To Be Argued By:
Misha Tseytlin
Time Requested: 15 Minutes

Steuben County Clerk's Index No. E2022-0116CV

New York Supreme Court

APPELLATE DIVISION — FOURTH DEPARTMENT

Docket No.
CAE 22-00506

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

Petitioners-Respondents,

against

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENTATE 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.

BRIEF FOR PETITIONERS-RESPONDENTS

TROUTMAN PEPPER HAMILTON SANDERS LLP
Attorneys for Petitioners-Respondents
875 Third Avenue
New York, New York 10022
212-704-6000
misha.tseytlin@troutman.com

Of Counsel:
Misha Tseytlin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes And Rules

Constitutional Provisions

Other Authorities

PRELIMINARY STATEMENT

Rucho v. Common Cause, 139 S. Ct. 2484 (2019), explained that while partisan "gerrymandering is incompatible with democratic principles," resolution of such "questions [was] beyond the reach of the federal courts," leaving the States to "actively address[ ] the issue." *Id.* at 2506–07 (citation omitted). States across the country have taken up this responsibility, invalidating partisan gerrymanders drawn by their legislatures. New Yorkers in 2014 adopted—and then in 2021, defended—the most robust protections against political gerrymandering in the Nation. The 2014 Anti-Gerrymandering Amendments establish an Independent Redistricting Commission ("IRC"), which the People demanded would take mapdrawing authority out of the Legislature's hands and place it into a process centered on bipartisan compromise. *See* N.Y. Const. art. III, § 4(b). The Anti-Gerrymandering Amendments also outlawed partisan gerrymandering. *Id.* § 4(c)(5).

Yet, in the very first election cycle after these groundbreaking Amendments, the New York Legislature and Governor disregarded the New York Constitution, ignored the exclusive IRC process, refused even to consult with their Republican colleagues, and used their power to gerrymander New York's maps, including turning what is currently a 19-8 Democratic delegation under New York's neutral, court-drawn congressional map, into what Respondent's own experts and even Respondent's counsel at the stay hearing before this Court admitted is now a 22-4

Democratic map under typical election conditions. In doing so, Respondents ran roughshod over the Constitution's procedural requirements for redistricting, ignoring the exclusive IRC process, which "shall govern redistricting in this state." *Id.* § 4(e). The result was a nationally embarrassing spectacle, unquestionably one of the worst examples of partisan gerrymandering in this redistricting cycle.

The public immediately noticed this deeply cynical effort for what it was. Among a uniform chorus of voices across the political spectrum, even a top attorney for the left-leaning Brennan Center for Justice, Michael Li, described the congressional map as "a master class in gerrymandering, . . . tak[ing] out a number of Republican incumbents very strategically," *see* R.241, noting that the 2022 congressional map is "among the more aggressive (gerrymandered) maps that we've seen in the country," Brian Lee, '*A Lot of Eyes Are on New York': Lawyers Map Road Ahead as Steuben County Judge Upends Congressional Maps*, N.Y. L.J. (Apr. 1, 2022), https://bit.ly/3EboYFu. Dave Wasserman, a widely respected (including by Respondents' expert, R.2923–24) nonpartisan elections expert, noted that the "Dems' gerrymander [of the 2022 congressional map] could lead to the single biggest seat shift in the country (19D-8R to 22D-4R)." R.240–41.

The packing-and-cracking *manner* in which the Legislature accomplished its gerrymander provides an independent basis for striking down the map, as such

packing and cracking violates the 2014 Anti-Gerrymandering Amendments in multiple respects. Petitioners' expert showed that Respondents packed and cracked Republicans throughout the State so ruthlessly that the adopted congressional map is more pro-Democrat than any of many thousands of maps (which results *Respondents'* own expert replicated at a 50,000-simulated-maps figure, and then admitted on cross-examination to obtaining much the same results).

Further, all of the 2022 maps are also unconstitutional because the Legislature enacted those maps without complying with the mandatory, exclusive process for redistricting contained in Article III, Section 4 of the New York Constitution. The Legislature circumvented the requirement that it receive and consider two rounds of IRC maps before it could propose its own. These actions violated the Constitution's plain text and the People's manifest purpose in adopting the IRC aspects of the 2014 Anti-Gerrymandering Amendments, as explained eloquently by proposed *Amicus* the League of Women Voters of New York State ("League"), the preeminent non-partisan election reform organization in this State, which led the effort to convince the People to adopt the 2014 Anti-Gerrymandering Amendments in the first place. Indeed, as the League powerfully points out, if the appellate courts of this State adopt Respondents' arguments on this score, the entire IRC aspect of the Amendments would become an utterly meaningless, dead letter.

* * *

In 2022, the Legislature and Governor thumbed their noses at New Yorkers, engaging in egregious gerrymandering as if the 2014 Anti-Gerrymandering Amendments had never been enacted, while smugly assuming that the courts would fail the People as well. Petitioners strongly believe otherwise. The Supreme Court here took the parties' arguments seriously, accepting some of Petitioners' arguments, while rejecting others. This Court then issued only a limited stay, which contemplated—at minimum—having constitutional congressional maps govern for the 2022 election cycle. This Court should expeditiously affirm the Supreme Court, thereby permitting constitutional maps to govern in the first election under the 2014 Anti-Gerrymandering Amendments.

COUNTERSTATEMENT OF FACTS

A. Redistricting In New York

1. The Redistricting Process After The 2014 Reforms

Before 2014, legislators seeking partisan advantage controlled New York's redistricting process, with predictable results, David Freedlander, *Backgrounder: How Redistricting Will Reshape New York's Battle Lines*, Observer (Dec. 27, 2010), https://bit.ly/3xesqh6, but courts interpreted the extant constitutional provisions as not barring partisan gerrymandering, *Bay Ridge Cmty. Council, Inc. v. Carey*, 103 A.D.2d 280, 284 (2d Dep't 1984), *aff'd* 66 N.Y.2d 657 (1985).

In 2014, the People rejected the failed regime by amending Article III, Sections 4 and 5 and adding a new Section 5-b to the same Article (collectively, "the 2014 Anti-Gerrymandering Amendments"). Under these 2014 Amendments, the Constitution now vests primary redistricting responsibility in the newly created IRC and establishes procedural and substantive safeguards against gerrymandering. N.Y. Const. art. III, § 5-b. The Constitution now lays out a mandatory, IRC-driven process that "*shall govern redistricting in this state*." N.Y. Const. art. III, § 4(b), (e) (emphasis added). Under this mandatory process, before January 15 of the second year after the census, the IRC must submit an initial set of redistricting maps to the Legislature. *Id.* § 4(b). The Legislature must then vote on the maps as submitted, without any amendment. *Id.* If this first set of maps is not enacted, the redistricting process reverts to the IRC to develop and submit a second set of maps with implementing legislation to the Legislature. *Id.* As with the first set of maps, the Legislature must vote on the second set without any amendment. *Id.* *Only* if the Legislature takes public accountability for rejecting this second set of maps can it amend the IRC's proposed plan and enact its own maps. *Id.*; *see also* N.Y. Legis. Law § 93(1). And in substance, new Article III, Section 4(c)(5) specifically precludes partisan gerrymandering, encompassing three specific prohibitions. Under this new constitutional provision, the IRC and the Legislature may not draw

districts (1) "to discourage competition," (2) "for the purpose of favoring or disfavoring incumbents," or (3) "for the purpose of favoring or disfavoring . . . political parties." N.Y. Const. art. III, § 4(c)(5).

2. The Legislature Fails To Derail These Reforms With A Proposed 2021 Constitutional Amendment

In 2021, the Legislature attempted to gut the 2014 Anti-Gerrymandering Amendments' reforms, but the People decidedly rejected those efforts. Seeking to allow itself to adopt redistricting legislation "with any amendments . . . [it] deem[ed] necessary" if the IRC failed to approve a plan by the required deadline, *2021 Statewide Ballot Proposals*, N.Y. State Bd. of Elections, https://on.ny.gov/3KrxOB7, the Legislature referred to voters a constitutional amendment that would have altered the 2014 Anti-Gerrymandering Amendments' mandatory and exclusive process by allowing the Legislature to bypass the IRC if the Commission did not complete its constitutionally required process:

> If either house shall fail to approve the legislation implementing the second redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto, or the redistricting commission fails to vote on a redistricting plan and implementing legislation by the required deadline and makes a submission to the legislature pursuant to subdivision (g-1) of section five-b of this article, each house shall introduce such implementing legislation with any amendments each house of the legislature deems necessary.

2021 Statewide Ballot Proposals, *supra* (proposed amendment underlined). The People voted this measure down. Ballot Proposition 1, 2021 General Election Results (Nov. 2, 2021), https://bit.ly/37vNPHv.

On November 12, 2021—just days after the People's rejection of the proposed 2021 constitutional amendment—the Legislature delivered to the Governor for signature a bill that sought to achieve the same result as the failed amendment, by amending Section 4(c) of the Redistricting Reform Act of 2012. This law provides that if the IRC "does not vote on any redistricting plan or plans, for any reason," it must forward all plans, drafts, and data upon which they are based to the Legislature to develop its own implementing legislation. L.2021, c. 633, § 1. The Governor signed this unconstitutional bill on November 24, 2021. *See id.*

B. Respondents Enact New Maps In 2022, While Repeatedly Violating The 2014 Anti-Gerrymandering Amendments

In 2021–2022, the 2014 Anti-Gerrymandering Amendments' exclusive process governed redistricting in New York for the first time. The IRC was duly constituted, *see* N.Y. Const. art. III, § 5-b(a)–(b), and then held public meetings across the State and subsequently released initial draft maps to the public, *see* N.Y. Const. art. III, § 4(c). The IRC worked to prepare a single, consensus set of maps for submission to the Legislature and held additional public hearings to guide the process. N.Y. State Indep. Redistricting Comm'n, *Meetings*, https://bit.ly/38E6hP1.

Despite prior agreements between the members, on December 22, 2021, the Democratic Caucus abruptly refused to negotiate bipartisan maps, and instead would only negotiate on its partisan maps, which it unexpectedly released the day before. Testimony of Jack Martins at 9:16–9:49, Virtual Public Meeting of the NYIRC (Jan. 3, 2022) ("1/3/22 IRC Meeting"), https://bit.ly/3vklb4v. As a result, the IRC split evenly between two plans and delivered both to the Legislature. *Id.*

The Legislature rejected both IRC plans out-of-hand. 2021–2022 N.Y. Reg. Sess. Leg. Bills A.8587, A.8588, A.8589, A.8590, S.7631, S.7632, S.7633, S.7634. When the full IRC met to discuss a single plan for its final submission to the Legislature, the Democratic IRC members refused any discussion of consensus maps and instead wanted to re-submit essentially the same plan that the Legislature had rejected—despite multiple entreaties from the Republican Caucus. *See* 1/3/22 IRC Meeting, *supra*; R.288. At an impasse, the IRC failed to submit revised maps to the Legislature by the constitutional deadline.

The Legislature then crafted its own redistricting maps as though the Anti-Gerrymandering Amendments had never been enacted. Acting entirely behind closed doors and without any Republican input, Democratic leaders pushed through legislation for a new congressional map, releasing the Legislature's proposed map late on Sunday, January 30. R.288–89. Two days later, Democratic leaders pushed

through new maps for the state legislative districts. R.288–89. On February 2, 2022, the Democrats in the Assembly and Senate adopted the unconstitutional 2022 congressional map, with all Republican members of the Legislature voting against it. *See* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196 and A.9039-A (as technically amended by A.9167). On February 3, 2022, legislative Democrats adopted the unconstitutional 2022 state legislative maps on a vote of 118-29 in the Assembly and 43–20 (a straight party line) in the Senate. *See* 2021–2022 N.Y. Reg. Sess. Leg. Bills A.9040-A and A.9168. The very same day, Governor Hochul signed both maps, 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196, A.9039-A, A.9040-A, and A.9168; *see* R.240, thereby fulfilling her prior promise of "us[ing] [her] influence to help Democrats expand the House majority through the redistricting process," and help the Democratic Party "regain its position that it once had when [she] was growing up," R.927.

C. Procedural History

1. Amended Petition And Evidence Below

Petitioners challenged the congressional map on the very same day it was enacted, *see* R.51–117, and the new state Senate map several days later, R.354–65. Petitioners alleged that the Legislature's new maps are unconstitutional on two separate and independent bases. *First*, the maps are procedurally invalid because the Legislature did not follow the exclusive process for adopting replacement

redistricting maps set out in Sections 4 and 5 of Article III of the New York Constitution. *See* R.371–73; N.Y. Const. art. III, §§ 4–5. *Second*, the maps are substantively invalid because they are unconstitutional gerrymanders, in violation of Article III, Section 4(c)(5) of the New York Constitution. *See* R.375–76.

In support of their Petition, Petitioners submitted the affidavit of Senate Minority Leader Robert G. Ortt, R.287–89, the expert reports of Mr. Sean Trende, R.231–64, and Mr. Claude A. LaVigna, R.265–86, and the judicially noticeable proceedings before the Legislature and the IRC.

In an unrebutted affidavit, Minority Leader Ortt explained that legislative Democrats controlled the entire mapdrawing process without Republican input. R.288–89; *see also* Transcript at 10–12, 20–21, Session, New York State Assembly (Feb. 2, 2022), https://bit.ly/3JX1MMx. Democratic leaders drew the new congressional map over only a few days, allowing for no Republican or public input or involvement. R.288–89. Then, the Democrats did not engage in any negotiations with the Republicans prior to enacting the map. R.288–89.

Mr. Trende—a widely renowned expert on redistricting who was recently selected by the Supreme Court of Virginia as a special master to redraw successfully Virginia's maps, R.232–34—submitted his opening Expert Report analyzing the congressional map by using the well-accepted method of comparing the map to

5,000 computer-generated maps based on New York's redistricting requirements. R.240–53. Mr. Trende then calculated a "gerrymandering index" from these 5,000 maps, showing that the enacted congressional map was more pro-Democrat than any of those 5,000 maps. R.242–43. Further, Mr. Trende generated a dotplot that reveals the "DNA of a gerrymander" in the map, vividly illustrating how the Legislature packed and cracked Republicans across the State. R.244–48.

Next, Mr. LaVigna's opening Expert Report analyzed each new district. R.265–86. Mr. LaVigna's Expert Report described how legislative Democrats packed Republicans into four districts while also making numerous other Republican districts more Democratic, leading to a 22-4 map. *See generally* R.265–86.

Respondents' expert Dr. Michael Barber argued in his expert report that the 2022 congressional map was actually *pro-Republican*, because it effectively guaranteed Republicans four seats in a 22-4 map. R.1001–04, 1007. And important for many of Respondents' arguments on appeal, Dr. Barber replicated *50,000* simulated maps using Mr. Trende's parameters and admitted on cross-examination that he reached results in his simulations consistent with Mr. Trende's reported results. R.997–1001, 2842.

Respondents' expert Dr. Kristopher R. Tapp submitted an expert report concluding, just like Dr. Barber, that Mr. Trende's analyses reveal that the 2022

congressional map was pro-Republican because it created four strong Republican districts, as part of a 22-4 map. R.848–49, 853–55, 3074–77.

Finally, Respondents' expert Dr. Stephen Ansolabehere looked at statewide-race election averages, district by district, and concluded the congressional map was 22-4 under his methodology, R.873–74, while making certain critiques of Mr. LaVigna's district-by-district analysis.

Mr. Trende's Reply Expert Report addressed and refuted the criticisms from Respondents' experts. Specifically, Mr. Trende increased the number of his simulations to three runs of 10,000 neutral maps—responding to the critique that 5,000 simulations was somehow too few—and again found the same results, including as to the dotplot. R.1040–44. In each of these additional 10,000 neutral map runs, Mr. Trende also addressed fully claims that he failed to consider the avoidance of city and town splitting, minority-vote dilution, and core retention by re-running his simulations and finding the same results. R.1038–44. Additionally, Mr. Trende evaluated statewide and congressional races, concluding that the map was 22-4 under typical conditions. R.1032–33.

Mr. LaVigna's Rebuttal Expert Report refuted Dr. Ansolabehere's district-specific conclusions. In particular, he noted that Dr. Ansolabehere incorrectly identified districts currently represented by Republicans as Democratic districts and

that Dr. Ansolabehere did not dispute that these districts were now more Democratic under the 2022 congressional map. R.1055–65. Mr. LaVigna also utilized the Cook Partisan Voting Index ("CPVI") to bolster his prior conclusion that the map is 22-4. R.1055.

Finally, on March 3, 2022, the Supreme Court permitted Respondents to submit additional expert reports by March 10, 2022, *only to address the state Senate maps*, given that the court had just then permitted Petitioners to add the state Senate claims into the case. R.2477. Respondents then egregiously violated the Court's order by submitting reports from Dr. Tapp, R.1194–216, and Dr. Jonathan N. Katz, R.1225–53, that addressed *both* the congressional and state Senate maps on the eve of trial. The Supreme Court, of course, struck the congressional portions of these reports as flagrantly untimely, meaning that Petitioners did not respond to the congressional aspects of reports below and did not cross-examine Drs. Katz and Tapp about those aspects. *See* R.2976, 3014. Respondents also submitted the expert report of Mr. Todd A. Breitbart, which properly focused only on the state Senate map. R.1152.

2. Supreme Court's Opinion And Order

The Supreme Court issued its decision on March 31, 2022. The court first held that the Legislature failed to follow the exclusive process for enacting replacement maps. R.16. Because "the IRC failed to act and submit a second set of

maps," the Legislature constitutionally could not step in to draw its own maps. R.16. The court also held that the congressional map was unconstitutionally gerrymandered beyond a reasonable doubt. R.16, 20. The court noted that "the testimony of virtually every expert . . . is that at least in the congressional redistricting maps the drawers packed Republicans into four districts, thus cracking the Republican voters in neighboring districts and virtually guaranteeing Democrats winning 22 seats." R.19. Further, finding particularly persuasive the expert evidence put forth by Petitioners, the court emphasized how the map packed Republicans into four districts and eliminated competitiveness in numerous previously competitive districts, which now favored Democratic candidates. R.18–20. The court specifically found Mr. Trende's testimony highly persuasive and credible. R.18. The Supreme Court, however, rejected Petitioners' arguments on the substantive gerrymandering of the state Senate map, including based upon the evidence and expert report submitted by Mr. Breitbart, which is not relevant to this appeal. R.20. In light of its holdings, the Supreme Court gave the Legislature until April 11, 2022, to submit bipartisanly supported, constitutionally sound maps for the court's review. R.24. Failing that, the Supreme Court declared that it would retain a neutral expert at the State's expense to prepare new maps. R.24.

3. Appellate Division's Limited Stay Order

Respondents appealed the Supreme Court's Decision And Order, R.1–34, and thereafter moved this Court for a stay pending appeal, Dkts.5, 9. During stay proceedings, counsel speaking for all Legislative Respondents explained to Justice Lindley that, assuming appellate review concluded by the end of April, there would be ample time to hold a primary election on new maps in August 2022. *See* Email from Craig R. Bucki to Justice Lindley (Apr. 7, 2022 5:58 PM EST). Justice Lindley then granted a partial stay pending appeal. Dkt.23 at 1. The partial stay specifically did not stop the Supreme Court from retaining a neutral expert to prepare a proposed congressional map, in order to ensure that a constitutional map can be in place for 2022, if Petitioners prevail in this expedited appeal. Dkt.23 at 2.

LEGAL ARGUMENT

I. Point I: Respondents Contravened The Mandatory, Exclusive Redistricting Process Enshrined In New York's Constitution

A. The Constitution establishes the following "*process* for redistricting" that "*shall govern redistricting in this state*," N.Y. Const. art. III, § 4(b), (e) (emphases added): the Legislature must consider two rounds of maps created and submitted by the IRC before having any authority to draw maps itself. If this process fails, courts are "*required* to order the adoption of, or change to, a redistricting plan." N.Y. Const. art. III, § 4(e) (emphasis added); *see* League.Br.5, 10–11, 13. That is,

legislative IRC appointees and the non-partisan appointees must agree on a first map to submit to the Legislature, which the Legislature must vote on "without amendment." N.Y. Const. art. III, § 4(b). If the Legislature disapproves, the Constitution then provides the IRC with at least 15 days from then to "prepare and submit to the legislature a second redistricting plan," which the IRC must submit "in no case later than February twenty-eighth." *Id.* Again, the Legislature must vote on these second-round maps "without amendment." *Id.* Only if these maps fail to pass in the Legislature, or if the Governor vetoes them, does redistricting responsibility pass to "each house [of the Legislature to] introduce" their own maps and "implement[ ] legislation with any amendments each house of the legislature deems necessary." *Id.*; *see* League.Br.10–11.

The plain language of Article III, Section 4, *see Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 207 (1907), mandates that the Legislature may only adopt redistricting maps through the exclusive process articulated in Article III, Sections 4, 5, and 5-b. The Constitution provides that those procedures "*shall govern* redistricting in this state," N.Y. Const. art. III, § 4(e) (emphasis added), with "shall" "command[ing] an action" with "no discretion," *Brusco v. Braun*, 84 N.Y.2d 674, 680 (1994), especially when related sections contain permissive, or "may," clauses, *People v. Golo*, 26 N.Y.3d 358, 362–63 (2015). Article III, Section 4(b)—enacted as part of the same

2014 Anti-Gerrymandering Amendments—states that "[t]he redistricting plans for the assembly and the senate shall be contained in and voted upon by the legislature in a single bill, and the congressional district plan *may* be included in the same bill *if the legislature chooses to do so*." N.Y. Const. art. III, § 4(b) (emphases added). The Constitution *requires* that the IRC procedures outlined in Article III, Section 4—including the IRC's unassailable primary duty to present two sets of maps to the Legislature before the Legislature has any authority to draw maps itself, N.Y. Const. art. III, § 4(b)—"*shall govern* redistricting in this state," *id.* § 4(e) (emphasis added); *see* League.Br.11. Article III, Section 4 does not give any "discretion" to vary from those requirements, *Brusco*, 84 N.Y.2d at 680.

The Constitution's use of the definite article "the" underscores the exclusive nature of the redistricting process, permitting no alternative process. Courts must apply grammar and syntax rules when interpreting constitutional provisions, and "the" is a "function word . . . indicat[ing] that a following noun or noun equivalent is definite or has been previously specified by context." *Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019); *see also Work v. U.S. ex rel. McAlester-Edwards Coal Co.*, 262 U.S. 200, 208 (1923). The definite article "the" evinces the intent to restrict meaning to a specific referent. *Shaffer v. Mason*, 29 How. Pr. 55, 1865 WL 3674 (N.Y. Sup. Ct. 1865). Because Article III, Section 4(e) makes clear that the process for

redistricting after the 2014 Amendments is "*[t]he* process for redistricting . . . in this state," the Constitution explicitly creates a single, mandatory, exclusive process for adopting redistricting maps. N.Y. Const. art. III, § 4(e) (emphasis added).

The People's clear purpose for enacting the 2014 Anti-Gerrymandering Amendments supports this reading of Article III, Section 4. *Sherrill*, 188 N.Y. at 207. New Yorkers expected the Amendments to eliminate the Legislature's exclusive partisan control over New York's redistricting process, N.Y. Const. art. III, § 4(b), believing the IRC's primary role would result in less partisan redistricting. Further, the exclusive process incentivized the Legislature to use its appointment powers to broker compromise, *see* N.Y. Const. art. III, § 5-b(a)–(b), by appointing commissioners who would complete the process.

Any contrary interpretation would lead to the impossible result that the Constitution's carefully drawn IRC process is meaningless. Legislative leadership could—and, given their historical, insatiable desire for gerrymandering, would—deliberately thwart the IRC process by stacking the Commission with allies that would have no reason to pass out a second set of maps, thereby giving the Legislature a free hand to draw maps as if the IRC never existed, without ever taking political accountability for voting down IRC maps. *See also* League.Br.15. If, on the other hand, this Court enforces the mandatory IRC process, making clear to the Legislature

that failure to appoint Commissioners that will do their jobs will lead to courts drawing maps, the constitutional incentives for bipartisanship will be just what the People demanded through the 2014 Anti-Gerrymandering Amendments.

Notably, the Legislature understood that it would need a constitutional amendment to achieve what Respondents now claim the Constitution permits. Ahead of the November 2021 election, the Legislature referred to the ballot a new constitutional amendment, which would empower the Legislature to enact its own maps in the exact situation in dispute here:

> If . . . the redistricting commission fails to vote on a redistricting plan and implementing legislation by the required deadline and makes a submission to the legislature pursuant to subdivision (g-1) of section five-b of this article, each house shall introduce such implementing legislation with any amendments each house of the legislature deems necessary.

2021 Statewide Ballot Proposals, *supra* (amendment underlined). The amendment "was voted down by the people of the State of New York—Republicans, Democrats, and Independents alike." R.13.

Notwithstanding the People's clear rejection of this legislative "escape clause" from the IRC process, "[j]ust three (3) weeks later, the legislature enacted legislation signed by the governor giving themselves the power to do exactly what the people of the State of New York had just voted down three (3) weeks earlier." R.13. This new law, L.2021, c. 633, § 1, provided that "if the commission does not

vote on any redistricting plan or plans, for any reason, by the date required for submission . . . each house shall introduce such implementing legislation with any amendments each house deems necessary." L.2021, c. 633, § 1. Of course, the Legislature's effort to replicate the failed 2021 constitutional amendment in statutory form cannot "override" or remove constitutional requirements. *City of N.Y. v. N.Y. State Div. of Hum. Rts.*, 93 N.Y.2d 768, 774 (1999).

B. The 2022 maps are unconstitutional for failure to follow the exclusive redistricting process that the Constitution mandates. Here, the Legislature ignored the Constitution's exclusive process for redistricting—acting exactly as if the failed 2021 constitutional amendment had passed—rendering the enacted maps ultra vires and void. After the Legislature notified the IRC that it had rejected the Commission's initial set of maps on January 10, 2022, *see* Transcript at 18–21, Session, New York State Assembly (Jan. 10, 2022), https://bit.ly/3LRogQd; Transcript at 70:8–79:16, Regular Session, New York Senate (Jan. 10, 2022), https://bit.ly/38w5Nu5, the IRC had 15 days to submit its second set of maps for the Legislature's consideration, N.Y. Const. art. III, § 4(b) but the Commission never developed or submitted these maps, Transcript at 6, Session, New York State Assembly (Feb. 2, 2022), *supra*. Nevertheless, the Legislature authorized LATFOR to create the Legislature's maps, Assembly Speaker Carl E. Heastie, News Release,

Speaker Heastie Announces Assemblymember Zebrowski Appointed Temporary Co-Chair of LATFOR (Jan. 18, 2022), https://bit.ly/3rtLCDN; *see* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196, A.9039-A, A.9040-A, and A.9168, without waiting for the necessary constitutional predicates, taking action long before the IRC's absolute deadline of February 28, 2022, R.12, and thus rendering the redistricting legislation unconstitutional and ultra vires, *Robinson v. Robins Dry Dock Repair Co.*, 204 A.D. 578, 583 (2d Dep't 1923), *rev'd on other grounds* 238 N.Y. 271 (1924). Given that the Legislature cannot correct this violation, the only possible remedy would be for the courts to draw replacement maps immediately. *See* League.Br.12–13.

C. Respondents offer no engagement with the clear, governing constitutional text of the 2014 Anti-Gerrymandering Amendments—namely, that "*[t]he* process for redistricting [following those 2014 Amendments] *shall govern* redistricting in this state," N.Y. Const. art. III, § 4(e) (emphases added). That failure alone is fatal to their arguments. *See People v. Rathbone*, 145 N.Y. 434, 438 (1895) ("In the construction of constitutional provisions, the language used, if plain and precise, should be given its full effect, and we are not concerned with the wisdom of their insertion."); *see also Sherrill*, 188 N.Y. at 207. Instead, their argument appears to be that if "the process" fails, then the pre-2014 Amendment "process" kicks back

into effect, which is obviously contrary to the constitutional text. The nontextual arguments that Respondents do muster are meritless.

Respondents' claim that the 2014 Amendments somehow reaffirm "centuries of precedent vesting the redistricting prerogative in the Legislature," Assembly.Br.26; Senate.Br.21; Gov.Br.19, only reveals their fundamental misunderstanding of why the 2014 Anti-Gerrymandering Amendments were necessary in the first place. The People understood that the 2014 Anti-Gerrymandering Amendments would *require* that the Legislature follow the two-step IRC redistricting process before having any mapdrawing authority, *see* League.Br.19, emphatically rejecting the Legislature's former prerogative and resigning the Legislature to a rather begrudging backstop. In short, contrary to Respondents' mistaken belief, the 2014 Anti-Gerrymandering Amendments *did* in fact "extinguish the Legislature's authority to enact redistricting plans," Senate.Br.20, in very substantial part, precisely because the People were tired of the Legislature's relentless gerrymandering. *See* League.Br.14–18.

Respondents' claim that it would be "absurd" that "four Commission members could extinguish the Legislature's redistricting power" by failing to submit a second set of maps to the Legislature, *see* Assembly.Br.28–29; Senate.Br.25–26; Gov.Br.20–21, similarly misunderstands the fundamental reforms in the 2014 Anti-

Gerrymandering Amendments and is just an effort to nullify the 2014 Anti-Gerrymandering Amendments. *See* League.Br.17. The People expected that legislative leaders would seriously deliberate before naming IRC Commissioners, so that any IRC map that the Legislature *must* consider would have *bipartisan* support, or the nonpartisan courts would draw the maps. And if the Legislature failed to vet Commissioners sufficiently, there is an easy fix: legislative leadership's power to appoint eight of the ten members of the IRC, N.Y. Const. art. III, § 5-b(a)(1)–(4), includes the plenary "power to remove," *Melendez v. Bd. of Educ. of Yonkers City Sch. Dist.*, 34 A.D.3d 814, 814 (2d Dep't 2006); *see also Sharkey v. Thurston*, 268 N.Y. 123, 127 (1935), any IRC Commissioners who may undermine the redistricting process, *Bartlett v. Bedient*, 47 A.D.2d 389, 390 (4th Dep't 1975) (per curiam), and appoint new members who will discharge their duties, N.Y. Const. art. III, § 5-b(a)(1)–(4).

Respondents wrongly assert that the Supreme Court "ignored uncontested record evidence," showing "[i]t was the Republican commissioners who prevented the Commission from submitting a final plan or plans to the Legislature, not the Democratic commissioners." Senate.Br.26. This false assertion is legally irrelevant. As all parties agreed below, the issue of whether the maps are procedurally invalid turns on the purely legal question of whether the redistricting process set forth in

Sections 4 and 5 of Article III of the New York Constitution is *exclusive* under the Constitution's text. NYSCEF No.94 at 9–10; NYSCEF No.95 at 7–9; NYSCEF No.96 at 12–13. In any event, Respondents misrepresent the facts, which clearly show the Democratic Caucus refusing to negotiate bipartisan maps and instead only negotiating on the latest iteration of its partisan maps. Testimony of Jack Martins at 9:16–9:49, 1/3/22 IRC Meeting, *supra*. And while Respondents contend that Petitioners could not and did not offer any "proof of their own," Senate.Br.26, they conveniently ignore Respondents' and the Democratic IRC members' blatant evasion of the Supreme Court's discovery order that would have allowed Petitioners to depose certain Respondents and a Democratic IRC member. *See* R.1989–2107.

Finally, Respondents rely heavily upon the pre-2014 case *Cohen v. Cuomo*, 19 N.Y.3d 196 (2012) (per curiam), but it does not help them. Assembly.Br.30–32; Senate.Br.22–23; Gov.Br.17–18. There, the Court of Appeals held that because the Constitution is silent on the method of calculating the number of Senate seats, the Legislature "must be accorded a measure of discretion" to address this silence. *Cohen*, 19 N.Y.3d at 202. Unlike in *Cohen*, the Constitution is *not* silent on the issue here. Article III, Section 4's text clearly provides "[t]he process" that "shall govern" redistricting, including the necessity of two rounds of IRC maps before the Legislature may take the helm on redistricting, N.Y. Const. art. III, § 4(e); *see also*

League.Br.13. By unambiguously requiring that only "the process" allows for the adoption of new maps, the Constitution forecloses any alternative "process."

II. Point II: The 2022 Congressional Map Violates Article III, Section § 4(c)(5) Of The New York Constitution

The Constitution prohibits drawing districts "to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." N.Y. Const. art. III, § 4(c)(5). The plain text of Section 4(c)(5), *Sherrill*, 188 N.Y. at 207, as supported by the history of this provision, *see N.Y. Pub. Interest Rsch. Grp. v. Steingut*, 40 N.Y.2d 250, 258 (1976), prohibits the drawing of district lines with impermissible partisan intent, N.Y. Const. art. III, § 4(c)(5), *see People v. Smith*, 79 N.Y.2d 309, 314 (1992).

This Court should affirm the Supreme Court's judgment that the 2022 congressional map was drawn with impermissible partisan intent, in violation of Section 4(c)(5), for two independent reasons. First, and sufficient by itself to affirm, the *undisputed* evidence shows that the Legislature and Governor followed an entirely partisan process to enact the 2022 congressional map, *and* that this process replaced the State's fair, 19-8 federal-court-drawn map with one that is 22-4 in a typical year. *Infra* Part II.A. Second, even as to the evidence that Respondents ineffectually try to dispute on appeal, the evidence proves beyond a reasonable doubt

that Respondents acted with partisan intent by cracking and packing Republicans in the 2022 congressional map for the Democrats' clear advantage. *Infra* Part II.B.

A. This Court Can Affirm On The Undisputed Facts Alone: Respondents Used A Wholly Partisan Process To Turn A Neutral, Court-Drawn 19-8 Map Into What Respondents And Their Experts Concede Is A 22-4 Pro-Democrat Map

This Court can affirm the Supreme Court's conclusion that the 2022 congressional map violates Section 4(c)(5) based on the undisputed evidence that Legislature and Governor followed an entirely partisan process to draft and enact the 2022 congressional map, which map replaced a fair, 19-8 court-drawn map with one that is 22-4 in a typical year. This undisputed evidence, standing alone, establishes that the Legislature and Governor acted with the impermissible partisan intent prohibited by Section 4(c)(5) of the New York Constitution. *See Szeliga v. Lamone*, Nos. C-02-CV-21—001773, -001816, slip op. at 88–94 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, ___ N.E.3d___, 2022 WL 110261, at *24 (Ohio 2022); *Harper v. Hall*, ___S.E.2d___, 2022 WL 343025, at *2 (N.C. 2022); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 808, 817, 825 (Pa. 2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 387, 390–93 (Fla. 2015); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1094–96 (S.D. Ohio 2019), *vacated and remanded*, 140 S. Ct. 102 (2019); *Common Cause v. Rucho*, 318 F. Supp. 3d 777,

861–62 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019); *Whitford v. Gill*, 218 F. Supp. 3d 837, 887–90 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018); *Rucho*, 139 S. Ct. at 2520–21 (Kagan, J., dissenting); *see also Davis v. Bandemer*, 478 U.S. 109, 129 (1986), *abrogated by Rucho*, 139 S. Ct. 2484 ("As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.").

There is no dispute that the Legislature and the Governor's process in drafting and enacting the 2022 congressional map was wholly partisan. To begin, legislative Democrats hurriedly drew the 2022 congressional map without any Republican input or involvement whatsoever. R.288–89; Transcript at 10–12, Session, New York State Assembly (Feb. 2, 2022), *supra*; *accord* R.11. As Senator Ortt explained in his affidavit below—which affidavit Respondents neither refuted nor rebutted, and *stipulated to* in closing arguments at trial—the legislative Democrats "unilaterally, secretly, and without any public input, drafted new maps." R.288–89. Thus, Republicans had no "*input or involvement in the drafting or creating of the congressional . . . map[ ] that the Legislature adopted*." R.289 (emphasis added). Additionally, Democratic Governor Kathy Hochul expressly promised to "use [her] influence to help Democrats expand the House majority through the redistricting process," thus helping the Democratic Party "regain its position that it once had

when [she] was growing up," R.927, which shows her clear partisanship. Finally, legislative Democrats passed their single-party-drawn congressional map, despite every Republican in the Assembly and Senate voting against it. *See* supra pp.8–9.

It is likewise undisputed that this deeply partisan process replaced the State's 19-8 map, *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012); *Member Directory*, N.Y. Senate (Mar. 3, 2022), https://bit.ly/3roPZjx; *2020 General Election Results: New York State Assembly*, N.Y. State Bd. of Elections, https://bit.ly/3OdWzDf—which, as all agree, was a fair, court-drawn map—with a map that is 22-4 in a typical year. Experts on both sides of this case agreed that the 2022 congressional map yielded a 22-4 Democratic majority in the typical year, although these experts reached that conclusion via different methodologies. Mr. Trende reached this conclusion based upon his analysis of statewide races and actual congressional results from the prior decade. R.1027–38, 1045. Mr. LaVigna arrived at the same 22-4 finding by considering a combination of the CPVI, along with the specific features of the congressional districts. R.267–72, 1056–66. Dr. Ansolabehere also found a 22-4 split by looking exclusively at statewide-race average results in each district. *See* R.868, 872–76. And Drs. Barber and Tapp both touted the 22-4 split as a *positive* feature of the map, after reviewing only Mr. Trende's dotplot, while offering no other estimate beyond 22-4. *See*

R.853–55, 1001–04. The Supreme Court made this point clear as part of its holding, explaining that "all the experts agreed . . . that the enacted congressional map would likely lead to the Republicans winning four Congressional seats," while "virtually guaranteeing Democrats winning 22 seats"—although "[t]he Republicans currently hold 8 of the 27 congressional seats" under the State's prior map. R.19.

Notwithstanding the Supreme Court's unambiguous reliance on the shift from a 19-8 court-drawn map to a 22-4 Democratic-drawn map, based upon the testimony of experts from both sides, Respondents fail to grapple with this case-ending point. Respondents do not attempt to dispute that the mapdrawing process was wholly partisan, with Democrats in the Legislature giving Republicans no say. Further, Respondents do not grapple meaningfully with the Supreme Court's point below that experts on both sides *agreed* that, by enacting the 2022 congressional map, Respondents replaced the State's fair, court-drawn 19-8 map with a 22-4 map in a typical year. Indeed, the *only* response on this point comes from the Assembly, arguing that "[t]he political landscape" for Republicans in New York "can shift"—including because of the People's responses to "rising gasoline prices or . . . the war in Ukraine." Assembly.Br.50. That voters' preferences can shift in a particular election year does not change the fact that the experts on both sides found that the 2022 congressional map results in a 22-4 split *in a typical year*—meaning those

years where neither Republicans nor Democrats experience a wave election due to a shift in voter preference resulting from unusual election conditions.

B. Petitioners Proved Beyond A Reasonable Doubt That Respondents Packed And Cracked Republicans For Partisan Gain

1. Petitioners Proved That The Congressional Map Packs And Cracks Republican Voters Throughout The State, Resulting In A Three-Fold Constitutional Violation

If this Court chooses to go beyond the undisputed facts, the simulation 5,000/10,000/10,000/10,000 map analysis that Mr. Trende conducted—*which Respondents' own expert, Dr. Barber, then successfully replicated, with a 50,000-map figure*—shows beyond any doubt that the congressional map "pack[ed] supermajorities of [Republican] voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail," while "crack[ing] the rest across many more districts, spreading them so thin that their candidates will not be able to win." *Rucho*, 139 S. Ct. at 2513–14 (Kagan, J., dissenting); *infra* Part II.B.1.a. Such cracking and packing violates all three prohibitions in Section 4(c)(5)—drawing maps (1) "to discourage competition," (2) "for the purpose of favoring or disfavoring incumbents," and (3) "for the purpose of favoring or disfavoring . . . political parties." N.Y. Const. art. III, § 4(c)(5). Further, looking at specific districts bolsters Mr. Trende's conclusions, while also showing some of the politicians that the Legislature sought to favor or disfavor. *Infra* Part II.B.1.b.

a. Mr. Trende's systematic and comprehensive analysis of the 2022 congressional map—which analysis the Supreme Court credited, R.18–20—showed just how successfully the Legislature "pack[ed] and "crack[ed]" Republicans so as to favor the Democrats, by making four districts extremely Republican (and thus less competitive), in order to make the previously competitive districts more Democratic. *Rucho*, 139 S. Ct. at 2513–14 (Kagan, J., dissenting). To reach his conclusions, Mr. Trende generated and analyzed 5,000 partisan-neutral, computer-generated maps, R.241–42—and then three more sets of 10,000 maps, R.1038, 1041, 1048–49—using a methodology grounded in the academic literature and commonly used by courts, including recently by courts in Ohio and Maryland, *see, e.g.*, *League of Women Voters of Ohio* 2022 WL 110261, at *23; *Szeliga*, slip op. at 83–84. Respondents' expert Dr. Barber replicated and confirmed Mr. Trende's analysis by generating 50,000 simulated maps of his own and on cross-examination admitted that his findings were consistent with Mr. Trende's. R.997–1001, 2842.

Mr. Trende's analysis explains *how* the Legislature "pack[ed] and "crack[ed]" Republicans to "dilut[e]" their vote. *Rucho*, 139 S. Ct. at 2513–14 (Kagan, J., dissenting), with a dotplot model that compares the partisan effects of 2022 congressional map with those of the 5,000 simulated maps. R.244–46. The dotplot lists all 26 congressional districts in individual columns along the x-axis, and then

scores each district in each map in terms of "percent Democratic" along the y-axis. *See* R.249–53. The columns line up according to the percent composition of Democratic/Republican voters, based upon an average of certain statewide races, in the district: column 1 is the most Republican/least Democratic district in the State in a given map, while column 26 is the most Democratic/least Republican district in the State in the given map. *See* R.244–46. Then, the red and blue bands in each dotplot column represent the percent-composition of Democrats in each district from the 5,000 simulated maps, while the black dot in each column represent the percent-composition of Democrats in each district of the enacted 2022 congressional map. *See* R.244–46.

This dotplot reveals the "DNA of a gerrymander," R.246, by showing how a mapdrawer "packed" or "cracked" Republican voters to aid the Democrats. *Rucho*, 139 S. Ct. at 2513–14 (Kagan, J., dissenting). Specifically, if a mapdrawer did *not* draw a map to have a Democratic partisan effect, then the black dots in each column would fall in the *middle* of each red/blue band. This means that the most-Republican district in the enacted map would have the same number of Republicans as the most-Republican district in the average map of the 5,000 generated maps (leftmost column); the second-most Republican district in the enacted map would have the same number of Republicans as the second-most-Republican district in the average

map of the 5,000 generated maps (second leftmost column); and so on, up to the maps' most Democratic district (rightmost column). If, however, the mapdrawer did draw a map to benefit Democrats, the dotplot would reflect the "packing" of Republican voters by plotting the black dots in the leftmost columns below the vast majority of the red/blue bands—meaning that the most-Republican districts in the enacted map were far *more* Republican ("packed" with Republicans) than the most-Republican districts in each of the 5,000 generated maps. Then, the dotplot would reflect the "cracking" of Republican voters by plotting the black dots in *many* other leftward columns above the vast majority of the red/blue bands—meaning that many other more-Republican districts in the enacted map have more Democrats in them (Republicans "cracked" across these many other districts).

Mr. Trende's dotplot exposes the "DNA of a gerrymander" in the 2022 congressional map, R.246, revealing the legislative Democrats' clear "packing" and "cracking" of Republicans, *Rucho*, 139 S. Ct. at 2513–14 (Kagan, J., dissenting). Specifically, as shown on page 245 of the Joint Record, the black dots in the four leftmost columns of the dotplot—representing the four most-Republican districts in the map—fall clearly below each red/blue band, meaning that the four most-Republican districts in the enacted map are *more Republican* than the four most-Republican districts in *all* of the 5,000 generated maps. R.244–46. Thus, Democrats

"packed" Republicans in these four districts "in numbers far greater than needed for their preferred [Republican] candidates to prevail." *Rucho*, 139 S. Ct. at 2513–14 (Kagan, J., dissenting). Then, the black dots in the next nine or so columns—representing the next most-Republican districts in the State—fall above all or almost all of the red/blue bands. R.244–46. This means that the next nine or so most-Republican districts are *more Democrat* than the next nine or so most-Republican districts in almost all of the 5,000 generated maps. R.244–46. So, legislative Democrats "cracked" Republicans across these many districts by adding large numbers of Democrats to them, "spreading" Republican voters "so thin" that Republican "candidates will not be able to win." *Rucho*, 139 S. Ct. at 2513–14 (Kagan, J., dissenting). This means that the map: (1) is more favorable for the Democratic Party; (2) is less competitive throughout the first thirteen or so districts in the dotplot; *and* (3) favors Democratic candidates, while disfavoring Republican candidates (outside of the four packed Republican districts).

In addition to his dotplot model, Mr. Trende also showed the extreme Democratic partisan effects of the 2022 congressional map through his "gerrymandering index" calculation. The "gerrymandering index" is a reliable and accepted metric that shows how partisan the 2022 congressional map is as a whole compared to the 5,000 apolitical, computer-generated maps. R.242–43. Here, the

"gerrymandering index" showed that the 2022 congressional map is an extreme outlier in terms of partisanship. R.242–43. Specifically, as shown in the chart on page 244 of the Joint Record, the 5,000 generated maps had, on average, an index of about 7.5%, while the enacted map had an index of 17%—almost six standard deviations from the mean. R.244. The 2022 congressional map was thus more biased in favor of Democrats than all of the 5,000 simulated maps that Mr. Trende analyzed. R.242–44. Mr. Trende concluded that "it is implausible, if not impossible" that the 2022 congressional map "was drawn without a heavy reliance upon political data and was likely drawn to favor or disfavor a political party." R.242–44.

b. That Democrats engaged in packing and cracking of Republican voters, while attempting to target certain Republican incumbents and help certain Democratic incumbents, is further illustrated by reviewing the specific districts.

Long Island Districts. In Long Island, the Legislature cracked CD1 and CD3 in order to pack CD2. *See* R.1056–58. Moving heavily Republican areas into new CD2 and shifting solidly Democratic communities into CDs 1 and 3, the Legislature flipped CD1, which elected Republicans for several election cycles and has a Republican incumbent, Representative Lee Zeldin, and decreased competition in CD3, which was a previously competitive district. R.1056–58. These undeniably

partisan shifts are supported by the CPVI, a nationally accepted standard for measuring partisan shifts in redistricting, R.1057 (showing CD1's CPVI metric shifted from R+6 under the old map to D+2, CD2's CPVI shifted from R+5 to R+11, and CD3's CPVI shifted from D+2 to D+5)—which metrics Respondents ignore, Assembly.Br.37; Senate.Br.54; *see* Gov.Br.23–24. *See Benisek v. Lamone*, 348 F. Supp. 3d 493, 507 (D. Md. 2018) (favorably citing the "well-respected" CPVI metric), *vacated and remanded sub nom. Rucho*, 139 S. Ct. 2484; *Householder*, 373 F. Supp. 3d at 998 (same). Respondents on this point cite Dr. Ansolabehere's testimony, Assembly.Br.37; Senate.Br.17, 54; *see* Gov.Br.23–24, but he *admitted* on cross-examination that the 2022 congressional map made *multiple* districts that are currently represented by Republicans more pro-Democratic, R.2929–32—including the new Long Island Districts discussed herein. *See* R.2929–30.

New York City Districts. As to the new CDs 8, 9, 10, and 11, the Legislature cracked Republican voters out of CD11 to create a partisan advantage and to unseat the Republican incumbent, Representative Nicole Malliotakis. R.1058–61. Formerly covering Staten Island and adjacent southern portions of Brooklyn, the new CD11 breaks apart closely knit, conservative communities, cracking these Republican voters into multiple districts, and delved deep into the heavily liberal areas of Brooklyn for partisan advantage. R.1058–61. Respondents argue that the

new map actually respects communities of interest in Brooklyn, Assembly.Br.37–38, Senate.Br.55; *see* Gov.Br.23–24—despite evidence and vocal public testimony to the contrary, R.1058–61. But more importantly, Respondents again ignore clear evidence showing Republicans were cracked into the overwhelmingly Democratic CDs 8, 9, and 10 to shift CD11's CPVI metric from R+7 to D+4, R.1059.

Hudson Valley Districts. The Legislature cracked Republican voters from the center of CD18 into CD16, a strong Democratic district, to make CD18 a more safely Democratic district without at all risking the Democratic Party's interests in CD16. R.269. In the new map, the strongly Republican towns of Putnam Valley, Carmel, Yorktown, and Somers are awkwardly connected to highly populated Democratic communities in CD16 with no logical explanation—neutralizing these Republican votes, improving Democratic candidates' chances in CD18, and protecting the incumbent Democratic Congressman Sean Maloney, the newly elected chair of the Democratic Congressional Campaign Committee, in CD18. R.1061–64. Again citing to Dr. Ansolabehere, Respondents argue that population shifts and communities of interest required this configuration of the Hudson Valley Districts, Assembly.Br.38, Senate.Br.55–56; *see* Gov.Br.23–24, but offer no coherent explanation for why the Legislature chose its illogical configurations, R.1061–64. They also ignore that the Republican strongholds of Putnam Valley, Carmel,

Yorktown, and Somers have little to nothing in common with the Democratic municipalities in Westchester County, which include Mount Vernon and Yonkers, let alone the portion of the Bronx now included in CD16. R.1061–62. A comparison of the 2012 CD16 and the 2022 CD16 reveals how thoroughly noncompact the new district is, R.1063–64, and Respondents do not offer any explanation whatsoever for the long tail connecting these disparate counties, *see* R.1062. The new configuration of CD16 operates to negate the votes of these Republicans in Putnam County, R.1062 (showing the CPVI metric of CD16 shifts from D+25 to a still overwhelmingly safe D+18 as the adjacent CD18 moves from R+1 to D+1).

Upstate Districts. The Legislature packed Republican voters into CDs 21, 23, and 24, enabling Democrats to gain a partisan advantage in CD22, R.270–71, 1064–66. The CPVI metrics show that by packing CDs 21, 23, and 24, *see* R.1064–66 (illustrating how CD21's CPVI metric went from R+8 to R+12, CD23 went from R+9 to R+14, and CD24, which resembles 2012 CD27, went from R+12 to R+14), the Legislature was able to make the surrounding districts more favorable to Democrats, R.1062, 1064–66. As Respondents' own expert acknowledged, R.2931–32, the new CD19 is more favorable to Democrats, with its CPVI metric shifting from R+1 to D+1, R.1062, and the Syracuse-center district, which was CD24 under

the old map and is now CD22, went from D+2 to D+6, R.1065—a partisan shift that can only be achieved by packing CDs 21, 23, and 24.

2. Respondents Have No Coherent Response To Petitioners' Showing That The Congressional Map Packs And Cracks Republican Voters Throughout The State

Respondents in their briefs to this Court launch various methodological attacks on Petitioners' expert evidence, especially as against Mr. Trende, but the Supreme Court heard testimony from all of the expert witnesses and concluded that Mr. Trende's analysis was the best methodology, including based upon the "quality and credibility of the expert testimony." R.18. This Court gives "great deference" to a trial court's "credibility determinations," and Respondents provide no reason whatsoever for this Court to "reject the court's credibility determinations here." *People v. Travis*, 156 A.D.3d 1399, 1400 (4th Dep't 2017); *see also Matter of Jamal V.*, 159 A.D.2d 507, 508 (2d Dep't 1990). In any event, all of Respondents' arguments here fail.

First, Respondents assert that the new congressional map is actually a Republican gerrymander because it virtually guaranteed Republicans four seats. Assembly.Br.48–50; Senate.Br.29, 47–48. To support this bizarre claim, Respondents rely upon a partisan index that is based upon a statewide average, which categorizes districts as "Democratic" or "Republican" *based solely on whether the average Democratic performance of that district in certain statewide races is in*

excess of 50%; that is, Respondents would treat a district where Democrats get 50.01% of the statewide average and a district where they get 70% of the statewide average identically, as "Democratic Districts," while one where the average is 49.99% Democratic in certain statewide races is a "Republican District." R.1031–38. Such nonsensical analysis is, of course, unsupported in the academic literature and caselaw, which is why several of Respondents' experts admitted on cross-examination that treating all seats on the same side of the 50% threshold as equivalent is incomplete, at best, R.2843–53, 3073–77, with Respondents' expert Dr. Katz (when testifying about the state Senate) unambiguously disclaiming this entire method of analysis as patently "not correct," R.3134–36. Critically, this 50.01%+ partisan-index approach fails to consider whether packing and cracking of Republicans was responsible for pushing formerly slightly Democratic districts far more pro-Democratic on a statewide average, as both Dr. Tapp and Dr. Barber admitted on cross-examination, R.2843–48, 3073–83, and thus is entirely unresponsive to Petitioners' packing-and-cracking gerrymandering theory.

Second, Respondents criticize Mr. Trende's initial set of 5,000 simulations for failure to control for requirements of municipal splits, the Voting Rights Act, district cores, and communities of interest. Assembly.Br.41–45; Senate.Br.32–39. As a threshold matter, Respondents' argument amounts to a thinly veiled conspiracy

theory that taking these traditional criteria into account would coincidentally replicate packing and cracking of Republicans in the enactment map. Even if this frankly silly theory were somehow plausible on the facts here—*which it obviously is not, as explained immediately below*—that would only support Justice Kagan's well-taken point that "big data and modern technology" give mapdrawers the ability to "choose the [map] giving their party maximum advantage" all while "still meeting traditional districting requirements." *Rucho*, 139 S. Ct. at 2512–13 (Kagan, J., dissenting).

But, in any event, Mr. Trende *did* control or explain for every factor that was technically possible to control for—municipal splits, VRA, and district cores—in his Reply Report, compiling three additional sets of 10,000 simulations, and came to the same results. In his Reply Expert Report, Mr. Trende noted that the New York Constitution requires mapdrawers to "consider" municipalities and town lines, ran an additional set of 10,000 simulations while "freezing" portions of the map so they could not split municipalities, and saw no change in results from his analysis and ultimate conclusions—the enacted map is a partisan gerrymander. R.1038–39. Addressing Respondents VRA concerns, Mr. Trende noted that he included majority-minority districts in his simulations, consistent with the VRA, but also produced additional, new simulations "freezing" certain districts in place in the same

manner as the enacted map, to protect the districts of minority members of Congress, and "strong evidence of gerrymandering" remained in his analysis of the enacted congressional map. R.1039–42. Finally, Mr. Trende explained that Dr. Ansolabehere was incorrect in stating that the enacted map exhibits a high degree of core retention, and it is more accurate to say that the map offers a "high degree of core retention in heavily Democratic districts, but pulls apart Republican districts, when possible." R.1043. In any event, when Mr. Trende ran 10,000 additional simulations with stronger core retention, that too offered no difference in the results. R.1043–45. Mr. Trende also used the exact same, standard compactness setting on his simulations as did Respondents' expert Dr. Barber, eliminating the possibility of differences there. R.2816–17.

Respondents' communities-of-interest criticisms of Mr. Trende's simulations likewise fail. No one can build that consideration into simulations because of the contested nature of the communities-of-interests, R.1043, as even Dr. Tapp conceded, R.3033. When Mr. Trende did control for objective factors closely related to communities of interest that are controllable in a simulation analysis—municipal splits—and then ran 10,000 simulations, he obtained the exact same gerrymandering results. *See* R.1045. This is, of course, exactly what one would expect, as there is no reason to think that considering communities of interest one way or another

would produce the extreme, packed-and-cracked 2022 congressional map, which just so happens to radically benefit the party that unilaterally adopted the map. Notably, "considerat[ion]" of communities of interest—which is all that the New York Constitution requires, N.Y. Const. art. III, § 4(c)(5)—is a standard requirement for redistricting in most States, including in States like North Carolina, where courts have relied heavily upon the simulation methodology to invalidate maps, *see Redistricting Criteria*, Nat'l Conf. of State Legislatures, https://bit.ly/3uM6JDx, therefore, this meritless critique would render the now-dominant simulation methodology—promoted by courts around the country, *supra* p.31—a dead letter throughout much of the Nation.

Third, Respondents erroneously contend that Mr. Trende's analysis is inadequate to prove the 2022 congressional map is a gerrymander because he created an insufficient number of simulations and those simulations included some number of redundancies. Assembly.Br.45–48; Senate.Br.40–44. Mr. Trende initially created 5,000 simulations, R.241–42, and then ran three sets of 10,000 additional simulations in his Reply Report (with each 10,000 simulation run controlling for majority-minority districts, municipal splits, and core retention, respectively), R.1038–42, for a total of 35,000 simulated maps, many more than the 1,000 or 3,000 or 5,000 simulations that Justice Kagan and courts have found sufficient to show an

effective gerrymander, *Rucho*, 139 S. Ct. at 2518, 2521 (Kagan. J., dissenting); *League of Women Voters of Ohio*, 2022 WL 110261, at *23. Dr. Barber conducted 50,000 more simulations with the same results that Mr. Trende had reached, R.2819, 2842, meaning that this case involves 85,000 simulated congressional maps of New York, all consistent with Mr. Trende's conclusions.

Respondents presented no evidence whatsoever of duplicates in Mr. Trende's *congressional* simulations, despite their flagrantly false assertions to the contrary to this Court. In Dr. Tapp's opening report, R.845–63—the only report he timely submitted on the congressional map—he provided no analysis whatsoever of redundancies or duplications within Mr. Trende's simulations and merely stated his "belie[f] that 5,000 [simulations] *probably* is not enough," R.861 (emphasis added). In his second report—which the Supreme Court struck as untimely all references to the congressional map, R.2976, a ruling that no Respondent has challenged on appeal—Dr. Tapp merely concluded that Mr. Trende's *Senate simulations* had a large number of redundant maps based upon Dr. Tapp's review of a "bimodal distribution" of those Senate maps, and only *speculated* on supposed redundancies in the congressional map, R.1204–08, 3042–43. Thus, Respondents are plainly mistaken when they claim that Dr. Tapp had *anything* relevant to say about redundancies in Mr. Trende's congressional analysis. Indeed, Dr. Tapp noted that a

"bimodal distribution" in the Polsby-Popper score for the Senate map simulations led him to believe there was a redundancy problem in the simulations, R.3042–43, 3071–73, *but no such bimodal distribution is found in Mr. Trende's congressional simulations*, R.247. And another of Respondents' experts, Dr. Barber, confirmed Mr. Trende's conclusions after his own, independent 50,000-simulation analysis, with no mention at all of redundancies. R.997–1001, 2842.

Respondents' attempt to disparage Mr. Trende's methodology here compared to the expert report he submitted to a Maryland circuit court in *Szeliga*, is waived, *see Christantiello v. Christantiello*, 168 A.D.2d 943, 943 (4th Dep't 1990), and without merit in any event, Assembly.Br.46–48; Senate.Br.42–44. The Maryland court "gave great weight" to Mr. Trende's "testimony and evidence" relying on his work as "an example of a deliberate, multifaceted, and reliable presentation" in striking down the Maryland map. *Szeliga*, slip op. at 83–84. Respondents had the right to cross-examine Mr. Trende on his Maryland approach below, but asked him nothing on the topic during their lengthy cross-examination, R.2564–672, and only raised this complaint for the first time in closing arguments. That they now claim that they did not do sufficient diligence before cross-examination of Mr. Trende, Seante.Br.43 n.5, is entirely their own fault. Had they asked Mr. Trende about Maryland (preserving this issue), his response would have been devastating to their

untimely speculations. Mr. Trende's choice to make 750,000 simulations in *Szeliga* reflected the need to incorporate plans with two districts with a Black Voting Age Population well greater than 50%. Dkt.19, Ex.H, Appx. I at 4. Because of these unique-to-Maryland constraints, a generation of 5,000 maps alone would have created only 600 valid maps to use as comparators in Maryland. *See* Dkt.19 Ex.H, ¶¶ 86–87 & App. I at 4. Entirely refuting Respondents' arguments here, when Mr. Trende ran an additional analysis in Maryland that "froze" the Maryland majority-minority districts—thereby eliminating the 600/5,000 problem discussed immediately above—he used 5,000 total simulations, Dkt.19, Ex.H, Appx. I at 4. When Mr. Trende used this same exact "freeze" methodology in the present case with regard to majority-minority districts in New York, he ran 10,000 simulations. R.1038.

Fourth, Respondents argue that this Court should reject Mr. Trende's analysis because he never provided his simulated maps to be placed into the record. Assembly.Br.43–44; Senate.Br.36. Respondents never requested Mr. Trende's maps through discovery. *Christantiello*, 168 A.D.2d at 943. In any event, each set of simulations will produce a unique set of maps, resulting in useful collective *data* from which an expert can provide a mathematical analysis. R.241–43. Each individual map, even those with some oddities, is not relevant to the data-based

conclusions experts draw from these simulations, which is why courts using the simulation methodology do not analyze each of these thousands of maps. *See supra* p.31. And—again—Dr. Barber's own 50,000 simulations came to the same conclusions as Mr. Trende's, R.997–1001, 2842, so Respondents could have reviewed Dr. Barber's simulations to search for outliers or oddities in that data set, if they thought that relevant. Respondents obviously found no such issues in Dr. Barber's 50,000-simulation sample, which is why their briefs below and here are silent on this point.

Fifth, Respondents' misguided attacks on the simulations approach, Dr. Imai's methodology, and Mr. Trende all miss the mark. Assembly.Br.48–52; Senate.Br.30–44. The simulation approach for evaluating gerrymandering has become the dominant approach in redistricting litigation, with Justice Kagan endorsing the approach, *Rucho*, 139 S. Ct. at 2518, and with courts relying upon this approach in Michigan, *id.*, Ohio, *League of Women Voters of Ohio*, 2022 WL 110261 at *23, *26, Pennsylvania, *League of Women Voters*, 178 A.3d at 818; and Maryland, where Mr. Trende's own simulations-approach analysis—based upon Dr. Imai's work, *Szeliga*, slip op. at 63—was the key evidence invalidating Maryland's congressional map, based upon the same methods Mr. Trende used here, *Szeliga*, slip op. at 83. Moreover, Mr. Trende's redistricting work is so well respected that

he was recently selected by the Supreme Court of Virginia to redraw that State's congressional districts in this redistricting cycle. R.234.

Sixth, Respondents' reliance on Dr. Katz's "partisan-symmetry" analysis of the 2022 congressional map, Senate.Br.47–52, is flagrantly improper. The Supreme Court excluded Dr. Katz's discussion of the congressional map as untimely submitted. R.2976, 3014. Respondents did not appeal that decision, and nowhere explain how filing an expert report two weeks late, thus providing Petitioners no opportunity for an expert rebuttal, comports with basic fairness. *See Kigin v. N.Y. Workers' Comp. Bd.*, 24 N.Y.3d 459, 469 (2014). Had Dr. Katz submitted his report in a timely matter, Petitioners would have retained their own partisan-symmetry expert (or an expert to criticize partisan-symmetry metrics), and, further, would have questioned Dr. Katz about why his partisan-symmetry calculations conflict with the most respected public partisan-symmetry calculations from FiveThirtyEight. *Compare What Redistricting Looks Like In Every State*, FiveThirtyEight, https://53eig.ht/3M6gJ08 (noting a very large D+8.6 efficiency gap for the map), *with* R.1247. Notably no timely submitted expert in this case attempted a partisan-symmetry analysis of the congressional map and for good reason. Such a symmetry approach is properly disfavored vis-a-vis a simulation approach, *see Rucho*, 139 S. Ct. at 2518–19 (Kagan, J., dissenting), because symmetry does not look for or care

about whether the symmetry score is the result of natural packing of voters, which is why symmetry does not analyze partisan intent at all, as Dr. Katz himself admitted when discussing his analysis of the state Senate map, R.3135–38.

Finally, Assembly Respondents' contention that the Supreme Court erred in failing to address the congressional map district by district, Assembly.Br.53–55, is waived for not being raised below, *see Christantiello*, 168 A.D.2d at 943, and meritless in any event because it misunderstands the typical statewide nature of partisan gerrymandering, *see Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring). Respondents' reliance on *Upham v. Seamon*, 456 U.S. 37 (1982) (per curiam), an inapposite Voting Rights Act case, is misplaced, as VRA violations—unlike partisan gerrymandering ones—are generally district-specific, focusing on whether a sufficiently compact majority-minority district can and should have been drawn under federal antidiscrimination law.

III. Point III: The Supreme Court Properly Granted An Immediate Remedy, Applicable To The 2022 Elections

A. The Supreme Court properly invalidated the 2022 maps immediately, before the 2022 elections. The New York Constitution contemplates that successful challengers under the 2014 Anti-Gerrymandering Amendments will receive relief in the first election cycle under the new map. The Constitution authorizes expedited judicial review of the newly adopted redistricting plan, N.Y. Const. art. III, § 5

(imposing a strict, 60-day deadline for the court to "render its decision"), and explicitly requires a reviewing court to "invalid[ate]" maps found to "violate the provisions of" Article III, Sections 4 and 5. N.Y. Const. art. III, § 5; *see Goldstein v. Rockefeller*, 257 N.Y.S.2d 994, 1004 (Monroe Cnty. Sup. Ct. 1965); *Landes v. Town of N. Hempstead*, 20 N.Y.2d 417, 421 (1967). It would make very little sense for the Constitution to mandate such expedited proceedings if any remedy were not meant to take effect immediately before the impending election season, especially in cases like this one, where the challengers filed their Petition on the very day that the Governor signed the maps into law. R.51–117. Indeed, as Justice Lindley explained during the hearing on Respondents' stay requests, unconstitutional maps should not remain to govern the upcoming elections.

The Supreme Court's decision to invalidate the maps immediately poses no risk to New York's election processes, given that the evidence below established that there is ample time for new maps to be drawn and implemented well in advance of election day and absentee balloting. Indeed, as the Legislative Respondents admitted at the stay stage, *see infra* pp.52–53, there is ample time to hold primary elections in August and general elections on November 8, 2022, as prescribed by federal law, *see* 2 U.S.C. § 7, including accommodating the 45-day federal-law requirement for military and overseas citizen voting, 52 U.S.C. § 20302(a)(8)(A).

Moving back the primary election to August would permit candidates ample time to obtain signatures on designating petitions, *see* N.Y. Election Law §§ 6-134(4), 6-158(1), and allow the Board of Elections a full week to authorize primary petitions, *see* N.Y. Election Law § 6-120(3), with sufficient time to certify the primary ballot, *see* N.Y. Election Law § 4-110, all while complying with the federal requirements noted above, 52 U.S.C. § 20302(a)(8)(A). And this extension of these primary deadlines would in no way implicate the general-election deadlines, which do not begin until September. N.Y. Election Law §§ 4-112, 4-114, 10-108, 11-204.

In just this election cycle, multiple state courts across the Nation have taken this approach during various redistricting challenges—moving statutory election deadlines to accommodate the prompt adoption of new maps. In Maryland, the Court of Appeals very recently moved primary election deadlines from June 28, 2022, to July 19, 2022, to determine the constitutionality of a legislative redistricting plan that is subject to a partisan gerrymandering challenge. *See* Order, *In re 2022 Legislative Districting of the State of Maryland*, No. COA-MISC-0025-2021 (Md. Mar. 15, 2022), https://bit.ly/3KSak8v. In Pennsylvania, courts suspended election calendar dates pending those courts' review of challenges to reapportionment plans by Pennsylvania's Legislative Reapportionment Commission. *See* Order, *Covert v. 2021 Legislative Reapportionment Comm'n*, Nos. 4 WM 2022, 11 MM 2022, 14

MM 2022, 16 MM 2022, 17 MM 2022, 18 MM 2022, 7 WM 2022, 11 WM 2022, 12 WM 2022 (Pa. Mar. 16, 2022), https://bit.ly/36ZoBSj. And in North Carolina, the state Supreme Court delayed primary elections for over two months to permit sufficient consideration of pending redistricting challenges. *Harper v. Hall*, 865 S.E.2d 301, 302 (N.C. 2021).

B. Respondents advance various arguments for why the Supreme Court's remedy cannot stand, none of which are persuasive.

Respondents attack the Supreme Court's remedial order because they now claim that it will be difficult to draw new remedial maps and hold a primary in August. *See* Assembly.Br.56–63; Senate.Br.60–62. This argument is both factually wrong, as explained above, and also foreclosed by judicial-estoppel principles, *Lorenzo v. Kahn*, 954 N.Y.S.2d 331, 333 (4th Dep't 2012). Specifically, at the stay stage, Legislative Respondents supported their stay request by explaining that, given the Court of Appeals' intended expedition of its consideration of this case, "the Legislature now knows it would be able to consider and enact replacement maps promptly in the first week of May 2022, approximately 3 ½ months before August 23, 2022," if such maps are required, thus allowing full elections in 2022 under remedial maps. Email from Craig R. Bucki to Justice Lindley (Apr. 7, 2022 5:58 PM EST). That concession in the middle of trying to obtain relief from this Court

was exactly correct and consistent with the affidavit below of Todd D. Valentine, the Co-Executive Director for the New York State Board of Elections. R.2326–29. Thus, Executive Respondents are wrong to claim that a remedy for this election cycle would disrupt election processes. Gov.Br.29–30. As Mr. Valentine explained, the Board of Elections and local officials have a noted history of successfully altering election processes at even the eleventh hour to accommodate exigent circumstances, performing well under such conditions, and moving the primary to August to allow for drawing new maps would cause no real trouble for state and local election officials, providing ample time to complete all legal requirements. R.2327–29.

Contrary to Respondents' arguments, Assembly.Br.58–62; Senate.Br.60–62; Gov.Br.28–32, granting Petitioners' requested relief would not run afoul of *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), or its progeny. Under *Purcell*, "a State on its own" may modify "its election laws close to a State's elections," *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring), which includes state courts moving those deadlines, as in the examples described below. Only "lower federal courts" are prohibited from "alter[ing] . . . [State] election rules on the eve of an election," to avoid voter confusion, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). Any action by New York courts to supervise and administer redistricting because of Petitioners'

challenge is "precisely the sort of state judicial supervision of redistricting [the U.S. Supreme Court] ha[s] encouraged." *Growe v. Emison*, 507 U.S. 25, 34 (1993). This observation is supported by the U.S. Supreme Court's recent and different treatment of appeals from state-court judgments versus federal-court judgments. *See, e.g.*, *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1 (2020); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020). And given that Petitioners seek only to delay certain election deadlines with ample time for the State to advise voters while this Court considers the Petition, such changes do not "require complex or disruptive implementation," so the State can "easily" make these changes "without undue collateral effects," *Merrill*, 142 S. Ct. at 881 n.1 (Kavanaugh, J., concurring), and do not in any way risk the federal-court order in *United States v. New York*, No. 1:10-cv-1214, 2012 WL 254263, at *2 (N.D.N.Y. Jan. 27, 2012) ("this decision by no means precludes New York from reconciling their differences and selecting a different date, so long as the new date fully complies with UOCAVA").

Respondents' attack on the Supreme Court's "bipartisan" remedy for redrawing maps, *see* Assembly.Br.52–53; Senate.Br.24–25, is irrelevant to this appeal. The need for any remedial maps proposed by the Legislature to have bipartisan support is now plainly moot, as the Supreme Court's order specifically stated that the Legislature had only "*until April 11, 2022* to submit bipartisanly

supported maps" before that court would retain its own independent expert, R.24 (emphasis added), a date that, of course, has now passed. If this Court agrees with Petitioners on their procedural-invalidity argument, the remedy is for the courts, not the Legislature, to draw new maps because the Legislature plainly cannot cure its noncompliance with the process demanded by Article III, Section 4. *See also* League.Br.11–13. And if this Court rules for Petitioners only on the substantive unconstitutionality of the 2022 congressional map, the Legislature has only until April 30 to draw new maps, under this Court's stay decision, Dkt.23 at 2, and those remedial maps would not need to have bipartisan support, but would need to comply with Article III, Section 4(c)(5).

IV. Point IV: Petitioners Have Standing To Assert Their Claims Against The 2022 Maps

A. In New York, standing "involves a determination of whether the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast[ ] the dispute in a form traditionally capable of judicial resolution." *Graziano v. Cnty. of Albany*, 3 N.Y.3d 475, 479 (2004) (citation omitted). To have standing, a plaintiff must meet a two-part test, demonstrating (1) injury in fact, meaning that the plaintiff "will actually be harmed by the challenged . . . action"; and (2) that he "fall[s] within the zone of interests or concerns sought to be promoted or protected" by the law at issue. *Id.* (citation omitted). "The question of standing to challenge particular

governmental action may, of course, be answered by the [law] at issue, which may identify the class of persons entitled to seek review." *Soc'y of Plastics Indus., Inc. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 769 (1991). Thus, the Court of Appeals has noted as a sufficient example of explicit standing State Finance Law § 123, which declares that "any citizen-taxpayer should have and hereafter does have a right to seek the remedies provided for herein." *Id.* (quoting N.Y. State Finance Law § 123).

There are three independent bases for standing in a partisan gerrymandering case like this.

First, the New York Constitution can itself provide such standing. Here, the Constitution provides that "[a]n apportionment by the legislature, or other body, shall be subject to review by the supreme court, *at the suit of any citizen*." N.Y. Const. art. III, § 5 (emphasis added). The Constitution further requires that apportionments be enacted on the basis of a statewide plan, *see generally* N.Y. Const. art. III, § 4, and authorizes citizens to challenge "any law establishing congressional or state legislative districts," N.Y. Const. art. III, § 5. Thus, "any citizen" may challenge a statewide "apportionment" plan adopted by the Legislature.

Second, as Justice Kagan has explained in her concurrence in *Gill v. Whitford*, the specific nature of political gerrymandering—implicating multiple individual rights, including free speech and political rights—imposes unique statewide harms

on voters, which provide for statewide standing in cases were such harms are pleaded. 138 S. Ct. at 1934, 1937–39 (Kagan, J., concurring). Although the plaintiffs in *Gill* had failed to plead such statewide harms in that case, Justice Kagan explained that a partisan-gerrymandering plaintiff may demonstrate such statewide standing in future cases by alleging that "the gerrymander has burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects"—including by causing "difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office" and "accomplish[ ] their policy objectives." *Id.* at 1938–39. As those sorts of "injur[ies] . . . are statewide, so too is the relevant standing requirement." *Id.* at 1939.

Finally, gerrymandering plaintiffs can also establish standing "based on vote dilution," which was the type of harm specifically at issue in *Gill*. *See id.* at 1930, 1935; *accord id.* at 1938–39. A plaintiff establishes standing based on a vote-dilution theory by showing that "the value of her own vote has been 'contract[ed].'" *Id.* at 1935 (citation omitted). This is a "threshold showing" that is easily made "[i]n many partisan gerrymandering cases." *Id.* at 1936 (noting specifically that drawing "alternative maps[ ]—comparably consistent with traditional districting principles" can establish standing under a vote dilution theory). By showing "her district has

been packed or cracked," the plaintiff "proves, as she must to establish standing, that she is 'among the injured.'" *Id.* (citations omitted).

B. Petitioners clearly have standing to bring their claims under each of the three independent bases for establishing standing in partisan gerrymandering cases.

First, Article III, Section 5 provides that a lawsuit may be brought by "*any citizen*" challenging the constitutionality of a statewide apportionment plan, N.Y. Const. art. III, § 5, explicitly giving standing to each of the Petitioners, who are New York citizens, individually, to maintain this lawsuit, *Soc'y of Plastics*, 77 N.Y.2d at 769, any of which is sufficient to allow this Court to proceed to the merits on all aspects of the challenged maps, *see Humane Soc'y of U.S. v. Empire State Dev. Corp.*, 53 A.D.3d 1013, 1017 & n.2 (3d Dep't 2008). Indeed, the Senate Respondents concede that "article III, section 5 of the Constitution provides that redistricting plans may be challenged 'at the suit of any citizen,'" Senate.Br.59, which should be the end of the matter, and which is also why the trial court reached the same conclusion, R.9.

Second, tracking Justice Kagan's statewide theory specifically, Petitioners have also clearly established "associational injur[ies] flowing from a statewide partisan gerrymander," *Gill*, 138 S. Ct. at 1939 (Kagan., J., concurring), which none of Respondents dispute, *cf.* Senate.Br.58 (arguing only that partisan gerrymandering

claims are "district specific" under *Gill*); Assembly.Br.17–18 (same). In their Affidavits to the Supreme Court, Petitioners described how the Legislature's egregious gerrymander has diminished their "political action efforts" and "campaign activit[ies]" across the state, *see* R.290–91, 1067–89. Respondents' actions in gerrymandering the 2022 congressional map, statewide, harm Petitioners beyond their own individual congressional districts, impeding their efforts to help the Republican party and Republican candidates all across New York, even in districts where they do not reside. *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring).

Finally, Petitioners have established standing based on the dilution of their votes at a district level. Twelve Petitioners submitted to the Supreme Court Affidavits explaining the specific and concrete harms Respondents' gerrymander has caused and will cause them, including that the 2022 congressional gerrymander "dilute[s] the power of [Petitioners'] vote based upon [their] political beliefs," as well as "diminish[ing] the effect of [Petitioners'] political action efforts" by "undermin[ing] efforts throughout New York to elect Republican candidates." *See* R.290–91, 1067–89. Under the vote dilution theory, each Petitioner has demonstrated that his or "her own vote has been contract[ed]," by "produc[ing] a[ ] set of alternative maps[ ]—comparably consistent with traditional districting

principles" to show how the Legislature packed and cracked his or her districts. *Gill*, 138 S. Ct. at 1935–36 (Kagan, J., concurring); *see* R.242–44.

C. Respondents' contrary contentions on standing fail.

Respondents rely upon *Gill* and the trial court decision in *Bay Ridge Cmty. Council v. Carey*, 454 N.Y.S.2d 186, 192 (Kings Cnty. Sup. Ct. 1982), to claim that a petitioner may only have standing to challenge the district in which they live. Senate.Br.57–60; Assembly.Br.16–18. But the plaintiffs in *Gill* raised only claims related to an alleged "burden on those plaintiffs' own votes," for which standing arises only through "placement in a 'cracked' or 'packed' district," and the majority opinion specifically did not address "consideration of other possible theories of harm," like those raised by Justice Kagan in concurrence. *Gill*, 138 S. Ct. at 1931. And, of course, the federal Constitution does not specifically grant to "any citizen" the right to bring a "suit" challenging "[a]n apportionment by the legislature," as the New York Constitution does. N.Y. Const. art. III, § 5.

The *Carey* trial-court decision is irrelevant to the standing question before this Court, as the plaintiff there "ha[d] no standing to sue on the question of *race* gerrymander" because he was "not a member of a minority group, d[id] not live in Queens County (he live[d] in Town of Long Lake, Hamilton County), [and wa]s not aggrieved by either a 14th or 15th Amendment claim," and so failed standing thrice

over. 454 N.Y.S.2d at 192 (emphasis added). And the appellate courts affirmed that trial court's ruling without ever addressing the standing question in that case. *Carey*, 103 A.D.2d 280, *aff'd* 66 N.Y.2d 657 (1985).

Respondents also argue that this Court should take into account "prudential" considerations here because Petitioners reside in some, but not all, districts in the State. Senate.Br.58–60; Assembly.Br.19–21. But Petitioners reside in or border nearly every single congressional district in the State, R.303–05, thereby covering the vast majority of the State. In addition, under Justice Kagan's statewide gerrymandering harms/standing theory, this would further strongly support statewide standing, as explained above, given the number of Petitioners throughout the State. *See supra* pp.58–59. Finally, in terms of prudential considerations in adjudicating this case to completion and giving guidance to the People, even in the extremely unlikely event that this Court concluded that there was some sort of standing issue with a district here or there, this Court should issue a full decision on the merits and then remand this case to the Supreme Court, for Petitioners to add additional Petitioners in whatever very few relevant districts the Court finds a prudential standing concern.

V. Point V: Petitioners Did Not Sue Over The Assembly Districts

Petitioners explained in their Amended Petition that they were not seeking any relief as to the Assembly districts. R.303 nn.6 & 7; *see* Assembly.Br.21–23. Of

course, if this Court and/or the Court of Appeals agree with Petitioners' argument that the Legislature violated the Constitution's procedural requirements in enacting the 2022 congressional map, the 2022 Assembly map would likewise need to be invalidated for the same reason, upon the suit of any other voter.

VI. Point VI: The Governor Is A Proper Respondent

Contrary to her claim, Gov.Br.13–17, the Governor is a proper respondent. She is the "chief executive officer" of the State, *Dorst v. Pataki*, 90 N.Y.2d 696, 700 (1997), oversees the Board of Elections, *Clark v. Cuomo,* 66 N.Y.2d 185, 190 (1985), and should generally be named in a redistricting challenge. *E.g.*, *Schneider v. Rockefeller*, 31 N.Y.2d 420 (1972) ; *Wolpoff v. Cuomo*, 80 N.Y.2d 70 (1992).

CONCLUSION

The Court should affirm the judgment of the Supreme Court and remand for the adoption of constitutional maps to govern the 2022 elections.

Dated: April 15, 2022

Respectfully Submitted,

By: 

MISHA TSEYTLIN
Attorney for Petitioners-Respondents
875 Third Avenue
New York, New York 10022
212-704-6000
misha.tseytlin@troutman.com

PRINTING SPECIFICATION STATEMENT

Pursuant to 22 NYCRR § 1250.8(f) and (j), I certify the following:

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, and printing specifications statement is 13,979 words, as determined by the word counter in the Microsoft Word processing program.