. I know what you meant.

8 Q. A lot of briefs in this case.

9 And so what you essentially did is you took your
10 chart on Page 10 and you kind of drew a line horizontally
11 across the page between 18 and 24 --

12 A. No.

13 Q. -- no -- between 24 and 3 --

14 A. Yes.

15 Q. -- and you decided based on that that a
16 Republican can't be elected to Congress in the State of
17 New York if the partisanship is below 55.6 percent
18 according to the statewide index you used, right?

19 A. That's the highest I can say that a Republican
20 has won at. I also have to know that they've never won 3
21 or 4. I'm not sure about 20 off the top of my head. I
22 think that's Tonco's district. But, anyway --

23 Q. Whose district is 24?

24 A. 24 is Katko.

25 Q. Is there anything idiosyncratic about

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1 Congressman Katko, soon-to-be Former Congressman Katko,
2 that might factor into your analysis of how you're looking
3 at this chart?

4 A. He's a talented politician. He fits the
5 district well.

6 Q. He's an unusually popular Republican incumbent
7 in a district that is a Democrat district even as you
8 would calculate it in your reply papers, right?

9 A. He does very, very well for a Republican in that
10 district.

11 Q. And so if you were to hypothetically discount
12 those races as idiosyncratic and unrepresentative and move
13 your line up one to the line between 18 and 24, that would
14 materially impact where you're calculating this ceiling by
15 approximately 3 percent, right?

16 A. Well, yeah, but if you're going to start
17 throwing people out, you're going to throw out Antonio
18 Delgado in 19. And so Republicans almost always -- you
19 know, have only lost one race up to 52 percent. Rather
20 than making those type of ad hoc calls, I just looked at
21 the actual data that we had.

22 Q. So you're not saying to a reasonable degree of
23 professional certainty that there's a calculable ceiling
24 on competitiveness in New York congressional elections at
25 55.6 percent, are you?

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1 A. Yeah. I'm saying from the data that we see,
2 that's where Republicans stop winning, and so that's the
3 usable threshold. If someone wants to come in with a
4 contrary analysis and show, no, they win at 65 percent,
5 which they never have, I'd be interested to see it.

6 Q. Mr. Trende, I don't think you answered my
7 question. I was asking you if this is your opinion to a
8 reasonable degree of professional certainty, and it's an
9 important question because it's the standard that applies
10 to your expert testimony, right? You're a lawyer and an
11 expert. That's the standard, right?

12 Can you just tell me, are you saying, yes or no,
13 to a reasonable degree of professional certainty that the
14 ceiling beyond which congressional districts in the State
15 of New York become uncompetitive is when the statewide
16 index is 55.6 percent? Are you saying that to a
17 reasonable degree of professional certainty or no?

18 A. Yes.

19 Q. Based upon this chart only, right?

20 A. Based upon my knowledge of elections and based
21 upon the data presented in this chart, yes, and anything
22 else mentioned in my report.

23 MR. HECKER: That's all I have for now,
24 your Honor.

25 THE COURT: Thank you, Mr. Hecker.

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1 Who's next on cross-examination? You said
2 you had an agreement between the -- okay.

3 Mr. Channing (sic), please proceed.

4 MR. CHILL: Thank you, your Honor.

5 CROSS-EXAMINATION

6 BY MR. CHILL:

7 Q. When I was -- I'm fairly old now, in my 80s, but
8 I can remember still back when I was a freshman in
9 college. We had a course called Statistics. The first
10 thing they told me was -- they gave me a book called How
11 to Lie with Statistics. And I believe a problem, because
12 I'm not -- I don't pretend to be as knowledgeable as you
13 are in this world, but I am what you call a voter, and I
14 know that statistics don't vote. I know numbers don't
15 vote. Human beings vote; is that correct?

16 A. Yes.

17 Q. And human beings vote based on what's going on
18 at the time that they vote?

19 A. So most political scientists --

20 Q. I'm not asking that. I'm asking what your view
21 is. Yes or no?

22 A. Well, consistent with most political scientists,
23 I think of something called retrospective voting, which is
24 that most people vote based on --

25 Q. If --

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1 A. -- on how they have perceived things over the
2 course of the last two to four years. It's Ronald
3 Reagan's famous question. Are you better off today than
4 you were four years ago?

5 Q. Are you telling me that the vote that's going to
6 come up now is going to be the same based on four years
7 ago and the fact that the price of gasoline is going to be
8 \$5 a gallon? Do you understand my question?

9 A. Yeah. I hope it won't be. But, yes, they --

10 Q. You hope it won't be? If you're --

11 A. If they don't --

12 Q. Excuse me. Let me rephrase the question. If
13 you walk in there and you are not a wealthy person and you
14 have to choose between driving your car at \$5 a gallon and
15 paying for your food, that's not going to impact how
16 you're going to vote on the particular election coming up
17 now, yes or no?

18 A. So, yes, that will --

19 Q. Thank you.

20 A. -- but --

21 Q. Thank you.

22 A. -- it's not just how things are today.

23 MR. CHILL: Can I go on to my next
24 question?

25 A. They do it relative to how things were four

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1 years ago.

2 MR. CHILL: Can I go on to my next
3 question, your Honor?

4 THE COURT: Go ahead.

5 MR. CHILL: It's cross-examination.

6 THE COURT: Next question.

7 MR. CHILL: His counsel can rehabilitate
8 him --

9 THE COURT: Understood.

10 MR. CHILL: -- and that's the way it goes.

11 BY MR. CHILL:

12 Q. How about if the people today who are going to
13 vote soon in 2022 elections are looking at what's going on
14 in Ukraine and they see the murderous stuff that's going
15 on every day and getting worse? Do you think that
16 might -- and they don't like the way the president is
17 reacting to it? Do you think that might affect their
18 vote?

19 A. It could.

20 Q. How about when they see crime in the big cities?

21 A. It could.

22 Q. How about incumbency?

23 A. It could.

24 Q. And what happened two, three years ago would not
25 necessarily indicate how they're going to vote today?

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1 A. It gives a baseline that people --

2 Q. I didn't ask you about that. That's how they're
3 going to vote today?

4 A. Yes. What happened two or three years ago
5 impacts how they vote today.

6 Q. How much?

7 A. It gives a baseline by -- I cannot quantify it,
8 but it gives a baseline from which people evaluate current
9 data.

10 Q. If --

11 A. \$5-gallon gas today is way different. It was \$2
12 four years ago --

13 Q. That's correct.

14 A. -- or \$8 four years ago.

15 Q. I want to thank you for that answer. It was
16 very helpful to me. Thank you.

17 A. You're welcome.

18 Q. The difference between \$2 and \$5 is going to
19 change somebody's vote, won't it?

20 A. It could, yes.

21 Q. Okay. So in the real world when you go over the
22 whole State of New York, you really have no idea what any
23 person will vote other than in heavily Democratic or
24 heavily Republican areas or what we call marginal or
25 competitive districts given these factors today?

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1 A. I'm not going to say I have no idea. No.

2 Q. Well, will you concede that given the factors we
3 just discussed and the competitive districts, it can make
4 a difference? How many competitive districts are there?

5 A. The outcome of the 2022 elections aren't set in
6 stone. They could vary between now and November. Yes.

7 Q. Well, thank you again for answering my question.
8 That's very helpful.

9 It can change. It can change every day. What
10 it doesn't do is reflect, depending on the amount of the
11 change and the magnitude of the change, what happens to
12 you four years ago, does it?

13 A. Can you say that again?

14 Q. What happens three or four years ago pales in
15 comparison to what's happening today or what's going to
16 happen to you now in the next election, correct?

17 A. It provides the baseline against -- so I'm not
18 going to say it pales in comparison because it's all part
19 of the evaluation.

20 Q. Where is it more important? You can answer that
21 question, can't you? Isn't contemporary events more
22 important than past events?

23 A. People will look at the change more than they
24 look at the absolute value, so the -- where things end up
25 is what decides things based on where things were two or

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1 four years ago. It's a comparative analysis.

2 Q. You've answered the question.

3 Tell me something. I see people today, young
4 kids and even older people, worrying about going under the
5 table because of atomic warfare threatened by Putin. Do
6 you think that would impact somebody dramatically with
7 regards to whether Democrats or Republicans registered?

8 A. It could. I mean, it could.

9 Q. A lot more than four years ago when there was no
10 threat of any possible atomic weapon?

11 A. It certainly wasn't at the forefront of anyone's
12 mind four years ago.

13 Q. So if you take all of these factors into
14 consideration, you can see that events of today dictate
15 the outcome of reality in the real world, then how can you
16 say how many Republicans and how many Democrats are going
17 to get elected given there are marginal districts or there
18 are competitive districts? You don't know?

19 A. No, I don't know exactly who is going to win.

20 Q. Then how can you as an expert go and want this
21 Court and every Court to go and overthrow a
22 Democratic-elected Legislature, which is the most
23 Democratic way we know in the United States as opposed to
24 Russia, and to say they did something that you think is
25 wrong?

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1 MR. MOSKOWITZ: Objection, your Honor.

2 There's a lot loaded in there that I don't think
3 Mr. Trende ever did.

4 MR. CHILL: Well, he's saying --

5 Q. Mr. Trende, are you not saying that based on
6 your mathematical, statistical stuff that -- I don't even
7 pretend to know what you're talking about. I'm being very
8 honest about that. Mr. Hecker, thank God, knows a lot
9 more than I do. But, most assuredly, the point I'm trying
10 to make is you're --

11 THE COURT: Just ask a question, Mr. Chill.

12 MR. CHILL: Okay. Yes. Yes. I'm sorry,
13 your Honor. I will.

14 Q. I'm going to ask you, you are predicting
15 approximately how many Republican -- based on your
16 analysis how many Republican seats and how many Democrat
17 seats will come out?

18 A. I don't know how many wins there's going to be
19 in a given year. What I know is how the district shares
20 deviate from what we'd expect. What the Court and the
21 lawyers argue about from that, I'm not going to be here
22 for that. I'm just here to testify how the maps deviate
23 from what you'd expect from a drawn map and how that
24 translates to understanding what the motivations of the
25 Legislature was.

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1 Q. So you have some mathematical view, and I'm
2 asking you about a real-world view. And they're
3 different?

4 A. They can be. I think the mathematical view --
5 the mathematical view can inform your real-world view.
6 But, again, that is not my job.

7 Q. You're telling me that your mathematical formula
8 can inform how I vote, my wife votes, my children vote?
9 That's what you just said?

10 A. I'm sorry. I misunderstood your question. I
11 thought we were talking about democracy and the maps and
12 everything. I'm saying all I'm here to say -- talk about
13 today is how the enacted maps -- what the role of
14 partisanship was in the enacted maps. And then after
15 everyone else testifies there's going to be a big fight
16 among the lawyers and judges will weigh in, and I'm not
17 here for that. I'm just here to say that the enacted maps
18 were plainly drawn with partisan intent to disfavor
19 Republicans in competitive districts.

20 Q. But in the real world that may not be true?

21 MR. MOSKOWITZ: Objection, your Honor. I
22 think this has been asked and --

23 THE COURT: It has. You've already asked
24 that, Mr. Chill.

25 MR. CHILL: Thank you, your Honor.

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1 Q. Now, I thought that we talked about population
2 equality, and I think you said your simulations do not
3 come to perfect population equality. Is that correct?

4 A. That's right.

5 Q. Are you aware, therefore, that your simulations,
6 if they were put into the real world, they would be
7 unconstitutional?

8 A. Directly doing the --

9 Q. If --

10 A. I'm trying to answer, sir.

11 THE COURT: Let him answer the question,
12 Mr. Chill.

13 Q. I'll rephrase the question -- withdraw the
14 question.

15 MR. MOSKOWITZ: He was already answering.

16 Q. Go ahead.

17 THE COURT: He was answering.

18 Go ahead. You can answer the question.

19 A. Directly inputting the congressional districts
20 would not pass -- well, the Courts have tolerated some
21 population deviation, so you may be able to convince the
22 Court that a deviation of .3 percent for congressional is
23 acceptable. Since these maps aren't drawn with
24 partisanship as a motivation, the Senate maps are all well
25 under the threshold for one person, one vote.

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1 Q. I want to thank you for that answer because that
2 answer is dead wrong.

3 Because you're a lawyer, do you know a case
4 called Karcher v. Daggett?

5 MR. MOSKOWITZ: Objection. Now we're
6 having an argument.

7 THE COURT: Yes. Sustained.

8 Q. Karcher -- are you familiar with the Supreme
9 Court case Karcher v. Daggett?

10 A. I am.

11 Q. And do you know in that case that the Supreme
12 Court did not allow a deviation of one person let alone .3
13 percent?

14 A. I would have to review the exact finding of that
15 case.

16 Q. I'm sorry. You said you were familiar with the
17 case.

18 A. Well, yes. I've heard of it. I know it, but
19 I'm not going --

20 Q. Will you take my word for it that the Supreme
21 Court of the United States has said not even a deviation
22 of one person is permitted?

23 MR. MOSKOWITZ: Objection, your Honor.

24 THE COURT: No testifying, Mr. Chill. Ask
25 a question.

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1 MR. CHILL: I asked him to take my word for
2 it.

3 A. I won't take your word for it.

4 Q. Okay. So you stick to your views that .3
5 percent is an appropriate deviation under the Constitution
6 of the United States? Is that your final statement?

7 A. It can be. I believe West Virginia has more
8 than 1 population deviation because the Court has allowed
9 it.

10 Q. This is a court in New York State under the
11 United States of America subject to the dictates of the
12 Supreme Court of the United States whether you like it or
13 not. I'm asking you for this state.

14 THE COURT: If he knows.

15 MR. CHILL: Yeah, if he knows.

16 A. As I said, I think the Court has allowed a small
17 population deviation in West Virginia when they're trying
18 to conform to county lines. But, again, you would have
19 to -- you would, admittedly, have to justify the
20 deviations. Realistically these maps would be adjusted by
21 block work, which would not alter the outcome of the
22 simulations.

23 Q. You keep talking about outlier results, and yet
24 even in districts that you are announcing would show the
25 trend Democratic, a Republican could get elected, correct?

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1 A. It's possible.

2 Q. And vice versa?

3 A. It's possible.

4 Q. Katko is in one of those districts, correct?

5 A. Katko does very well in a Democratic district.

6 Q. Yes.

7 And Delgado?

8 A. Same story the other way.

9 Q. The other way.

10 So, again, in the real world, now true, and
11 notwithstanding your analysis, the real world does
12 something different; the results of the real world are
13 different?

14 A. I mean, that's part of my analysis, but yes.
15 There are Republicans who do well in Democratic districts
16 sometimes and vice versa.

17 Q. Does your simulations predict or your report
18 predict approximately how many Democratic districts or
19 Republican districts should be the outcome based on your
20 simulation?

21 A. No, and it's not just Republican and Democratic.
22 It's competitive. You can look at the dot plot and get a
23 sense for where things should be versus where they are.

24 THE COURT: I'm going to ask you both to
25 speak up --

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1 THE WITNESS: I'm sorry, your Honor.

2 THE COURT: -- please.

3 Q. Can I look at the report, Page 10 of your
4 rebuttal report?

5 THE COURT: His original report?

6 MR. CHILL: Rebuttal, your Honor.

7 Q. Take a look at this table and work with me on
8 it, please. The first column other than district is your
9 index. What does your index --

10 A. I'm sorry, sir. I want to make sure we're on
11 the same page.

12 Q. Yeah. Sure.

13 A. Table 1?

14 Q. Page 10 of your rebuttal, Table 1.

15 A. Table 1. Okay.

16 Q. Index --

17 A. Yes, sir.

18 Q. -- the one that's titled Index. What does it
19 show -- supposed to show?

20 A. It shows the average Democratic statewide vote
21 share in the district.

22 Q. Yes, and it's based on -- is it not based on the
23 statewide elections that you picked to create this index?

24 A. It's the statewide districts in this kind of
25 canonical data set, and I used them all to avoid the

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1 charge of cherry picking.

2 Q. I didn't ask you about that. I just asked you
3 if -- based on the statewide races that you've used for
4 your report.

5 A. That I used, yes.

6 Q. So let's look at District 27. You're off -- the
7 2020 election, 42.89 percent in reality was 39.50 percent,
8 correct?

9 A. It's 39.50 in 2020, yes.

10 Q. Yes, and 2018 it's 7 points' difference, 49.81?

11 A. Oh, yeah, Democrats got 49.81.

12 Q. And then, again --

13 A. Collins had a scandal.

14 Q. -- look at this 2016, the national election. It
15 changed dramatically, did it not?

16 A. Yeah. It's 32.8.

17 Q. Okay. So at least for District 27, your average
18 statewide index is not reflected in the Democratic share
19 of the actual election?

20 A. That's absolutely true. Democrats tend to run
21 behind the statewide index. Absolutely. 100 percent.

22 Q. So how many of these do I have to go through
23 where you admit that that's true of many, many districts
24 in here?

25 A. I will freely concede that the statewide

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1 Democratic vote share is usually higher than the
2 Democrats' congressional share.

3 Q. And, therefore, the index is not accurate. So
4 how much is it off if you average it?

5 MR. MOSKOWITZ: Objection, your Honor.

6 THE COURT: Sustained.

7 MR. MOSKOWITZ: Thank you.

8 THE COURT: You can ask him that, but you
9 can't testify to that.

10 MR. CHILL: I asked, how much is it off?

11 THE COURT: Well, you are saying it was off
12 by such and such and --

13 MR. MOSKOWITZ: You just characterized it
14 as inaccurate.

15 BY MR. CHILL:

16 Q. Okay. If you were to do it, how much off, on
17 average, would it be?

18 A. I don't think I've calculated the -- well, since
19 the regression calculates the average off, but generally
20 speaking, the Democratic congressional candidates run
21 about 3 percent behind the index.

22 Q. So does 3 percent, in your view, not make a
23 difference in terms of the outcome of which district gets
24 elected Republican, which Democratic?

25 A. It makes a huge difference. That's why you

Sean F. Trende - Cross - Mr. Chill

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1 wouldn't want to use 50 percent as the cutoff between a
2 Republican and Democratic district. 100 percent agree
3 with that.

4 Q. I'm just basing it on your table.

5 A. I'm agreeing with you.

6 Q. Well, thank you.

7 MR. CHILL: Bear with me, your Honor. I'm
8 coming to an end soon. If you'll give me a couple
9 minutes.

10 THE COURT: That's fine, Mr. Chill.

11 Q. On Pages 10 and 11 of your original report, I'm
12 looking at the statements of David Wasserman.

13 A. Oh, yes, sir. That was -- oh, that's in my
14 initial report, sir.

15 Q. Sorry.

16 A. That's okay.

17 THE COURT: He said Page 10 and 11 of your
18 initial report.

19 Q. I'm drowning in reports. I apologize.

20 A. Yes, sir, it is on Page 10 of my original
21 report.

22 Q. Yeah, 10 and 11, the bottom of 10 and 11. You
23 quote from a person named David Wasserman, editor of the
24 Cooke Political Report, correct?

25 A. Yes.

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1 Q. Is Mr. Wasserman a political scientist?

2 A. I don't believe so.

3 Q. Do you have any idea what Mr. Wasserman relied
4 on to form his opinion?

5 A. I'm guessing he relied upon --

6 Q. I asked if you know, not guess.

7 A. Okay. He's relying on -- at least in part on
8 the Cook Political -- Partisan Voting Index, which is
9 included in my report.

10 Q. Do you know whether he conducted an analysis?

11 A. He would have used the Cook Political Report,
12 which is something that political scientists rely upon in
13 their work all the time to assess district partisanship.

14 Q. And have you relied on Mr. Wasserman's opinion
15 formulating your report or just pointing it out?

16 A. I mean, it's informative when a nonpartisan,
17 extremely well-respected congressional analyst like David
18 Wasserman says it. It's something that I pay attention
19 to, but it's not the overwhelming consideration.

20 Q. Well, he's not here to be cross-examined, is he,
21 now?

22 A. He is not.

23 Q. How about Mr. Nathaniel Rakich?

24 MR. CHILL: Next page, your Honor.

25 A. He is not in this room either.

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1 Q. Is he a political scientist?

2 A. I don't believe so.

3 Q. Do you know what Mr. Rakich relied on for his
4 statement?

5 A. So FiveThirtyEight uses an index of presidential
6 election results and state legislative results in
7 analyzing districts, so that is almost certainly what he
8 relied upon.

9 Q. Okay. But, again, as you can see, he's not here
10 to be cross-examined, so we don't really know whether it's
11 accurate or not, correct?

12 A. Yeah. If we -- again, knowing how these things
13 work, I believe, from my recollection, it's all spelled
14 out in the article that's linked, but I will concede he is
15 not here to be cross-examined.

16 Q. Is the article in your report?

17 A. No, it is not.

18 Q. So we don't have the article to look at even, do
19 we?

20 A. Not from my report, no.

21 Q. Okay. And Mr. Reisman? Is Mr. Reisman a
22 political scientist?

23 A. I don't believe so.

24 Q. You state he's an attorney for Brennan Center.

25 A. Yes.

Sean F. Trende - Cross - Mr. Chill

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1 Q. Are you aware that Mr. Reisman's not an
2 attorney?

3 A. I don't know one way or the other. That's my
4 understanding.

5 Q. From where did you get that understanding?

6 A. Probably from the article.

7 Q. What article?

8 A. The article that's linked.

9 Q. In that article you claim that he's an attorney
10 for the Brennan Center.

11 A. Or I made a mistake.

12 Q. You might have made a mistake?

13 A. It's possible.

14 Q. In fact, he's a reporter for Spectrum News, is
15 he not?

16 A. I don't know.

17 Q. But you used him without looking into what he
18 really was?

19 A. I might have made a mistake.

20 Q. Mr. Duncan Hosie, is he a political scientist?

21 A. I don't believe so.

22 Q. And other than a Wall Street article that you
23 cite, does he have any credentials that you relied on?

24 A. I don't know if he has any other credentials.

25 Q. So other than the fact that he had an opinion in

Sean F. Trende - Cross - Mr. Chill

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1 The Wall Street Journal, he had no other credibility, in
2 your view?

3 A. I don't think that's what I said.

4 Q. Well, take a look.

5 A. He's an attorney for the ACLU making a bit of a
6 statement against interest. So, yeah, I give it -- I
7 found it something worth relaying at the very least.

8 Q. You rely on the ACLU for his credentials?

9 A. I like the ACLU, so...

10 Q. I know, but Republicans usually don't.

11 A. I'm a Libertarian, not a Republican.

12 Q. I see.

13 A. I love the ACLU.

14 THE COURT: Next question.

15 MR. CHILL: I'm going on, your Honor.

16 Q. How about Colby Itkowitz and Blanco?

17 A. Colby is not a political scientist. I don't
18 know about Adrián Blanco.

19 Q. You don't know about the rest of them, and you'd
20 give the same answer that you gave about they're not here;
21 they can't be cross-examined? I don't want to go through
22 this and repeat this endlessly.

23 A. That's right.

24 MR. CHILL: If I could have a two-minute
25 break, your Honor. I'm about to wind up. I'd just

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1 like to check with my team if that's okay.

2 THE COURT: Very good, Mr. Chill.

3 MR. CHILL: Thank you.

4 Q. Mr. Trende, I have one last question about all
5 the people that you cited. If you didn't -- if you didn't
6 know much about many of them or their sources, why did you
7 cite them?

8 MR. MOSKOWITZ: Objection, your Honor.

9 That characterizes his testimony and what he knew
10 about --

11 MR. CHILL: I thought it was based on his
12 testimony.

13 THE COURT: I'm going to let him ask it.

14 Go ahead, although I think he's even
15 answered that they seemed of interest to him and
16 worth mentioning. I don't think it was any more than
17 that.

18 But go ahead, Mr. Trende.

19 MR. CHILL: That was only the last question
20 on that one anyway.

21 BY MR. CHILL:

22 A. I thought they were an interesting cross-section
23 of political viewpoints evaluating these districts that
24 made for a nice introduction to the report and may give
25 some context to the map being drawn.

1 Q. In your original report, Mr. Trende, Page 12 --
2 Footnote 12 -- Footnote 2, excuse me, Footnote 2, you
3 state, the simulation approach tends not to be as
4 sensitive to the choice of elections as other metrics
5 unless political coalitions in a state vary radically from
6 election to election, correct?

7 A. That's right.

8 Q. And, therefore, the choice of election would
9 impact your simulation if political coalitions did vary
10 from election to election, correct?

11 A. If you have a very unusual statewide candidate
12 who has a very different political coalition than other
13 statewide candidates, yes. It's not my understanding of
14 recent New York elections.

15 Q. Well, do you know if the elections in New York
16 tend to vary radically from election to election?

17 A. The basic configuration? You know, if you had
18 a -- if you had Rudy -- to explain, if you had -- if Rudy
19 Giuliani had made it to the 2000 Senate election, he
20 probably would have run mutually well in New York City,
21 which would be something to keep in mind. But absent
22 something like that, the political coalitions tend to look
23 more or less the same.

24 Q. Is Rudy Giuliani in your simulation?

25 A. No. That's why it's reliable.

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1 Q. I don't understand what he's got to do with
2 this.

3 A. I was trying to give an example of a candidate
4 who might have had an unusual political coalition that you
5 would want to be aware of. He's not in here. No one like
6 him is in here, which is part of what makes this reliable.

7 Q. No one's in here, and the difference between
8 elections in 2018 and 2020 didn't have large variations?

9 A. The political coalition's roughly the same, yes.

10 Q. You mean when Trump ran the first time and Trump
11 ran the second time, for example, that would not have been
12 a variation?

13 MR. MOSKOWITZ: Objection, your Honor. I
14 think we're now switching what elections we're
15 talking about.

16 MR. CHILL: No, I'm not. I'm asking him --

17 THE COURT: I'm going to let him ask it.

18 Go ahead. Are you waiting for the
19 question, sir?

20 THE WITNESS: Yes, your Honor. I didn't
21 get the --

22 THE COURT: Mr. Chill, he's waiting for a
23 question.

24 BY MR. CHILL:

25 Q. I'm giving you an election -- a statewide

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1 election, presidential election, okay, and -- I'm giving
2 you two: the first time Donald Trump ran and the second
3 time Donald Trump ran. Weren't the results radically
4 different?

5 A. I don't think they were radically different. I
6 think he did better in 2016 than 2020, but the basic
7 political coalitions are roughly the same.

8 THE COURT: Next question.

9 Q. Did he not win in the first time overwhelmingly
10 the Electoral College and lose overwhelmingly the
11 Electoral College the second time?

12 A. I think he had a narrow Electoral College
13 victory and narrow Electoral College loss, but they
14 switched, yes, nationally.

15 Q. And the first time, you say it was a narrow
16 electoral victory?

17 A. 303 electoral votes.

18 Q. And how much did Mrs. Clinton have?

19 A. It would have been 237 or so.

20 Q. And what was the gap?

21 A. That would be like 66 points, 67 electoral
22 votes.

23 Q. That's narrow.

24 And how much did --

25 MR. MOSKOWITZ: We're getting very far

Sean F. Trende - Cross - Ms. McKay

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1 afield here, your Honor.

2 MR. CHILL: I'm trying to show there's
3 variation, your Honor, in the national election.

4 THE COURT: You've made your point,
5 Mr. Chill, I think.

6 MR. CHILL: Okay. I accept your Honor's
7 view of that, and I'll withdraw from the --

8 THE COURT: Thank you, Mr. Chill.

9 MR. CHILL: Thank you, your Honor.

10 THE COURT: Anyone on behalf of the
11 Governor, Lieutenant Governor?

12 MS. MCKAY: Everyone's saying it, but
13 briefly.

14 THE COURT: Ms. McKay?

15 MS. MCKAY: I really will be brief.

16 THE COURT: Okay.

17 CROSS-EXAMINATION

18 BY MS. MCKAY:

19 Q. Good afternoon, Mr. Trende.

20 A. Good afternoon.

21 Q. You mentioned that you were retained for this
22 case obviously. I don't think we talked about your rate.
23 It's \$400 an hour?

24 A. That's correct.

25 Q. And you mentioned you're a Libertarian, correct?

Sean F. Trende - Cross - Ms. McKay

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1 A. Correct.

2 Q. Would you agree that there's some serious
3 overlap with the Libertarians and Republicans?

4 A. On some issues. I voted for Clinton and for
5 Biden and for the Democratic -- I was one of like 35
6 percent of Ohio voters who voted for the gubernatorial,
7 so...

8 Q. Mr. Trende, I asked you just a simple yes-or-no
9 question. I know you've been on the stand for a while, so
10 I'm going to try to keep it brief.

11 Okay. So next I want to ask you, do you make
12 any political contributions?

13 A. I donated \$1,000 to Clinton in 2016, and I think
14 I donated to McCain back in 2008 and maybe a congressional
15 candidate in Massachusetts.

16 Q. Okay. Is that something that you regularly do?

17 A. Those are the only three I can think of.

18 Q. Okay. Have you ever worked for campaigns?

19 A. No.

20 Q. Are you familiar with Conservative Country, the
21 entity, or the Facebook page I should say?

22 A. I've been made aware of it, yes.

23 Q. Do you have any affiliation with that group?

24 A. None.

25 Q. And you've testified that RealClearPolitics is

Sean F. Trende - Cross - Ms. McKay

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1 nonpartisan. Is there any connection between
2 RealClearPolitics and Conservative Country?

3 A. Not anymore.

4 Q. Okay. Now, with respect to the substance of
5 what you're here testifying about, you've gone into it a
6 lot, and I do not have the expertise to get too in the
7 weeds with you, but generally speaking, would you agree
8 that this is a very technical subject?

9 A. Yes.

10 Q. And I believe you -- your report has numerous
11 places where you say -- you know, you're trying to put it
12 in layman's terms. You're saying -- "to better
13 understand," I believe, at one point you said, right?

14 A. Yes.

15 Q. And to simplify greatly, you give examples of
16 clusters, right?

17 A. That's right.

18 Q. So you would agree that it's -- laypeople really
19 have to kind of defer to the experts on this subject,
20 right?

21 A. That's --

22 Q. Okay. If you disagree, a simple no is fine.

23 A. I don't think there has to be blanket deferral
24 but...

25 Q. And even politicians need to hire statisticians

Sean F. Trende - Cross - Ms. McKay

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1 to draw maps, right?

2 A. Yes.

3 Q. Like that's LATFOR. That's why that exists,
4 correct, because politicians are not the ones -- are not
5 able to really understand the statistics behind it that
6 you've been here talking about, correct?

7 A. Yeah. Most politicians can't create a
8 shapefile. Yeah.

9 MS. MCKAY: All right. No further
10 questions.

11 THE COURT: Thank you, Ms. McKay.

12 Redirect, Mr. Moskowitz?

13 MR. MOSKOWITZ: We have nothing, your
14 Honor.

15 THE COURT: All right. You can step down,
16 sir.

17 THE WITNESS: Thank you, your Honor.

18 THE COURT: Thank you.

19 (The witness was excused.)

20 THE COURT: This is an appropriate place to
21 take a break. We'll probably go to about 4:30 if we
22 have witnesses here. So we'll take ten minutes.
23 We'll start in again. Okay? Thank you.

24 (A recess was taken.)

25 THE COURT: Petitioners, next witness?

Claude A. Lavigna - Direct - Mr. Browne

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1 MR. BROWNE: Good afternoon, your Honor.
2 For the record, Robert Browne on behalf of
3 Petitioners. The petitioners at this time would call
4 Claude A. Lavigna.

5 CLAUDE A. LAVIGNA,
6 called herein as a witness, having been first duly sworn,
7 was examined and testified as follows:

8 THE DEPUTY: Would you please state and
9 spell your name for the Court.

10 THE WITNESS: Sure. My name is Claude A.
11 Lavigna. Last name's spelled L-a-v-i-g-n-a.

12 THE COURT: I'll ask you to keep your voice
13 up, Mr. Lavigna, when you're answering questions so I
14 can hear a little better, and you also, Mr. Browne,
15 Attorney Browne.

16 MR. BROWNE: Certainly.

17 THE COURT: Please proceed.

18 MR. BROWNE: Thank you, your Honor.

19 DIRECT EXAMINATION

20 BY MR. BROWNE:

21 Q. Mr. Lavigna, could you tell the Court why you're
22 here today?

23 A. I was retained by the petitioners to evaluate
24 the 2020 congressional maps -- 2022 congressional maps and
25 2022 state Senate maps.

Claude A. Lavigna - Direct - Mr. Browne

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1 Q. And, Mr. Lavigna, as part of your evaluation,
2 did you produce reports?

3 A. Yes, I did.

4 MR. BROWNE: And, your Honor, if I could
5 have marked -- and I think they've been previously
6 marked -- and may I approach, your Honor?

7 THE COURT: You may.

8 MR. BROWNE: -- Petitioners' Exhibit 3 and
9 Petitioners' Exhibit 4. I have copies for the Court,
10 your Honor. May I approach?

11 THE COURT: Yes.

12 MR. BROWNE: Thank you.

13 BY MR. BROWNE:

14 Q. And, Mr. Lavigna, I put in front of you
15 Petitioners' Exhibit 3 and Petitioners' Exhibit 4. Are
16 those your reports?

17 A. Yes, they are.

18 MR. BROWNE: And, your Honor, the
19 petitioners would offer those into evidence at this
20 point.

21 MR. GOLDENBERG: No objection.

22 THE COURT: Ms. McKay?

23 MS. MCKAY: No objection, your Honor.

24 MR. CHILL: No objection.

25 THE COURT: Admitted without objection.

Claude A. Lavigna - Direct - Mr. Browne

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1 MR. BROWNE: Thank you, your Honor.

2 (Petitioners' Exhibits 3 and 4 were
3 received in evidence.)

4 BY MR. BROWNE:

5 Q. Mr. Lavigna, let's take a step back.

6 THE COURT: One second. What are they
7 labeled?

8 MR. BROWNE: Petitioners' Exhibit 3 is the
9 original report, and that's dated February 14, 2022.

10 THE COURT: And Number 4?

11 MR. BROWNE: It's the rebuttal report dated
12 March 1, 2022.

13 THE COURT: And that's 4?

14 MR. BROWNE: Yes, sir.

15 THE COURT: Thank you. Please proceed.

16 MR. BROWNE: Thank you, your Honor.

17 BY MR. BROWNE:

18 Q. Mr. Lavigna, let's take a step back from your
19 reports for a second. Can you tell us your educational
20 background?

21 A. Yeah. I went to Harrison High School in
22 Westchester County, graduated from there, went to Ohio
23 University for two years, transferred to the State
24 University of New York at Albany, where I graduated in
25 1985 with a degree in communication.

Claude A. Lavigna - Direct - Mr. Browne

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1 Q. Mr. Lavigna, where are you currently employed?

2 A. I'm currently the president and CEO of Eagle
3 Point Strategies based -- a survey research firm based in
4 Albany, New York. I'm also the vice president of
5 Research & Analytics at co/efficient, another survey
6 research firm, based in Kansas City, Missouri; and I am
7 the director and treasurer of Balance New York, an
8 independent expenditure committee, in New York.

9 Q. And you hold all those positions concurrently;
10 is that right?

11 A. Yes.

12 Q. Can you tell us what co/efficient is?

13 A. Co/efficient is a -- it's a national polling
14 firm. It does a lot of voter contact through texting
15 tele-town halls, virtual town halls, and I'm in charge of
16 the polling division, so...

17 Q. And you mentioned Eagle Point Strategies. Could
18 you tell us what Eagle Point Strategies is?

19 A. Yeah. Eagle Point Strategies is a full-service
20 survey research firm based in Albany, New York.

21 Q. And how long has Eagle Point Strategies been in
22 existence?

23 A. Eagle Point Strategies was created in 2008.

24 Q. And are you the actual founder of Eagle Point?

25 A. Yes, I am.

Claude A. Lavigna - Direct - Mr. Browne

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1 Q. Do you hold any other titles, other than
2 founder?

3 A. No, not for Eagle Point. No.

4 Q. What does Eagle Point Strategies do?

5 A. Eagle Point Strategies is a survey research
6 firm. The bulk of its clients are in New York State.
7 It's basically state Senate races, state Assembly races,
8 congressional, county execs. It's also done issue
9 advocacy campaigns for different issues before the state
10 Legislature that various activists will hire the polling
11 firm for.

12 Q. And you mentioned issue advocacy. What exactly
13 is issue advocacy?

14 A. Issue advocacy is for groups that are trying to
15 get certain legislation passed. Eagle Point Strategies
16 worked on the casino gaming legislation, to get that
17 passed; marriage equality; pro-marriage equality; and also
18 medical marijuana.

19 Q. And you also mentioned positions you hold
20 currently. You mentioned Balance New York. Could you
21 tell the Court, or all of us, what Balance New York is?

22 A. Balance New York is an independent expenditure
23 committee created in the 2014 election cycle. Its mission
24 statement was to elect Republican members to the state
25 Senate.

Claude A. Lavigna - Direct - Mr. Browne

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1 Q. And, Mr. Lavigna, have you held any other
2 positions other than these three positions we just
3 discussed? Have you held positions prior to any of these
4 positions?

5 A. Prior to those positions I was a production
6 manager for the state Senate Republican Campaign
7 Committee. I started in 1988, spent about 20 years there,
8 eventually got into the data services position, and then
9 we developed an in-house polling operation at the Senate
10 Campaign Committee, which I headed up.

11 Q. And what was your ultimate title with the state
12 Senate --- Republican State Senate Committee?

13 A. Deputy director by the end.

14 Q. And, Mr. Lavigna, in all these positions did you
15 obtain any specialized knowledge or skills?

16 A. Yes. I mean, when you -- the specialized
17 knowledge or skills is to understand each district,
18 different parts of the state, how they're all different,
19 you know, how to advise candidates or different campaigns
20 on how to target their messaging, you know, so I was kind
21 of a strategist for that.

22 Q. And did you obtain specialized knowledge about
23 the political landscape and geography of New York?

24 A. Yes. Through our survey research, you know, as
25 we drill down into the districts, we have a lot of

Claude A. Lavigna - Direct - Mr. Browne

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1 different knowledge just based on the political geography
2 that's out there.

3 MR. BROWNE: Your Honor, at this point I
4 would offer Mr. Lavigna as an expert based on his
5 knowledge, skill, and experience.

6 MR. GOLDENBERG: No objection.

7 MS. McKAY: No objection.

8 MR. CHILL: No objection.

9 THE COURT: I'm admitting -- or qualifying
10 him as an expert.

11 Go ahead.

12 MR. BROWNE: Thank you, your Honor.

13 BY MR. BROWNE:

14 Q. Mr. Lavigna, I want to talk about your reports a
15 little bit right now. I want to talk about what you
16 considered in putting together your reports.

17 A. I considered -- I looked at the 2022 maps for
18 Congress and for state Senate, I looked at the 2012 maps
19 for Congress and state Senate, I looked at election data
20 from the State Board of Elections, I looked at testimony
21 to the Independent Redistricting Committee, and I looked
22 at data from the Cook Partisan Voting Index.

23 Q. And where did you obtain all these documents?

24 A. They're all publicly -- public information on
25 the internet.

Claude A. Lavigna - Direct - Mr. Browne

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1 Q. And, Mr. Lavigna, I want to talk now
2 specifically about the congressional -- the 2022
3 congressional report. Were you able to form an opinion as
4 to the 2022 congressional district map?

5 A. Yes, I was.

6 Q. And what was your opinion?

7 A. My opinion on the congressional district maps is
8 it was a partisan gerrymander that protected incumbents
9 and reduced competitiveness across other districts.

10 Q. And what made you reach this conclusion or draw
11 this opinion?

12 A. I reach that conclusion based on communities
13 that were split. A lot of it is cracking Republican
14 voters out of seats and packing them into other seats,
15 making them significantly strong Republican districts,
16 which reduces competitiveness across other seats.

17 Q. Can you give us some examples of where this
18 occurred within the congressional districts in the 2022
19 congressional district map?

20 A. Sure. Looking at Suffolk County, you know,
21 Congressional District 1 and Congressional District 2 were
22 Republican districts. What we see is
23 Republican-performing areas in District 1 were cracked
24 out, put into District 2, which makes District 2
25 significantly Republican but at the expense of District 1,

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1 which is now -- you know, leans to a Democratic district
2 by packing those voters out.

3 Q. Were there other examples that you can let us
4 know about?

5 A. Yeah. I think on Congressional District 3,
6 along the North Shore of Long Island, which had originally
7 stretched into Queens, it now goes, you know, through
8 Queens, into the Bronx, and then pulls in that Sound Shore
9 area of Westchester, which is Mamaroneck, Larchmont, Rye,
10 which is a very, you know, liberal, Democratic area, but
11 took out some of those middle class, more conservative
12 areas in the North Shore of Long Island, making that
13 district, you know, much more Democratic than it was
14 before. That would be one of them.

15 Q. Are there other examples outside of the
16 Long Island area?

17 A. Yeah. I think if you go to New York City, in
18 District 11, which is, you know, predominantly
19 Staten Island, it contained prior the portion of Brooklyn,
20 which had a lot of --

21 (There was an outside interruption.)

22 THE WITNESS: Should I wait?

23 THE COURT: One second.

24 BY MR. BROWNE:

25 Q. So, Mr. Lavigna, you were talking about

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1 District 11.

2 A. So District 11, again, Staten Island-based. The
3 portion of Brooklyn that was in that congressional
4 district was a lot of Orthodox Jewish voters, Russian
5 voters. They're very conservative, much more in line with
6 the Staten Island voters. That part was taken out of
7 Congressional District 11, and then it went to another
8 part of Brooklyn, which brought in more of the stronger
9 Democratic-performing areas, more liberal areas like
10 Park Slope, which changed that district from a Republican
11 district to now a Democratic district.

12 Q. So we've talked about Long Island,
13 New York City, and Staten Island. Are there other
14 examples outside of the City and Long Island?

15 A. Yes. I think when you go to Upstate New York,
16 especially the new District 23, which is the Southern
17 Tier, and District 24, which is the northern part of
18 New York which stretches from Erie County all the way to
19 St. Lawrence County, those districts were Republican
20 districts, but now they are very strong Republican
21 districts. Republican voters were packed into those
22 districts, which then made the surrounding districts much
23 less competitive.

24 Q. And based on all of this, Mr. Lavigna, what is
25 your opinion again about the enacted 2022 congressional

Claude A. Lavigna - Direct - Mr. Browne

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1 district maps?

2 A. My opinion is that they were a partisan
3 gerrymander and, you know, voters were packed --
4 Republican voters, especially, were packed into districts,
5 making others less competitive.

6 Q. And do you hold this to a reasonable degree of
7 professional certainty?

8 A. Yes, I do.

9 Q. Mr. Lavigna, I want to talk now about the state
10 Senate maps that were enacted. Did you -- were you able
11 to form an opinion about the 2022 state Senate maps?

12 A. Yes, I was.

13 Q. And could you tell us what that opinion is?

14 A. Yes. The state Senate maps were similar in
15 certain ways to the congressional drawing. Again, if you
16 go to Suffolk County on the state Senate maps, the old --
17 the current Districts 1, 2, 3, and 4 are Republican
18 districts served by Republican-elected members with the
19 exception of District 3, which for one period of time, for
20 one session, had a Democratic representative. It's now
21 backed Republican. Those were -- you know, they were not
22 strong Republican districts, but they were competitive.

23 Now, District 1 -- again, Republicans in
24 District 1 were cracked out, put into District 2, making
25 District 2 a strong Republican district;

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1 Democratic-performing areas were put into District 1
2 making 1 now a Democratic seat; and the same with 3 and 4.
3 People -- folks were cracked out of 3, put into 4.
4 District 4 -- 4 is now a very strong Republican district,
5 and 3 is now a Democratic-leaning district.

6 Q. Are there other examples which helped you form
7 your opinion about the state Senate maps?

8 A. Yeah. I think in District 9, in Nassau County,
9 you know, you had the Five Towns area formerly in there,
10 which is an Orthodox Jewish area. That was taken out of
11 District 9 and put into District 10, which is really a
12 New York City seat, you know, based in Queens, and that --
13 you know, that Jewish community is not in line with the
14 area of Queens that it was drawn into.

15 Q. And are there other examples outside of
16 New York City and Long Island?

17 A. Yeah. I think if you go up the Hudson Valley,
18 the new 48, which is similar to the old District 46 -- the
19 new 48 took out of the northern portion of 46 like
20 Montgomery County, Schenectady County, which were
21 Republican-performing counties. They were replaced by
22 more Democratic-performing areas in Ulster, Dutchess,
23 Columbia Counties.

24 Q. And are there other examples you would want to
25 point out?

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1 A. I think the last one would be District 54, which
2 was a strong Republican district in Upstate New York.
3 More Republicans were put into that district, making it an
4 extremely strong Republican-forming district, 54.

5 Q. And based on all this what is your opinion
6 regarding the 2022 state Senate districts?

7 A. Again, similar to the congressional districts,
8 it was a partisan gerrymander to protect, you know,
9 Democratic incumbents and resulted in reduced
10 competitiveness across other districts.

11 Q. And do you hold your opinion to a degree of
12 professional certainty?

13 A. Yes, I do.

14 Q. Mr. Lavigna, the last area I want to talk to you
15 about is the rebuttal report of Stephen -- and I'm going
16 to butcher this name. I apologize -- Ansolabehere. Did
17 you have a chance to review the professor's report?

18 A. Yes, I did.

19 Q. And did you draw any conclusions about his
20 report?

21 A. Yes, I did. The professor used -- when he
22 looked at partisanship, used statewide campaigns to
23 determine partisanship. In New York, especially in the
24 recent history, Republican statewide candidates have not
25 been the strongest candidates; they've also been outspent

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1 by a tremendous amount of money, so they have not been
2 competitive statewide races. So it's -- to me, it's on
3 the barometer to measure what goes on down-ballot using
4 uncompetitive races on the top of the ticket.

5 Q. What does that do to the picture that's
6 developed?

7 A. It makes it seem like it's more
8 Democratic-leaning at times because you just don't have --
9 you're running Republican candidates with no name ID, no
10 resources.

11 Q. The professor raises a number of issues with
12 your analysis. Can you address the issues he's raised?

13 A. Yes. One of the things that I looked at were
14 actual election results of state Senate races or
15 congressional races especially because they tend to be
16 more competitive and voters would know who the candidates
17 are on both sides. So those down-ballot races are much
18 more indicative of partisanship than an uncompetitive top
19 ticket -- top line.

20 MR. BROWNE: Thank you. Your Honor, I have
21 nothing further. I tender the witness.

22 THE COURT: Thank you, Mr. Browne.

23 Who's starting cross-examination for
24 Respondents?

25 MR. CHILL: I am, your Honor.