To be Argued by:
CRAIG R. BUCKI
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

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

Petitioners-Respondents,

-against-

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

Respondents-Appellants,

and

NEW YORK STATE BOARD OF ELECTIONS,

Respondent.

Docket No.: CAE 22-00506

REPLY BRIEF FOR RESPONDENT-APPELLANT SPEAKER OF THE ASSEMBLY CARL HEASTIE

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PRELIMINARY STATEMENT

In their opening briefs, Respondents offer four main contentions: When the New York State Constitution is silent, the Legislature may fill the void. When a challenge to redistricting legislation relies on the flawed, experimental analysis of a single expert, the legislation has not been proven unconstitutional beyond a reasonable doubt. When Petitioners do not reside in a Congressional district, they cannot challenge that district's boundaries. And when an election cycle is in full swing, the Courts should not create upheaval by ordering election officials, political candidates, and supporters to stop everything and start over.

Petitioners fail to overcome these arguments. Instead, they erroneously claim that 2014 amendments to the State Constitution wrested redistricting authority away from the Legislature and handed it to the Courts. They dress up and gloss over their expert's fatal mistakes. They transform their theory of the case, at the eleventh hour, to seek statewide standing based on a concurring, non-controlling Supreme Court opinion. And they assure this Court that enacting new district maps in the middle of an election cycle would be smooth sailing. Petitioners' contentions should be rejected, the Trial Court should be reversed, and the Amended Petition should be dismissed.

Any other outcome would reward troubling conduct. Republican members of the Commission stayed home in January 2022, denying the

Commission a quorum and frustrating the redistricting process envisioned by the State Constitution. With election deadlines approaching, and with the Commission unable to act, the Legislature enacted maps of its own. Republicans ran to Steuben County Supreme Court that same day — having already retained counsel, written a 67-page petition, recruited 14 Petitioners, and pre-printed the judge's name on a proposed order to show cause. If this maneuvering is allowed to bear fruit, it will represent a profound loss for this State and for the separation of powers enshrined in its Constitution.

ARGUMENT

POINT I

PETITIONERS' BRIEF CONFIRMS THAT SEVERAL POINTS ARE NOT AT ISSUE IN THIS APPEAL

Preliminarily, Petitioners concede or waive several issues.

First, Petitioners concede they did not seek to invalidate the enacted 2022 Assembly district map. Petitioners' Brief p. ("Pet. Br.") 61. The concession was virtually obligatory: no one challenged the Assembly map, the Trial Court's decision to invalidate it was an improper advisory opinion, and everyone agrees the map received bipartisan support. Assembly Brief pp. ("Assembly Br.") 21-23.

Second, Petitioners abandon the Trial Court's invention of a bipartisanship requirement for remedial maps. Pet. Br. 54-55 (conceding "remedial maps [drawn by the Legislature] would not need to have bipartisan

support"). For good reason — any bipartisanship requirement violates the State Constitution. Assembly Br. 52-53.

Third, Petitioners fail to make — and therefore waive — any argument that the State Senate map is substantively unconstitutional. In fact, Petitioners affirmatively disclaim the argument. Pet. Br. 14 (asserting evidence regarding the Senate map's substantive constitutionality "is not relevant to this appeal").

Finally, Petitioners halfheartedly ask this Court to deprive the Legislature of an opportunity to draw remedial maps. Pet. Br. 21, 55. They contend that if the procedures used to enact New York's 2022 redistricting were unconstitutional, "the remedy is for the courts, not the Legislature, to draw new maps." Pet. Br. 55. But Petitioners waived this contention, which they had made to the Trial Court (R. 2459-60), and which the Trial Court rejected. Instead of awarding Petitioners the full relief they sought, the Trial Court held the Legislature may draw remedial maps. R. 22-24. This determination aggrieved Petitioners, yet they did not file a notice of cross-appeal. And in the absence of a cross-appeal, this aspect of the Trial Court's decision is not reviewable here. *See Bellevue S. Assocs. v. HRH Constr. Corp.*, 78 N.Y.2d 282, 299 n.5 (1991); *Collucci v. Collucci*, 58 N.Y.2d 834, 837 (1983); *Depczynski v. Schuster*, 196 A.D.3d 1105,

1107 (4th Dep't 2021); *Matter of McGraw v. Town Bd. of Town of Villenova*, 186 A.D.3d 1014, 1016 (4th Dep't 2020).[1]

By contrast, the Speaker did not waive his contention that the Trial Court should have evaluated the Congressional map district-by-district, rather than broadly deeming the entire map to be the product of improper partisan motive. Assembly Br. 53-55; *see also* Pet. Br. 49. This contention alleges no new facts, and the existing record on appeal permits review by this Court. *See Vanship Holdings Ltd. v. Energy Infrastructure Acquisition Corp*., 65 A.D.3d 405, 408 (1st Dep't 2009); *Brawdy v. Nat'l Grange Mut. Ins. Co.*, 207 A.D.2d 1019, 1020 (4th Dep't 1994). Indeed, the contention relies on a straightforward provision in the State Constitution allowing Courts to invalidate redistricting plans "in whole *or in part*." N.Y. CONST. art. III, § 5 (emphasis added). *See also* Assembly Br. 53-55.

POINT II

PETITIONERS LACK STATEWIDE STANDING

Respondents explained Petitioners allege residence in only a small handful of new Congressional districts. Assembly Br. 19. Respondents further explained that, in lawsuits like this one claiming vote dilution, voters have standing to challenge only districts where they live. Assembly Br. 16-19. Under these

[1] For the same reason, the proposed amicus brief of the League of Women Voters, Dkt. No. 38, is pointless. That brief asks this Court to reverse the Trial Court's Order inasmuch as it "permits the Legislature to submit redistricting maps." *Id.* at 21. But again, because Petitioners failed to file a notice of cross-appeal, that aspect of the Order is not reviewable here.

principles, Petitioners lack standing to challenge most Congressional districts, including all districts on Long Island.

Petitioners assert three contentions in response: (1) that the State Constitutional provision subjecting reapportionment to judicial review "at the suit of any citizen" is dispositive; (2) that they have statewide standing under Justice Kagan's "possible theor[y]" of associational injury from her concurrence in *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018); and (3) that standing for vote-dilution claims is established by showing only "the value of [a Petitioner's] own vote has been 'contract[ed].'" Pet. Br. 57 (quoting *Gill*, 138 S. Ct. at 1935). These arguments fail.

First, the Constitutional provision allowing "any voter" to challenge reapportionment has been in the New York Constitution since the late 1800s. *See Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 195 (1907). It certainly was in the Constitution in 1982 upon the decision in *Bay Ridge Community Council v. Carey* , 115 Misc. 2d 433 (Sup. Ct. Kings County 1982), *aff'd,* 103 A.D.2d 280 (2d Dep't 1984), *aff'd*, 66 N.Y.2d 657 (1985) — which holds that "any citizen" means any citizen with an injury-in-fact. Petitioners dismiss *Bay Ridge* because it involved racial gerrymandering and because additional grounds supported the plaintiff's lack of standing. Pet. Br. 60-61. Yet the standing analysis for claims of partisan vote dilution is the same as for race-based vote dilution. *Gill*, 138 S. Ct. at 1930.

And simply because a plaintiff lacks standing for multiple reasons does not mean any one reason alone cannot defeat standing.

Second, Petitioners' newfound reliance on Justice Kagan's associational-harm theory is misplaced. The *Gill* majority declined to endorse that theory, "leav[ing] for another day consideration of … whether [such] theor[y] might present justiciable claims giving rise to statewide remedies." 138 S. Ct. at 1931. Rather, because vote dilution is district-specific, the majority determined the Court lacked jurisdiction to decide that case, "much less to draw speculative and advisory conclusions regarding others." *Id.*

Even if associational injury did confer standing, Petitioners here claim vote dilution — specifically, packing and cracking — not associational injury. Neither of Petitioners' experts testified about associational injury; they addressed cracking and packing only. Petitioners themselves make no associational-injury argument in their Brief's merits sections. *See, e.g.*, Pet. Br. 32-35. Absent from this lawsuit are the associational injury indicia Justice Kagan described: *viz.*, that the claim is brought by a party member or by the party itself; that the challengers emphasized membership in a party or activities supporting it; and that "the gerrymander had debilitated their party or weakened its ability to perform its core functions." *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring). Here, as in *Gill*, Petitioners failed to advance "a First Amendment associational theory to avoid the

Court's holding on standing …. [They] tried this case as though it were about vote dilution alone. Their testimony and other evidence went toward establishing the effects of rampant packing and cracking on the value of individual citizens' votes." *Id.* Petitioners' associational-injury argument is little more than belated desperation to overcome their lack of standing.

Regarding their third standing argument, concerning vote dilution, Petitioners misleadingly state "[a] plaintiff establishes standing based on a vote-dilution theory by showing that 'the value of her own vote has been contract[ed].'" Pet. Br. 57 (quoting *Gill*, 138 S. Ct. at 1935 (Kagan, J., concurring)). Egregiously, however, they omit Justice Kagan's very next sentence, which devastates their argument: "And that entails showing, as the Court holds, that she lives in a district that has been either packed or cracked." *Gill*, 138 S. Ct. at 1935 (Kagan, J., concurring).

Finally, Petitioners offer no real answer to prudential standing limitations, including "a general prohibition on one litigant raising the legal rights of another [and] a ban on adjudication of generalized grievances." Assembly Br. 19 (quoting *Soc'y of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 773 (1991)). Petitioners contend residence in bordering districts suffices for standing purposes, but they cite no supporting authority. Pet. Br. 61. Nor are they correct in asserting Petitioners reside in or border "nearly every single congressional

district in the State." Pet. Br. 61. For example, no Petitioner alleges residence in a district bordering any of 2022 enacted Congressional Districts 1 through 3 on Long Island.

Petitioners' analysis of the merits underscores their lack of standing. They engage in a regional, individualized review of specific districts they claim to be packed or cracked. Pet. Br. 35-39. Among the districts Petitioners assail are seven (1, 2, 3, 8, 9, 21 and 24) where no Petitioner resides. Taking Petitioners at their word — that Mr. Trende identified "thirteen or so" faulty districts, Pet. Br. 34, although those districts are unidentified, Assembly Br. 19 — no more than six districts are properly at issue in this lawsuit. The Trial Court's sweeping decision to strike down every single Congressional district on substantive grounds, therefore, should be reversed.

POINT III

TO SUPPORT THEIR MERITLESS PROCEDURAL ARGUMENT, PETITIONERS MISCHARACTERIZE THE 2014 STATE CONSTITUTIONAL AMENDMENTS

Petitioners contend that if the Independent Redistricting Commission (the "Commission") fails to propose two rounds of redistricting plans to the Legislature — as occurred here — then the Legislature has no authority to enact its own plan. In doing so, they mischaracterize the 2014 amendments that created the Commission.

Specifically, Petitioners state the 2014 amendments are "the most robust protections against political gerrymandering in the Nation," that "the People … [took] mapdrawing authority out of the Legislature's hands," and that the amendments "vest[ ] primary redistricting responsibility in [the Commission]." Pet. Br. 1, 5. Petitioners further contend the 2014 amendments "resign[] the Legislature to a rather begrudging backstop" in redistricting, and "did in fact extinguish the Legislature's authority to enact redistricting plans." Pet. Br. 22 (emphasis and quotation marks omitted). None of that is true.

To be sure, the amendments did confer advisory authority on the Commission. For instance, the Commission must hold public hearings and gather data. N.Y. CONST. art. III, § 4(c). Then, if the Commission submits a proposed reapportionment plan, the Legislature must accept or reject it without amendment. Assembly Br. 7. Moreover, if the Legislature rejects the Commission's first proposed plan, the Commission may submit a second reapportionment plan by a specified deadline. *Id.* And if such second plan is submitted, the Legislature again must accept or reject it without amendment. *Id.*

Critically, however, the Legislature may reject both plans proffered by the Commission for any reason. N.Y. CONST. art. III, § 4(b). And if the Legislature does so, it "shall introduce such implementing legislation with any amendments each house of the legislature deems necessary." *Id.* Far from

"extinguish[ing]" the Legislature's prerogative over redistricting (Pet. Br. 22), the 2014 amendments reaffirmed it. Both before and after the amendments, the Legislature retains ultimate authority over redistricting.

This was clear before the amendments' ratification. Proposed ballot summaries for the 2014 referendum on those amendments would have described the Commission as "independent," but a Court ordered that adjective's removal. *Leib v. Walsh*, 45 Misc. 3d 874, 882 (Sup. Ct. Albany County 2014). The Court reasoned describing the Commission as independent would have been "misleading." *Id.* at 881. After all, the Commission's proposed redistricting plans are "little more than a recommendation to the legislature, which can reject [them] for unstated reasons and draw its own lines." *Id.* Hence, contrary to Petitioners' characterization, the 2014 amendments did not "extinguish the Legislature's authority to enact redistricting plans." Pet. Br. 22.

In contrast, the 2014 amendments could have divided redistricting power equally between the Commission and the Legislature, such as by requiring both bodies to approve redistricting plans. Or, as in Arizona, the 2014 amendments could have vested redistricting power exclusively in the Commission. *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015). But the 2014 amendments did neither. Instead, redistricting power remains with the Legislature. The 2014 amendments did not change the

Legislature's longstanding authority over reapportionment of Congressional, State Senate, and Assembly districts, "subject to review by the supreme court" should a reapportionment plan violate Article III's requirements. *See* N.Y. CONST. Art. III, § 5. And even if a Court finds a Constitutional infirmity, Article III, § 5, preserves the Legislature's primacy in redistricting by guaranteeing the Legislature "a full and reasonable opportunity to correct" any violation.[2]

The Commission's failure to submit a second proposal did not extinguish the Legislature's exclusive power and authority to enact reapportionment legislation. Nothing in Article III, § 4, of the State Constitution allows four Commission members to divert the Legislature's redistricting power to a Court simply by refusing to meet so there is no quorum. Rather, the Legislature was entitled to propose and enact its own redistricting legislation. Because the Legislature could enact its own reapportionment simply by rejecting a second redistricting plan received from the Commission, then *a fortiori*, it was entitled to

[2] In its proposed amicus brief, the League of Women Voters contends the State Constitution creates a two-tiered structure that strips the Legislature of remedial power in the case of procedural unconstitutionality, leaving it able to correct only substantive infirmities. League Br. at 10-13. This contention is not reviewable by this Court, because Petitioners failed to cross-appeal. *See* Point I, above. In any event, the contention fails regardless. The Constitution vests broad and sweeping remedial power in the Legislature. Article III, § 5, mandates the Legislature's full and reasonable opportunity to correct redistricting infirmities arises any time a Court finds "*any law establishing legislative districts … to violate the provisions of this article*," without distinguishing between violations of procedural or substantive provisions (emphasis added).

adopt its own reapportionment when the Commission failed to submit any such second plan.

While Article III, § 4(b), of the State Constitution does not address what happens when the Commission fails to submit a redistricting proposal to the Legislature, it is clear that: (1) any proposal submitted by the Commission was advisory only; and (2) at all times, the Legislature could fashion its own redistricting plan, because it could reject both the Commission's first and second proposals and "introduce such implementing legislation with any amendments each house of the legislature deem[ed] necessary."

Petitioners attempt to justify their position by focusing on selected individual words in the 2014 amendments, including by explaining the definition of the word "the." Pet. Br. 17. Yet "[o]ne of the most elementary canons of statutory construction requires that all parts of a statute are to be read and construed together to determine the legislative intent." *Gaden v. Gaden*, 29 N.Y.2d 80, 86 (1971); *accord*, In re *Dowling*, 219 N.Y. 44, 56 (1916). Reading Article III, § 4, as a whole, the Commission's failure to comply with its advisory role to proffer one or more reapportionment plans does not impair the Legislature's power and authority to enact its own reapportionment legislation.

Petitioners also ignore the standard of review, as the Trial Court did. "[L]egislative enactments are entitled to a strong presumption of constitutionality,

and courts strike them down only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Cohen v. Cuomo,* 19 N.Y.3d 196, 201-02 (2012) (quoting *Matter of Wolpoff v. Cuomo,* 80 N.Y.2d 70, 78 (quotation marks omitted)); *accord*, *Matter of Fay*, 291 N.Y. 198, 207 (1943). Thus, even if Petitioners' reading of the Constitution were reasonable (it is not), still they would not have met their burden. Rather, Petitioners had to demonstrate the Legislature's enactment of maps was absolutely irreconcilable with the State Constitution. Here, a reasonable reading of Article III, § 4, as a whole reconciles with Legislative enactment of redistricting maps. Notwithstanding any redistricting proposal the Commission might propose — or fail to propose — the Legislature has unfettered power and authority, in the final analysis, to enact a redistricting plan of its own formulation.

Under *Cohen*, Courts must defer to the Legislature when it legislates in areas of Constitutional silence. Assembly Br. 30-32. Again, *Cohen* instructs a statute may not be stricken until every reasonable mode of reconciliation with the Constitution has been attempted and reconciliation is impossible. 19 N.Y.3d at 201-02. Chapter 633 of the New York Laws of 2021 (the "2021 Statute") is readily reconcilable with the State Constitution, as has been explained (*see, e.g.*,

Assembly Br. 24-32), but neither Petitioners nor the Trial Court made a real effort to do that.

Petitioners seek to evade *Cohen* by claiming "the Constitution is *not* silent on the issue here." Pet. Br. 24 (emphasis in original). This contention is incorrect. Even the Trial Court acknowledged the void in the 2014 amendments concerning what happens if the Commission fails to discharge its Constitutional responsibility to present the Legislature with proposed redistricting plans. R. 12 ("The redistricting compromise plan envisioned by our 2014 amended constitution had a flaw. The plan lacked a way to handle the contingency of the committee not coming up with a bipartisan plan(s)."). The Legislature acted consistently with Article III, § 4, of the State Constitution read as a whole by dealing with that contingency based on its ultimate redistricting authority by enacting the 2021 Statute. *See Ginsberg v. Purcell*, 51 N.Y.2d 272, 276 (1980) ("[T]he Constitution is to be construed … to give its provisions practical effect, so that it receives a fair and liberal construction, not only according to its letter, but also according to its spirit and the general purposes of its enactment.") (citation omitted).

Accordingly, the Legislature's enactment of redistricting legislation was neither procedurally defective nor void *ab initio*. The Trial Court's holding otherwise should be reversed.

POINT IV

PETITIONERS FAIL TO REHABILITATE THEIR EXPERTS' FLAWED ANALYSIS

A. Petitioners prove nothing by comparing the 2012 and 2022 Congressional maps' partisan leans

Petitioners base their allegation that partisanship drove New York's Congressional redistricting by relying upon the supposed number of seats they claim New York Republicans will lose under the 2022 enacted Congressional map. Specifically, Petitioners submit the Legislature "replaced a fair, 19-8 court-drawn map with one that is 22-4 in a typical year." Pet. Br. 26. This statement is false. Even if it were true, it proves nothing.

1. The 2012 map gave Democrats a recent 23-4 advantage, not a 19-8 advantage

Under the 2012 Congressional map, Democrats currently hold 19 seats, and Republicans hold eight. But that does not mean the 2012 map gives Democrats a 19-8 advantage. Four of those eight Republicans represent Democratic-leaning districts: Lee Zeldin (District 1), Andrew Garbarino (District 2), Nicole Malliotakis (District 11), and John Katko (District 24).

One of Respondents' experts, Dr. Stephen Ansolabehere, confirmed this conclusion. He explained that in Congressional District 1 under the 2012 map, the average vote for candidates for statewide office from 2016 through 2020 was 50.4% Democratic and 49.6% Republican. R. 874. This means District 1 has, for

quite some time, leaned Democratic, *id.*, and nevertheless elected a Republican to Congress. Dr. Ansolabehere found the same is true in 2012 Congressional Districts 2, 11, and 24. *Id.* In statewide elections, District 2 has voted 51.8% Democratic on average, District 11 has voted 51.1% Democratic, and District 24 (now numbered District 22 under the 2022 map) has voted 57% Democratic. *Id.*

Like Dr. Ansolabehere, Harvard Professor Kosuke Imai — whose algorithm Mr. Trende used to prepare his simulations – also would have concluded that Congressional Districts 1, 2, 11, and 24 under New York's 2012 map lean Democratic. Dr. Barber, whom Dr. Imai trained and advised at Princeton University (R. 2808), confirmed Dr. Imai determines a district's partisan lean by calculating "the average of a variety of statewide elections," then classifying the district as Democratic or Republican according to which party receives "the majority of the two-party vote share" across those elections. R. 2868.

Thus, the 2012 Congressional map gives Democrats a recent advantage of 23-4, not 19-8. So a projected advantage of 22-4 for Democrats under the 2022 map hardly represents a Democratic power-grab. Quite the opposite — it represents a loss of one Democratic-leaning seat. Petitioners' incorrect characterization of the 2012 map stems, perhaps, from their failure to understand a key point: Computers don't vote. People do. And people's decision-making on Election Day sometimes defies expectations. SR-78; *see also* R. 2830

(Dr. Michael Barber opining that computer simulations are "estimates of what's going to happen," not "perfect predictions").

2. From one census to the next, a political party can lose seats for many reasons

Even if New York's 2022 enacted Congressional map yields more expected Democratic seats than the 2012 map (it does not), such change proves nothing. No political party, in any State, is guaranteed to win the same number of Congressional seats forever — even if redistricting ignores politics. In a ten-year period, Democrats can move into a State, Republicans can move out, and existing residents can change party affiliation. Respondents already explained this, Assembly Br. 50-51, but Petitioners offer no counterargument.

One point deserves particular emphasis: As Mr. Trende opined in *Gill*, *supra*, a State's "political geography" can disfavor a party if its voters are "inefficiently distributed." 138 S. Ct. at 1925. Here, New York's inefficient distribution of Republicans, concentrated in shrinking rural areas while counting relatively fewer registrants in growing cities and suburbs, explains why both the Court-ordered 2012 Congressional map and the enacted 2022 Congressional map feature at least 22 Democratic-leaning districts apiece. R. 819, 994. Since the 2010 census, New York's population shifted away from rural, Republican-leaning areas and toward urban, Democratic-leaning areas. Specifically, Dr. Ansolabehere noted the New York City metropolitan area grew by 6.2% from 2010 to 2020,

while rural communities across the State shrunk by between 2.2% and 3%. R. 869. These shifts weakened Republicans' ability to win Congressional elections.

B. Petitioners cannot avoid the devastating implications of Mr. Trende's testimony in Maryland

As Respondents have explained, Mr. Trende made critical mistakes in this case — including his decision to produce only 10,000 sample maps and his failure to investigate his sample for duplicative districts or eliminate redundant simulations. Assembly Br. 46-48. He evidently learned from those mistakes and corrected them for his testimony in Maryland, where he produced 750,000 sample maps and eliminated hundreds of thousands of duplicates. *Id.* In effect, New York was a rocky practice run for Mr. Trende and his experimental methodology.

Petitioners now astoundingly claim Respondents forfeited their right to address Mr. Trende's Maryland analysis, because Respondents failed to question him about it during cross-examination. Pet. Br. 45. But Mr. Trende never disclosed the existence of his Maryland report to Respondents, and Petitioners first disclosed and advocated that the Court consider it on March 28, 2022 — nearly two weeks after testimony had ended, and three days before closing arguments. R. 2330-31. What's good for the goose is good for the gander: once Petitioners invoked Mr. Trende's Maryland analysis to the Trial Court to support invalidating New York's enacted 2022 Congressional map, Respondents could certainly use that analysis to demonstrate why Petitioners had failed to prove their case beyond a

reasonable doubt, as Respondents did in their closing statements. SR-48-54, SR-100-03.

Petitioners' effort to explain away Mr. Trende's small sample size fares no better. First, Petitioners offer no reason why he produced only 10,000 simulated Congressional maps (R. 1038, 1041, 1049) for his reply report to cover New York State's approximately 15,000 precincts (*viz.*, 0.667 simulations per precinct), when Dr. Imai, the leader in applying Monte Carlo simulation to analyze redistricting, had produced 10,000 maps for a hypothetical jurisdiction having only 50 precincts (*viz.*, 200 simulations per precinct). Assembly Br. 46. Further, Petitioners' *post hoc* rationalization of this disparity finds no support in Mr. Trende's Maryland report. Pet. Br. 46.

C. Mr. Trende's maps are a useless, unrepresentative sample

Mr. Trende's simulated maps fail to account for all factors the State Constitution required real mapmakers to consider when they drew New York's 2022 Congressional district map. For example, Mr. Trende did not program his algorithm to consider communities of interest. Assembly Br. 42-43. He claimed his algorithm "p[aid] attention" to keeping cores of pre-existing districts together, but he had "no idea" how. *Id.* at 44. He crudely instructed the algorithm to toggle county preservation "on" or "off." Senate Br. 33. And concerning compactness, he simply chose a setting of "1" because the algorithm does not work with any

other. *Id.* These shortcomings, by themselves, render Mr. Trende's analysis worthless — and, more important, insufficient to prove unconstitutional partisanship beyond a reasonable doubt. Assembly Br. 41.

Petitioners dismiss this conclusion as a "thinly veiled conspiracy theory," which makes no sense. Pet. Br. 40-41. Then they contend Mr. Trende controlled for or explained "every factor *that was technically possible to control*[.]" *Id.* at 41 (emphasis added). Quite the caveat. Petitioners cannot receive a free pass for relying on methodology incapable of accounting for all constitutionally required factors. Further, Mr. Trende accounted for several factors — like maintaining cores of existing districts, avoiding county splits, and compactness — in only an incomplete way that does not approximate what a real map-drawer would have done.

Petitioners repeatedly assert Respondents' expert, Dr. Barber, confirmed or approved of Mr. Trende's conclusions. *E.g.*, Pet. Br. 31. This characterization is false. Dr. Barber expressly testified he did not necessarily endorse Mr. Trende's simulation methodology. R. 2860. Dr. Barber "was unable to exactly replicate the analysis that [Mr. Trende] had conducted" (R. 2807), because Mr. Trende had not specified all the parameters and assumptions upon which his simulations relied. Dr. Barber explained,

> [t]here are a whole host of parameters that the user has to select when running [redistricting simulations], and

> [they] can really change how the program runs or how well it runs. We just don't know what choices … Mr. Trende made in … running these models, and so there's just a very high degree of uncertainty as to how those choices impacted the outcome or the output of the models.

R. 2862. Given this uncertainty regarding all the assumptions incorporated into Mr. Trende's simulations, Dr. Barber sought only to "get as close as possible given the information that was contained in [Mr. Trende's] report." R. 2807.

Dr. Barber based his analysis on Mr. Trende's "dot-plot" graph. R. 2869. Critically, however, Dr. Barber did not opine on the validity of Mr. Trende's analysis or resulting maps. Simply because Dr. Barber "was able to infer [certain] choices" Mr. Trende made in conducting his simulations did "[not] necessarily mean that those are the choices [Dr. Barber] would have used if [he were] asked from the beginning to create a set of redistricting simulations that mirrored the requirements set [forth] in the New York Constitution." R. 2863. Ultimately, Dr. Barber found that if Mr. Trende had meaningfully accounted for all Constitutional requirements, the data would have changed. R. 2870. For that reason, Dr. Barber testified Mr. Trende's simulations could not "enable [one] to infer whether the actual map drawers did or did not draw [New York's Congressional] lines in 2022 with partisan intent," or to ascertain any district's competitiveness in the enacted 2022 Congressional map. R. 2847, 2861. This falls far short of confirming or approving Mr. Trende's conclusions. "If anything," Dr. Barber opined, "the 2022

Enacted Congressional plan favors the Republican Party when compared to Mr. Trende's simulation results," which most often produced "23 Democratic-leaning districts and 3 Republican-leaning districts — one more Democratic district than [New York's] enacted [Congressional] plan creates." R. 1004.

D. Petitioners' characterization of supposed "cracking and packing" is wrong

Petitioners assert the Legislature cracked and packed Republican voters in every region of New York in the 2022 enacted Congressional map. Pet. Br. 35. This assertion does not withstand scrutiny.

Long Island Districts. Petitioners claim the Legislature cracked Districts 1 and 3 in order to pack District 2. *Id.* Yet, as Dr. Ansolabehere explained, Districts 1, 2, and 3 (because of their population deficit) had to move their boundaries westward to satisfy the population required for a district in the 2022 reapportionment. R. 869-70. Dr. Ansolabehere found the districts incorporating most of Nassau and Suffolk Counties "retain[ed] the lion's share of their populations." R. 871.

Petitioners misconstrue Dr. Ansolabehere's testimony, saying he "admitted" Republican-held districts have been turned "pro-Democratic." Pet. Br. 36. Not true. In fact, Dr. Ansolabehere affirmed District 1 has long leaned Democratic (R. 874); and that District 2, which had leaned Democratic in the 2012 Congressional map, now favors Republicans (R. 2930).

New York City Districts. Petitioners claim the Legislature cracked District 11 to create a "partisan advantage" and inhibit Republican incumbents. Pet. Br. 36. But 2012 Congressional Districts 5, 8, 10, and 12 were overpopulated and Districts 6, 7, 9, 11, and 13 through 15 were underpopulated, requiring their boundaries to move. R. 870. Districts 8 and 9, and neighboring 7, are majority-minority districts (R. 875), which carries implications under the Voting Rights Act. Hence, the configurations of Districts 8, 9, and 7 affect the configuration of District 11. *Id.* Mr. Trende's analysis does not adequately account for the Voting Rights Act. R. 876.

Hudson Valley Districts. Petitioners claim the Legislature cracked District 18 to strengthen District 16, a Democratic-leaning district, to make District 18 "a more safely Democratic district" without "risking the Democratic Party's interests in [District] 16." Pet. Br. 37. But the Legislature did not need to do so — the mid-Hudson districts usually elect Democrats. Under the 2012 Congressional map, Democrats won an average of 78% of the vote in statewide elections from 2016 through 2020 in District 16, 64% in District 17, and 54% in District 18. R. 875. Under the enacted 2022 Congressional map, the results are comparable: Democrats won an average of 72% of the vote in statewide elections from 2016 through 2020 in District 16, 60% in District 17, and 55% in District 18. *Id.* Further, contrary to Petitioners' assertion, the towns of Putnam Valley, Carmel,

Somers, and Yorktown are not "Republican strongholds." Pet. Br. 37. Rather, Putnam Valley and Carmel lean Republican while Somers and Yorktown lean Democratic. R. 875.

Upstate Districts. Finally, Petitioners claim the Legislature packed Districts 21, 23, and 24 to give Democrats an advantage in District 22. Pet. Br. 38. This contention ignores population deficits that required the loss of a district upstate. R. 870-71. It also ignores the Legislature's charge to maintain communities of interest. N.Y. CONST. art. III, § 4(c)(5). The Commission's Republicans and Democrats agreed, as did a majority of the Legislature, that the 2022 Congressional reapportionment should create districts around metropolitan Buffalo, Rochester, Albany, and Ithaca/Syracuse; and also districts for the Southern Tier, the North Country, and rural communities bordering Lake Ontario. Assembly Br. 42, 55; *accord*, R. 3263-65. This meant the four upstate metropolitan districts would lean Democratic, while the three rural districts would lean Republican. But this reflects not impermissible partisan intent, but rather the Commission's and the Legislature's exercise of their Constitutional prerogatives to maintain upstate communities of interest.

POINT V

ANY REMEDY SHOULD TAKE EFFECT AFTER THE 2022 ELECTIONS

A. It is too late to change the maps governing the 2022 elections

Petitioners claim there is "ample time" to put the ongoing election cycle on hold for unknown time while the appellate process continues, and while any required remedial maps are drawn. Pet. Br. 50. Not even the Trial Court believed that: rather, it expressed "concern[ ] about the relatively brief time in which everything would need to happen to draw new maps" and casually noted that, as a result of its Order, New York might not have maps in time for the 2022 elections. R. 21, 23.

Petitioners assure this Court that primary elections could be moved from June to August, and that doing so "would cause no real trouble." Pet. Br. 53. This view is untethered from reality. New York State has never done, and almost certainly cannot do, what Petitioners suggest here: complete the ballot-access process; hold local, gubernatorial, and other primaries in June; conduct a statewide redistricting; restart the months-long election process for Congress, the Assembly, and the State Senate from scratch; and then hold the Congressional primaries (and possibly State Senate and Assembly primaries) in August. Governor's Brief p. ("Governor's Br.") 30.

Petitioners assume that after this Court reaches a decision, and after the Court of Appeals does likewise, and after the Legislature enacts any remedial maps, then this lawsuit will have reached its end, and the election cycle can restart. Their view is naïve. The Legislature's remedial maps might not create enough "Republican-leaning" seats to satisfy Petitioners. Presumably, then, experts would need to testify anew regarding whether the remedial maps pass Constitutional muster. (In Ohio, the State Supreme Court recently ordered the Legislature to re-draw district maps a fifth time.[3])

District Judge Sharpe already recognized the difficulty of holding primary elections in August, even under normal circumstances. In *United States v. New York*, he rejected a suggestion that New York conduct Congressional primary elections in August. 2012 WL 254263, at *2 (N.D.N.Y. Jan. 27, 2012). Such a late primary, the Court determined, would jeopardize New York's compliance with the Federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). *Id.* at *1. UOCAVA requires transmission of primary- and general-election ballots to certain overseas citizens 45 days before the election. *Id.* Judge Sharpe ordered that "New York's non-presidential federal primary date shall be the fourth Tuesday

[3] Jane C. Timm, *Ohio Supreme Court tosses fourth legislative map in chaotic redistricting process*, NBC NEWS (Apr. 14, 2022), https://www.nbcnews.com/politics/elections/ohio-supreme-court-tosses-fourth-legislative-map-chaotic-redistricting-rcna24476 (last accessed Apr. 17, 2022).

of June, unless and until New York enacts legislation resetting the [primary election] for a date that complies fully with [UOCAVA] requirements, *and is approved by this court*." *Id.* at *3 (emphasis added). Thus, the Congressional primary cannot be moved without Judge Sharpe's approval. Petitioners' assertion otherwise (Pet. Br. 54) is wrong.

Todd Valentine's affidavit does not help Petitioners, either. It offers only baseless assurances that everything will be fine if the judiciary upends the election cycle. R. 2326-29. In contrast, the affidavits of Thomas Connolly, the State Board of Elections Director of Operations, describe in detail the upheaval that shoehorning remedial maps into the ongoing 2022 elections would create. Governor's Br. 30-32.[4]

B. Other States' decisions to sow chaos do not justify doing likewise in New York

Petitioners emphasize the Courts of three States — Maryland, Pennsylvania, and North Carolina — have attempted to resolve redistricting lawsuits in time for the current election cycle. Pet. Br. 51-52. But those Courts disrupted their States' elections much earlier in the election calendar than would be

[4] The Legislative Respondents did not suggest 2022 elections could or should proceed under remedial maps. *Contra* Pet. Br. 15, 52. Rather, they said "the Legislature now knows it would be able to consider and enact replacement maps promptly in the first week of May 2022." Even on that timeline — and assuming Petitioners would not further delay by commencing new litigation — applying remedial maps to the ongoing elections would invite chaos and confusion.

the case here. Further, those States are hardly models worth following. In Maryland, for instance, "state and local election officials are losing sleep right now thinking about how they're going to deal with whatever emerges from … court challenges to state maps."[5] New York should seek to avoid, not emulate, the chaos in those States.

In contrast, the 2022 elections in at least four States — Alabama, Georgia, Nevada, and Kentucky — will proceed under challenged maps.[6] A Federal District Court in Georgia, for instance, refused to enjoin election deadlines while a redistricting challenge was pending. *Alpha Phi Alpha Fraternity Inc. v. Raffensberger*, 2022 WL 63312, at *74 (N.D. Ga. Feb. 28, 2022). The Court recognized "elections are complex and election calendars are finely calibrated processes, and significant upheaval and voter confusion can result if changes are

[5] Tim Henderson, *Redistricting Delays Scramble State Elections*, THE PEW CHARITABLE TRUSTS (STATELINE), Mar. 10, 2022, 2022 WLNR 8066659 (quotation marks omitted); *accord*, Jeff Barker, *"I say the serenity prayer": Maryland redistricting court cases keep candidates, election officials in limbo*, THE BALTIMORE SUN (Mar. 20, 2022), 2022 WLNR 8848073.

[6] *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Alabama); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 2022 WL 633312 (N.D. Ga. Feb. 28, 2022); Riley Snyder, *Judge blocks GOP-Backed redistricting lawsuit for 2022 election*, THE NEVADA INDEPENDENT (Mar. 9, 2022), https://thenevadaindependent.com/article/judge-blocks-gop-backed-redistricting-lawsuit-for-2022-election (last accessed Apr. 17, 2022); Joe Sonka, *Judge denies motion to halt Kentucky redistricting. Here's what it means for the election*, COURIER JOURNAL (Feb. 18, 2022), 2022 WLNR 5151751; *see also* Susan Tebben, *ACLU unhappily files Ohio congressional map challenge aiming for 2024, instead of 2022*, WKYC STUDIOS (Mar. 26, 2022), https://www.wkyc.com/article/news/local/ohio/aclu-ohio-congressional-map-challenge-2024-instead-of-2022/95-ac5fc604-d44d-49cc-ba82-56c4836c64f8 (last accessed Apr. 17, 2022).

made late in the process." *Id.* When the Court denied the injunction, the candidate-qualification process in Georgia was scheduled to *begin* in six days; here, it *ended* on April 7, 2022, and the statutory deadline for primary ballot certification is May 4, 2022. There, like here, "it would not be proper to enjoin the 2022 election cycle for which the election machinery is already in progress." *Id.* A Kentucky State Court judge decided similarly, employing stronger language: "the Court refuses to serve as the ringmaster of a three-ring circus by creating a new filing deadline and throwing the 2022 election cycle into turmoil."[7] These Courts chose the wiser path.

C. Petitioners mischaracterize the applicability of *Purcell* in State Courts

The *Purcell* principle is based on common sense: Courts should not change election rules when an election is near, let alone when an election has already begun. Assembly Br. 59. Suggesting erroneously the United States Supreme Court has encouraged State Courts to ignore *Purcell* (Pet. Br. 53-54), Petitioners mischaracterize *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Mem) (Kavanaugh, J., concurring), and *Growe v. Emison*, 507 U.S. 25 (1993). Neither opinion supports State-Court tinkering with imminent elections; at most, they recognize federalism is an additional reason why Federal Courts should adhere to the *Purcell* principle.

[7] Sonka, *Judge denies motion to halt Kentucky redistricting*, *supra* n.6.

Petitioners have no answer to the many State Courts that have followed *Purcell*. Assembly Br. 59-60. Nor do they acknowledge *Badillo v. Katz*, 32 N.Y.2d 825 (1973), or *Honig v. Board of Supervisors of Rensselaer County*, 24 N.Y.2d 861 (1969), in which the New York Court of Appeals allowed imminent elections to proceed under illegal district maps. Assembly Br. 60-61. Petitioners also decline to address United States Supreme Court decisions recognizing that "if a [redistricting] plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time." Assembly Br. 61 (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)).

D. The State Constitution does not require a remedy for this election cycle

Petitioners contend the State Constitution "contemplates" a remedy for the ongoing election cycle. Pet. Br. 49. Once again, Petitioners try to re-write the Constitution. As the State Constitution does not address what happens if the Commission fails to submit a second set of proposed redistricting maps, *see* Point III *supra*, it also does not address when a remedy must take effect. Assembly Br. 62.

Petitioners claim "[i]t would make very little sense" for the State Constitution to create a 60-day limit on Supreme Court review of a redistricting plan "if any remedy were not meant to take effect immediately." Pet. Br. 50 (citing N.Y. CONST. art. III, § 5). In reality, however, what Petitioners suggest

makes far less sense: that the Constitution requires an immediate remedy for an ongoing election cycle, no matter the chaos that would ensue, without stating so, and without setting an appellate-review deadline.

Properly read, the State Constitution expedites Supreme Court review to give appellate Courts the option, depending on the circumstances, to order an immediate remedy. For instance, perhaps a 2022 remedy would have made sense had the 2020 census not been delayed by months due to a global pandemic,[8] had primaries already been scheduled for later in the year, had the Commission acted more quickly, and had redistricting maps been enacted earlier. But that is not the situation here. Ordering a redistricting of an entire Congressional plan — let alone State Senate and Assembly plans — in the middle of an election cycle would be reckless; the State Constitution's silence does not require such an outcome. In any event, no remedy is necessary, because the Legislature did not violate the Constitution.

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[8] David A. Lieb, *Census data delay scrambles plans for state redistricting*, AP NEWS (Mar. 28, 2021), https://apnews.com/article/legislature-redistricting-voting-districts-elections-census-2020-2e4d1a9fed96c531d4ef313c40143af2 (last visited Apr. 17, 2022).

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Speaker's principal Brief, the Trial Court's Order should be reversed, and the Amended Petition should be dismissed.

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