

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.

SUPPLEMENTAL RECORD ON APPEAL

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(For Continuation of Appearances See Inside Cover)

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TRANSCRIPT OF CLOSING ARGUMENTS, DATED
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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF STEUBEN : SUPREME CALENDAR

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TIM HARKENRIDER, GUY C. BROUGHT,
LAWRENCE CANNING, PATRICIA CLARINO,
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LINDA FANTON, JERRY FISHMAN, JAY
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MARIANNE VOLANTE,

Petitioners,

-versus-

GOVERNOR KATHY HOCHUL, LIEUTENANT
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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
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Respondents.

-----x

Steuben County Courthouse
Bath, New York
March 31, 2022

P r e s i d i n g :

THE HONORABLE PATRICK F. MCALLISTER
Judge

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Official Court Reporter

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I N D E X T O E X H I B I T S

<u>For the Assembly:</u>	<u>ID</u>	<u>EVD</u>
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1 THE COURT: This is the matter of Tim
2 Harkenrider at el, Petitioners, against Governor
3 Kathy Hochul at el, Respondents. We're on today for
4 closing arguments. I am going to have Counsel all
5 note your appearances. We will start with
6 Petitioners.

7 MR. WINNER: George Winner, Keyser Maloney
8 & Winner.

9 MR. TSEYTLIN: Misha Tseytlin.

10 THE COURT: Mr. Tseytlin. All right. For
11 the Senate Majority Leader?

12 MS. REITER: Alice Reiter, Cuti Hecker
13 Wang.

14 MR. HECKER: Eric Hecker, Cuti Hecker Wang.

15 MR. GOLDENBERG: Alexander Goldenberg, Cuti
16 Hecker Wang.

17 THE COURT: Thank you. For the Governor,
18 Lieutenant Governor?

19 MS. MCKAY: Heather McKay from the New York
20 State Attorney General's Office.

21 MS. HALLIYADDE: Muditha Halliyadde from
22 the New York State Attorney General's Office.

23 THE COURT: Thank you, Ms. Halliyadde. And
24 for the Speaker of the Assembly?

25 MR. BUCKI: Craig Bucki, B-u-c-k-i, from

1 Phillips Lytle in Buffalo.

2 THE COURT: Thank you, Mr. Bucki. Does
3 that cover everybody?

4 (No response.)

5 THE COURT: We are here for closing, as I
6 said. This won't be a back and forth. This is
7 everybody has a chance to present their closing
8 argument, each of the respondents, petitioners.
9 Whether you share duties, that's up to you, but it
10 won't be a versus, you know, one side going and then
11 the other side going and then the other side having a
12 chance to respond to that. This is closing argument.
13 You each have a chance. All right. Petitioners, are
14 you ready to proceed?

15 MR. TSEYTLIN: Absolutely, your Honor.

16 THE COURT: Mr. Tseytlin.

17 MR. TSEYTLIN: Thank you, your Honor. In
18 2014 the people of New York enacted perhaps the
19 strongest protection against partisan gerrymandering
20 anywhere in the country. They did this first as a
21 matter of process by setting up an Independent
22 Redistricting Commission to which the redistricting
23 process would be funneled.

24 Second, they did it as a matter of
25 substance and they prohibited partisan gerrymandering

1 in three aspects. One, they prevented partisan
2 gerrymandering for favoring a particular party.
3 Second, they prohibited partisan gerrymandering in
4 terms of decreasing competition. And third, they
5 prohibited partisan gerrymandering in terms of
6 favoring incumbents or disfavoring incumbents.

7 Yet in the very first election cycle, first
8 redistricting cycle, after the 2014 amendments, the
9 Governor, the Democrat, and the Legislature, which is
10 a supermajority Democrat, decided to ignore these
11 2014 amendments and decided to enact an egregious pro
12 Democrat, anticompetitive, pro Democrat incumbent,
13 anti Republican incumbent gerrymandering.

14 Governor Hochul signaled this from the
15 start. When she took office she told the press that
16 she's going to use her influence over the
17 redistricting process to help out the Democratic
18 party because she saw herself as the leader of the
19 Democratic party in New York. And boy, did the
20 Legislature deliver. The Legislature ignored the
21 work entirely of the Independent Redistricting
22 Commission and then it, behind closed doors, without
23 any Republican input cooperation, enacted, frankly
24 nationally embarrassing national gerrymandering --
25 partisan gerrymandering. This gerrymander has been

1 pilloried by independent analysts, partisan analysts
2 from left and right, the Brennan Center, which is
3 perhaps the leading anti gerrymandering group on the
4 left called the congressional gerrymander, a master
5 classer in gerrymandering.

6 Now, when Congressman Maloney, who was one
7 of the benefits of this gerrymander, was asked how
8 could this gerrymander be consistent with the 2014
9 amendments and the greater commitment that you claim
10 to have against partisan gerrymandering --

11 MR. HECKER: Objection, your Honor.
12 Congressman Maloney didn't testify in this case.

13 THE COURT: I'm not ruling on objections in
14 this. Go ahead.

15 MR. TSEYTLIN: Your Honor, thank you. She
16 said well, this is kind of retribution for what
17 Republicans have been doing in other states. Now,
18 what other states have been doing is a little bit
19 interesting and it provides some context for both the
20 testimony your Honor heard and the kind of relief in
21 terms of timing that we're asking for. In states
22 around the country, since the US Supreme Court issued
23 a true sure decision saying partisan gerrymandering
24 is an issue for the states, have been taking their
25 state law prohibitions against partisan gerrymander

1 very seriously, most on the left and on the right.

2 The courts in North Carolina and Ohio have
3 struck down partisan gerrymanders that they have
4 found from enacted by Republicans. Recently, just
5 last week, Maryland struck down a partisan
6 gerrymander that was enacted by Democrats. And
7 there's a couple of commonalities that's been
8 happening around the country in these cases.

9 One is these courts are generally not
10 waiting until the next election cycle. They are
11 striking down the partisan gerrymandering maps now
12 and making sure that fair maps are in place for this
13 cycle because of the importance of having fair maps
14 for the people.

15 Second, they are relying in large part on
16 the simulation methodology, exactly the kind that is
17 the centerpiece of this case, the kind that Mr.
18 Trende presented and the kind that was the majority,
19 vast majority, of the discussion before your Honor at
20 the trial two weeks ago.

21 So with that kind of framing in mind, I'd
22 like to do three things today, your Honor. First,
23 I'd like to talk about the theory of gerrymandering
24 that we put into our amended petition and we had a
25 very specific theory of how the gerrymander in the

1 congressional seats and the state Senate seats
2 occurred, and how the evidence before your Honor is,
3 in fact, undisputed, that that type of gerrymander
4 did, in fact, occur.

5 Second, I will briefly touch upon our
6 procedural argument, which, of course, was the lead
7 argument that we made in our papers, but it wasn't
8 the subject of any of the testimony before your Honor
9 because it's purely legal argument, procedural
10 argument being that by not following the process of
11 the IRC the Legislature violated the Constitution.

12 And finally, I'll close by discussing the
13 remedy that we are asking your Honor to adopt and
14 some thoughts about the timing of that remedy.

15 Now, turning to the first part of that
16 discussion, which would be the lion share of what I
17 would like to discuss today, in our amended petition
18 we didn't just say that there was a general
19 gerrymandering in favor of Democrats or Democrat
20 incumbents. We had a very specific -- what we said
21 is that both in the congressional and the state
22 Senate what the Legislature did is they took as many
23 Republicans as they could and they packed them into a
24 couple of districts making those already Republican
25 districts really, really Republican. And then what

1 the Legislature did thereafter is it took all of the
2 other left competitive seats and it made those
3 competitive seats more and more Democrat. That is,
4 in the words of the Brennan Center, the master class
5 of gerrymandering that occurred here. This also had,
6 in those competitive seats, had the consequence of
7 favoring Democrat incumbents in close seats, in
8 otherwise competitive seats, and disfavoring
9 Republican incumbents in otherwise close seats. This
10 also had the impact of decreasing competition, which
11 so -- and as you can see, our theory hit all three
12 points, independent prohibition in the 2014 partisan
13 gerrymandering prohibition.

14 So what I would like to do, your Honor, is
15 we have a couple -- I have a couple of
16 demonstratives. They are just the dot plots from the
17 Trende report and I'd like to put them up for
18 purposes of discussion.

19 THE COURT: Okay.

20 MR. TSEYTLIN: And I know everyone in the
21 courtroom is familiar with these dot plots. These
22 are found in Petitioners' Exhibit 1, Pages 15 -- this
23 is 15 and 21, is the state Senate one that is down
24 there. I talked to my friends and they are familiar
25 with the dot plots and they didn't ask for handouts.

1 So, just going on, what Mr. Trende did
2 doing the same kind of analysis that he did in
3 Maryland is he created 5,000 simulated maps and then
4 eventually created 10,000 more and 10,000 more of
5 what maps would look like if a map drawer is
6 concerned with the legal requirements of New York's
7 maps but was not concerned with the partisanship.
8 It created something called a partisan gerrymandering
9 index, which shows how far of an outlier the enacted
10 maps are from the ensemble maps, the 5,000, 10,000
11 maps, and he found that that partisan gerrymandering
12 index showed that the enacted maps were an extreme
13 outlier, almost six standard deviations away from the
14 mean. And you don't have to take Mr. Trende's words
15 for that being an outlier. Dr. Tapp, when asked,
16 also agreed that this was an outlier.

17 Now, my friends on the other side say yeah,
18 it could be an outlier, but a gerrymandering index
19 could show that it favors the Democrat party, the
20 Republican party, or something else, but what Mr.
21 Trende did is he showed through a dot plot analysis
22 exactly why the gerrymandering index was such an
23 outlier, why this was more of an outlier than any of
24 the 5,000, 10,000 in the second simulation maps that
25 he was showing. And he did this and what he showed

1 exactly confirms and proves beyond a reasonable doubt
2 the theory that we alleged in our amended petition,
3 that what happened is the Democrats packed
4 Republicans purposefully into a couple of districts
5 and they used the wages that they gained from that
6 packing to make all of the competitive districts in
7 New York on the congressional side and the state
8 Senate side more Pro-Democratic.

9 I will quickly walk through what happened
10 and I think -- because I think it shows, as Mr.
11 Trende says, the DNA of the gerrymander and what this
12 master class of gerrymandering was. As your Honor
13 can see from the first four lines, these are the four
14 most Republican districts, congressional districts,
15 in New York and the black dots represent the enacted
16 map. What this shows is that the enacted map for the
17 first district, the first most Republican district,
18 is more Pro-Republican than any map in the ensemble.
19 In the second district, also more Pro-Republican than
20 any map in the ensemble. Third, fourth, all the same
21 thing. This is the clearest evidence of packing one
22 can imagine.

23 And what happens after those four districts
24 are created, after those four packed Republican
25 districts? The dot plots shift dramatically. Here

1 what we have here from about 6 to about 15 are really
2 the competitive seats in New York. These are the
3 seats that in a fair map one side to win or the other
4 side to win. And what your Honor can clearly see
5 from this dot plot is that each one of these seats in
6 the enacted map is significantly more Pro-Democrat
7 than any on the ensemble maps. This is the DNA of
8 the gerrymander. This is the master class of
9 gerrymandering that the Brennan Center said.

10 And I will briefly put up the state Senate
11 dot plot, which shows the same pattern. As your
12 Honor can clearly see, you got the same pattern in
13 the state Senate. Now, the first Republican district
14 is -- you know, it is usually Republican under any
15 map, but after that you go through 2 through about 15
16 and every single one of those in the enacted state
17 Senate map is far, far more Democratic than in the
18 ensembles. That means that Republicans are far more
19 Republican than any of the ensembles. I mean, the
20 Republicans are hugely packed in these areas. Their
21 votes are wasted and you will see there is nothing
22 like that on the Democrat side. And what is the
23 wages of that? Again, the competitive seats, the
24 ones right over this line are all far, far more
25 Pro-Democrat. That means that the Republican

1 incumbents in the competitive seats are disfavored
2 and the Democratic incumbents in those competitive
3 seats are more favored. Furthermore, competition is
4 decreased throughout this whole range. These seats
5 are far less competitive because they are packed
6 Republican and these are less competitive because the
7 previously competitive seats are more Pro-Democrat.

8 Now, what I found interesting from the
9 trial testimony is how the experts on the other side
10 really didn't engage with this analysis at all, even
11 though it was the heart of the amended petition and
12 the DNA of the gerrymander that we were proven beyond
13 a reasonable doubt and that Mr. Trende was focused
14 upon. And I'd like to read a colloquy that my
15 friend, my colleague, had with Dr. Tapp, one of the
16 experts on the other side.

17 (Reading) Question, so you do not have an
18 expert opinion as to whether Republican voters were
19 packed into certain districts in order to reduce
20 their voting power in other districts? Answer, from
21 Dr. Tapp, correct. Question, and so nothing in your
22 analysis refutes the thesis that the enacted
23 congressional map was drawn so that Republicans were
24 packed into four districts, thereby giving them less
25 of a chance to win any of the other 22 districts,

1 correct? Answer, I think that statement is mostly
2 outside of what I addressed. Question, right. So
3 you don't refute that thesis, right? Answer, I did
4 not refute that thesis. Question, okay. And you
5 can't refute the thesis that the enacted Senate map
6 was drawn so that the Republicans were packed into 14
7 districts, thereby giving them less of a chance to
8 win any of the other 49 seats, right? Answer, I did
9 not address that. (End of reading.)

10 And Dr. Barber has the same kind of
11 colloquy, same answers. Now, Dr. Ansolabehere, I
12 have a little trouble pronouncing that name, he
13 didn't go through that colloquy, but I think it is
14 telling that when he was asked, even on his analysis,
15 let's look at the seats where you say it is a
16 pro-Democrat lean based on statewide averages, but a
17 Republican incumbent has won most of the time, and
18 those are Districts 1, 11, 19. We asked him isn't it
19 correct that under your analysis each of these
20 districts, the most competitive districts in New
21 York, are now made more Pro-Democrat? He conceded
22 that on his analysis that was true. That's exactly
23 -- that's the districts here (indicating). That's
24 the districts that are the DNA of the gerrymander,
25 the ones that would be competitive if you weren't

1 looking at -- if you weren't trying to draw a
2 partisan gerrymander, but they are made Pro-Democrat
3 by the packing and the cracking.

4 Now, my friends, since they don't actually
5 engage with the Court the thesis that we had, they
6 had two types of responses to Dr. Trende -- Mr.
7 Trende's analysis. One was they attempted to change
8 the subject. The other was methodological and I'll
9 talk about each of those in turn.

10 In terms of changing the subjects, the
11 subject, their theory appeared to be that this map is
12 Pro-Republican because look how effective the packing
13 is. They said the Republicans are guaranteed under
14 this plan, essentially guaranteed, four seats. And
15 they said just looking at that, that is a great thing
16 for Republicans, and so what their analysis
17 completely ignores and doesn't take any account of is
18 where these districts are. Do you have -- are
19 Districts 5, 6, 7, 8 all the way through 14, are
20 those more competitive for Republicans or are those
21 more -- systematically more Pro-Democrat?

22 And the other thing that I found puzzling
23 is while they were making this very strange claim
24 that all we want to look at is whether a seat is
25 50.01 percent Republican versus 49.9 Republican, I

1 found it strange that they couldn't cite a single
2 peer review paper, any sort of paper, anyone ever
3 looking at a map wholistically and deciding that
4 that's how you should determine whether a map is
5 Pro-Republican or Pro-Democrat.

6 So what do you do when you have experts
7 saying something that seems really odd and not
8 supported by any literature they can point to? You
9 try to come up with an absurd hypothetical to show
10 how they will deal with it. I will just read the
11 colloquy that my colleague had with Dr. Barber.

12 (Reading) Dr. Barber -- question, so a map
13 that had, let's say, five seats that were
14 49.9 percent Democrat, so that means they were just
15 under the 50 percent line, and then had four seats
16 that were 70 percent Democrat, so you -- so way over
17 the 50 percent line, according to your own logic,
18 that would be five Republican seats and four Democrat
19 seats, right? Answer, from Dr. Barber, yes, that is
20 correct. So a map like that would lean Republican,
21 right? Yes, that is correct. And you don't really
22 believe that a seat that is 50.01 percent, is at the
23 50.01 percent mark, is just as likely to elect a
24 Democrat as a seat that is at the 70 percent mark,
25 right? No. (End of reading.)

1 And, of course, that -- this shows kind of
2 the absurdity of this entire form of analysis and why
3 they can't point to any sort of any expert that would
4 ever do this kind of analysis. I mean, think about
5 it, if you had nine seats where four of them are
6 guaranteed to the Democratic party and five are
7 50.01, that is obviously a four-zero-five map. That
8 means the Democrats are guaranteed four seats and
9 both parties have a pretty much equal shot at the
10 other five seats. No one would say that that is a,
11 seriously say, that's a five-four Republican map
12 without the Pro-Republican map. And you can see
13 that, and you can see that with the dot plots. What
14 their analysis will lead to is that it wouldn't
15 matter if the Fifth District was here, such that it
16 was right at the 50 percent line, or up here kind of
17 at the 56 percent line, etcetera, etcetera. No one
18 would look at that.

19 And so I think that it was pretty clear
20 just from those colloquies that that analysis is a
21 nonstarter but, you know, they later brought up
22 another expert, a Dr. Katz, who was doing this kind
23 of analysis and I figured, you know, Dr. Katz was
24 someone I've interacted with in other cases, very
25 respected, careful expert, surely he must have a view

1 on this. And if you recall, your Honor, I did an
2 exercise with him. I went through his report and I
3 said you've got three exemplar seats, a seat that's
4 50.02 percent Democrat, 54.2 Democrat, and 80.2
5 percent Democrat, and this is what I asked him: What
6 would you think of an expert analysis that would just
7 call all three of those Democrat seats without
8 differentiating between them about how highly
9 Democrats are to win those seats? Dr. Katz' answer:
10 That's not correct. They have a quite different
11 probability of electing Democrats. I think he was
12 kind of taken back that I was even asking him such a
13 question that I think seemed to him obvious. That is
14 because this way of classifying, which ignores how
15 Pro-Democrat or Pro-Republican as a district as long
16 as you're plus or minus over the 50 percent line, is
17 not something that anyone would ever do in any
18 serious election analysis.

19 Now, since that's out of way what do they
20 have left to attack the Trende analysis? Well, they
21 have a series of methodological complaints. They
22 kind of did a spaghetti against the wall approach.
23 They said he didn't do this right, he didn't do that
24 right. I think what's -- and I will go through those
25 one by one, but I think an overarching point is that

1 each of their experts could have done their own
2 simulations doing whatever assumptions or additional
3 consideration they thought were important. None of
4 them did them. In fact, Dr. Barber ran 50,000
5 simulations and for some reason he didn't run it the
6 way he thought would lead to a better result. So,
7 you know, they really -- and since they certainly
8 didn't move to exclude the Trende simulations, they
9 really don't have anything, any counter simulations,
10 but in any event, there are a couple of criticisms
11 they had of Dr. -- of Mr. Trende's simulations, so
12 I'll talk about those in turn.

13 First, they complain that he didn't take
14 into account municipal splits in his first 5,000
15 simulations. So what Mr. Trende did following the
16 approach recommended by Dr. Imai, who is like the
17 guru in this area and who created the algorithms, is
18 he froze all of the municipalities that the
19 Legislature kept together and he reran this time
20 10,000 simulations. Same exact result, same exact
21 pattern, same exact gerrymandering -- not the same --
22 he didn't recalculate the gerrymanders, but the same
23 exact dot plot pattern, didn't change the conclusion
24 one bit.

25 The next criticism was he didn't take into

1 account the Voting Rights Act. So, what he did there
2 is he did exactly what Dr. Imai recommends. He
3 froze, and this was a very big concession for the
4 Legislature, he froze all the majority-minority
5 districts, including some very obviously gerrymander
6 districts, and he reran 10,000 simulations again.
7 Same exact result fully refuting those criticisms.

8 The next criticism was that he didn't --
9 that Mr. Trende didn't account for communities of
10 interest. When Dr. Tapp was on the stand he said the
11 following: Quote, I think it would be hard for any
12 marvelor (phonetic) to find an accurate way that
13 everybody could agree is correct to program the
14 computer to maintain communities of interests. My
15 friends haven't pointed to a single one of these
16 simulations in any of the growing number of cases
17 that have accepted these simulations as the core
18 evidence of partisan gerrymandering that somehow
19 controlled for communities of interest in the
20 Maryland decision that came out last week. Mr.
21 Trende did the same analysis. The Court noted that
22 communities of interest were not specifically frozen
23 and yet that didn't dissuade the Court's analysis at
24 all. Plus, my friends on the other side don't have
25 any reason to suggest that somehow taking communities

1 of interest into account in some way would change the
2 fundamental structure here. After all, when Mr.
3 Trende froze the municipalities nothing changed, and
4 neither they nor their expert offered one iota of
5 suggestion of why somehow taking -- freezing a
6 different category of communities rather than
7 municipalities would make any bit of difference.

8 So their final methodological criticism was
9 the number of simulations that Mr. Trende ran. They
10 said he only ran 5,000. We want more. Now, it's
11 interesting, 5,000 is the number that the Ohio
12 Supreme Court just found sufficient when Justice
13 Kagan was talking about simulations in her Rucho
14 dissent. She was talking about 1,000 or 3,000. In
15 any event, Mr. Trende did more. In his reply he ran
16 10,000 and then 10,000 again. Dr. Barber ran 50,000
17 and he admitted in testimony before this court that
18 his results using the Trende assumptions were
19 consistent. So, whether it's 5,000, 10,000, 10,000
20 or 50,000, the results in this pattern just remain
21 exactly the same.

22 So, I think that's enough to show that Mr.
23 Trende's core analysis of the DNA of the gerrymander,
24 the very DNA we allege in our amended petition, is
25 essentially un-refuted in this case in any meaningful

1 way.

2 So, then the only other kind of codicil I'd
3 like to talk about with regard to our substantive
4 theory is Dr. Katz' testimony about the state Senate
5 in particular. Now, of course, Dr. Katz did a
6 completely different way of looking at partisan
7 fairness than anything any of the other experts did
8 and he came in at the eleventh hour. I asked Dr.
9 Katz a couple of questions to try to illustrate to
10 the Court why his kind of analysis doesn't bear on
11 the issue of partisan intent. And I will read off
12 his answers to my questions, but I think in order to
13 understand why I asked those questions the way I did,
14 I need to give a little bit of background about what
15 his type of methodology is and what it does try to do
16 and what it doesn't try to do. And if my friends had
17 brought Dr. Katz in earlier this would have been in
18 my briefs, but I'm going to give your Honor my
19 general take.

20 So, what partisan symmetry does is it's an
21 academic view of what counts as a fair map. It
22 doesn't take into -- it doesn't look at all of
23 partisan intent. It doesn't take into account about
24 whether a more fair map was even possible under the
25 political geography of the state. All it cares about

1 is certain social scientists have decided that a
2 certain way, a certain kind of map, is fair and is a
3 normative aspect and it calculates maps based on that
4 issue of normativeness. And this was kind of like
5 the approach that some plaintiffs were using back
6 before the simulation approach became the dominant
7 approach and the reason that that approach has become
8 disfavored in courts in proving partisan intent, not
9 necessarily in academia or academics like to talk to
10 each other about fairness, is the approach doesn't
11 take into account of what is possible in the state.

12 So, for example, if a state had such a
13 political geography that the voters of one party were
14 significantly packed into a couple of major cities,
15 it would be almost impossible for that to score for a
16 gerrymander in favor of that packed party to score
17 poorly on the partisan symmetry metrics.

18 In any event, with that in mind, these are
19 the two questions I asked Dr. Katz: (Reading) Is
20 there anything in your report that excludes the
21 possibility that the state Senate here is the most
22 Pro-Democratic map under your metric than any map
23 that could possibly be drawn complying with all of
24 New York constitutional criteria, except the
25 prohibition against partisan gerrymandering? Answer,

1 I do not know that. Question, so you cannot exclude,
2 and nothing in your report excludes that the map that
3 the Democrats adopted for the state Senate is the
4 most Pro-Democratic map possible under the New York
5 constitutional criteria putting aside partisan
6 prohibition? Answer, I honestly have no idea. (End
7 of reading).

8 Again, as I mentioned earlier, Dr. Katz is
9 a very forthright expert in his field in calculating
10 partisan symmetry. I am not going to call anything
11 in his doubt, but there is a significant limitation
12 in the partisan symmetry metrics. They don't talk
13 about partisan intent. They have nothing to do with
14 partisan intent and they are measuring an academic
15 notion of partisan fairness. And they cannot even
16 exclude that even if something scores well on their
17 social science metrics that it is, in fact, something
18 like this, the most extremely partisan effort to help
19 out one party and harm the other within the
20 limitations of a political geography of a state.

21 So, that is kind of my presentation on the
22 substantive aspect of why we have made our case that
23 this is an egregious gerrymander.

24 Now, briefly on the procedural argument.
25 As we explained in our papers, the Constitution sets

1 out an exclusive process after 2014 for how
2 replacement maps can be drawn on a state. The
3 Constitution calls this the process that shall be
4 used. The definite article "the" denotes under New
5 York case law this is the exclusive process. Under
6 the process, before the Legislature can act like it
7 did before -- can act without considering the
8 commission maps there has to be two rounds of
9 commission maps that are rejected by the Legislature.
10 Here there was no second round. The commission did
11 not pass a second set of maps and so the process was
12 not activated.

13 What my friends on the other side seem to
14 be saying is that if the process that the 2014
15 amendments lays out fails, there is another process,
16 standard by catabolism (phonetic) and presentment.
17 That, of course, defeats the whole notion of the
18 process, that creates an additional process and, in
19 fact, this is exactly what my friends tried to do in
20 the latest attempt on constitutional amendment. They
21 put before the people, do we want to have a backup
22 process if the commission doesn't do its work? And
23 the people resoundingly in November rejected having a
24 backup process. They left the exclusive process in
25 place and since that process failed, didn't complete,

1 the new maps are procedurally improper, even before
2 getting into their clear substantive impropriety.

3 Now, moving to the issue of remedy, we have
4 in our amended petition asked for this Court to
5 invalidate four maps. One is the 2022 congressional
6 map both on procedural grounds and on substantive
7 grounds. Two is the state Senate map both on
8 procedural grounds and substantive grounds. And then
9 the 2012 court drawn map because that map is now
10 malapportioned and it has the congressional map, that
11 map is now malapportioned, has the wrong number of
12 congressional districts now, and the legislative
13 drawing state Senate map for 2012 because that map is
14 malapportioned.

15 Now, what the Constitution provides is that
16 when the judicial review mechanism is initiated this
17 court needs to issue a decision within 60 days, and
18 if the Court agrees with us, it shall invalidate the
19 map.

20 Our respectful submission is, at least in a
21 case like this where we filed our lawsuit on the very
22 day the Governor signed these illegal maps, the
23 Constitution contemplates that the remedy will be in
24 the very first election cycle. Otherwise, why would
25 the Constitution create this break next process if

1 there was enough time to do this over the next cycle,
2 which is going to be in two years? Why would the
3 Constitution require this Court to do everything in
4 60 days, which obviously, it was a very challenging
5 process for everybody involved? That is because, we
6 would respectfully submit, that the Constitution
7 expects that if the 2014 amendments are violated that
8 the constitutional maps will be put in place. And so
9 that is what the New York -- what New York
10 contemplates.

11 Now, what my friends have said on the other
12 side is well, this is really impossible. And so a
13 couple of things about that, and by really impossible
14 what they are saying is impossible to have the fix
15 now, that the constitutional maps need to continue
16 until 2024. This is contrary to what the Senate
17 Majority Leader told the press as soon as this
18 lawsuit was filed. What you told the press is
19 there's a lawsuit. We in the Legislature will be as
20 nimble as we need to be about election deadlines and
21 the like. Of course. If this Court were to
22 invalidate these maps and require and either order
23 replacement maps by this Court, if the Court agrees
24 with our procedural argument, or send the maps back
25 to the Legislature, if this Court agrees with our

1 substantive argument, this could be accomplished very
2 quickly and could be easily fit into our election
3 cycle. Then, for example, have the primary in July
4 or August.

5 As a case in point, I think in the last
6 couple of days we have submitted some letters
7 updating this Court what happened in the Maryland
8 case which, again, Mr. Trende's same analysis that
9 was used here was the centerpiece. The court struck
10 down these maps on Friday, six days ago. As of
11 yesterday, a replacement congressional map has
12 already been enacted. That is how quickly with the
13 use of computers the process can move. The
14 Legislature enacted these maps and the Assembly map,
15 which is obviously even more complicated, within
16 eleven days of the commission not completing their
17 constitutional duty.

18 So, the timeframes for either this Court
19 receiving remedial maps and adopting one, or the
20 Legislature adopting a remedial map, can be easily
21 done and the Constitution clearly contemplates that
22 they will be done.

23 This Court now has before it an affidavit
24 for the co-executive director of the New York Board
25 of Elections, who explained that New York election

1 officials and candidates can deal with changes. We
2 all know that they dealt with two different primaries
3 based upon federal statutory issue in the last
4 decennial and their law is, obviously, supreme to the
5 state law, but the New York Constitution is supreme
6 to the statutes. So, if New York elections can be
7 held on different times to comply with federal
8 statutory requirements, surely there can be held and
9 deferred timetables to comply with state
10 constitutional requirements.

11 And, then, in terms of practicality, the
12 co-executive director pointed out that everything was
13 already, most everything was already done to get the
14 enacted maps into working order in less than a month
15 and that was in February, which was a short month,
16 plus the counties had to worry about the Assembly,
17 which they wouldn't have to worry about here.

18 So, it is certainly doable to have the
19 remedy for this remedy cycle and I think it's
20 constitutionally essential. If this Court agrees
21 with us that these maps are procedurally or
22 substantively unconstitutional, a putting off of
23 remedies in 2024 will mean the people of New York in
24 the very first election cycle where the 2014
25 amendments are relevant will be subjected to

1 unconstitutional maps.

2 Maryland isn't doing that. North Carolina
3 isn't doing that. There is no reason that New York
4 should do that. Thank you, your Honor.

5 THE COURT: Thank you, Mr. Tseytlin. Mr.
6 Hecker.

7 MR. HECKER: Good afternoon, your Honor.
8 Good to see you again. Eric Hecker, Cuti Hecker
9 Wang.

10 I'm very eager to talk about Maryland and
11 the dramatic differences between what Mr. Trende did
12 in Maryland and did here, which are very, frankly,
13 troubling and we will get to that, but I want to just
14 start briefly by talking about the procedural
15 argument because on March 3rd we didn't have the
16 opportunity to address that.

17 I will be very brief because I, frankly,
18 think the argument is somewhere in between weak and
19 frivolous and there isn't a ton to say about it. I
20 will start with the plain text of the Constitution.
21 The plain text of the Constitution, even after 2014,
22 makes clear in four different places that the same
23 thing is true now as has been true for the last 200
24 years, which is that the Legislature gets to decide
25 ultimately in its unfettered discretion what the map

1 looks like. It says -- where it says in Article 3
2 that the Legislature has unfettered discretion to
3 accept or reject the first commission recommendation.
4 It says it again about the commission recommendation.
5 It says that if it rejects both, it gets to enact any
6 amendments that it deems necessary, and it says a
7 fourth time when it makes clear to reviewing courts,
8 like this court, that if any infirmity is found the
9 Legislature gets the first opportunity to attempt to
10 correct it.

11 So, against that backdrop of clarity, Mr.
12 Tseytlin keeps talking about, quote/unquote, the
13 process. The process. The process. The process.
14 The process is the interplay between the commission's
15 role and the Legislature's role. They are very
16 clearly defined. They are each important and they
17 work in tandem. The commission finds the facts. The
18 commission holds the hearings. The commission
19 considers the testimony and the commission makes
20 recommendations. Then, and only then, does the
21 Legislature do what it does, which is exercise its
22 unfettered discretion to do what it deems necessary.

23 If something happened that interrupted the
24 process, in that sense, we would have a
25 constitutional problem. If, for instance, the

1 Legislature enacted a plan before the commission's
2 deadlines, and it's like well, wait a minute, you
3 didn't even wait for the commission, you didn't
4 consider the commission, that would be a
5 constitutional violation. If the commission plans
6 were presented and the Legislature refused to give
7 them an up or down vote, which they are required to
8 do, that would violate the process.

9 What we have here is a totally unplanned
10 for, unaccounted, unanticipated anomaly, which is
11 that there was a complete abdication of the
12 commission's duty and the Constitution doesn't say
13 anything about what happens then. It is not part of
14 the process at all, expressly or impliedly. And the
15 question is: What do you do then? And Cohen versus
16 Cuomo answers this question squarely on point. It
17 says when you have a constitutional silence, that's
18 the quote from the case, on what to do, legislative
19 discretion is at its absolute zenith and reviewing
20 courts scrutiny of what the Legislature does is at
21 its absolute nadir. And the Court of Appeals, seven
22 to nothing, used some of the most strikingly broad
23 differential language you're ever going to find in
24 any case saying that unless the fundamental law is
25 violated beyond a reasonable doubt the Legislature

1 can still silence.

2 So what does the Legislature do here? The
3 Legislature said that the Legislature has the same
4 discretion to make any amendments it deems necessary
5 when the commission's done nothing that it would have
6 if the commission had done anything. That is miles
7 away from an abuse of discretion under any standard,
8 especially, the Cohen standard.

9 Of course, Mr. Tseytlin has no response to
10 the language in Article 3, Section 5, about how if
11 infirmities are found the Legislature gets the first
12 cut. He is trying to just end-run around that. And,
13 perhaps, most importantly, there's this absurdity
14 inherent in his argument that he doesn't address
15 because he can't, which is that four minority
16 commissioners, if he is right, can unilaterally block
17 the Legislature from doing anything, every time. If
18 your Honor rules for them, what is going to happen in
19 ten years is four minority commissioners are going to
20 block the commission from doing anything and force it
21 into the courts. That's absurd and there's well
22 established case law saying that you don't interpret
23 the Constitution in a way that would lead to absurd
24 results.

25 And then there's the factual allegation in

1 Paragraph 113 of the amended petition, which for
2 reasons that I completely understand, I believe your
3 Honor took an interest in in the March 3rd hearing,
4 and I believe that your Honor's subsequent discovery
5 order reflects an interest in seeing some factual
6 development on this unsworn allegation in Paragraph
7 113. Quote, upon information and belief, the
8 Democratic Caucus of the IRC decided not to submit a
9 compromised congressional map within the
10 constitutional timeframes after receiving
11 encouragement to undermine the constitutional process
12 from Democratic party politicians and officials.

13 They said that in their unverified, unsworn
14 pleading. We now know it is a 100 percent false and,
15 in fact, the opposite of the truth. We know that for
16 two reasons. Number one, our answer is verified
17 under oath. Their petition is not evidence in this
18 case. When you look at the evidence, and we will get
19 to that, you can take the petition and just put it in
20 the waste paper basket because it's not evidence.
21 You can't do that with our answer because it is
22 verified. It is evidence. It is, essentially, an
23 affidavit, and Paragraph 113 of our verified, under
24 oath affidavit, Docket 148 says the following:

25 (Reading) Deny the allegations set forth in

1 Paragraph 113. Contrary to Petitioners'
2 unsubstantiated allegation, the Senate Democrats did
3 not at anytime discourage the commission from
4 submitting a final congressional or state legislative
5 plan or plans to the Legislature by the deadline
6 prescribed in the Constitution, nor did the
7 Democratic commissioners refuse to meet to vote on a
8 final plan or plans to submit to the Legislature. To
9 the contrary, when the deadline for submitting a
10 final plan or plans to the Legislature was looming,
11 the Democrat commissioners sought to convene a
12 meeting of the full commission to vote on a final
13 plan or plans, but the Republican commissioners
14 refused to meet to vote on a final plan or plans. It
15 was the Republican commissioners who prevented the
16 commission from submitting a final plan or plans to
17 the Legislature, not the Democrat commissioners.

18 That is the unrebutted actual evidence in
19 the actual record and you know what, your Honor, Jack
20 Martins, the Republican Chair of the Commission,
21 former State Senator, sat as a state senator until
22 2016, still quite active in party politics. Is there
23 anybody in this room who thinks that if Mr. Tseytlin
24 had called up Senator Martins and said hey, Paragraph
25 113, they swore to it and Docket 148. Is that true?

1 Is there anybody in this room who thinks that Mr.
2 Martins wouldn't have taken Mr. Tseytlin's call?

3 Senator Minority Leader, Senator Ortt, took
4 Petitioners' call when they asked him to put in an
5 affidavit saying that the Legislature didn't hold
6 hearings publically, which, of course, we didn't.
7 The Constitution says the commission holds hearings,
8 not the Legislature. The commission held 24
9 hearings, so I don't understand the relevance of
10 Senator Ortt's testimony that there were no hearings,
11 which we would stipulate to and which is shown in
12 documents that we produced in discovery, but
13 nevertheless, Petitioners wanted an affidavit from
14 him. They called him up and he gave them an
15 affidavit. So to with Todd Valentine, Republican
16 official with the Board of Elections. They wanted an
17 affidavit from him. They called him up. He gave
18 them an affidavit. They know that allegation is not
19 true, your Honor. They know it is opposite of true,
20 but they made it anyway and they let it fester.

21 Okay, let's talk about partisan
22 gerrymandering, and we need to focus like a laser on
23 the evidence that is in the record, okay. This is
24 not a book group where we are reading to each other
25 headlines from the New York Times. This is not a

1 spirited debate in the hallway of a college dormitory
2 about right and wrong in politics. This is a court
3 of law and we have a record.

4 I would ask your Honor to just take a
5 moment when you're preparing your decision to look
6 through the docket and to sift through and sift out
7 what the evidence is on the docket and what the
8 evidence isn't because it is very stark. You have an
9 amended petition, not evidence. They could of
10 verified it. They didn't and, honestly, your Honor,
11 I do these redistricting cases every ten years. My
12 day job is a plaintiff's lawyer and I regularly bring
13 special proceedings on behalf of plaintiffs and
14 anybody who does that is aware of the summary and
15 narrow nature of a special proceeding. You typically
16 don't get any discovery. You typically don't get a
17 trial. You put your papers in. It's like a motion.
18 I am not aware of anybody who as a matter of course
19 would put in an unverified petition in a special
20 proceeding and there is a reason why we verified our
21 answer, but they didn't, for whatever reason, verify
22 their petition, so it is just out of the case in
23 terms of your decision-making. It's just not part of
24 the case.

25 The first moment on the docket where you

1 have any evidence at all is Docket Number 28, the
2 affidavit of Senate Minority Leader Ortt, and as I
3 indicated, I'll stipulate right here and right now
4 that there were no public hearings. The Constitution
5 doesn't contemplate them and the commission had 24 of
6 them and we will get in a couple of minutes to the
7 fact that what the Legislature did, clearly, was very
8 consistent with the copious evidence in the hearings
9 held by the commission.

10 So, okay, Senator Ortt's Docket 28 says
11 there were no public hearings. The only thing left
12 in the entire record, the only thing, is the Trende
13 reports and the Lavigna reports. That's it. There
14 is literally zero evidence in the record directly
15 about any partisan intent. There is no sworn
16 petition. Sorry, I overlooked the petitioners
17 themselves. Each petitioner puts in an affidavit
18 that says here's my address, your Honor. Okay, but
19 that's not about partisan gerrymandering, that's
20 about standing, and we will get to that. There is
21 literally nothing in this record, nothing, about
22 partisan intent, except for Trende and Lavigna.
23 Lavigna limped out of here to the point where Mr.
24 Tseytlin doesn't even mention him in his summation.
25 We will get to Mr. Lavigna, but let's start with Mr.

1 Trende, and I really want to get to the Maryland
2 piece, but I want to start with the basics.

3 There are four fundamental problems with
4 what Trende did and didn't do. There is
5 constitutional factors that he didn't address
6 adequately. There is constitutional factors that he
7 ignored completely. There is his wholesale failure
8 to balance anything, and unlike a lot of other
9 constitutions in other states, New York's
10 Constitution requires balancing and the algorithm,
11 which is where Maryland becomes critical.

12 With respect to the constitutional factors,
13 he didn't address adequately, you've got compactness,
14 county splits and cores.

15 On compactness he sets the thing to one and
16 the reason why he sets it to one is that is the only
17 setting that works, your Honor. He testified on the
18 first day of trial, Page 73, Line 22, that there were
19 performance issues with any other compactness
20 setting. That's why he picked it, not because he
21 thought it best reflected how actual map makers in
22 New York would approach compactness, it was the only
23 setting that worked.

24 County splits, this is Page 82 of his
25 testimony, there's an on or an off button. He turned

1 it on. Someone like Dr. Imai would be able to
2 approach this in a much more nuanced way. Trende
3 either couldn't or didn't. Didn't. He just turned
4 it on.

5 And then with respect to cores, we
6 literally don't know what he did. In his first
7 report he says nothing about it. In his second
8 report, after we took him to task for not saying
9 anything about it, he says at the bottom of Page 19
10 of his second report, quote, I have instructed the
11 simulations to draw maps that considered district
12 core retention. The analysis once again does not
13 change. What does that mean? How did you instruct
14 it to consider cores? What settings did you use?
15 Obviously, if you use an itty-bitty setting, the
16 results are going to be very different than if you
17 used a gigantic setting. What setting did you use?
18 His second report doesn't say. So I asked him on the
19 stand and I wasn't being cute. I was like,
20 seriously, what setting did you use and he said I
21 don't know. I don't know what I did. I don't
22 remember.

23 So that's three big strikes right there.
24 Compactness he just sets to one because no other
25 setting in his algorithm, where Dr. Imai's algorithm

1 even works. It is designed to enable the user to
2 pick any number it wants, below one, above one, but
3 one's the only one that works, so he picks one. He
4 turns county splits on and he doesn't remember what
5 he did with cores and never told us.

6 Then you get to the constitutional
7 requirements that he completely ignored. There is no
8 other case that has expressed constitutional
9 requirements that simulations ignored, your Honor.
10 Not Ohio, not Maryland, not North Carolina. It has
11 never happened before. There's never been an
12 expressed constitutional requirement that a simulator
13 has shrugged and said I ignored it, at all, much less
14 beyond a reasonable doubt standard, but that's what
15 we have here. The Constitution says you can't split
16 towns in a Senate plan. He ignored that. His plan
17 split towns. I asked him under oath if he knows
18 whether his results would change if he had followed
19 that constitutional requirement and at Page 109 of
20 his testimony, Lines 9 through 12, he said I don't
21 know. Block-on-border rule, town-on-border rule, it
22 was a little awkward. He didn't know what they were,
23 never heard of them really, other than the name, and
24 in fairness, it's complicated, hard to understand,
25 even for an expert, but if you're going to come in

1 here and say that your simulations show beyond a
2 reasonable doubt that constitutional criteria were
3 ignored, you need to understand what they are and you
4 need to account for them in your methodology. He
5 just blows off block-on-border and town-on-border and
6 he doesn't know whether it would change his results.

7 Then we get to communities of interest. I
8 think Mr. Tseytlin is being really cavalier about the
9 massive problem we have with communities of interest.
10 The Ohio Constitution says nothing about communities
11 of interest. The Maryland Constitution says nothing
12 about communities of interest. No court has ever
13 relied on simulations in a state where not only is it
14 permissible, but required to consider communities of
15 interest and for good reason. It doesn't even make
16 any sense. How can simulations simulate what an
17 actual map drawer is doing when they are not focused
18 on communities of interest in the state where that's
19 required. It doesn't even make sense.

20 Now, Mr. Trende tries to end-runaround this
21 problem by saying, kind of complaining, they are hard
22 to define. They are not that hard to define. Mr.
23 Trende and Professor Grofman had no problem at all
24 defining communities of interest in Virginia. That
25 doesn't mean that if your Honor and I had done it, we

1 would of done it the same way. We might of done it a
2 different way and maybe behind closed doors Mr.
3 Trende and Dr. Grofman got into it a little bit about
4 disagreements over communities of interest, maybe, or
5 maybe they didn't, but we know for sure in the end
6 they were unanimous that here are the communities of
7 interest and they listed them proudly and in detail
8 in a document that's in the record and they presented
9 it to the Virginia Supreme Court and the Virginia
10 Supreme Court credited it and blessed their proposed
11 map. And then he comes in here and he says they are
12 difficult to define. That's not true. The problem
13 is they're difficult to code. They're impossible to
14 code. That's the problem and that's why no court has
15 ever relied on simulations in any case in a
16 communities of interest state, including Maryland,
17 which I'll get to very soon.

18 So I ask the court to pay careful attention
19 to Exhibit S-4. In my opinion, this is the most
20 important exhibit in the case. This is the four
21 paged exhibit that shows the Upstate configurations
22 in the enacted plan, the Democrat Commission Plan A,
23 the Republican Commission Plan B, and then Dr. Imai's
24 crazy Upstate districts. I was using that word and
25 so was Mr. Trende. It's an appropriate word. We

1 have the ALARM Project samples in the record.
2 They're also publically available. Your Honor could
3 go right after this hearing to the ALARM Project
4 website, download all of Dr. Imai's simulations he
5 did of New York and look at them and see if they are
6 drawing districts the way actual map drawers would or
7 they're not. And what S-4, Page 4, shows
8 definitively is that the three examples that Dr. Imai
9 put pictorially on his website show that those
10 Upstate districts drawn by the very same algorithm
11 are totally nuts. They just really are. We have a
12 situation in which there was broad consensus about
13 how to draw Upstate. The Democrats and the
14 Republicans on the commission agreed there would be
15 four urban blue districts in the four urban centers
16 Upstate, and there would be a Souther Tier district,
17 and then you would fill in the rest with Districts 21
18 and 24. That is what everybody decided to do. That
19 is what all the commission testimony supported, and
20 instead of heeding that, what Dr. Imai did, in good
21 faith, and what Mr. Trende did, is they started from
22 a quote, unquote, blank page, paid no attention
23 whatsoever to what the commission had done, and the
24 consensus that had been formed, just ignored it
25 entirely and started from a blank page. So guess

1 what? The simulated bands look different than the
2 enacted plan. Not because of anything nefarious, but
3 because Mr. Trende just chose to ignore the consensus
4 about communities of interest and do it a completely
5 different way.

6 While I'm here, let's talk about
7 competitiveness for one second while I'm pointing at
8 Mr. Tseytlin's demonstrative because I think it's
9 quite telling. I really don't understand their
10 competitiveness argument at all. I really don't and
11 I'd like to try to explain why. We are standing in
12 District 23 right now. This is not a competitive
13 district. Nobody thinks it is. That's not good or
14 bad. It's just a fact. The fact that this district
15 is highly uncompetitive does not make it
16 unconstitutional. The fact that a Democrat cannot
17 win in this district, other than a seriously rogue
18 blue wave or some kind of crazy scandal right before
19 the election, doesn't make it unconstitutional. It
20 reflects that the men and women who form the
21 consensus on the commission, and the men and women
22 who testified before the commission, all agreed that
23 because the four urban centers are communities of
24 interest, and the Southern Tier should be united as a
25 community of interest, and Congressman Stefanik's

1 district in the North Country is a community of
2 interest, and just fill in the rest of 24, they
3 agreed to do it that way and to respect the cores of
4 the prior districts because that's what the
5 Constitution says to do, respect cores of prior
6 districts and identify and heed communities of
7 interest. It just so happens when you do that the
8 entire Upstate region is totally uncompetitive. Now,
9 you know, exceptions to the rule, like Congressman
10 Katko, who's on his way out, who was unusually
11 popular and consistently won in a blue district, but
12 we're not talking about impossible outcomes. We are
13 just talking about important generalizations. There
14 aren't any competitive Upstate districts. There
15 aren't supposed to be. I just don't really
16 understand what they are saying.

17 By the way, you know which districts these
18 are, your Honor, the ones on the left? This is 21,
19 23 and 24. They are packed with Republicans. I
20 don't even understand what that means. Everybody on
21 the -- who testified before the commission and all
22 the commissioners agreed to pack Republicans into
23 District 23 and form a Southern Tier district. They
24 didn't use that word. It's a dirty, pejorative word,
25 but they purposely drew the district knowing that it

1 would be uncompetitive, not to make it uncompetitive,
2 but knowing that it would be uncompetitive. So it's
3 uncompetitive. I just don't even understand the
4 argument.

5 Balancing. This is where I'll just dip my
6 toe into the Maryland waters. When Trende testified
7 in Maryland he did three different sets of
8 simulations, three different ways. Balancing,
9 compactness, and county splits, which were the only
10 two constitutional requirements that had to be
11 accounted for at all in Maryland. No town splitting.
12 No block-on-border. No town-on-border. No
13 communities of interest. Just compactness and county
14 splitting. That's all he did. And he did it three
15 different ways, balancing those three different ways,
16 to see if the changing the balance affected the
17 outcome, which is a really smart thing to do, because
18 in a state like New York you got to balance a lot of
19 things. In a state like Maryland you only got to
20 balance two things, but you do have to balance them.
21 He did that.

22 Let's talk about his algorithm. This is
23 where the Maryland example gets really important. I
24 won't go into too much detail because I did a lot
25 with Mr. Trende and I'm sure your Honor appreciated

1 the thrust of the questions and the answers. This is
2 a new proposed algorithm from a draft paper that's
3 never been published, let alone peer reviewed. There
4 are known performance issues with it to the point
5 where Trende concedes you can only use one compact
6 setting because the rest of them don't work. Dr.
7 Imai's validation study in the paper that's in the
8 record used 15,000 -- I'm sorry -- 5,000 simulations
9 to validate 50 precincts. We've got over 15,000 in
10 New York.

11 And the redundancy issue. The redundancy
12 issue is so critical, your Honor, so I'm going to
13 spend a few minutes on that, if it's okay. Dr. Tapp
14 talks a lot about redundancy problems. He talks
15 about it in his two reports and he talked about it on
16 the stand. What he found, if consistent with what
17 academics understand about this new draft proposed
18 algorithm that's never been peer reviewed, which it's
19 got this kind of eloquent, brilliant math, but it's
20 very susceptible to high degrees of redundancy, which
21 is why Dr. Tapp explained that he actually did do a
22 reconstruction of what Trende did to see if he found
23 a redundancy problem. This is Paragraphs 47 and 48
24 of his second affidavit, and he found a massive
25 redundancy problem, your Honor. When he reversed

1 engineered what Trende did, as best as he could based
2 on the bread crumbs that Trende left us about his
3 methodology, he found that of the 5,000 simulations
4 3,219 of them were substantially identical. That's
5 an enormous amount of redundancy that Tapp said was
6 consistent with what he really was afraid would be
7 there, and part of the reason he was afraid it would
8 be there is the bimodal distribution. This is
9 critical.

10 I don't know if your Honor recalls, Page 22
11 of the Trende report shows the Polsby-Popper scores
12 of his Senate simulations and you'd expect it to be a
13 bell curve. You don't need to be a PhD in statistics
14 to understand generally speaking in 5,000 random
15 simulations you'd expect a bell curve of compactness
16 kinda, sorta. You've got these twin towers of a huge
17 spike on the left and a huge spike on the right. It
18 makes no sense. Dr. Tapp instantly knew it made no
19 sense and he instantly knew what he thought it was,
20 which is the massive redundancy problem that this
21 algorithm is known to be susceptible to. Then he
22 goes and does a validation study himself, runs 5,000
23 and he finds massive redundancy and he talks about it
24 at length in his report.

25 Now, what did Dr -- Mr. Trende do in

1 Maryland? Do you know how many simulations he ran?
2 Three quarters of a million simulations in Maryland.
3 He ran three tranches of 250,000 simulations using
4 the same algorithm that he used in this case and do
5 you know what happened? He had a massive redundancy
6 problem, massive, and the way he addressed it was,
7 first, by not running 5,000 or 10,000 simulations, he
8 ran three quarters of a million and then when he
9 found this massive redundancy problem he threw out
10 more than three quarters of the maps because they
11 were redundant. Duplicative is the word he used in
12 his testimony in Maryland and the word that the court
13 used in its opinion.

14 Paragraph 99 of the Maryland court's
15 opinion, which they put in the record on Monday,
16 Paragraph 99 of her findings of fact: Quote, in each
17 of Mr. Trende's three simulations he used 250,000
18 maps all suppressing politics and using two
19 majority-minority districts mandated by the Voting
20 Rights Act: He discarded duplicative maps and
21 arrived at between 30,000 to 90,000 maps to be
22 sampled for each simulation.

23 So, he's got three tranches of 250 and
24 those three tranches of 250 each got reduced to
25 somewhere between 30 and 90,000. Massive redundancy

1 and it's starkly kind of proportional to what Tapp
2 found in this case; 5,000 reversed engineered
3 simulations, 3200 duplicative maps. Trende admits
4 three quarters of a million or 250,000 times 3 all
5 had to be culled from 250 down to between 30,000 and
6 90,000 because the duplication is massive.

7 Let's talk about his testimony about that
8 in this case. I honestly find it very troubling, so
9 I'm going to read it to you twice. I'm going to read
10 it once. Then, I'm going to talk about the timeline
11 of what we learned when and then I'm going to read it
12 to you again. This is Page 74 of what Mr. Trende
13 says under oath sitting in that chair right there. I
14 asked him, and this is about the Polsby-Popper
15 bimodal distribution on Page 22 of his report.

16 Question, you see that at the top of Page
17 22 of your original report you have the Polsby-Popper
18 scores for all the stimulated maps? Answer, that's
19 correct. Yes. Question, does anything look weird to
20 you about that chart? Answer, it's how the districts
21 came out. No. Question, well, I know it's how they
22 came out. Does how they came out look weird to you?
23 Doesn't it look like there's two very different
24 clusters, one around the .23 and the other about the
25 .26 range? Answer, it's a standard bimodal

1 distribution. Question, what do you mean by standard
2 bimodal distribution? Answer, they're two bumps.
3 Question, is it your testimony that there is nothing
4 noteworthy about that? Answer, not without going
5 through the maps and looking at them individually.
6 Question, did you go through the maps and look at
7 them individually? Answer, no.

8 Let's talk about the timeline and then go
9 back to that because it is very troubling. On
10 February 14th, Valentine's Day, Trende puts in his
11 first report in this case. On February 24th Tapp
12 puts in his first report saying I don't know about
13 this sample size. Then, on the 28th, four days
14 later, your Honor, Trende puts in this Maryland
15 report with 750,000 gross simulations and massive
16 redundancy problems that have been culled down by
17 more than 75 percent, throwing out more than three
18 quarters of his maps in his report in Maryland.

19 Then, on March 1st he puts in his report in
20 this case, his second report, the day after his
21 Maryland report. Doesn't say a word about that.
22 Doesn't tell you that he's put in 750,000 maps in
23 Maryland and more than three quarters of them were
24 duplicative and he had to throw them out.

25 Then, on March 10th Tapp puts in his second

1 report and he goes into great detail about the
2 redundancy problem, about the reverse engineering he
3 did, and how he found that like three quarters of the
4 maps were duplicative and had to be thrown out and he
5 talks about it under oath in this case.

6 And then, the next day, actually four days
7 later, on March 14th, Mr. Trende got in that chair
8 and he swore under oath to tell the truth and I asked
9 him if the bimodal distribution looked weird and he
10 said nope, two bumps. And I said is there anything
11 weird about that and he said I wouldn't know without
12 going through the maps and looking. He didn't go a
13 step further and say, which I did in Maryland last
14 week and I'm literally leaving from here to get in my
15 car and drive. He testified in Maryland the next
16 day, your Honor, Tuesday, the 15th. Mr. Tseytlin
17 asked me as an accommodation if Mr. Trende could
18 testify first so he could go and get in his car and
19 make it for his testimony Tuesday morning. And he
20 sat there under oath and he didn't continue and say
21 by the way, if we did look at them that'd be a pretty
22 good idea because when I did that in Maryland to my
23 three quarters of a million maps I had to throw out
24 more than three quarters of them. Very troubling,
25 your Honor. I hope the Court's troubled.

1 Let's talk about the gerrymandering index,
2 which has never been used before in any case and that
3 Mr. Trende just made up. It's a total misnomer. The
4 gerrymandering index measures gerrymandering when all
5 the other variables have been accounted for. When
6 variables have not been accounted for the index
7 measures the things that haven't been accounted for.
8 So when you actually apply all of the criteria that
9 the map makers were required to apply, and did apply,
10 except for partisanship, and you see a big delta,
11 that is a gerrymandering index. When you ignore
12 communities of interest in a state where that's an
13 affirmative constitutional requirement, and where we
14 know from S-4 that when you do apply communities of
15 interest you get dramatically different results than
16 when you don't, it would be more apt to call it, and
17 I didn't bother to apply communities of interest
18 index, because that's all it's measuring, the fact
19 that you didn't do it.

20 Let's talk about Mr. Lavigna, who is so
21 mortally wounded that Mr. Tseytlin didn't even
22 mention him in his summation and is one of two people
23 who is offering any evidence in this case at all from
24 which you could possibly infer partisanship, the only
25 evidence. Mr. Lavigna I found to be a very likeable,

1 honest guy. I have no doubt that he's a great
2 pollster. If I were to run for Senate as a
3 Republican I'd probably hire him as a pollster. I'd
4 love to get a beer with him. He doesn't know the
5 first thing about redistricting, your Honor. He says
6 throughout his report no coherent explanation.
7 That's his pull the string and let it go. No
8 coherent explanation. No coherent explanation for
9 everything. District 3, Congressional District 3, no
10 coherent explanation. Well, now we know that there's
11 a really coherent explanation, which is that District
12 3 was underpopulated by almost 38,000 people.
13 Districts 1 and 2 are underpopulated by like over
14 80,000 people. All that population has to shift west
15 and then you hit a Voting Rights Act wall in
16 Districts 5, 6, 14, 15 and 16. They form a wall from
17 the south shore of Long Island up to almost the Long
18 Island Sound, except there's a little break at the
19 top, and they form a wall in the Bronx, not that far
20 from the eastern part of the Bronx. So, you just
21 have this sliver of space around the wall and all the
22 population has to go west. It has to. So it's just
23 like the Army Corp of Engineers moving a dam, the
24 water gets diverted. The population could only go
25 there. Anybody who knows anything about

1 redistricting knows that. Professor Ansolabehere
2 testified about it very clearly. It was the only
3 place the population can go and yet Mr. Lavigna said
4 there's no coherent explanation. And again, I give
5 him credit for being, without exception, the most
6 honest expert witness I've ever seen on cross. It
7 was just a concession fest. Every question that Mr.
8 Goldenberg asked, no fighting, no squirming. Not the
9 kind of thing we got with Mr. Trende. Mr. Lavigna
10 just gave it up every time. Mr. Goldenberg, I did
11 not consider population at all when I said there was
12 no coherent explanation for District 3. Mr.
13 Goldenberg, I did not consider those Voting Rights
14 Act districts and their placement and the fact that
15 it made it impossible to run over them when I said
16 there was no coherent explanation. He just gave it
17 up.

18 Same with District 11. District 11 you
19 have a population shift problem. 8 and 10 are both
20 overpopulated. 9 and 11 are both underpopulated. 8
21 and 9 are Voting Rights Act districts, so you can't
22 tinker with them too much. They need to be
23 respected. District 10, no coherent explanation for
24 District 10. It's the same district that was drawn
25 by the special master in federal court ten years ago

1 with one significant exception, which is that for the
2 first time ever it uncracks the Chinese-American
3 community that had been problematically cracked
4 between 10 and 11 in the old plan and it unites them
5 in 10. So Mr. Lavigna says in his report, this is
6 Page 4 of his original report: Quote, the
7 Legislature also divided and established Asian
8 community in District 10 by moving half of it to
9 District 11. That's just wrong. We know it's wrong
10 because Dr. Ansolabehere said it's wrong and we know
11 it's wrong because Mr. Lavigna, to his credit,
12 admitted he was just wrong. He just made a mistake
13 when he said that. Pretty important allegation,
14 just 180 degrees wrong. The truth is, and this is
15 undisputed, there's no testimony rebutting it, nor
16 could there be because the map is what it is, that
17 the Chinese-American community used to be cracked
18 between 10 and 11. There was copious testimony
19 before the commission that that's not ideal and they
20 should be united into 10. Now they are united into
21 10, and if you look at the map, when 10 goes down to
22 Bath Beach to grab the Chinese-American population
23 that had been problematically cracked in the last
24 plan, it means that the 280,000 people that you need
25 to add to Staten Island and 11 from Brooklyn can't

1 come from the east. They can only come from the
2 north. So just like a tube of toothpaste, you
3 squeeze it and it just goes up north to the only
4 place it can go given the Voting Rights Act
5 constraints and the eminently reasonable decision to
6 uncrack a cracked community, which is what the
7 Constitution says you're supposed to do. Pay
8 attention to communities of interest. Pay attention
9 to the dilution of minority voting stats.

10 No coherent explanation, Lavigna says, and
11 then he admits, yep, that makes sense. By the way,
12 Trende's reply report, lest we lose the forest for
13 the trees, where he freezes the Voting Rights Act
14 district, he showed not only that these districts,
15 based on the statewide index they are trying to use
16 in his first report, give the Republicans at least as
17 much as you'd expect based on the simulations, but
18 his simulations show that there is literally not a
19 single simulation he ran that gives a Republican lean
20 to District 11. Not one. It's just an inherently
21 Democratic area. Close, but the simulations can't
22 even draw it as Republican and that gets me back to
23 this competitiveness thing. District 11 is more
24 competitive now than it used to be. That's a fact.
25 They don't like the fact that it now leans a way they

1 don't like, but it's more competitive, not less
2 competitive. Upstate is not as competitive as it
3 could be because we respected cores and communities
4 of interest and nobody disagrees with that. So, I
5 just don't understand the competitiveness point and I
6 don't understand how your Honor can be expected to
7 write an opinion based on this record telling the
8 Legislature like which districts have to be more
9 competitive and why. It's not a coherent argument
10 and there's no evidence in the record supporting it.

11 Then, you get to Mr. Lavigna's no coherent
12 explanation about Upstate and it becomes really a
13 little embarrassing. Not only has he just completely
14 ignored that Plan A, Plan B, and the enacted plan all
15 do the same thing, which is the four blue urban
16 centers, Southern Tier 23, Stenfonik, fill in the
17 rest with 24. No coherent explanation. I guess,
18 none of us is coherent except Mr. Lavigna. Although,
19 we know he's not because his chart, not just in his
20 initial report, but in his reply report, he is
21 comparing old district numbers to new district
22 numbers Upstate when it's different districts. He's
23 like old District 22 and new District 22 are really
24 different. Of course, they are. They're not the
25 same district. Old District 22 is gone. It's now

1 24, Mr. Lavigna, and it's not just that he did it in
2 his first report, he did it in his second report,
3 after in our verified answer we called him out on it.
4 But to his credit, when Mr. Goldenberg was like, Mr.
5 Lavigna, on cross he said, no, you're right, I made a
6 mistake.

7 The Senate, you know, here the battle of
8 the experts was really extremely one sided. You have
9 Mr. Lavigna, who respectfully is an expert in a lot
10 of things, but just not redistricting, obviously.
11 And then you have a true state Senate redistricting
12 expert in Mr. Breitbart, somebody who's done it
13 repeatedly for the last forty years and is a
14 veritable encyclopedia about what to do, what not to
15 do, what's been done, what needs to be done. He
16 testified without contradiction that you have this
17 massive population equality problem that's really
18 double. Half of it is that there was this egregious
19 2012 Republican gerrymander where they went right up
20 to the constitutional ten percent population
21 deviation limit in order to rob Downstate of a
22 district and move it Upstate artificially, which is
23 where you got the 9.8 deviation or whatever it was.
24 You have to undo that if you want to be fair. And
25 then because things have changed over the last ten

1 years significantly, naturally there's been a
2 migration of another district from Upstate to
3 Downstate. So, the deviation of this plan is 1.62
4 percent. It would be much closer to zero if it
5 weren't for the anti-town splitting and
6 block-on-border and town-on-border rules. 1.62 is,
7 essentially, zero given those rules, and getting it
8 from close to the constitutional precipice, where it
9 was, down to close to zero, where nobody could deny
10 would be the most fair place for a population
11 deviation to be, necessarily required moving a lot of
12 people, or as Dr. Ansolabehere explained, moving
13 boundaries a lot to make sure that people are
14 captured the right way. Mr. Lavigna never considered
15 that. No coherent explanation for what was done on
16 Long Island nearing Huntington, but he didn't know
17 that Huntington had been improperly and unlawfully
18 split in 2012 and it was corrected in this plan. He
19 had no idea that the cities New Rochelle,
20 Schenectady, Troy, Saratoga Springs, and Auburn were
21 split under the old plan but have been made whole
22 now. He just didn't know.

23 Partisan lean. I'm glad that Mr. Tseytlin
24 agrees that Dr. Katz has impeccable credentials, that
25 he's testified dozens of times, including most of the

1 time for Republicans, and he's testified definitively
2 that there's no statistically significant partisan
3 lean in the Senate plan. And, if anything, it's
4 tilted a little bit in favor of the Republicans. Mr.
5 Tseytlin is correct that he wasn't trying to infer or
6 define intent. His methodology just doesn't allow
7 that. He's just a symmetry guy, and in these other
8 cases in which simulations were used, those were
9 symmetry cases. Ohio is not an intent state. It's a
10 symmetry state. Article 11, Section 6, of the Ohio
11 Constitution, essentially, requires proportionality.
12 It's in their Constitution. So, the Ohio case was
13 all about people like Dr. Katz fighting it out about
14 symmetry and there was some throw in about
15 simulations. That was kind of the tail wagging the
16 dog and wasn't hard to do because there was no
17 anti-town split rule, no communities of interest
18 rule, no block-on-border rule. Very, very different,
19 but it's obviously highly relevant that Dr. Katz has
20 testified without any contrary evidence that there's
21 no partisan lean in the Senate plan, except maybe a
22 slight Pro-Republican lean and that report did not
23 come in at the eleventh hour. You know when that
24 report came in? On the date that your Honor said it
25 should come in. Were we supposed to file it early?

1 Mr. Trende has testified in other cases about
2 partisan lean. He's testified in other cases about
3 partisan symmetry. Why didn't they ask him about it?

4 I want to say a couple of words about
5 standing and then I'll wrap up. The language in the
6 Constitution at the suit of any citizen, I might be
7 misremembering, but I believe your Honor might have
8 suggested on March 3rd that that language was
9 inserted in 2014. It wasn't. It was inserted in
10 1894. It's always been there in every redistricting
11 case. You have never in the history of this state
12 had, notwithstanding that language, it's been there
13 the whole time, had somebody come to Steuben County
14 living in Steuben Company complaining about Long
15 Island, nothing like that ever in any case in the
16 last 200 years, including since this language was
17 inserted in 1894.

18 Now, the Society of Plastics case that both
19 sides cite and that is the seminal case, Chief
20 Justice Kaye very clearly talks about constitutional
21 requirements and prudential requirements. I will
22 grant you, and I like making concessions, at the suit
23 of any citizen gives you constitutional jurisdiction
24 to hear stuff about Long Island. It's in the
25 Constitution. It says at the suit of any citizen.

1 So, you don't stop there. Society of Plastics says
2 you don't stop there. There has to be prudential
3 limitations as well that make sense. And the quote
4 from Society of Plastics at Page 773 is: To this
5 essential principle of standing courts have added
6 rules of self-restraint or prudential limitations; a
7 general prohibition on one litigant raising the legal
8 rights of another and the requirement that the
9 interest of injury asserted fall within the zone of
10 interests. It's not a constitutional adoption. It's
11 common sense doctrine so courts don't overstep.

12 I'm sure your Honor recalls when Mr.
13 Breitbart was on the stand and you had a question
14 about the block-on-border rule in White Plains, that
15 squiggly line, and you said but White Plains is cut
16 and he said it is and let me tell you why and he
17 explained it. If you touch Long Island in this case
18 or if you touch any area in which a petitioner
19 doesn't live, it's going to invite people, it's going
20 to invite people from Steuben County to come into
21 this court and complain about a block-on-border
22 violation in White Plains. Because why not? At the
23 suit of any citizen. If somebody did that, wouldn't
24 you say, you know, Society of Plastics, prudence, I'm
25 not sure it makes sense for me to exercise my

1 jurisdiction to hear this case. Why don't you go to
2 White Plains.

3 To sum up, your Honor, I don't want to push
4 this too far, but I want to acknowledge one elephant
5 in the room. Petitioners came to Steuben County on
6 purpose. They came to Steuben County because they
7 were hoping that coming here would be better for them
8 than going somewhere else. Obviously, and again, I'm
9 a plaintiff's lawyer. Fair is fair. When you have
10 the opportunity to go somewhere sometimes you take
11 it, but I really think they have put you in a very
12 difficult position because they just haven't given
13 you close to enough. If your Honor has any doubts
14 about either of these plans, okay, but can your Honor
15 say, based on what they've put in the record, beyond
16 a reasonable doubt, that this plan is
17 unconstitutionally infected with partisan intent when
18 all they have is Lavigna, who is out of the case, and
19 Trende who did 750,000 simulations with massive
20 redundancy problems and didn't own it in this case
21 when he knew. He was sitting there. He knew about
22 the problem. By the way, if I had known at the time
23 I would of clobbered him with it. I didn't know. I
24 found out later. He knew. Mr. Trende knew about the
25 massive redundancy problem.

1 And here's just the kicker, your Honor.
2 Where are his maps? Where are they? Can we see
3 them? We know from Exhibit S-4 that the Imai
4 algorithm, when Imai used it in New York using the
5 same methodology as Trende, drew crazy districts. I
6 would like to see the maps that he drew in this case,
7 the 5,000, the 10,000, because if I could see them, I
8 would do two things. Number one, I would see how
9 many of them drew crazy Upstate districts and how
10 many of them maybe drew districts that looked
11 something, something like what an actual map drawer
12 would actually draw, and then we could throw out the
13 crazy ones and see how many are left. I'd love to do
14 that. I can't. We'd also see how many are
15 redundant. Tapp showed that 3219 out of 5,000 would
16 be expected to be substantially duplicative. Trende
17 knew that, which is why he upped his number to three
18 quarters of a million in Maryland and threw out most
19 of them, Threw out most of them, and he said under
20 oath I don't know whether the bimodal distribution is
21 the problem without going through the maps and
22 looking at them individually. It is their burden of
23 proof, your Honor, and I'm not talking about
24 preponderance. Overwhelming, the highest burden
25 known in law, beyond a reasonable doubt and there's

1 no maps. Why are there no maps? Mr. Tseytlin says
2 we didn't run our own simulations. I'll tell you
3 why. You can't. You can't effectively run
4 simulations to divine intent in a communities of
5 interest state, let alone one with the
6 block-on-border rule, the town-on-border rule. If we
7 could do it, we would of done it. What we could do
8 was reverse engineer his kind of cruddy, insufficient
9 system, enough to show massive redundancy and we did
10 that, but we can't come in here and do this exercise
11 in a communities of interest state. It's never been
12 done before.

13 Anyhow, I just don't see, despite any
14 doubts your Honor may have about some of the wavy
15 issues that have been raised, I don't see how you can
16 say beyond a reasonable doubt that Trende proves
17 their case, which is all they have, without the maps.
18 Where are the maps? Imai's maps are on the ALARM
19 Project site. Where are Trende's maps? How do you
20 write an opinion crediting Trende and striking this
21 plan down without those maps? I just think it's
22 impossible and I would just urge your Honor to tell
23 Petitioners you gave them a fair trial, you heard
24 them out, Lavigna bled out, the only thing that's
25 left in the record at all, at all, is Trende. It is

1 just not enough, not even close to enough without the
2 maps.

3 On remedy, I don't really want to talk
4 about remedy because there's nothing to remedy here.
5 But another elephant in the room, and I say this
6 respectfully, and I know you know I'm saying it
7 respectfully, it applies to every trial judge in the
8 State of New York, you get to decide who wins but
9 then there's an automatic stay. So if you say they
10 win, okay. If you say they win and I'm changing the
11 election calender, that decision just stops in its
12 tracks. Nothing personal. It's just the way it
13 works in the State of New York. So what you would be
14 doing, what they are inviting you to do in the middle
15 of the election season, when we are a few days away
16 from the end of the petitioning period, is to have
17 you say I'm throwing out the map and I'm changing the
18 election calender, but the lawyers who know what 5601
19 says understand that it's stayed, but like the rest
20 of the state is not going to understand that. It's
21 going to sow massive confusion. So, please rule for
22 us, and if you don't, just say whatever you want to
23 say about the infirmities in the plan and let the
24 appellate courts do their thing. Every state that
25 has every tinkered with the election calendar, and we

1 cite many, many, many in our briefs, recently 2021,
2 that don't. The couple that have, it's come from the
3 state's highest court. The Maryland judge did not
4 change the election calendar. It was the state's
5 highest court that did. I just don't think that's
6 something that would be a good idea for you to do.
7 Thank you, your Honor.

8 THE COURT: Thank you, Mr. Hecker. Who on
9 Respondents' side will be next? Mr. Bucki.

10 MR. BUCKI: I will, your Honor. First, I
11 just wanted to inquire, I know our stenographer has
12 been going for an hour and thirty-five minutes
13 straight, whether our stenographer requires a break.

14 THE COURT: Maybe we will take ten minutes.
15 We will start again. I think we'll go to 12:30 and
16 take a break for lunch, if we're not completed, and
17 finish after lunch. We will take ten minutes. Thank
18 you.

19 (Break taken.)

20 (Exhibit A-3 was marked for
21 identification.)

22 THE COURT: Mr. Bucki on behalf of the
23 Speaker of the Assembly. Mr. Bucki.

24 MR. BUCKI: Yes, your Honor, and before I
25 begin, there is a demonstrative aid that I have

1 erected on the easel and I've also had marked as
2 Assembly Exhibit A-3 for identification, and with
3 your Honor's permission, I'd like to approach the
4 bench and give you a smaller version of the
5 demonstrative aid, which should be easier to read.

6 THE COURT: Please do. Thank you. Go
7 ahead, Mr. Bucki.

8 MR. BUCKI: Good morning, your Honor.
9 Again, Craig Bucki from Phillips Lytle in Buffalo,
10 New York on behalf of Speaker Carl Heastie of the New
11 York State Assembly.

12 First, I'd like to begin by saying that we
13 join and second and agree with all of the arguments
14 that were made very eloquently by Mr. Hecker with
15 respect to the Senate map that was enacted. We agree
16 that the Senate map should remain in force and that
17 the challenge to that map should be rejected for all
18 of the reasons that Mr. Hecker stated. Where I would
19 like to focus in particular is on the congressional
20 map that was enacted and why that map should remain
21 in place and where I'd like to begin is with the
22 standard of review in this case, because I do not
23 think it can be emphasized enough.

24 And with respect to the standard of review,
25 we are fortunate that only nine days ago, as recent a

1 pronouncement as one could possibly have, the New
2 York Court of Appeals entered a decision with respect
3 to the standard of review that needs to be followed
4 and applied in any kind of case in which the
5 constitutionality of a statute is challenged and that
6 is what we have here, a challenge to the
7 constitutionality of two different statutes. One,
8 enacting in words the contours of the congressional
9 map and another one enacting in words the contours of
10 the Senate map. And that case is White versus Cuomo,
11 which was rendered on March 22nd and White versus
12 Cuomo was about the constitutionality of the law that
13 authorized sports betting in the State of New York.
14 And, in fact, the Court of Appeals upheld that law in
15 opposition to the argument that this was an
16 authorization of illegal gambling, rather than a game
17 of skill in terms of predicting whether the Buffalo
18 Bills are going to win on a particular Sunday. I
19 thought that in particular the language in the
20 decision really focuses well the kinds of questions
21 that the Court needs to ask in evaluating the
22 challenge that has been made by the petitioners.

23 So Judge DeFiore, the Chief Judge of the
24 State of New York said it is well settled that
25 legislative enactments are entitled to a strong

1 presumption of constitutionality, and courts strike
2 them down only as a last unavoidable result after
3 every reasonable mode of reconciliation of the
4 statute with the Constitution has been resorted to,
5 and reconciliation has been found impossible. Thus,
6 while the presumption of constitutionality is not
7 irrefutable, as the party challenging a duly enacted
8 statute, plaintiffs, here the petitioners, face the
9 initial burden of demonstrating [the legislation's]
10 invalidity beyond a reasonable doubt. Moreover, as
11 the party mounting a facial challenge, which is what
12 we have here, plaintiffs bear the substantial burden
13 of demonstrating that in any degree and in any
14 conceivable application, the law suffers wholesale
15 constitutional impairment. And I would submit that
16 this is the highest possible standard under the law
17 that the petitioners would need to satisfy. They
18 don't need to prove their case by a preponderance of
19 the evidence. We're not talking about clear and
20 convincing evidence. We're talking about beyond a
21 reasonable doubt just as if this were a typical
22 criminal case.

23 And, in fact, Matter of Wolpoff versus
24 Cuomo, from about thirty years ago, is consistent
25 because there, likewise, the court said that we

1 examine the balance in the redistricting context
2 struck by the Legislature in its effort to harmonize
3 competing Federal and State requirements. I'm going
4 to talk about those in a little bit. It is not our
5 function to determine whether a plan could be worked
6 out that is superior to that set up by the
7 Legislature. Our duty is, rather, to determine
8 whether the legislative plan substantially complies
9 with the Federal and State Constitutions. A strong
10 presumption of constitutionality attaches to the
11 redistricting plan and we will upset the balance
12 struck by the Legislature and declare the plan
13 unconstitutional only when it can be shown beyond a
14 reasonable doubt that it conflicts with the
15 fundamental law and that until every reasonable mode
16 of reconciliation of the statute with the
17 Constitution has been resorted to and reconciliation
18 has been found impossible. And one will find some of
19 this same language by doing a cross reference to the
20 decision that came down in White versus Cuomo only
21 nine days ago.

22 And we can also find some of this language
23 in the case of Cohen versus Cuomo. Now, Mr. Hecker
24 is a great colleague and an outstanding lawyer.
25 Unfortunately, in 2012 he was representing some of

1 the litigants in Cohen versus Cuomo and there the
2 question was how many state senators did there need
3 to be under a plan. The plan that was enacted said
4 there would be 63 state senators and there was a
5 dispute as to whether there should be fewer and the
6 Constitution was really murky as to how that number
7 should be calculated. And so the Court of Appeals
8 said well, it was a reasonable calculation that the
9 Legislature made and, therefore, the beyond a
10 reasonable doubt standard is not satisfied and we are
11 going to give deference to the choice that was made
12 by the Legislature. And so that precedence from
13 Cohen versus Cuomo applies equally here ten years
14 later.

15 And that gets us first into the procedural
16 argument, which I think is worth addressing. In
17 Cohen, like I said, there was silence in the State
18 Constitution as to how particularly it was required
19 to determine the number of senators that there needed
20 to be. And as Mr. Hecker said, when there is that
21 silence, and when one cannot tell clearly what the
22 Constitution would command in a situation such as
23 that, one needs to give the benefit of the doubt, the
24 win on the jump ball, to the Legislature. And that
25 is exactly what happened in Cohen versus Cuomo and

1 further, the Legislature had the prerogative if there
2 is some gap in the constitutional language to enact a
3 statute to fill in the gap, and that is precisely
4 what happened here. There was a statute that was
5 enacted November 2021, which actually had been passed
6 by the Legislature several months before, but it was
7 signed into law by the Governor in November 2021 that
8 said that if there was going to be some minority of
9 members of the Independent Redistricting Commission,
10 who simply were not going to do their job and who
11 were not going to issue a map for the Legislature
12 consideration, that the Legislature was free to take
13 back its prerogative under Article 3 of the State
14 Constitution and draw a map on its own and that is
15 precisely what has happened here. And so to conclude
16 that that procedure was somehow unconstitutional
17 would be very much contrary to the precedent that
18 came from the New York Court of Appeals in Cohen
19 versus Cuomo and that is why the procedural argument
20 made by at the petitioners, we submit, fails and that
21 is why Mr. Hecker agrees.

22 So, now moving to the evidence that was
23 brought forth in this case, I want to try to focus on
24 several macro concepts because it is easy, especially
25 given the fact that I wasn't a math major, it is easy

1 to get lost in the weeds of the various intricacies
2 of the simulations that were done and the various
3 intricacies of the mathematical calculations that
4 need to be done in order to interpret what those
5 simulations say. So I want to focus on these macro
6 level concepts in order to really bring home for the
7 Court why the petitioners have not proven their case
8 beyond a reasonable doubt.

9 Before we even talk about the substance of
10 the simulations and what was done, I think it is
11 important to recognize the inherent limits in the
12 simulations that were done. The simulations that
13 were done by Mr. Trende are based upon the work of
14 Professors McCartan and Imai that was set forth in a
15 paper that they have written that is actually
16 undergoing substantial revision right now. It is
17 undergoing a peer review process. It has been
18 released for peer review for others in the
19 mathematics and statistics and political science
20 communities to comment, but it isn't a final draft.
21 And, in fact, as Dr. Tapp said, depending upon what
22 comments there may be from academia, the paper may be
23 substantially changed. And yet Mr. Trende's
24 simulations are going off this draft paper that is
25 subject to revision. Simulations happen on a

1 computer and the important thing to remember, even if
2 one wants to give any countenance to the simulations
3 that were run, is that simulations don't draw maps.
4 Simulations don't vote. Computers don't draw maps
5 and computers don't vote. People draw maps and
6 people vote. And so just because Mr. Trende comes up
7 with this simulation whereby he claims to predict
8 what is going to happen in a particular election does
9 not mean that that is what's going to happen. A good
10 example is from when I was in law school in New York
11 City. There were sixteen years of Republican mayors
12 in about as blue and Democratic city as one could
13 possibly have. First, Rudolph Giuliani, followed by
14 Mayor Michael Bloomberg, because there were local
15 issues at play whereby people notwithstanding their
16 party affiliation decided that they wanted to vote
17 for the candidate rather than for the party. And
18 that is why you had the election results that you did
19 over the course of those sixteen years.

20 Likewise, as my colleague Mr. Chill noted
21 on his cross-examinations, there are a wide variety
22 of circumstances that affect how people vote.
23 Current events; the high price of gasoline; the
24 response to the war in Ukraine; whether people like
25 the incumbent or not; whether the incumbent is set by

1 some scandal; whether it's a wave election where
2 people's vote on local issues is determined by how
3 they perceive national issues; how well a candidate
4 is financed. All of these are factors that go into
5 how people vote and so as a consequence the
6 simulations that were done have an inherent
7 limitation in their ability to predict what is going
8 to happen in elections because really when you take
9 away Mr. Lavigna's discredited testimony, all you
10 have are the Trende simulations and the Trende
11 simulations don't necessarily tell us what the
12 effects are going to be because what the petitioners'
13 case is, look at the simulation effect and that is
14 how we divine partisan intent. And I would submit
15 that simply relying upon simulations without more,
16 which is really all the petitioners have, is not
17 enough to satisfy their burden.

18 But let's assume that it is. I would
19 submit that the key take away from this entire case
20 is that the simulation is only as good as the data
21 that the person doing the simulations puts into the
22 computer. And, in fact, this is such a basic concept
23 in the world of computer science that there is a term
24 that has been developed by computer scientists and
25 that is so pervasive a term that, in fact, there is a

1 Wikipedia page entirety devoted to this term and the
2 phrase that I'm going to use, which really is the
3 summary of what my closing argument is going to be
4 about is, garbage in, garbage out.

5 What does the phrase garbage in, garbage
6 out mean? What it means is that if you put into the
7 computer data that is flawed, data that is bad, data
8 that doesn't make sense, data that does not account
9 for all kinds of factors that need to be accounted
10 for, then your output, what you get out of the
11 computer after the computer does its work, is simply
12 not reliable. And that is the situation that we have
13 here. You know, Mr. Tseytlin says that the
14 respondents have failed to engage with the data that
15 was brought forth by Mr. Trende. I would submit we
16 have engaged with the data, except the inputs were
17 bad and the outputs were bad too.

18 So, how I'd like to structure my discussion
19 of the substance of the closing argument is first by
20 talking about the garbage in, the inputs that make
21 the data unreliable, and second talking about the
22 garbage out, how even if one were to assume that the
23 inputs were reliable, the outputs were either not
24 appropriate or misread or riddled with inaccuracies,
25 all of which give rise to reasonable doubt.

1 So, first of all, the garbage in. We are
2 talking about Monte Carlo simulation and Monte Carlo
3 simulation has that name for a reason. Because Monte
4 Carlo, of course, is the very famous casino in
5 Monaco. It's a really interesting place. I've had
6 the privilege of being there once. And just as would
7 be true in Monte Carlo if you were rolling dice on
8 the craps table to see what numbers are going to come
9 up, in the simulation aspect of redistricting what
10 Monte Carlo simulation means is you put your numbers
11 into the computer and effectively you're rolling the
12 dice because it's the computer that is going to
13 randomly generate however many simulations it is that
14 you tell the computer to generate. But there can be
15 times when the computer produces results that are not
16 exactly representative of the full panoply of results
17 that could come out of the simulations. So if we
18 were to use the simple example of rolling dice, this
19 would be a circumstance where if you have a six-sided
20 dice, and you have two of them, whereby you program
21 the computer in such a way that all you're going to
22 come up with are double-sixes or double-fives or a
23 three and a five, whereby a whole host of possible
24 options aren't going to come up given the way that
25 the computer is calculated, and given the way that

1 the algorithm is applied, and that is what besets the
2 simulations that were done by Mr. Trende.

3 So the first way in which there was garbage
4 in is the fact that his sample of maps was not a
5 representative sample. And the lack of
6 representativeness of the sample arises from the
7 choices that Mr. Trende made in terms of how he
8 programmed the computer. So, for example, and this
9 is probably the biggest problem, he did not code and
10 he could not code for a consideration of the various
11 communities of interest that might be joined in a
12 particular district. He acknowledged that it's
13 impossible to do and I would submit if it's
14 impossible to do, then why are we relying upon these
15 simulations in order to try to prove a case beyond a
16 reasonable doubt because it's right in the State
17 Constitution that communities of interest is one of
18 the factors that requires -- that is required to be
19 considered.

20 In addition, he said well, I had a
21 particular instruction for the computer that we
22 should minimize county splits and, in fact, it was
23 Dr. Tapp who testified that the way Mr. Trende did
24 the algorithm and the programming that there were
25 only going to be about 12 to 16 county splits allowed

1 at any one time. Well, the problem with this is,
2 first of all, the State Constitution doesn't just say
3 let's try to avoid county splits. It also says to
4 the extent practicable, let's try to avoid city
5 splits. Let's try to avoid town splits. Let's try
6 to avoid splits of communities of interest. And so
7 the way Mr. Trende programed the computer, he
8 elevated the aversion to county splits over all of
9 these other criteria that needed to be considered and
10 that, in fact, legislators could consider and could
11 give priority to those criteria over the issue of
12 county splits.

13 So, a good example is Congressional
14 District Number 3, that is the congressional district
15 that goes along the shores of the Long Island Sound
16 starting in Nassau County, going up through the
17 Bronx, and around to West Chester, and this is one of
18 the districts that Mr. Trende and Mr. Lavigna said
19 the shape simply did not make sense and, therefore,
20 this must be an example of parties in gerrymandering.
21 Well, if one considers that, number one, the
22 communities along the Long Island Sound are a
23 community of interest given their proximity to the
24 watershed and, second of all, that the shape of the
25 district needs to navigate around various other

1 districts that need to be as they are because of
2 requirements under the Federal Voting Rights Act,
3 then the shape absolutely makes sense, but there was
4 no way for Mr. Trende to program that kind of
5 consideration into his computer and, in fact, he did
6 not do that.

7 So, Mr. Trende in terms of doing his input,
8 he was only going to come up with what a map would
9 look like if it were drawn by his algorithm using the
10 parameters that only he knows and he was placing his
11 own subjective weight on certain criteria when it was
12 well within the province of the Legislature to place
13 a greater weight on other criteria, like communities
14 of interest, like the fact that the Legislature was
15 striving to maintain the cores of the old districts
16 from the 2021 map.

17 And so by failing to account for the whole
18 panoply of possibilities that legislators could
19 consider in drawing these maps, that made the
20 ensemble of Mr. Trende unrepresentative of the full
21 panoply of perfectly permissible changes that the
22 Legislature could have made, entirely
23 unrepresentative of the various legally compliant
24 maps that could be expected without any reliance at
25 all on partisanship considerations.

1 So, the first aspect of garbage in is the
2 lack of representativeness of the maps.

3 The second aspect of garbage in is how Mr.
4 Trende went about calculating partisanship. I
5 thought that Dr. Barber testified very persuasively
6 about the right way to calculate partisanship and the
7 right way to calculate partisanship is actually
8 referenced by Mr. Trende in Footnote 2 at Page 12 of
9 his initial report. And the right way of doing it is
10 to take data from statewide elections and, in fact,
11 that is what Dr. Barber did in trying to replicate
12 the analysis that Mr. Trende did. He took the data
13 from seven different statewide elections and why we
14 use statewide elections to calculate partisanship is
15 that statewide elections have a good way of washing
16 out the unique aspects that come up in elections that
17 take place more of a local nature.

18 So, for example, the Katko District whereby
19 Congressman Katko, even though he was running in a
20 D-lean plus 55 percent district, was able to win
21 election because people simply liked him and thought
22 that he was doing a good job. Statewide elections
23 have a better way of controlling for those extraneous
24 variables that can get in the way. So, what Dr.
25 Barber did is actually what Professor Imai would have

1 done and has done, which is take all of this
2 statewide election data and calculate the average in
3 terms of determining what the partisan lean of the
4 district would happen to be.

5 Now, Mr. Trende, by contrast, calculated
6 his gerrymandering index, which as Mr. Hecker noted,
7 is a pretty novel concept and there is nothing wrong
8 with novelty, but what the gerrymandering index that
9 Mr. Trende applied does is it only summarizes how
10 closely a party's vote share in the district matches
11 the vote share that can be expected from the maps
12 that are created in the ensemble. So, if you have a
13 bad ensemble consisting of unrepresented maps, then,
14 therefore, the gerrymandering index really doesn't
15 tell you much because it's based upon an evaluation
16 of an unrepresented set of data. And further, even
17 if you did have a representative set of data, the
18 gerrymandering index wouldn't necessarily tell you
19 which party is favored in a given district. It
20 wouldn't necessarily tell you whether competition is
21 discouraged in a certain district. All that it tells
22 you is that there may be reasons for why you see the
23 index that's in effect and one of the fatal flaws in
24 Mr. Trende's analysis is that he assumes that
25 wherever you see this high, or in his view, high

1 gerrymandering index, therefore that must be an
2 indicator that the district was drawn with some
3 partisan intent. And I would submit that that is a
4 fallacious preface because, as Mr. Hecker explained,
5 there are any of a number of reasons why districts
6 are drawn the way they are and Upstate New York is a
7 good example.

8 It was entirely within the province of the
9 Legislature to say we're going to have districts
10 anchored in the major metropolitan areas. We are
11 going to have a Buffalo based district, a Rochester
12 based district, a Syracuse based district that
13 combines Tompkins County because Syracuse is a
14 college town and so is Ithaca, and we are going to
15 have an Albany based district. And it just so
16 happens that the population in those areas tends to
17 be more Democratic than Republican. This is nothing
18 about partisanship but everything about maintaining
19 the communities of interest. And, likewise, the
20 Southern Tier. There was a time two redistrictings
21 ago that actually the Southern Tier was split up.
22 Chautauqua County was put off with Erie County and
23 then the rest of the Southern Tier was in a district
24 that went all the way up to Rochester and there were
25 certain people who were unhappy about that and this

1 time the Legislature said, you know what, the
2 Southern Tier was reunified in 2012 and we want to
3 maintain that in 2022. It is not the fault of the
4 legislators that people in the Southern Tier it just
5 so happens tend to be more often Republicans than
6 Democrats. That is simply the way it is under the
7 geography of the map. Rather, the explanation for
8 why the map was drawn that way was to maintain the
9 Southern Tier community of interest so that there
10 could be someone from the Southern Tier representing
11 this region in Congress. That's what it was about.

12 And so the gerrymandering index, simply
13 put, does not have anything to say as a tautological
14 matter about the fact that partisanship was used in
15 developing a certain district. There could be any
16 one of a number of factors, and the communities of
17 interest factor that Mr. Trende wasn't able to code
18 is a big explanation for why the map is the way it
19 is.

20 So, these are the aspects of the garbage
21 in. And when you have garbage into the simulations
22 that infects the entire simulation that you get, but
23 not only do we have garbage coming in, we also had
24 garbage coming out of the simulations. And I want to
25 spend some time about the different categories of the

1 garbage that came out of the simulations.

2 First of all, we had problems with the
3 maps. As Mr. Hecker said, I wish we had an
4 opportunity to actually look at the maps and inspect
5 what they look like, but Mr. Trende didn't even do
6 that. We don't have anywhere in the record the
7 panoply of maps that were created by his simulations
8 so that we could be able to determine whether, in
9 fact, these are actual maps that would make sense
10 that real map makers in the real world could possibly
11 draw. And the other problem with the maps not only
12 is a problem of substance but is also a problem of
13 number. The sample size is simply too small.

14 Professor McCartan and Imai in their
15 proposed paper, just to give an example, they
16 produced a simulation with 10,000 maps for a
17 hypothetical territory consisting of 50 electoral
18 precincts and 3 districts to be drawn. New York
19 doesn't have 50 precincts. It has 15,000 precincts
20 and there aren't just 3 districts to draw. There are
21 26 districts to draw. So, there is an infinite
22 amount more of complication in terms of doing the
23 job. If Professors McCartan and Imai could do 10,000
24 maps in a territory with 50 precincts, does it really
25 make sense to the Court, or even anybody who isn't a

1 statistician, that Mr. Trende would only do 10,000
2 maps at a time in a territory where you have to
3 create 26 districts out of 15,000 precincts, not to
4 mention all of the various communities of interest
5 and the compactness scores and avoiding a splitting
6 of the cores of old districts, and all of these
7 various criteria that the Constitution requires to be
8 considered.

9 We would submit that the job Mr. Trende did
10 was simply not good enough. And then on top of that
11 he didn't do a redundancy analysis and this is really
12 more appoint with respect to the Senate map because
13 there he confirmed he didn't do the redundancy
14 analysis to take out the various duplications. And,
15 in fact, Dr. Tapp said the big problem is you take
16 his ensemble of Senate maps, more than half of the
17 maps contain more than half districts that are
18 exactly the same. That is not an ensemble from which
19 it is worthy of drawing any kind of reasonable
20 conclusion. And likewise, we have nothing from Mr.
21 Trende about any kind of redundancy analysis having
22 been done with respect to the congressional maps
23 either.

24 So, that's the first problem in terms of
25 garbage out, the fact that there wasn't enough of a

1 sample. Second of all, the reading of the sample was
2 downright skewed. As Dr. Barber testified, the way
3 to look at these maps in terms of evaluating their
4 partisan lean is by calculating the results from the
5 statewide elections over a period of time and then
6 determining whether a district is Republican or
7 Democrat by saying okay, a Democratic district is
8 above 50 percent Democratic, Republican district is
9 below 50 percent Democratic, and that makes perfect
10 sense and, in fact, that is the kind of calculation
11 that Professor Imai would do and Dr. Barber was
12 taught by Professor Imai. He is simply using the
13 methodologies that Professor Imai passed down to him.
14 And when one looks at that data, what one finds in
15 the Trende simulations, as flawed as they were, that
16 the mode, the most likely outcome in the simulation
17 is to have 23 Democratic leaning districts and 3
18 Republican leaning districts, a slightly fewer
19 amounts had actually 24 Democratic leaning districts
20 and 2 Republican leaning districts, and only about
21 17 percent of the maps in his simulation had 22
22 Democratic leaning districts and 4 Republican leaning
23 districts. And what do you know, that is the kind of
24 map that came from the Legislature that was actually
25 enacted, a map that has 22 Democratic leaning

1 districts and 4 Republican leaning districts. Now,
2 the petitioners may not like that and I suppose if
3 they didn't like it, they wouldn't be here, but
4 that's the reality of the politics in New York.
5 That's the reality of the political geography and, in
6 fact, the Legislature could have been, and would have
7 been, within its rights to be far more aggressive if
8 partisanship considerations were really being
9 considered, you would of had much more likely a map
10 with 23 or 24 Democratic leaning districts. Instead
11 what we have is a map with 22 Democratic leaning
12 districts. So, the premise that somehow partisanship
13 infected this process simply falls apart.

14 And this is a problem for Mr. Trende. It's
15 a problem for his thesis. So, what does he do?
16 Here's the next way that he has garbage out. He
17 moves the goal posts in terms of how to determine
18 whether a district had the Democrat or Republican
19 lean. So instead of saying that the lean is
20 calculated at a 50 percent threshold, he says well,
21 no, in reality we got to go to a 53 percent threshold
22 in terms of calculating the lean. And then,
23 actually, we can go up to like 55.5 percent as the
24 measure of lean beyond which there is no more
25 effective competition between Democrats and

1 Republicans. So, this 53 percent number is actually
2 derived from looking at data from congressional
3 elections rather than statewide elections. And we
4 would submit, first of all, that's a flaw right there
5 because the way to evaluate partisan lean is by
6 looking at statewide elections. That is the way to
7 control for all of these variables that may take
8 place in a more localized election for a
9 congressional seat. And then further, with respect
10 to how he comes up with no competition beyond 55.6
11 percent Democratic lean, all that Mr. Trende did was
12 take a look at the election results for Congress over
13 the past ten years and saw that the Republican who
14 was elected from the most Democratic district that
15 elected a Republican was John Katko and his district
16 happened to have a lean of 55.6 percent. So,
17 therefore, it must be that beyond 55.6 percent you
18 don't have competitive elections. Well, that is
19 simply not true because if that were true, then how
20 is it that New York City was able to elect Republican
21 mayors for four consecutive terms. New York City is
22 a lot more Democratic than John Katko's congressional
23 district.

24 So, there is an example of Mr. Trende
25 taking the data that comes out and drawing a

1 conclusion that fits the story that he wants to tell
2 and that is not how social science should be done.
3 What you do is, first of all, you put in data that
4 makes sense and that is representative, you get an
5 ensemble of maps that is representative, and you take
6 an impartial look at what the data tells you rather
7 than drawing conclusions that are not derived
8 organically but simply by observations in terms of
9 what you see having happened in the last ten years
10 that may not necessarily prove to be true in the next
11 ten or in any years thereafter.

12 And then the fourth way that we have
13 garbage out is the testimony of Mr. Lavigna and I
14 agree with Mr. Hecker. Mr. Lavigna, nice guy, but
15 there is a reason why we don't hear anything about
16 Mr. Lavigna in the closing argument from the
17 petitioners and it was because so much of what Mr.
18 Lavigna said actually recognized and agreed with the
19 reasons, the legitimate reasons, for why certain
20 decisions were made in the redistricting process.

21 First of all, far be it from putting
22 garbage in, Mr. Lavigna didn't put in any garbage,
23 good, bad, or indifferent. He had no data. He had
24 no baseline of analysis. He used no standards. He
25 had no evidence. He had no comparison with other

1 maps. All he did is he looked at the map that was
2 enacted and made some casual observations. As Dr.
3 Barber testified, that is not sufficient to satisfy
4 the riggers of social science and not sufficient to
5 overcome the reasonable doubt standard that the
6 petitioners need to satisfy.

7 Here is what happened. The reality is that
8 New York needed to lose a congressional district and
9 if you were to take the population of New York under
10 the 2020 Census and divide it by 26, the number of
11 districts that there needed to be, each district
12 needed to have 776,971 people on the congressional
13 map. And what's also important to know about the
14 congressional map is that whereas on the Senate map
15 you can have deviations plus or minus five percent in
16 the population, with respect to the congressional
17 map, under the standards that are applied under the
18 Federal Constitution, there needs to be absolute
19 equality of population among the various districts.
20 The only deviation you can have is the deviation of
21 one in the case where you cannot divide up a person
22 across multiple districts. And the further reality
23 is that New York City's population increased, whereas
24 the Upstate rural population decreased significantly.
25 And, in fact, the district that was anchored around

1 Binghamton and Utica, that was the district that saw
2 the greatest population loss. And if you take all of
3 Upstate New York, and I love Upstate New York, but
4 unfortunately, there were fewer people in 2020 than
5 there were in 2010. In fact, a deficit of 539,725 or
6 three quarters of a district. So, Upstate New York
7 needed to lose a district. And further, Long Island
8 had a population deficit of 148,667 people. So, Long
9 Island's district needed to move westward. They
10 couldn't move up to Connecticut to a different state.
11 They couldn't go in the water. Nobody lives in the
12 water, although the water can be used as a way of
13 joining districts together. The districts had to go
14 where there were going to be more people. So that is
15 how we derive the map that was enacted.

16 And what was really striking to me about
17 Mr. Lavigna was the numerous mistakes and
18 inaccuracies that when confronted by Mr. Goldenberg
19 he had to admit with respect to his analysis. So,
20 for example, he said that the 2012 congressional
21 district was more Republican. Well, you know, the
22 2012 Congressional District Number 1 on Long Island
23 actually was a Democratic district that happened to
24 elect Lee Zeldin, a Republican, who is now running
25 for governor. He said East Islip was in

1 Congressional District 1. No. It's always been in
2 Congressional District Number 2. He said
3 Congressional District 3, that there was a problem
4 with having the shape go along Long Island Sound
5 because it was going to make the district Democratic.
6 Well, the district in 2012 was already substantially
7 Democratic regardless of what it is that he says. He
8 said that Jewish voters were cracked and packed in
9 Brooklyn, when in reality Jewish voters live in a
10 variety of communities in Brooklyn. They have never
11 been united in a single district in any map, let
12 alone this one, let alone the one that was drawn by a
13 federal court in 2012. And also he failed to account
14 for the various differences in religious practices
15 and language among those Jewish voters. You know,
16 some of them speak Russian, some of them speak
17 Yiddish, some of them are Modern Orthodox, some of
18 them are Hasidic. And so all of these factors were
19 taken into account in terms of how the Jewish voters
20 in the various neighborhood were going to be
21 distributed. And, in fact, there were circumstances
22 where Jewish voters, like in Midwood and Brooklyn and
23 also in the Five Towns versus Far Rockaway, were
24 actually united. Further, Mr. Lavigna claimed that
25 there was cracking of the Asian communities in New

1 York City when, in fact, the Asian communities were
2 brought together in response to comments that were
3 received from the Asian community that were made to
4 the Independent Redistricting Commission. Further,
5 he said that there was cracking with respect to the
6 Hispanics in Sunset Park. No such thing in 2012 or
7 in 2022. He had complaints about how various towns
8 were distributed in the Hudson Valley, when in
9 reality, true there are some changes in the
10 distributions, but those districts have a Democratic
11 lean in 2012 maps as they do in the 2022 maps. He
12 said that there was a problem with not uniting all of
13 the Jewish constituencies in Rockland and Sullivan
14 and Orange Counties, when in fact those, too, have
15 never been united in a single district. And he had
16 complaints about Upstate when, again, it is clear
17 from the map that was created that there were anchors
18 made in the major metropolitan areas. Buffalo,
19 Rochester, Syracuse, Albany. Each of those got their
20 own district. The Southern Tier was determined to
21 be important. Southern Tier got its own district.
22 The North Country was determined to be important,
23 community of interest. North Country got its own
24 district and then there was everything else, which
25 goes into Congressional District, what will be,

1 Number 24 and Mr. Trende said he had a problem with
2 the fact that it went from Niagara Falls to
3 Watertown. Well, what he doesn't consider is that
4 all these communities are along the shores of Lake
5 Ontario and there have been lots of issues going on
6 with respect to the water levels in Lake Ontario in
7 recent years and the flooding that's been created.
8 There are common interest issues for all of these
9 communities in the Lake Ontario Watershed.

10 And so -- now, is it possible that Mr.
11 Trende would have drawn a different map? Sure. Is
12 it possible that the petitioners would have drawn a
13 different map? Sure. But is the map that was drawn
14 explained sufficiently by reliance upon permissible,
15 constitutional requirements like the need to keep
16 communities of interest together, like the need to
17 keep the cores of the old districts maintained.
18 Absolutely it is and, in fact, as Professor
19 Ansolabehere mentioned, if you compare the 2012
20 congressional districts with the 2022 they are about
21 three-quarters the same. I think it's that
22 77 percent of the 2012 districts are the same as the
23 2022 and about 75 percent of the 2022 districts are
24 the same as the 2012. And the maintenance of core
25 districts, again, is another consideration that is

1 very difficult to code for and that Mr. Trende's
2 simulation did not take into account.

3 And so in all these aspects, the fact that
4 there weren't enough maps produced, the fact that
5 there was skewing in terms of the reading of the
6 data, that he moved the goal posts with respect to
7 how to measure partisanship, and the mistakes that
8 infect Mr. Lavigna's testimony, for all these
9 reasons, notwithstanding the garbage that went into
10 the simulation, you also had a lot of garbage coming
11 out.

12 Now, Your Honor, the state fruit of New
13 York is the apple and I recall vividly Dr. Tapp
14 explaining in his testimony that when one is doing
15 this simulation analysis and looking at
16 redistricting, it is necessary to compare apples to
17 apples. You do not compare apples to oranges because
18 a bushel of apples looks nothing like a bushel of
19 oranges. And yet that is precisely what Petitioners'
20 counsel is looking to do by muddying the waters,
21 trying to confuse the Court doing a paper dump on
22 Monday and another one last night, relying so heavily
23 on the result that was reached in the case of Szeliga
24 versus Lamone from the State of Maryland. The
25 difference between that case and this case could not

1 be more stark and Mr. Hecker brought up a few of them
2 and I want to supplement that list.

3 So, Mr. Hecker brought up correctly that
4 Mr. Trende in Maryland did 250,000 simulations at a
5 time three different times to determine how the maps
6 should look when there are only 8 districts to be
7 drawn in the State of Maryland. Here in New York he
8 only saw fit to do at most 10,000 simulations at a
9 time when there are 26 districts to be drawn. I
10 would submit that he did not put in nearly the kind
11 of rigor into his analysis in New York that he did in
12 Maryland and then he, obviously, was capable of doing
13 here but chose not to.

14 Second, in Maryland Mr. Trende realized
15 that he had a problem with redundancy in the maps and
16 so he took special care to actually do what he should
17 have done here in New York, which is look at the maps
18 and weed out the redundancies. He didn't do that
19 here.

20 Next, with respect to compactness, and
21 that's one of the constitutional criteria, in
22 Maryland he evaluated not one, not two, not three, he
23 evaluated four different measures of compactness. I
24 never knew there could be so many. There's
25 apparently a reock score. There is an inverse

1 Schwartzberg score. There is a convex hull score.
2 And there is the Polsby-Popper score. In New York he
3 only looked at Polsby-Popper. In Maryland he looked
4 at all four of these. Why didn't he do the same kind
5 of rigor of analysis with respect to looking at his
6 simulations in the State of New York? I don't know
7 what it was. He was in such a hurry to leave on
8 Monday, March 14th. He was in such a hurry to leave
9 that even after an excellent cross-examination by Mr.
10 Hecker, no rebuttal questions, no redirect. He
11 wasn't called back to the stand to try to
12 rehabilitate the flaws that were identified in his
13 methodology. All we have is his direct examination
14 and the cross-examination and the reports that were
15 produced. And so given the fact that he offers no
16 explanation for why the analysis was so much more
17 robust in Maryland, a smaller state with fewer
18 districts and fewer constitutional criteria to be
19 considered, then that is more than enough to
20 demonstrate the fact that the petitioners do not
21 prove their case beyond a reasonable doubt.

22 And here is really another point that
23 cannot be lost in the comparison between this case
24 and the Maryland case and that goes back to what I
25 talked about at the very beginning, which is the

1 standard of review. It is clear that in New York the
2 petitioners need to prove their case beyond a
3 reasonable doubt in order to have this map
4 invalidated. Maryland, by contrast, all that the
5 plaintiffs needed to do, as is explained in detail in
6 the decision, is offer compelling evidence to rebut
7 the presumption of constitutionality and, in fact, on
8 at least one of the causes of action that was raised
9 by the Maryland plaintiffs the court actually applied
10 a strict scrutiny of constitutional analysis to
11 evaluate the map that was enacted. Here, your Honor,
12 there is no strict scrutiny analysis. There is no
13 standard that the petitioners can do their job simply
14 by providing evidence that is compelling. I would
15 submit for all the reasons I've talked about the
16 evidence from Mr. Trende is not particularly
17 compelling, but even if it were, that isn't enough.
18 The petitioners needed to prove their case beyond a
19 reasonable doubt and they simply have not done that.

20 Now, something that the petitioners say in
21 response is well, you know, Respondents, your experts
22 could have run their own simulations and my response
23 to that is that's not our job. It's routine in a
24 criminal case where the defendant doesn't testify and
25 the defense doesn't bring forth any witnesses to be

1 examined and they simply rest after the conclusion of
2 the prosecution case. There was no duty upon us at
3 all to run any kind of simulations whatsoever as
4 flawed as the methodology may have happened to be.
5 So, by identifying the flaws in the analysis that was
6 done by Mr. Trende the respondents have more than
7 enough done their job.

8 With respect to the remedy, I agree with
9 Mr. Hecker, it isn't something I want to spend a lot
10 of time on because we submit that these maps should
11 simply be allowed to stand and that the case should
12 be dismissed, the petition should be denied, and all
13 of us should move on. But should it be determined
14 that one or both of these maps should be invalidated,
15 I offer a few comments in response.

16 First, the filing of designating petitions
17 for various public offices for state Senates and for
18 Congress and a whole host of others begins on Monday
19 and concludes Thursday, April 7th. People all around
20 the states have been gathering these designating
21 petitions for Congress and state Senate. And so,
22 applying the Percell Principle that has come down
23 from the United States Supreme Court to say that all
24 of the sudden we are simply not going to do an
25 election pursuant to the enacted map would throw

1 chaos into the electoral system. All of these
2 petitions that have been collected now all of a
3 sudden become no good. And then further you need to
4 come up with a new map, which I would submit that
5 it's really not the province of the Court to draw a
6 new map. It's the province of the Legislature to
7 draw a new map, which we submit shouldn't be
8 necessary, but even if it would be, it would be the
9 province of the Legislature and, of course, that's
10 going to take time, and then a new schedule would
11 need to be set in terms of having a new set of
12 designating petitions for Congress and or state
13 Senate circulated. Perhaps, a second primary day
14 that's going to add to the cost of administering the
15 elections in New York State. You can have confusion
16 whereby certain offices have their petitions while
17 other offices you need to have a brand new
18 petitioning period, potentially a new primary date.
19 All of these extra complications, as are explained in
20 detail by Mr. Connolly from the State Board of
21 Elections in his affidavit, counsel that the proper
22 remedy, should there need to be one, is not to say
23 that the elections cannot proceed, but simply to
24 allow the appellate process to take its course. And
25 we would submit if the Legislature were somehow

1 ordered to take a certain action by a certain day,
2 then I agree with Mr. Hecker, there would be an
3 automatic stay that would apply and the 2022 enacted
4 map that came into being in February would still
5 remain the law of New York State. And effectively,
6 given that you can have up to nine months to perfect
7 an appeal to the Appellate Division, Fourth
8 Department, it could well be a long time before any
9 kind of appeal would be decided in this matter and
10 we're going to end up having elections run under the
11 2022 enacted map anyway.

12 So, I ask the Court not to accept the
13 invitation of the petitioners to throw chaos into New
14 York's electoral system and into the 2022 elections
15 by imposing a drastic form of relief that is simply
16 not necessary and that in the event of an appeal will
17 prove to be moot regardless.

18 I'd like to conclude by talking about a
19 personal experience involving redistricting. So, I
20 live in the Town of Amherst, New York, where the
21 state university is located and I happen to live in
22 the eastern part of the town. And I will acknowledge
23 that I'm a bit of a political nerd and I follow these
24 kinds of things. And so ten years ago I was
25 anxiously awaiting how the congressional map was

1 going to look for Western New York and what happened
2 that year was the State Legislature was able to agree
3 on a State Assembly map. They were able to agree on
4 a state Senate map but they weren't able to agree on
5 a congressional map. So, as a consequence with time
6 ticking to have maps and for the collection of
7 petitions, it was actually a federal court judge that
8 drew the map that we've been using for the last ten
9 years. And when that map came out I was dumbfounded
10 because where I lived was in territory encompassed by
11 1 of 5 election districts out of 79 in the whole Town
12 of Amherst, which has a population of a 130,000
13 people and would easily qualify as a community of
14 interest. I happen to live in one of these 5
15 election precincts that were shunted off by the
16 federal judge to a different congressional district.
17 So, the other 74 were slated to be represented, and
18 actually have been represented for the last ten years
19 by Congressman Brian Higgins, but for whatever reason
20 in the eastern part of the town these little 5
21 precincts were lopped off by a federal judge in New
22 York City who maybe has never even visited the Town
23 of Amherst before and put into a district that would
24 eventually go on to be represented by Congressman
25 Chris Collins and now Congressman Chris Jacobs. And

1 this is a district that starts out in the Town of
2 Lewiston in Niagara County and goes all the way to
3 Canandaigua. Now, Amherst, I would submit, was a
4 community of interest, but yet it was split up. It
5 didn't really make a lot of sense and, in fact, my
6 parents, who live five minutes away, they were going
7 to be represented by Brian Higgins in the next
8 precinct over while I was going to be in the other
9 congressional district. How could that possibly be?

10 And what this case has demonstrated for me
11 is that it's easy for someone like Mr. Lavigna to
12 look at a decision that was made in isolation, in a
13 vacuum, to take a single district, look at its shape
14 and say, you know, that shape doesn't make sense. I
15 would of drawn that district a little differently or
16 looking at the 2012 map, likewise in the City of
17 Niagara Falls, there's a block or two that are in the
18 district that is other than the district represented
19 by Congressman Higgins and it's easy to look at that
20 in isolation and say well, that doesn't really make
21 sense. How is it possible that anyone, Legislature
22 or federal judge, could come up with a kind of line
23 of demarcation?

24 And I think what's important to remember is
25 that the standard of review is not a standard of

1 perfection. In the first-path-of-post system that we
2 have whereby we don't elect representatives to the
3 Legislature off of a partisan list, whereby there's a
4 proportional calculation made as to how many people
5 of which party get elected, in a first-past-the-post
6 system that we have where you have single member
7 districts, one person elected from each and every
8 district, the lines delineating the boundaries of
9 those districts need to be drawn somewhere,
10 particularly on the congressional maps when the most
11 deviation that you can have in the population between
12 and among the districts is one person. And so, as a
13 consequence yes, there will be some towns that are
14 split. There will be some neighborhoods that are
15 split. There will be some communities where you look
16 at the map and think well, gosh, why is it that this
17 community is in one district whereas that community
18 is in another.

19 Simply undertaking casual observation as to
20 things about a map that you would change is not
21 enough to invalidate the entire map as a
22 constitutional matter. And here, in fact, I should
23 remind the Court we have petitioners who don't even
24 come from throughout the state. They come from
25 different pockets, but the vast majority of the

1 congressional districts are unrepresented by any
2 petitioner, which is why we retain our standing
3 argument as another reason why the challenge to the
4 congressional and state Senate maps should be
5 rejected. But rather than asking the question could
6 things have been done differently in terms of drawing
7 the map, rather the questions are these: Have the
8 plaintiffs borne their substantial burden to
9 demonstrate that in any degree and in any conceivable
10 application the law suffers wholesale constitutional
11 impairment? Have they meet their burden to
12 demonstrate beyond a reasonable doubt a conflict with
13 the requirements of the State Constitution? Have
14 they demonstrated beyond a reasonable doubt that
15 there is not substantial compliance of this map with
16 the requirements which there are many in the Federal
17 and State Constitutions?

18 We would submit that constitutionally
19 permissible criteria, required criteria, things like
20 maintaining cores of old districts, things like
21 maintaining communities of interest, these are all
22 legitimate reasons that explain each and every policy
23 choice that was made by the Legislature when it
24 enacted the 2022 maps. And for these reasons
25 Petitioners have not made their case beyond a

1 reasonable doubt and the petition should be denied
2 and the 2022 enacted maps should be upheld. Thank
3 you.

4 THE COURT: Thank you, Mr. Bucki. Just to
5 get a flavor, Ms. McKay, are you going to be
6 presenting a closing?

7 MS. MCKAY: I am.

8 THE COURT: And I have to give staff an
9 hour for lunch. So, I'd like to take that now and we
10 will start at, what is it, ten to one, at two
11 o'clock.

12 MS. MCKAY: Okay.

13 THE COURT: I think that is the way we will
14 leave it. We will start again at two o'clock.

15 MS. MCKAY: Okay, sounds good.

16 THE COURT: Thank you all.

17 MS. MCKAY: Thank you.

18 (Lunch taken.)

19 THE COURT: All right. On behalf of the
20 Governor, closing argument from Ms. McKay.

21 MS. MCKAY: Yes, your Honor.

22 THE COURT: Good afternoon.

23 MS. MCKAY: Good afternoon. Heather McKay
24 of the New York State Attorney General's Office here
25 on behalf of the executive respondents, Governor

1 Kathy Hochul and Lieutenant Governor Brian Benjamin.

2 If this trial has shown us anything it is
3 that redistricting is complicated and highly
4 technical. Lay people don't know the nuances. They
5 have to rely on the experts, and I use that term
6 loosely. As lay people, even people of significant
7 intellect have to rely on experts. In the context of
8 redistricting lay people are those without doctorate
9 degrees in mathematics, political science,
10 statistics. I think my colleague, Mr. Bucki, did a
11 great job of explaining why you shouldn't be an
12 armchair, try to be an armchair, quarterback in this
13 subject. It is dangerous to do that and as Mr.
14 Trende, Petitioners' main expert, agreed on
15 cross-examination, even legislators have to defer to
16 the experts. Politicians rely on experts. Hence,
17 the very existence of LATFOR.

18 Particularly, that's the case here in New
19 York State with its extremely complicated geography,
20 large population size, multiple communities of
21 interest and numerous state constitutional
22 requirements for the district.

23 So, when the maps came across Governor
24 Hochul's desk, she did just that. She trusted the
25 experts. She knew the importance of having clarity

1 and certainty in time for this year's election and
2 she signed them. The approval methods that she
3 issued at the time of the signing, which are public
4 records and made a part of the record here, they are
5 our answer, demonstrates that those valid
6 considerations motivated her.

7 The executive respondents first appeared in
8 this case with a simple message for your Honor.
9 Whatever criticisms may be lodged against the maps,
10 the specifics, the nitty-gritty, the Governor and
11 certainly the Lieutenant Governor, are not proper
12 parties. They had nothing to do with the actual line
13 drawing. And this simple message still rings true,
14 even more true now after we have provided discovery
15 to petitioners, fully participated in the process,
16 and a trial has been held.

17 And they state here today, the petitioners
18 have presented no credible evidence against my
19 client, not a shred of admissible proof of improper
20 partisan intent by the Governor and, certainly, not
21 the Lieutenant Governor, whose name hasn't even been
22 uttered. They have no credible proof of their single
23 allegation against the Governor, a conspiracy theory
24 based on hearsay, a newspaper article, which article
25 expressly indicates that the excerpts are from an

1 interview with the Governor the day after her
2 swearing in, which have been edited, quote/unquote,
3 and condensed, quote/unquote. This is not competent
4 evidence. Petitioners have the burden in this
5 special proceeding. We have complied with all of
6 their served discovery demands. We've even provided,
7 in fact, full recording of that interview that was
8 excerpted and condensed. Yet none of that has been
9 put before this Court. There's been no credible
10 evidence, no competent evidence, as required for a
11 special proceeding.

12 Our presence here has been seemingly for
13 the purpose of political theatre, not just naming the
14 Governor, but naming her in the caption first, not
15 because there is any basis for a crime against her,
16 and Petitioners eventually admitted it during oral
17 argument on our motion to dismiss. They changed tact
18 trying to appear reasonable. Oh, never mind, the
19 Governor's named only as a necessary party. She's
20 needed to obtain certain relief.

21 Well, we dispute the conclusion or the
22 legal theory that we are necessary parties, but we
23 are here all the same. And it's now quite clear that
24 there's absolutely no substantive case against the
25 executive respondents.

1 Now, because of the Governor's extremely
2 limited role in the redistricting process, I'm going
3 to address petitioners' individual causes of action
4 only briefly.

5 The legislative respondents have covered
6 them thoroughly and we join in those arguments, but
7 as we have been here throughout the trial and because
8 the expert testimony presented by co-respondents
9 further dispels the aspersions casted upon my
10 clients, I have a few points to make.

11 With respect to Petitioners' first cause of
12 action, the one that everyone has been referring to
13 as the procedural argument, Petitioners have
14 presented no proof in support of their first cause of
15 action. Now, we argued in our motion to dismiss that
16 this cause of action should be dismissed as a matter
17 of law. We renew those arguments now and we join in
18 the arguments of our co-respondents.

19 Petitioners' construction of the 2014
20 amendment runs counter to the plain language of New
21 York's Constitution, would lead to absurd results.
22 Mr. Hecker spoke very eloquently on the absurd
23 results that it would lead to and I go a step further
24 to say that the construction that Petitioners' urge
25 would violate the separation of powers doctrine. It

1 would usurp and quintessential legislative function
2 and transform it into a judicial one.

3 Turning to Petitioners' remaining causes of
4 action, my colleagues, again, have done a wonderful
5 job of explaining that Petitioners' burden is the
6 highest standard recognized in our courts of law,
7 proof beyond a reasonable doubt. Recall the one
8 thing that we have certainly learned in this trial,
9 is that redistricting is extremely complex. So what
10 reliable method do we have to assess if there is any
11 reasonable doubt? Experts. And what this trial has
12 proven is that Respondents' multiple, credible,
13 highly respected, and experienced experts disagree
14 that these are partisan maps or improperly partisan
15 maps.

16 Respondents' experts introduced significant
17 doubt about Mr. Trende's methodology, his failure to
18 run redundancy checks, his failure to include his
19 5,000 maps anywhere in the record, his admitted
20 failure to even lay eyes on them himself. These
21 constitute more than reasonable doubt.

22 Mr. Lavigna, Petitioners' expert to speak
23 to the districts themselves, admitted that he was
24 unaware of the constitutional requirements contained
25 in the New York State Constitution. That was

1 compared to Dr. Ansolabehere who knew the geography
2 districts of New York State like the back of his hand
3 down to the exact location of watersheds, who was
4 able to explain the real life decision-making process
5 underlying the maps as enacted, and he concluded in
6 his expert opinion that the maps are not the product
7 of partisan bias. Again, this is more than
8 reasonable doubt.

9 Dr. Breitbart, who contrasted the lack of
10 partisanship in the current maps with the clearly
11 gerrymandered Senate maps from 2012, the Legislature
12 fixed the prior partisanship but did not match it, I
13 believe were the words he used. I think that that is
14 a really important point to emphasize, that even when
15 it had the chance, the Legislature as a whole acted
16 without partisan intent. They had the opportunity to
17 tip the scales in the other direction in redrawing
18 the Senate maps, but when they acted as a whole in
19 the enacted maps they did not in Dr. Breitbart's
20 expert opinion.

21 It can be inferred that the Legislature who
22 did that with respect to the Senate maps acted the
23 same way when redrawing the congressional maps. When
24 we look into legislative intent it can be hard to get
25 a good indicator of what that intent was and Mr.

1 Tseytlin has taken a lot of liberties in terms of
2 saying what the people of New York State intended
3 when they amended in 2014 the Constitution and
4 required the IRC process. But when we look at the
5 different intents of the legislators over the years,
6 the indication of this Legislature in fixing prior
7 partisanship but not matching it is in stark contrast
8 to the Republican action in the 2012 election that
9 resulted in the 2014 amendments in the first place.

10 And, again, these are just some of the
11 examples of the reasonable doubt that exists in this
12 case. Petitioners have failed to prove
13 unconstitutionality beyond a reasonable doubt and all
14 of their causes of action should be denied.

15 And the last thing that I'm going to talk
16 about is Petitioners' proposed remedy. In what
17 should be a motion for reconsideration and is, thus,
18 fatally procedurally flawed, Petitioners ask this
19 Court to disrupt this year's election now well
20 underway. In addition to reversing itself,
21 Petitioners seek to have this Court disregard the
22 entire statutory scheme established -- that
23 establishes -- excuse me -- the proper time period
24 for the election to proceed.

25 Now, I do not think that the Court will

1 have occasion to consider a remedy because their
2 causes of action lack merit and they have not come
3 close to satisfying their high burden. But the
4 dangers and risks associated with Petitioners'
5 requested remedies are so severe that they do require
6 addressing.

7 To clarify at the outset, we do not take a
8 position with respect to whether a special election
9 could be held in 2023. By trying to take this Court
10 down that rabbit hole, Petitioners invite it to
11 engage in a result driven analysis. That a
12 particular remedy may or may not be available has no
13 bearing on this Court's finding. The risks of
14 interfering with the ongoing election would be too
15 grave.

16 With all that said, we have provided the
17 Court, via NYSCEF, document Numbers 235 and 236, the
18 sworn affidavit of Thomas Connolly, the Director of
19 Operations at the New York State Board of Elections.
20 First of all, Mr. Connolly is exactly who you want to
21 hear from regarding the practicability of Petitioners'
22 proposed remedy. He's the Director of Operation in
23 the Operations Unit of the State Board, which
24 supports and provides guidance to county boards of
25 elections. He is in the thick of it. He is not

1 removed from the day-to-day details. Before that,
2 Mr. Connolly spent six years as the Deputy Director
3 of Public Information in the State Board. That
4 office maintains -- monitors transmission of military
5 ballots within the federally mandated time. So, Mr.
6 Connolly is intimately familiar with the transmission
7 system and process and he's on the front lines of the
8 elections process, exactly the things that we have
9 been talking about here that would have -- that
10 petitioners' proposed remedy would have an impact on.
11 He deals with the logistics of those processes every
12 day.

13 Just to highlight a few of his initial
14 points, the election is already well underway.
15 Petitioning is nearly done, some candidates are done,
16 all must finish up by next week. Absentee voters
17 have already been applying and assigned election
18 districts. Newly registered voters and transfer
19 voters have already received notification stating
20 election district and polling sites. The sending of
21 notices to all of New York's voters is imminent. And
22 this certainly sets us apart from other states that
23 Petitioners have used as examples where petitions
24 didn't go forward in the first place.

25 If the remedy is ordered this year altering

1 district lines, information already provided to
2 voters will prove false. This is the epitome of
3 voter confusion. Notices would have to be reissued,
4 different polling sites assigned. Think of the
5 average citizen just trying to take care of their
6 day-to-day life. Take their kids to daycare or
7 school, go to work, do their other responsibilities,
8 and now they got to figure out which notice about
9 their polling place was accurate. Imagine they go to
10 the wrong site on their way home from work, like so
11 many of us do when we are voting, and when they are
12 turned away what are the chances they are going to
13 drive to the correct site instead of going home to
14 make dinner? As Mr. Connolly explains, based on his
15 role in the Operations Unit with regular contact with
16 local boards, Petitioners' proposed remedies carry
17 significant risks. He confirms what this Court
18 already strongly suspected and he provides detailed
19 reasons why that is. He explains every step in the
20 elections process and that we're already very much in
21 the thick of it.

22 In response Petitioners' filed an affidavit
23 from Todd Valentine. He's a co-executive director.
24 His name appears along with the commissioners on the
25 State Boards website and before that he spent about a

1 decade working in State Boards Counsel's Office. So
2 administration, if you will, not in a particular
3 unit, not like Mr. Connolly in charge of the
4 Operations Unit specifically acting as liaison with
5 the county boards. And the differences between the
6 two affidavits are significant. Mr. Valentine's is
7 brief and conclusory, where Mr. Connolly provides
8 detailed examples. Mr. Valentine expects the Court
9 to take his word for it, to buy into his unsupported
10 conclusions. And notice Mr. Valentine doesn't say
11 that there's no risk, or even low risk, associated
12 with Petitioners' proposed remedies. Note that Mr.
13 Connolly, he doesn't say it would be impossible.
14 What he says is that the risks of implementing of
15 Petitioners' plan are simply too great. Mr.
16 Valentine cannot assure this Court that those risks
17 will not result in real life disasters that prevent
18 New Yorkers from exercising their constitutional
19 right to vote. And as this Court has initially
20 suspected, those risks are far too grave.

21 Mr. Valentine's brief and conclusory
22 affidavit, essentially, boils down to four points.
23 First, in 2020 he remarks that the petition period
24 and the signature requirements were reduced by
25 executive order of Governor Cuomo due to the Covid 19

1 Pandemic. I'm going to circle back to this
2 particular first point of his a little bit later, but
3 suffice is to say at this juncture that, first,
4 Petitioners are asking this Court to do way more than
5 reduce the petitioning period. They are asking the
6 entire state system to do a reset in the midst of an
7 election and hold a second primary that no one has
8 planned for.

9 And the temporary grant of authority by the
10 Legislature, mind you, to Governor Cuomo to issue
11 executive orders suspending certain laws in order to
12 reduce the spread of Covid 19 is entirely irrelevant
13 to this case. It certainly doesn't establish this
14 Court's authority to suspend laws in a like manner.

15 Mr. Valentine's second point is that
16 because the local board turned their full attention
17 to translating new district boundaries into voter
18 registration systems and managed to do so in nearly
19 one month, I believe Mr. Tseytlin said in less than
20 one month, Mr. Valentine's affidavit emphasizes that
21 it was in nearly one month because it is slightly
22 over. Mr. Valentine states in conclusory fashion
23 that they can simply do it again. What an
24 assumption. Everyone agrees that local boards had to
25 turn their full attention to that task the first time

1 in order to get it done so quickly. That language is
2 right there in Mr. Valentine's own affidavit as well.
3 Local boards cannot possibly return their full
4 attention to such a task now that the election is
5 underway. They run the primaries. They move on to
6 their next essential task. Mr. Valentine says
7 without explaining most ballot access is done at the
8 state level. Well, presumably, that must be because
9 some petitions are filed at the state board level
10 rather than local boards, but this is totally besides
11 the point. And by the way, it's not even true for
12 all counties. So, larger counties and New York City
13 board handle petitions filings themselves, but
14 regardless, local boards are the ones who run the
15 primary either way.

16 They're no longer looking at ballot access.
17 They have moved on to the next steps in the process,
18 which is detailed by Mr. Connolly. And Mr. Valentine
19 doesn't even respond to Mr. Connolly's observation
20 that problems always arise even after boundaries have
21 been entered into voter registration systems. That
22 is why these things cannot be done in a haphazard
23 fashion. The closer to the election the more likely
24 those problems won't be discovered or can't be fixed.
25 This is a huge risk. Dr. Valentine -- or excuse me

1 -- Mr. Valentine doesn't deny there's risk.

2 Third, so his third of four points by Mr.
3 Valentine, he cites certain examples from the past.
4 A court ordered federal primary and separate state
5 primaries in four prior election cycles. Let's not
6 mince words. Petitioners are asking this Court to
7 issue unprecedented relief. Those cases are vastly
8 distinguishable from the extreme measures that
9 Petitioners seek here. And I'll highlight two ways
10 that they're very different and that this remedy
11 would be unprecedented. The first is the
12 petitioners' petitions have never been thrown out and
13 candidates told to start over. Imagine the
14 candidates, they are done by now or they're about to
15 be done, they have set up their campaign finance
16 committees, they've sent out volunteers and paid
17 staff, they've gathered all the required signatures.
18 Now all that work is simply nullified and the
19 ancillary effect of that on other people, the voters
20 who think they already signed petitions and they can
21 only sign one, but they haven't actually signed those
22 petitions because they were thrown out. And the
23 second way that this would be unprecedented is that
24 this state has never held two primaries in the same
25 year with an intervening redistricting process

1 occurring between the dates of those primaries. Can
2 two primaries happen? Yes, absolutely. That has
3 happened. Can they happen without any advance
4 preparations? Not without major risks. The majority
5 of voter registrations system used by county boards
6 are simply incapable of maintaining multiple sets of
7 the same district.

8 When the Federal Court ordered an
9 additional primary in 2012 it was known about as
10 early as January before any ballot access procedures
11 had begun. All the lines for congressional, state
12 Senate, and State Assembly were in place by mid-March
13 that year. Here in contrast no one has planned on
14 two primaries to take place this year. We all know
15 that we are suffering under serious supply chain
16 issues. That's going on everywhere that we go.
17 Ballot papers and envelopes are no exception. Boards
18 of elections are facing shortages. They needed to
19 order supplies months in advance. These are the
20 risks that Petitioners don't want the Court to think
21 about, the ones that Mr. Valentine cannot assure
22 anyone will not accord.

23 That brings us to the fourth and last point
24 in Mr. Valentine's affidavit, the timeline that he
25 sets out. Well, that timeline is not impossible. It

1 is very darn near too impossible. To hold an
2 August 23rd, 2012, primary he proposes a June 2nd
3 deadline for finalizing petitions. He does that to
4 keep the intervals of time to match the current
5 schedule that we are on. Well, fine. Those dates
6 sound fair enough in theory, but continue the
7 timeline up to the current day. So, before petitions
8 are finalized there is objections and court
9 challenges. Those take approximately 30 days. That
10 brings us up to May 3rd. And before challenges can
11 be made, of course, the initial petitioning happens.
12 That process normally runs 37 days. Well, that
13 equates to a start date on maps that don't exist yet
14 of this past Sunday, March 27th. And we don't even
15 have the new maps yet.

16 As this Court noted in its prior decision,
17 this process, getting the maps right, assuming that
18 there's any constitutional infirmities in them as is,
19 that process will take weeks, maybe months, and
20 that's in New York State, not Maryland. We have
21 significantly more districts. We have significantly
22 more constitutional requirements to consider and
23 balance. Petitioners' reckless timing poses grave
24 risks.

25 Remember, I said I would come back to Mr.

1 Valentine's first point about Governor's -- Governor
2 Cuomo's Covid 19 Executive Order. The really
3 disturbing thing about Petitioners analogy to 2020,
4 shortening the petition process, is that 2020 was
5 based on a worldwide pandemic, the likes of which
6 society had not seen in a century. In contrast, this
7 case involves what will be the new normal. Whichever
8 party doesn't like the maps in future years will
9 follow Petitioners' playbook. These statutory
10 timelines for New York's election process should not
11 be so easily and routinely ignored. By asking the
12 Court to utterly ignore and, essentially, rewrite
13 state election laws Petitioners ask this Court to set
14 a dangerous precedent indeed.

15 Thus, if the Court identifies any
16 constitutional infirmities in either the
17 congressional or state Senate maps, it should not
18 reconsider its previous ruling that the ongoing
19 elections still must proceed. And your Honor already
20 noted, and I am taking sections of the decision, but
21 the words used are, striking these maps would more
22 likely than not leave New York State without any duly
23 elected congressional delegate. Continuing on, I
24 believe the more prudent course would appear to be to
25 permit the current election process to proceed.

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STIPULATION PURSUANT TO CPLR § 5532 [SR-130 - SR-132]

New York Supreme Court
Appellate Division—Fourth Department

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FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN
NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, and MARIANNE
VOLANTE,

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

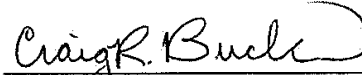
NEW YORK STATE BOARD OF ELECTIONS,

Respondent.

STIPULATION PURSUANT TO CPLR 5532

IT IS HEREBY STIPULATED AND AGREED by and between the
undersigned attorneys for the respective parties hereto that the foregoing
Supplemental Record on Appeal is hereby deemed correct and complete.

Dated: 4/18/2022



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