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VIA EMAIL

Hon. John P. Asiello
Chief Clerk & Legal Counsel to the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207
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Re: *Harkenrider v. Hochul*, APL-2022-00042 – Petitioners' Supplemental Letter Brief To Court Of Appeals

Dear Clerk Asiello:

I represent Petitioners and submit this letter brief in these appeals from the Appellate Division, Fourth Department's Memorandum And Order, dated April 21, 2022 (hereinafter "Appellate Division Decision") and the Supreme Court's Decision And Order, dated March 31, 2022. Consistent with this Court's instructions that these appeals "will be determined on the Appellate Division records and briefs, the writings in the courts below, such letter submissions on jurisdiction, leaveworthiness, and the merits as counsel in their respective professional judgments may file, and oral argument," Petitioners herein file a letter brief that supplements their already-filed Response Brief in the Appellate Division.

The only issue that is before this Court under N.Y. Const. art. VI, § 3(a) and CPLR §§ 5501, 5601 is the legal question as to whether the failure of the constitutional, exclusive Independent Redistricting Commission ("IRC") process means that the courts must draw new maps for Congress and state Senate immediately. As *Amicus* the League of Women Voters of New York State ("League of Women Voters") explained below, the IRC process is a core aspect of the 2014 Anti-Gerrymandering Amendments. ***The Appellate Division's decision below as to that constitutional process is, with all respect, contrary to the constitutional text and would render the constitutional IRC process a meaningless formality***. Petitioners thus respectfully request that this Court order the already-appointed Special Master to recommend remedial maps for both Congress and state Senate, so that constitutional maps can govern the 2022 elections.

As for Respondents' appeal, while Respondents are surely disappointed that they lost on the disputed *factual* question as to whether the Legislature acted with the intent "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), beyond a reasonable doubt in enacting the congressional map, that now-affirmed factual holding is not reviewable, and so cannot possibly be the basis for Respondents' appeal. Respondents' only possible legal arguments that this Court can review—relating to standing and whether the Governor is a proper Respondent—are so insubstantial that no Justice below credited them.

I. The Appellate Division's Legal Conclusion That The Legislature Can Enact Redistricting Maps Notwithstanding The Failure Of The Constitutional IRC Process Is Reviewable And Legally Wrong, Meaning That This Court Should Reverse And Remand To Require The Special Master To Propose Remedial Congressional And State Senate Maps That Will Govern The 2022 Election

The Appellate Division, over Justice Curran's dissent, overturned the Supreme Court's decision that failure of the constitutional IRC process—because the IRC did not submit a second set of maps to the Legislature—rendered the maps that the Legislature adopted in violation of that process *void ab initio*. The Supreme Court concluded that "the process used to enact the 2022 redistricting maps was unconstitutional" and thus the maps were *void ab initio* because that process failed. R.23. Reversing the Supreme Court's decision on this issue, the Appellate Division held that, in its view, "[n]othing in the Constitution, [ ] including subdivisions 4(b) and 4(e) of article III, expressly prohibits the legislature from assuming its historical role of redistricting and reapportionment if the IRC fails to complete its own constitutional duty." Appellate Division Decision, slip op. at 4. Seemingly acknowledging that this interpretation would render the entire IRC process irrelevant, the Appellate Division at oral argument described the IRC process as mere "window-dressing." Recording of Oral Argument at 1:10:19–1:11:09 (Apr.20, 2022), *available at* https://ad4.nycourts.gov/njs/term/argument/calendar?date=2022-04-20T00:00:00.000Z&venue=1. Dissenting from the Appellate Division's decision on the constitutional procedure, Justice Curran explained that, under the plain text of the 2014 Anti-Gerrymandering Amendments, "the legislature did not have the authority to adopt the maps," emphasizing that "any other reading" "renders the IRC a useless formality." Appellate Division Decision, slip op. at 14.

This Court should overturn the Appellate Division's decision and remand to the Supreme Court, so that the already-appointed Special Master can recommend to that Court constitutional congressional and state Senate maps to govern the 2022 elections.

A. This Court has jurisdiction to review this issue. Article VI, Section 3(a) of the New York Constitution provides that "[t]he jurisdiction of the court of appeals shall be limited to the review of questions of law except . . . where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered." N.Y. Const. art. VI, § 3(a); *accord* CPLR § 5501(b) ("The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered."). As all parties agreed below, the issue of whether the maps

are procedurally invalid, for violation of the constitutional IRC process, turns entirely 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 constitutionally exclusive, as a matter of law. NYSCEF No.94 at 9–10; NYSCEF No.95 at 7–9; NYSCEF No.96 at 12–13. Notably, nothing in the Appellate Division's reasoning on this procedural question turns on any disputed factual issues, *id.* at 3–5, and thus this Court has the constitutional authority to rule on this purely legal question.

The Notices of Appeals that Petitioners have filed—from both the decisions of the Appellate Division, and the Supreme Court, respectively—are sufficient to trigger this Court's jurisdiction on this issue. Under CPLR § 5601(b)(1), Petitioners may appeal the Appellate Division's decision to this Court as a matter of right because it is "an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state," CPLR § 5601(b)(1); NYSCEF No.272. Further, under CPLR § 5601(b)(2), Petitioners may appeal the Supreme Court's decision not giving Petitioners their requested relief on this issue—immediate, court-drawn maps without any opportunity for the Legislature to adopt replacement maps—to this Court,as a matter of right, because the Supreme Court's decision on this point "finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state." CPLR § 5601(b)(2); *see* NYSCEF No.264.

But if this Court concludes that Petitioners do not have the right to appeal, then this Court should grant leave to appeal on this issue, which raises constitutional concerns of exceptional importance. As the League of Women Voters explained in its *amicus* brief below, Brief of *Amicus Curiae* The League of Women Voter of New York ("League.Br.") 2, App. Div. NYSCEF No.47, and as explained further in Petitioners' briefing before the Appellate Division, Brief For Petitioners-Respondents ("Pets.' Resp. Br.") 17–20, App. Div. NYSCEF No.43, and in this letter brief, the issue of whether the constitutional IRC redistricting process is exclusive and mandatory is of great "public importance," 22 NYCRR § 500.22(b)(4), and this Court's review will undoubtedly "further the interest of substantial justice," *W. 158th St. Garage Corp. v. State*, 256 A.D. 401, 403 (3d Dep't 1939) (citation omitted); *see In re Miller*, 257 N.Y. 349, 357–58 (1931).

B. The Supreme Court, Justice Curran, and the League of Women Voters were all correct that the constitutional IRC process is the *exclusive* method for adopting maps under the 2014 Anti-Gerrymandering Amendment, such that the pre-2014 process is no longer available to the Legislature in the case of a failure in the IRC process. The 2014 Anti-Gerrymandering Amendments establish the mandatory and exclusive "*process* for redistricting" that "*shall govern redistricting in this state*," N.Y. Const. art. III, § 4(b), (e) (emphases added), with the *only* exception to the process being that the courts must draw remedial maps if the process fails, N.Y. Const. art. III, § 4(e); *see* League.Br.5, 10–11, 13 ("The Amendment thus makes clear beyond cavil both that the process it ordains is the exclusive process for effectuating redistricting and that the Judiciary is empowered to remedy redistricting plans that violate the law."). This exclusive process requires the IRC to submit two rounds of maps, which the Legislature must vote on "without amendment," before redistricting responsibility can 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." N.Y. Const. art. III, § 4(b); *see* League.Br.10–11. And as the League of Women Voters explained, League.Br.6–7, Article III, Section 4 does not give the Legislature any "discretion," *Brusco*, 84 N.Y.2d at 680, to vary from those requirements. Further, as Justice Curran pointed out, the distinct remedy in Section 4(e) further supports that the provision has independent effect because "any other reading of section 4(e) renders the IRC a useless formality." Appellate Division Decision, slip op. at 14 (Curran, J., dissenting in part).

The Appellate Division's contention that the Constitution is "silent as to the appropriate procedure to be utilized in the event that the IRC fails to submit a second redistricting plan" is, with all respect, textually impermissible. Appellate Division Decision, slip op. at 3. The Constitution sets forth the *entire exclusive* redistricting process, including by providing the *single* exception to the process—courts drawing remedial maps if the exclusive IRC process fails. N.Y. Const. art. III, § 4(e). There is no "gap" for the Legislature to "fill," Appellate Division Decision, slip op. at 3, because "when either the legislature or the IRC . . . defeat the primary role of the IRC," the Constitution gives "the judiciary" the "unwelcome task of . . . step[ping] into the breach and adopt[ing] a redistricting plan," Appellate Division Decision, slip op. at 14 (Curran, J., dissenting in part). Relatedly, the Appellate Division's conclusion that Section 4(e)'s judicial remedy does not apply for process violations "leads ineluctably to the nullification of the Amendment," League.Br.15, returning to the Legislature "its historically recognized redistricting authority," Appellate Division Decision, slip op. at 4. That is an "absurd" result, including because "two separate legislatures [ ] voted with bipartisan support to propose the 2014 amendments" to eliminate the Legislature's historical redistricting authority, and "the people of the State of New York [ ] approved" them. Appellate Division Decision, slip op. at 14 (Curran, J., dissenting in part); Pets.' Resp. Br.4–5; League.Br.15 ("[W]hat is at stake here is whether the check the Amendment created the IRC to supply will exist *at all*."). Further, that interpretation would render the proposed 2021 constitutional amendment, which the People emphatically rejected, 2021 Statewide Ballot Proposals, N.Y. State Bd. of Elections, *available at* https://on.ny.gov/3KrxOB7, an impermissible, meaningless waste of the People's time.

The underlying premise of the Appellate Division's decision—that the IRC process is "mere window-dressing," whereas only the substantive provisions of the 2014 Anti-Gerrymandering Amendments are meaningful restraints on decades of abuse by the Legislature, *see* Recording of Oral Argument at 1:10:19–1:11:09—is both legally wrong, as explained above, and deeply troubling. While Petitioners, of course, agree that the substantive prohibitions in the 2014 Anti-Gerrymandering Amendments are deeply important to curbing the Legislature's historical gerrymandering practices, *see infra* pp.6–10, the constitutional IRC process is *also* a critically important part of the People's comprehensive prohibition, comprising many hundreds of words of the Constitution, N.Y. Const. art. III, §§ 4(b), 5-b. As the League of Women Voters most eloquently explained, if the courts of this State are unwilling to enforce the constitutional IRC process, by holding that the failure of the process means that the courts will "order the adoption of, or change to, a redistricting plan," N.Y. Const. art. III, § 4(e), this will "nullify the process at the heart of the [Constitution's] anti-gerrymandering protection and [the] express limitation on the

power of the Legislature that the People understood they adopted and imposed in 2014," League.Br.20. ***Importantly, if Respondents prevail on this issue before this Court, there will be absolutely no reason for any future Legislature to appoint any IRC Commissioners who will adopt any proposed redistricting plan, N.Y. Const. art. III, § 5-b(a), or appoint any Commissioners at all, or to fund the Commission, N.Y. Const. art. III, § 5-b(h)(4)(i), in future decades***. On the other hand, "[b]y insisting that the remedial provisions of the Amendment must be enforced as written, this Court would give the members of the IRC a powerful incentive to perform their constitutional duties, and give the legislative leaders who appoint them a powerful incentive to spur them to do so." League.Br.15–16.

C. As the League of Women Voters correctly explained, violations of the Constitution's procedural redistricting requirements "cannot be corrected by the Legislature," and the plain text of "subsection (e) of Section 4 provides that the Judiciary—not the Legislature— is "required" to remedy the[se] violations of law." League.Br.6. Thus, the only possible solution is for the courts to draw constitutional maps for the 2022 elections, since the 2022 congressional and state Senate maps are void for failing to follow the exclusive, constitutional process, and the 2012 maps are unconstitutionally malapportioned. R.23. While Justice Curran concluded that the Appellate Division did not have jurisdiction to issue this remedy, Petitioners have now filed such a cross-appeal under CPLR § 5601(b)(2); *see* NYSCEF No.264, mooting Justice Curran's concern.

Further, as Petitioners explained in their briefing before the Supreme Court and the Appellate Division, this remedy must be in place for the 2022 election cycle, for the same exact reason that any remedy for the Legislature's violation of the substantive provisions of the 2014 Anti-Gerrymandering Amendments must be in place for the 2022 election cycle. The Constitution provides for 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"), requiring courts to correct procedural and substantive violations promptly, *see* N.Y. Const. art. III, §§ 4(e), 5; *Goldstein v. Rockefeller*, 257 N.Y.S.2d 994, 1004 (Sup. Ct. Monroe Cnty. 1965); *Landes v. Town of N. Hempstead*, 20 N.Y.2d 417, 421 (1967). It would be nonsensical for the Constitution to mandate such expedited proceedings if the remedy was not meant to take effect before the impending election season. R.51–117. Indeed, a holding by this Court that even where (as here) Petitioners filed a challenge on the very day the Governor signed the unconstitutional maps, the gerrymanderers get one election under the unconstitutional maps—allowing them to knock out the other party's incumbents and install incumbents of their own—would leave a gap in the 2014 Anti-Gerrymandering Amendments' practical operations, which will be repeated decade after decade.

Further, there is ample time to implement new maps during this election cycle, in advance of a new, August primary date and the general elections on November 8, 2022, as the Legislature conceded during stay proceedings in the Appellate Division. Email from Craig R. Bucki to Justice Lindley (Apr. 7, 2022 5:58 PM EST). Indeed, the Co-Executive Director for the New York State Board of Elections, Todd D. Valentine, provided further support for this timely relief, noting that the Board of Elections and local officials have a noted history of successfully altering election processes under time constraints to accommodate exigent circumstances, and stating that the

primary could be moved to August to allow for drawing new maps without any real trouble for state and local election officials, providing ample time to complete all legal requirements. R.2326–29. Finally, the Supreme Court has retained a Special Master, Dr. Jonathan Cervas, who is already drawing a remedial congressional map. To ensure constitutional maps are in place for the 2022 election cycle, Petitioners respectfully request that this Court instruct the Supreme Court to require that the Special Master drafts immediately a remedial state Senate map as well.

II. The Supreme Court's Factual Finding—Now Affirmed By The Appellate Division—That The Legislature Enacted The Congressional Map "To Discourage Competition Or For The Purpose Of Favoring Or Disfavoring Incumbents Or Other Particular Candidates Or Political Parties" Is Plainly Not Reviewable

Petitioners presented overwhelming evidence to establish the factual premise that the Legislature enacted the congressional map "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). Petitioners submitted the unrebutted affidavit of Senate Minority Leader Robert G. Ortt, explaining that Democrats "unilaterally, secretly, and without any public input, drafted new maps," giving Republicans no "input or involvement in the drafting or creating of the congressional . . . map[ ] that the Legislature adopted." R.288–89. Petitioners also submitted undisputed evidence that New York's current congressional delegation, under a neutral, court-drawn map, is 19-8 in favor of Democrats, whereas the delegation under the new map will be 22-4 in a typical year. R.1027–38, 1045; R.267–71, 1056–66. The authoritative Cook Partisan Voting Index ("CPVI") further supports this same conclusion, as it shows that every competitive district in New York under the 2022 congressional map is now *more* pro-Democrat than under the 2012 map. *See* R.1037; R.1056–66. Petitioners also submitted Mr. Trende's comprehensive simulations—35,000 simulations, in total, with Respondent's own expert, Dr. Barber, adding 50,000 simulations reaching the same result, R.240–49; R.1038–44; R.997–1001, 2842—which showed that the adopted map was an extreme, pro-Democrat outlier. Mr. Trende's simulations illustrated "the DNA of a gerrymander" through a dotplot model, R.245–46; *accord* R.1039, visually depicting how the Legislature successfully "pack[ed] and crack[ed]" Republicans to favor the Democrats, by making four districts extremely Republican (and thus less competitive), and thereby making the previously competitive districts more Democratic than in any of the simulated maps. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2513–14 (2019) (Kagan, J., dissenting).

Based on the overwhelming factual evidence that Petitioners placed into this record, the Supreme Court made the factual finding that the Legislature enacted the congressional map with the intent "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), beyond a reasonable doubt, while at the same time holding that Petitioners had not made this factual showing with regard to the state Senate, R.16–21. The Supreme Court explained that it was basing this factual finding upon "the testimony of virtually every expert . . . 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. The

Supreme Court also based this factual finding on the expert evidence submitted by Petitioners, including the testimony of Mr. Trende, reiterating how the map packed Republicans into four districts and eliminated competitiveness in numerous districts that have changed from previously competitive to favoring Democratic candidates. R.17–19.

The Appellate Division affirmed the Supreme Court's factual finding that the Legislature enacted the congressional map with the intent "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), beyond a reasonable doubt. "[E]vidence of the largely one-party process used to enact the 2022 congressional map, a comparison of the 2022 congressional map to the 2012 congressional map, and the expert opinion and supporting analysis of Sean P. Trende, met petitioners' burden of establishing that the 2022 congressional map was drawn to discourage competition and favor democrats in violation of article III, § 4 (c) (5)." Appellate Division Decision, slip op. at 5. The Legislature drafted and adopted the map "without any republican input" and "without a single republican vote in favor of it." Appellate Division Decision, slip op. at 5. It was also undisputed that "under the 2012 congressional map there were 19 elected democrats and 8 elected republicans and under the 2022 congressional map there were 22 democrat-majority and 4 republican-majority districts." Appellate Division Decision, slip op. at 5. Further, "the testimony of Trende was probative and confirmed the inference from the above two points that the legislature engaged in unconstitutional partisan gerrymandering when enacting the 2022 congressional map." Appellate Division Decision, slip op. at 5. Mr. Trende demonstrated with "probative" evidence that "the enacted congressional map pressed republican voters 'into a few [r]epublican-leaning districts, while spreading [d]emocratic voters as efficiently as possible.'" Appellate Division Decision, slip op. at 6 (brackets in original). "[T]he four most republican-leaning districts in the enacted congressional map were more republican-leaning than any of [Mr. Trende's] initial 5,000 simulated maps," while "[o]f the next nine most competitive districts, the enacted map was, in each, more democrat-leaning than any or nearly all of the initial 5,000 simulated maps." Appellate Division Decision, slip op. at 6. That "is the DNA of a gerrymander, and the result is exactly what gerrymandering looks like." Appellate Division Decision, slip op. at 6 (citations omitted).

The Supreme Court's now-affirmed factual finding—that the Legislature enacted the congressional map with the intent "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), beyond a reasonable doubt—is not reviewable. "The jurisdiction of the court of appeals shall be limited to the review of questions of law except . . . where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered." N.Y. Const. art. VI, § 3(a); *accord* CPLR § 5501(b). Under this provision, "this court is without power to review the findings of fact if such findings are supported by evidence in the record," meaning this Court's "review is confined solely to the legal issues raised by the parties." *Matter of Hofbauer*, 47 N.Y.2d 648, 654 (1979) (citations omitted); *see also Congel v. Malifitano*, 31 N.Y.3d 272, 294 (2018); *Humphrey v. New York*, 60 N.Y.2d 742, 743 (1983).

Here, there is obviously a very significant amount of "evidence in the record" to support the Supreme Court's now-affirmed "findings of fact," *Matter of Hofbauer*, 47 N.Y.2d at 654, as summarized above, *see supra* pp.6–7, which is the end of the matter. So while the Appellate Division had the authority to review the Supreme Court's findings of fact, *see Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 498 (1978) ("In reviewing a judgment of Supreme Court, the Appellate Division has the power to determine whether a particular factual question was correctly resolved by the trier of facts."), now that the Appellate Division has affirmed the Supreme Court's factual finding, the appellate-review landscape has fundamentally changed before this Court. The Supreme Court's now-affirmed factual finding that the Legislature enacted the congressional map with the intent "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), beyond a reasonable doubt, is plainly supported by evidence in the record and, thus, is conclusive and binding, *see Congel*, 31 N.Y.3d at 294; *Humphrey*, 60 N.Y.2d at 743.

Although Justices Whalen and Winslow did not agree with the Appellate Division majority as to the weight to give to Mr. Trende's simulations and asserted that this disagreement is "not the credibility issue routinely seen in battle-of-the-experts cases, but an issue of the probative force of an expert opinion unsupported by sufficient evidence regardless of respondents' opposition," Appellate Division Decision, slip op. at 11 (Whalen, J., and Winslow, J., dissenting), that claim appears to be—with all respect—an impermissible effort to turn a dispute about what weight to give competing expert evidence into a legal question that there is no "evidence in the record" to support a factual finding. *Matter of Hofbauer*, 47 N.Y.2d at 654; *Congel*, 31 N.Y.3d at 294; *Humphrey*, 60 N.Y.2d at 743. Notably, none of the cases that Justices Whalen and Winslow cited so much as suggest that where the Supreme Court admits an expert's opinion without objection and then concludes that the expert's opinion supports a particular factual finding, that the other side's experts raised some concerns with the expert's methodology that some appellate jurists may credit can turn the underlying factual finding into a "question[ ] of law" that this Court can review. N.Y. Const. art. VI, § 3(a). To allow such garden-variety disagreements about the weight to give competing expert testimony—which type of dispute will occur in every single case where opposing parties submit experts reports—to transform into "questions of law" under N.Y. Const. art. VI, § 3(a), would destroy the constitutionally mandated limit that factual findings that the Appellate Division affirms are *not* reviewable by this Court.

If, however, this Court concludes that concerns raised with an admitted expert's methodology can ever rise to the level of being reviewable "questions of law" under N.Y. Const. art. VI, § 3(a), nothing in Justices Whalen and Winslow's criticisms of Mr. Trende's simulations would come close to triggering that type of extreme departure of the bedrock rule that this Court cannot review affirmed factual findings. Justices Whalen and Winslow were concerned that Mr. Trende did not conduct more simulations, Appellate Division Decision, slip op. at 9 (Whalen, J., and Winslow, J., dissenting), but Mr. Trende conducted 35,000 simulations, and Respondents' own expert—Dr. Barber—conducted an additional 50,000, while conceding that he reached the same outcome as Mr. Trende, Pets.' Resp. Br.11, 44. That is orders of magnitude more simulations than courts around the country have found sufficient to show powerful evidence of an effective

gerrymander. Pets.' Resp. Br.43–44. Justices Whalen and Winslow also raised the objection that Mr. Trende's simulations did not control for communities of interest, Appellate Division Decision, slip op. at 10 (Whalen, J., and Winslow, J., dissenting), but as the Appellate Division explained, "[i]t is implausible that the failure to account for this one criterion in the simulated maps coincidentally resulted in showing that the enacted map had all four republican-leaning districts being more republican-leaning, all the next nine most competitive districts being more democrat-leaning, and the 'safest' democrat-leaning districts falling within the range of the simulated maps," Appellate Division Decision, slip op. at 7. Contrary to Justices Whalen and Winslow's further claims, *id.*, Mr. Trende *did* account for all constitutional criterion other than communities of interest in his rebuttal expert report and found results consistent with his original analyses. R.1038–44. Justices Whalen and Winslow also criticized Petitioners for not submitting Mr. Trende's simulated maps individually for review, Appellate Division Decision, slip op. at 10–11 (Whalen, J., and Winslow, J., dissenting), yet, as was undisputed below, courts using the simulation methodology do not analyze each individual simulated map or receive individual-map submissions—including in the recent Ohio and Maryland cases, *League of Women Voters of Ohio*, ___ N.E.3d___, 2022 WL 110261 (Ohio 2022) 2022 WL 110261, and *Szeliga v. Lamone,* Nos. C-02-CV-21—001773, -00186 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022). Rather, courts rely upon the data-based conclusions that experts draw from these simulations. Pets.' Resp. Br.46–47. In any event, Respondents had in hand Dr. Barber's analysis of 50,000 simulated maps—finding results consistent with Mr. Trende's analysis, R.240–53; R.1040–44; R.997–1001, 2842—and they did not believe there to be anything meaningful enough in those 50,000 simulations to bring to the Supreme Court's (or the Appellate Division's) attention.

Justices Whalen and Winslow further criticized Mr. Trende's analyses here based on his expert testimony in the *Szeliga v. Lamone*, Nos. C-02-CV-21—001773, -00186 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022). Appellate Division Decision, slip op. at 10–11. With all respect, these sorts of unfounded speculations are the result of parties raising arguments *after* the close of evidence, based on the record in other cases not subjected to adversarial testing in this case, without understanding the actual proceedings in those cases. Pets.' Resp. Br.45–46. In fact, the vast majority of the maps that Mr. Trende eliminated from his analysis in the Maryland case were not duplicate maps at all, but maps that did not produce two majority-minority districts, which Respondents would have learned about had they asked Mr. Trende about his Maryland simulations during his lengthy cross-examination. *See* Pets.' Resp. Br.45–46. Once Mr. Trende "froze" the majority-minority districts in Maryland, he ran only 5,000 simulations; when he froze the majority-minority districts here in his reply report in the present case, he ran 10,000 simulations. Pets.' Resp. Br.45–46. Further, there was no evidence that Mr. Trende's congressional-map simulations had redundancies here, unlike his simulations for the state Senate map. Pets.' Resp. Br.44–45. Finally, Mr. Trende properly based his simulation approach on the methodology of Dr. Imai, and Respondents' expert, Dr. Barber, has also used Dr. Imai's approach in recent cases, given that Dr. Imai's is Dr. Barber's key, deeply influential mentor. Pets.' Resp. Br.47–48; R.2808.

Further, even in the very unlikely event that this Court *both* believes that concerns raised with an admitted expert's methodology can ever rise to the level of being reviewable "questions

of law" under N.Y. Const. art. VI, § 3(a), *and* believes that the concerns that Justices Whalen and Winslow raised with Mr. Trende's simulations actually rise to that extreme level, there is still absolutely no basis for this Court to conclude that there is no "evidence in the record" to support the Supreme Court's factual finding. *Matter of Hofbauer*, 47 N.Y.2d at 654; *Congel*, 31 N.Y.3d at 294; *Humphrey*, 60 N.Y.2d at 743. As explained above, *see supra* pp.6–7, it is undisputed that the process that the Legislature used to enact the congressional map was entirely partisan, and that this turned a 19-8 map under a neutral, court-drawn plan into what every expert in this case concluded is a 22-4 map. Further, even putting Mr. Trende's simulation methodology entirely aside, Mr. Trende's core conclusion is supported by "evidence in the record": the congressional map pressed Republican voters "into a few [r]epublican-leaning districts, while spreading [d]emocratic voters as efficiently as possible." Appellate Division Decision, slip op. at 6 (brackets in original); *see also* R.19. As Mr. Trende explained, R.1037, based upon the nationally-respected CVPI, R.1036–37 & n.7 *see* Pls.' Resp. Br. 13, the 2022 congressional map made every competitive district more Democrat, while making the four remaining Republican districts far more Republican. Indeed, the 2022 congressional map:

- Moves District 11—which is represented by Representative Malliotakis (R), and has been represented by Republicans for eight out of the ten years under the 2012 map—from R+7 to D+4.

- Moves District 1—which is represented by Representative Zedlin (R), and has been represented by Republicans for six out of ten years under the 2012 map, including the final six years—from R+6 to D+2.

- Moves District 22—which is analogous to prior District 24 and is Represented by Congressman Katko (R), and has been represented by Republicans for 8 out of the 10 years under the 2012 map, including the final six years—from D+2 to D+6.

- Moves District 19—which is represented by Congressman Delgado (D), and has been represented by Republicans for eight out of the ten years under the 2012 map—from R+1 to D+1.

- Moves District 3—represented by Congressman Souzzi (D)—from D+3 to D+5.

- Moves District 18—represented by Congressman Maloney (D)—from R+1 to D+1.

- Moves the four still-existing districts currently represented by a Republican and scoring at R+5 to more Republican: District 21 from R+8 to R+12; District 23 from R+9 to R+13; District 27 from R+12 to R+13, and District 2 from R+5 to R+10.

R.1037. Thus, Petitioners presented ample "evidence in the record" to support the Supreme Court's now-affirmed factual finding, even without any resort to Mr. Trende's entirely reliable and probative simulation methodology. *Matter of Hofbauer*, 47 N.Y.2d at 654; *Congel*, 31 N.Y.3d at 294; *Humphrey*, 60 N.Y.2d at 743.

Given the above considerations, the only actual "questions of law" on which Respondents lost below and are thus reviewable by this Court, *see* N.Y. Const. art. 6, § 3(a), are whether Petitioners had standing to bring this challenge as to every single district, Brief For Respondent-Appellant Speaker Of The Assembly Carl Heastie 16–21, App. Div. NYSCEF No.31; Brief For Respondent-Appellant Senate Majority Leader And President Pro Tempore Of The Senate Andrea Stewart Cousins 57–60, App. Div. NYSCEF No.32, and whether the Governor and Lieutenant Governor are proper Respondents in this case, Brief For Governor And Lieutenant Governor And President Of The Senate 13–17, App. Div. NYSCEF No.33. No Justice below thought those legal issues had any merit, and with good reason. Petitioners have standing because, *inter alia*, the Constitution provides that a lawsuit may be brought by "any citizen" challenging the constitutionality of a statewide apportionment plan, Pets.' Resp. Br.58 (quoting N.Y. Const. art. III, § 5), under *Society of Plastics Industries, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 769 (1991), and because the 2022 congressional map caused them associational injuries, Pets.' Resp. Br.58–59, and vote-dilution injuries, Pets.' Resp. Br.59–60. And the Governor is a proper Respondent as the chief executive officer, which is why the Governor has always been a defendant in redistricting cases in New York. Pets.' Resp. Br.62.

Sincerely,

Misha Tseytlin

cc: All Counsel of Record (via email)