

Exhibit 3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

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

Index No. E2022-0116CV

Petitioners,

-against-

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

Respondents.

-----X

**PETITIONERS' RESPONSE MEMORANDUM TO
SPECIAL MASTER'S PROPOSED MAPS**

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PRELIMINARY STATEMENT

Petitioners thank the Special Master for his tireless work in addressing the Legislature's violations of the 2014 Anti-Gerrymandering Amendments. Petitioners believe that the Special Master has proposed a fair and constitutional remedial map for the state Senate and urge that map's adoption, after making only certain technical fixes. Petitioners, however, respectfully submit that the Special Master's proposed congressional map requires certain adjustments to bring that map into compliance with the New York Constitution's requirement of partisan fairness, including under the law-of-the-case doctrine. As Mr. Trende's supplemental report explains, the Special Master's proposed congressional map—while a substantial improvement over the Legislature's gerrymander—continues to favor Democrats significantly on Mr. Trende's dotplot and gerrymandering index analysis, as compared to the neutral map ensemble that prevailed at the merits stage of this case. Consulting respected third-party sources, such as the Cook Partisan Voting Index and FiveThirtyEight, confirms the conclusion that the Special Master's proposed congressional map significantly favors Democrats. Petitioners thus respectfully propose certain, limited alterations that would bring the Special Master's congressional map in line with the measure of partisan fairness that prevailed in this case, while improving upon the Special Master's map in terms of compactness, number of counties split, and number of competitive districts.

Petitioners respectfully request that this Court adopt their proposed changes to the Special Master's proposed congressional map. After all, it cannot be that Petitioners—having won on their substantive claim in this landmark case in large part based upon Mr. Trende's methodology for measuring partisan fairness—will receive as a remedy a congressional map that does not comply with that methodology's approach for evaluating partisan fairness.

ARGUMENT

I. This Court Should Adopt The Special Master’s Proposed Senate Map, After Making Only Minor Changes To Comply With The Town-On-Border Rule

While Petitioners continue to believe that their proposed remedial state Senate map best complies with the requirements of the New York Constitution, they have concluded that the Special Master’s state Senate map falls within the permissible range of remedial maps that this Court can adopt, including in terms of ensuring the map’s partisan fairness. *See* N.Y. Const. art. III, § 4(c); *Schneider v. Rockefeller*, 31 N.Y.2d 420, 426–31 (1972); *Harkenrider v. Hochul*, ___ N.Y.3d ___, 2022 WL 1236822, at *4–11 (N.Y. Apr. 27, 2022) (“*Harkenrider II*”).

Petitioners thus suggest only the following minor alterations to bring the Special Master’s proposed map into full compliance with the constitutional block-on-border and town-on-border rules. N.Y. Const. art. III, § 4(c)(6). With proposed Senate Districts 39 and 41, in Dutchess County, the border town of Union Vale (population 4,562) should move to Senate District 39, given the population difference of 9,084 persons between these districts. These changes would result in a new population difference between the districts of only 40 persons. With proposed Senate Districts 43 and 45, in Washington County, the border town of Hampton (population 859) should move from Senate District 45 to Senate District 43, given the population difference of 1,508 persons between these districts. These changes would have a new population difference of 3,180, with the next smallest town having a larger population than the new difference. With proposed Senate Districts 45 and 49, in St. Lawrence County, the border towns of Pierrepont (population 2,527), Parish (population 2,045), and Hopkinton (population 1,106) should move from Senate District 45 to Senate District 49 and the border town of Ogdensburg (population 9,068) should move from Senate District 49 to Senate District 45, given the population difference of 2,934 persons between these districts. These changes would result in a new population difference of

476. With proposed Senate Districts 48 and 49, in Lewis County, the towns of Osceola (population 243), Montague (population 97), Harrisburg (population 481) and Pinckney (population 313) should move into Senate District 49 for town-on-border compliance, given the population difference of 1,723 persons between these districts. These changes would result in a new population difference of 516. Finally, with proposed Senate Districts 49 and 53, the border town of Sangerfield (population 2,329) should move to Senate District 49, given the population deviation of 4,049 persons between these districts. After these changes, the districts would have a new population difference of 1,647.

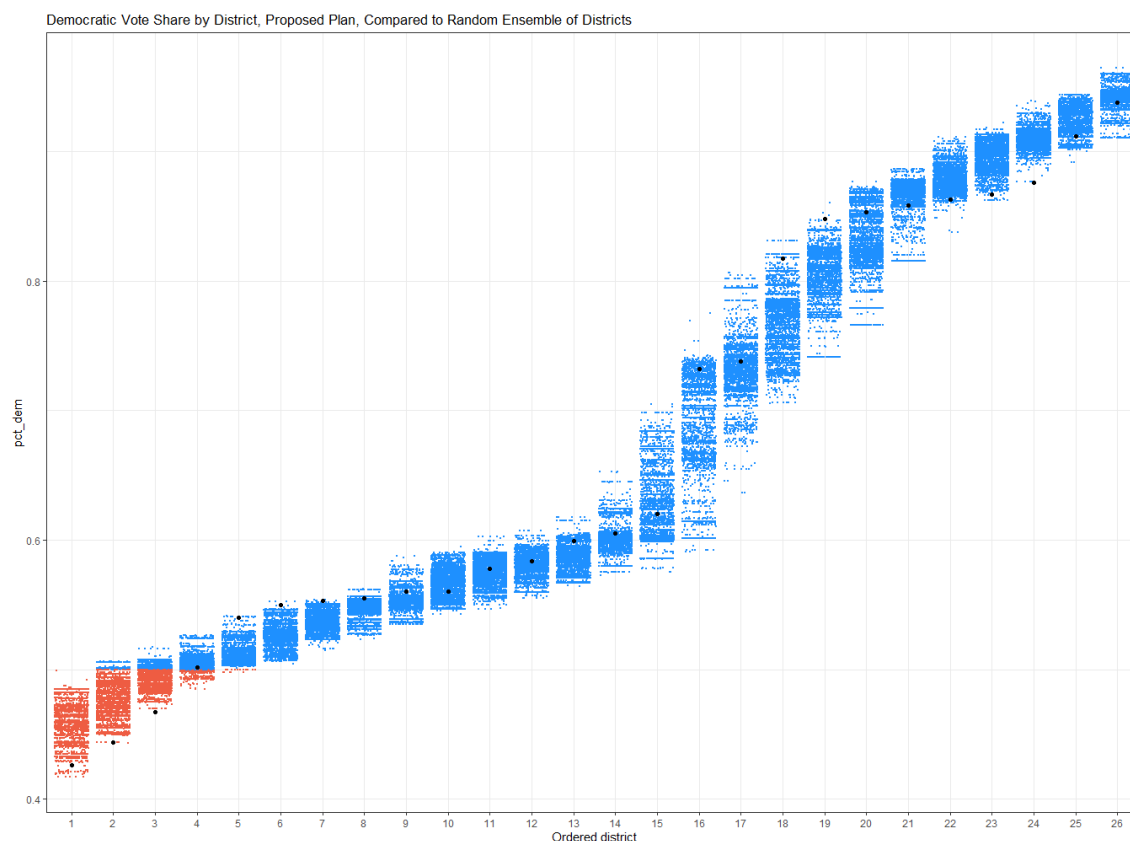
II. This Court Should Adjust The Special Master’s Proposed Congressional Map To Bring That Map Into Compliance With The New York Constitution, Including In Terms Of Article III, Section 4(c)(5)’s Partisan Fairness Requirement

A. While The Special Master’s Proposed Congressional Map Is A Substantial Improvement Over The Legislature’s Egregious Gerrymander, It Does Not Satisfy The Partisan Fairness Methodology That Prevailed In This Case

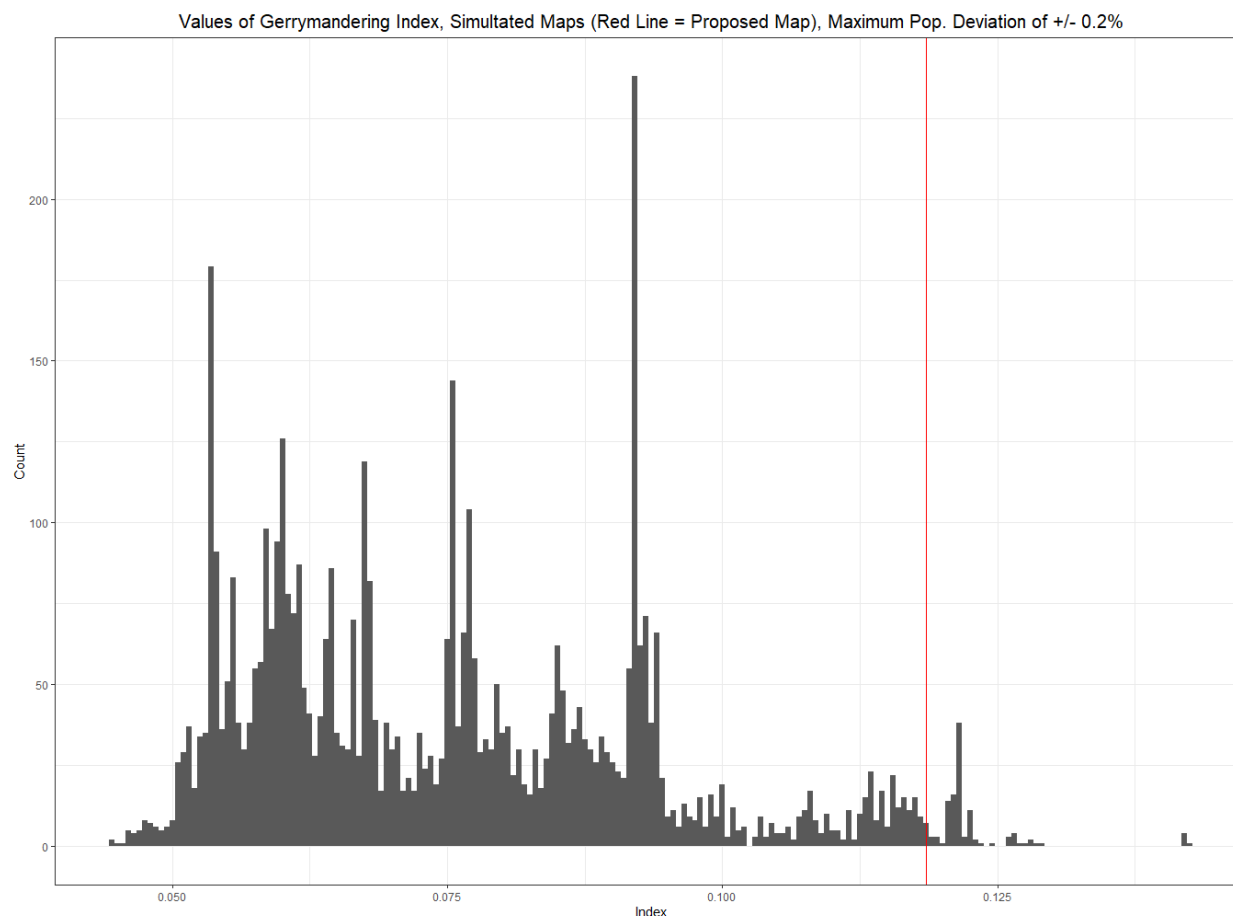
As Petitioners have previously explained, *e.g.*, NYSCEF No.403 at 2–3, the remedial maps that this Court adopts must comply with the 2014 Anti-Gerrymandering Amendments’ partisan fairness requirement found in Article III, Section 4(c)(5). The law-of-the-case doctrine, in turn, *see Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975), requires this Court to analyze partisan fairness according to the successful proof that Petitioners offered at the merits stage, which is the dotplot and gerrymandering index submitted by Mr. Trende and credited by every court in the present case. *See Harkenrider II*, 2022 WL 1236822 at *10–11; *Harkenrider v. Hochul*, ___ A.D.3d ___, 2022 WL 1193180, at *3 (4th Dep’t Apr. 21, 2022) (“*Harkenrider I*”); NYSCEF No.243 at 12–14. The very reason that the Court of Appeals issued its decision striking down the Legislature’s congressional map as substantively unconstitutional—notwithstanding its procedural unconstitutionality holding—was “to provide necessary guidance to inform the development of a new congressional map on remittal.” *Harkenrider II*, 2022 WL 1236822, at *3–5, 9–11 & nn.12

& 14. Accordingly, any remedial map accepted by the Court here must satisfy Mr. Trende's metrics for evaluating a partisan gerrymander, under the law-of-the-case doctrine.

While the Special Master's proposed remedial congressional map improves upon the egregiously gerrymandered map that the Legislature purported to enact, it continues to favor the Democratic Party significantly on Mr. Trende's dotplot and gerrymandering index analyses. Supplemental Report Of Sean P. Trende On The Special Master's Proposed Congressional Map ("Trende Spec. Master Rep.") at 4–6. **Most importantly for this Court's consideration, Mr. Trende's dotplot analysis shows that the Special Master's proposed remedial congressional map is significantly more Democratic than the ensemble from about the fifth-most Republican district through the eighth-most Republican district, which is the critical range of the most competitive districts for New York's congressional delegation, under typical election conditions.** Trende Spec. Master Rep. at 5.



In light of this departure from the neutral, computer-generated ensemble, the Special Master's proposed remedial congressional map's pro-Democratic bias gives it an outlier distribution of partisan splits, scoring 0.118 on the gerrymandering index, higher than 97.5% of the 5,000 computer-generated map ensemble. Trende Spec. Master Rep. at 5.



Mr. Trende's supplemental report also reveals the Special Master's proposal's tilt toward the Democratic Party in another way. As Mr. Trende explains, the Special Master's map provides only six districts that have a Republican-lean under the well-respected Cook Partisan Voting Index, making the map a 20-6 map, Trende Spec. Master Rep. at 7–8, assuming that all competitive races follow the CPVI, *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 v. Common Cause*,

139 S. Ct. 2484 (2019); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 998 (S.D. Ohio 2019), *vacated and remanded*, 140 S. Ct. 102 (2019) (same). This compares to the 2012 court-drawn map, which has a 19-8 representational distribution. Both this Court, NYSCEF No.243 at 13, and the Appellate Division, *Harkenrider I*, 2022 WL 1193180, at *3, placed considerable weight on the Legislature’s attempt to shift the map from a 19-8 map to a 22-4 map. Thus, this further confirms the conclusion of Mr. Trende’s dotplot and gerrymandering index analysis that, while the Special Master’s proposed map is a substantial improvement over the Legislature’s unconstitutional map, it still continues to favor substantially the Democratic Party.

Further, while Petitioners believe that the law-of-the-case doctrine requires this Court to rely only upon Mr. Trende’s methodology, *see supra* pp.3–4, they note that the nonpartisan analysis website FiveThirtyEight—a source that parties on both sides of this case have favorably cited, *see, e.g.*, NYSCEF No.33 at 2; NYSCEF No.312 at 6; NYSCEF No.403 at 11—confirms Mr. Trende’s conclusion that the Special Master’s proposed congressional map significantly favors Democrats. FiveThirtyEight concluded that the Special Master’s proposed remedial congressional map has a pro-Democrat efficiency gap of 5.4. FiveThirtyEight, *What Redistricting Looks Like In Every State* (May 17, 2022, 6:15 PM).¹ That is more pro-Democrat than any remedial map submitted for this Court’s consideration, other than the Legislative Respondents’ egregious gerrymander, and it is far more pro-Democrat than the 2012 court-drawn map that the Appellate Division looked to as a neutral baseline, *see Harkenrider I*, 2022 WL 1193180, at *3–4.²

¹ Available at <https://projects.fivethirtyeight.com/redistricting-2022-maps/new-york/>.

² Table excerpted directly from FiveThirtyEight, *supra*.

Efficiency gap

Difference between each party's share of "wasted votes" — those that don't contribute to a candidate winning.

New York Democrats' proposal	D+8.8
Court appointee's proposal	D+5.4
Common Cause proposal	D+4.8
Wilson Prieve proposal	D+4.6
Ari Spinoza proposal	D+2.8
Old map	R+1.3
Stephen W. Dunn proposal ²	R+1.5
Stephen W. Dunn proposal ³	R+1.5
Stephen W. Dunn proposal	R+1.7
Proposed remedial map	R+2.3
Empire Center for Public Policy proposal	R+7.2
New map	—

Michael Li, Senior Counsel for the left-leaning Brennan Center for Justice, confirms this conclusion, pointing out that the Special Master's proposed map would be a presumptively illegal pro-Democratic gerrymandered map under the proposed federal Freedom to Vote Act, S. 2747, 117th Cong. (2021–2022). *See* Michael Li (@mcpli), Twitter (May 16, 2022, 1:23 PM).³

In all, Mr. Trende's dotplot and gerrymandering index methodology—as well as analysis of third-party sources such as the CPVI, FiveThirtyEight, and a Brennan Center expert—all lead to the same conclusion: while the Special Master's map is an undoubted improvement over the

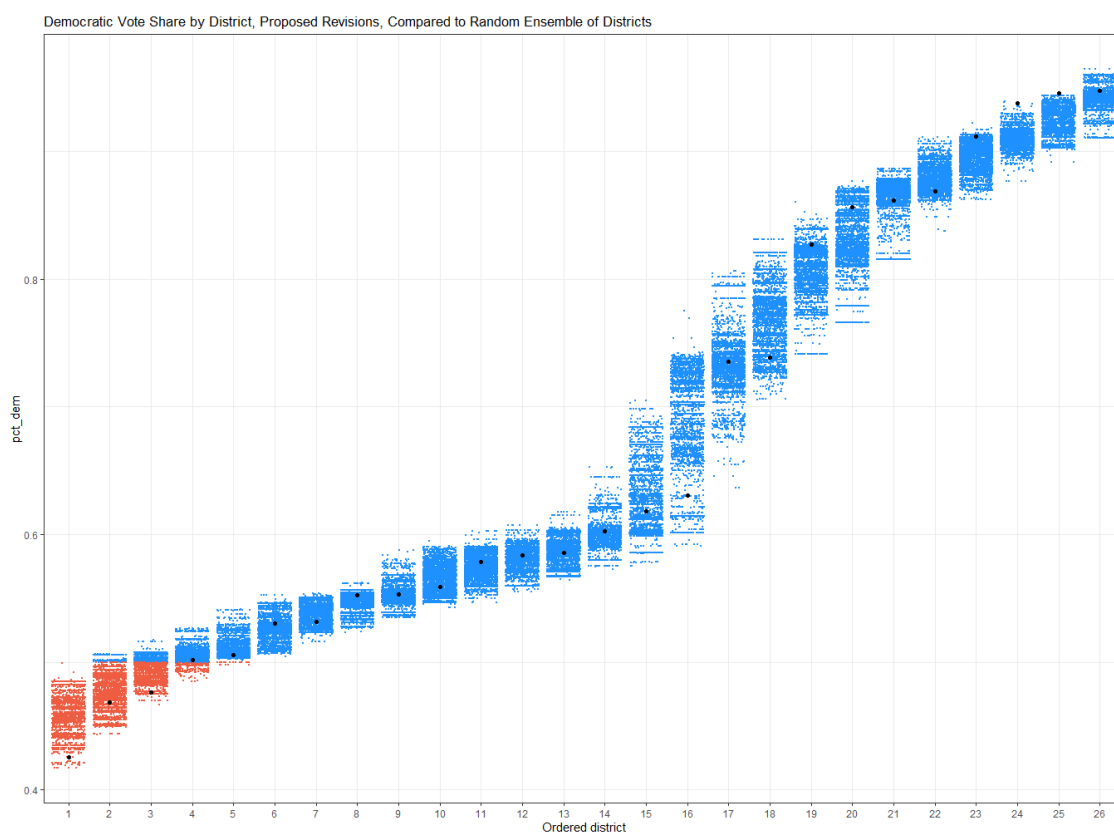
³ Available at <https://twitter.com/mcpli/status/1526252131480649728?s=21&t=SfwG75AUiwBcvshiYkSoVQ>.

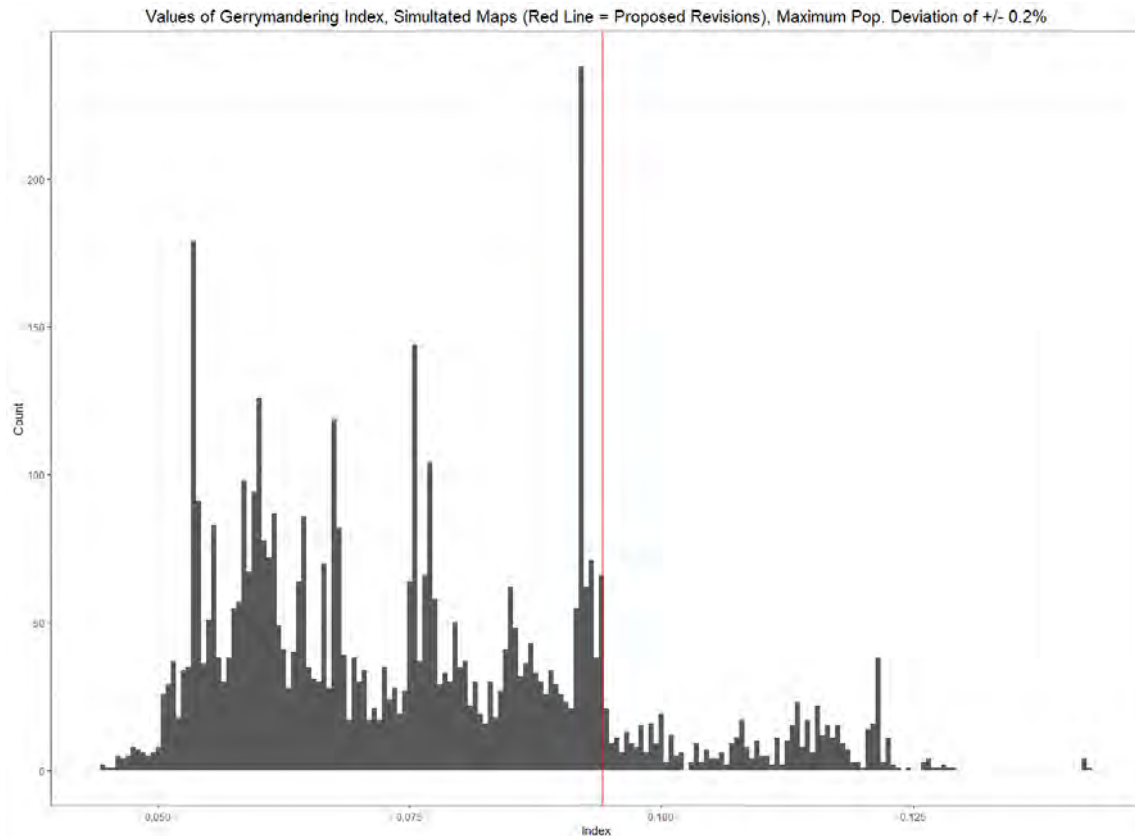
Legislature’s unconstitutional map, it is still significantly biased in favor of the Democratic Party. Given that Petitioners won this case largely based upon Mr. Trende’s dotplot and gerrymandering index methodology, Petitioners respectfully submit that this Court should adjust the Special Master’s map in accordance with core principles of partisan fairness to comply with Article III, Section 4(c)(5) and the law-of-the-case doctrine. And, of course, the conclusion that the Special Master’s proposed map favors the Democratic Party, contrary to Article III, Section 4(c)(5) and the law-of-the-case doctrine, does not change simply because certain Democratic Party partisans do not like the Special Master’s proposed map because that map—correctly—did not go out of its way to protect Democratic Party incumbents from being paired. As explained below, the Special Master properly declined to favor specific incumbents, just as the New York Constitution requires, *see infra* p.18, but that constitutionally mandated choice does nothing to alleviate the Special Master’s proposed map’s unmistakable, significant lean in favor of the Democratic Party, as a party, even if the map is less desirable for certain Democratic Party incumbents.

B. Petitioners’ Limited, Proposed Alterations To The Special Master’s Proposed Map Bring That Map Into Compliance With The New York Constitution and The Law-Of-The-Case Doctrine In Terms Of Partisan Fairness, While Improving Upon The Special Master’s Proposal On Compactness, Number Of Counties Split, And Competitiveness Grounds

Petitioners respectfully submit a limited number of proposed alternations to the Special Master’s congressional map that: (1) ensure that the final map that this Court adopts complies with Article III, Section 4(c)(5)’s partisan fairness requirement; (2) improve the Special Master’s map in terms of the other mandatory criteria in Article III, Section 4(c); and (3) make adjustments to the Special Master’s proposal that involve proper “consider[ation of] the maintenance of cores of existing districts, of pre-existing political subdivisions, including counties, cities, and towns, and of communities of interest,” N.Y. Const. art. III, § 4(c)(5), including in service of ensuring that the map complies with Article III, Section 4(c)(5)’s partisan fairness requirement.

In terms of partisan fairness, making Petitioners' proposed changes to the Special Master's map ensures that the map falls within Mr. Trende's ensemble in terms of his dotplot and gerrymandering index analysis, which the law-of-the-case doctrine requires. *See* Trende Spec. Master Rep. at 6–8. With Petitioners' proposed minor changes, the competitive districts now all fall within the distribution bands in Mr. Trende's dotplot, and the map does much better on the gerrymandering index, scoring a 0.094, which is within the range of the ensemble maps. Trende Spec. Master Rep. at 5–7.





In terms of the other mandatory criteria in Article III, Section 4(c), Petitioners' revisions make all congressional districts equipopulous⁴ and contiguous, and the new districts generally

⁴ This Court must ensure that any remedial map that it adopts complies with the U.S. Constitution's one-person/one-vote principle, which principle requires "congressional districts be drawn with equal populations," *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016), such that, "as nearly as is practicable[,] one man's vote in a congressional election is . . . worth as much as another's," *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). This is a principle of "unusual rigor," *Karcher v. Daggett*, 462 U.S. 725, 732 (2016), with the U.S. Supreme Court's most recent one-person/one-voter cases explaining that States must "draw congressional districts with populations as close to perfect equality as possible," with no noted exception, *Evenwel*, 578 U.S. at 59. While both Petitioners' initial congressional submission and their new map proposing alterations to the Special Master's map comply with the rigorous one-person/one-voter rule by having no more than 1-voter difference among the congressional districts, the Special Master's proposed remedial map appears to have a 2-voter difference as between multiple districts. And while the Wisconsin Supreme Court has recently held that such a minor deviation from perfect population equality is constitutionally permissible given its very limited nature, *Johnson v. Wis. Elections Comm'n*, 971 N.W.2d 402, 410–11 (Wis. 2022), *cert. granted, rev'd sub nom. on other grounds Wis. Legislature*

score better than or comparable to the Special Master’s proposed map on compactness scores. Trende Spec. Master Rep. at 1–2. The revisions eliminate one split county from the Special Master’s map. Trende Spec. Master Rep. at 2. The revised map also adequately respects the cores of prior districts, even modestly outpacing the Special Master’s map on this score, with 73.3% of the prior cores retained in Petitioners’ revisions, compared to 70.9% in the Special Master’s initial map. Trende Spec. Master Rep. at 3. Petitioners’ revised map incorporates the same number of minority-opportunity districts as the Special Master’s map, without having race predominate over any traditional redistricting criteria, under the Equal Protection Clause of the Fourteenth Amendment. Trende Spec. Master Rep. at 4. And Petitioners’ revisions create an additional competitive district. The following chart from Mr. Trende’s Report parallels the one that the Special Master included with this proposal:

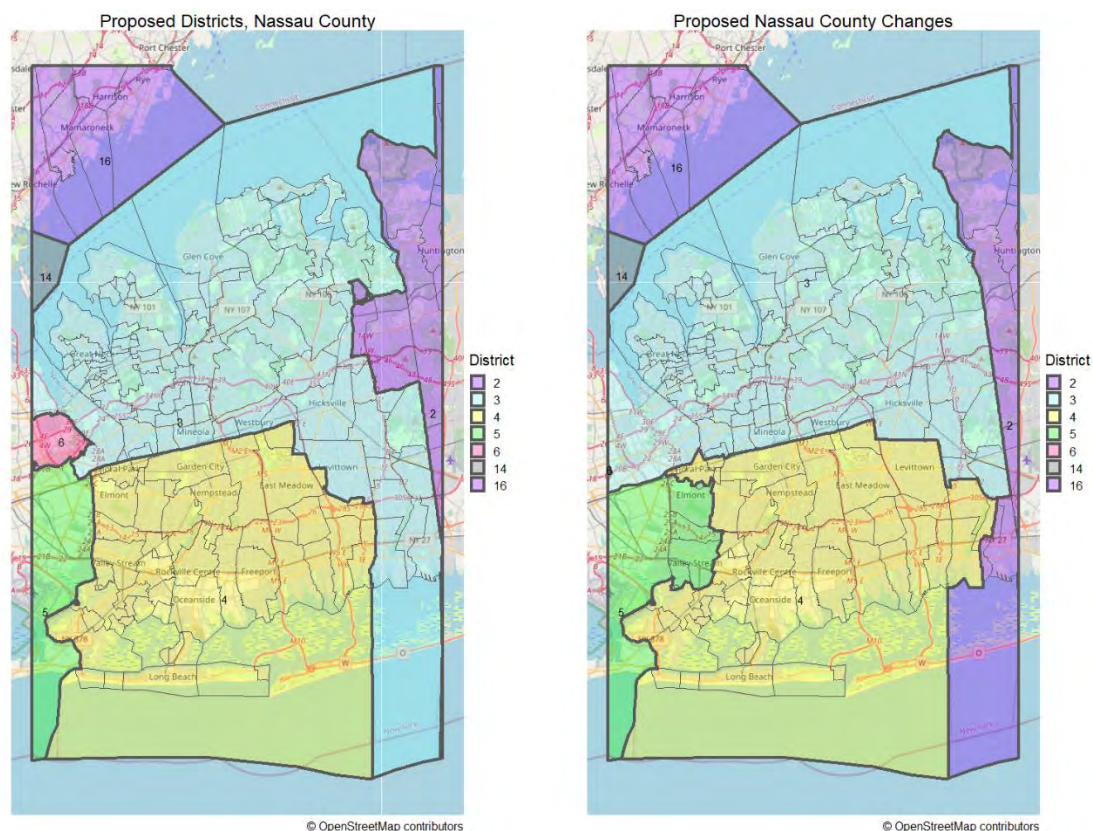
METRIC	LEGISLATIVE PROPOSAL	PROPOSED MAP	PROPOSED REVISIONS
Counties Split	34	15	14
County Splits	56	26	27
Reock Compactness	32	40	39
Polsby-Popper Compactness	25	34	37
Competitive Districts	3	8	9

Compare Trende Spec. Master Rep. at 9, *with* NYSCEF No.543 at 1.

Each of the limited, specific changes that Petitioners suggest involves “consider[ation of] the maintenance of cores of existing districts, of pre-existing political subdivisions, including counties, cities, and towns, and of communities of interest.” N.Y. Const. art. III, § 4(c)(5).

v. Wis. Elections Comm’n, 142 S. Ct. 1245 (2022) (per curiam), other courts have rejected minor population deviations, *see Vieth v. Commonwealth*, 195 F. Supp. 2d 672, 675–78 (M.D. Pa. 2002).

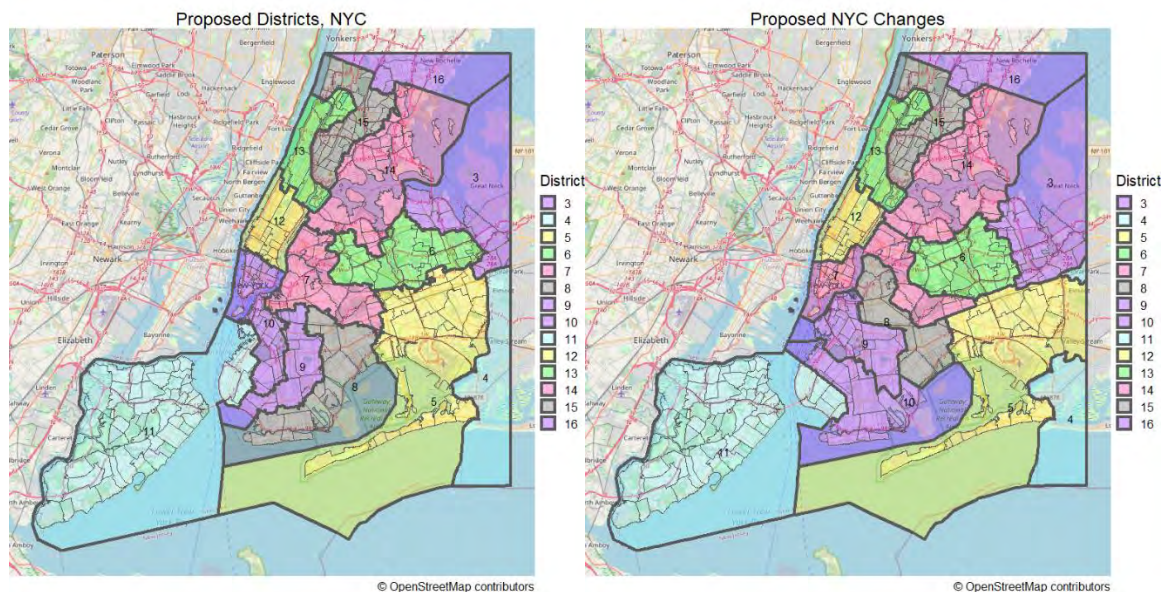
On Long Island and closely related districts, Petitioners make only minor changes to the Special Master's proposal. Beginning with CD2, Petitioners' remedial map merely removes the county-line cut in this district in the Special Master's proposed remedial congressional map into Woodbury, Syosset, and Oyster Bay Cove, keeping these census designated places ("CDPs") together and connected, more in line with how actual residents would think of their own communities. In place of these CDPs, Petitioners' remedial map adds a south-shore county crossing so as to include East Massapequa in CD2. East Massapequa represents a community of interest, and it has historically fallen within CD2. For CD3, Petitioners would merely make minimal changes to the Special Master's proposal, designed to maintain the historical north-shore/south-shore Nassau County divide. Petitioners propose eliminating the south-shore reach of the Special Master's proposed remedial map, instead extending this district further into Queens, like the prior 2012 court-drawn congressional map. These minor changes to CD3 in Petitioners' remedial map keep the whole of Bethpage, the Village of Farmingdale, and the unincorporated area of South Farmingdale in CD3. As to CDs 4 and 5, Petitioners' remedial map largely restores these districts to their boundaries in the 2012 court-drawn map, respecting the communities of interest along the Nassau-Queens border, including by keeping North Valley Stream, Elmont, and the Village of Valley Stream wholly within CD5, as they were historically.



Petitioners' proposed remedial map adjusts the Special Master's New York City districts in a limited, sensible matter. Petitioners proposed adjusting CDs 8, 9, and 10 so that these districts would now fall wholly within Kings County. These adjustments reflect the communities of interest within Kings County and avoid additional county splits. Further, Petitioners' proposed adjustments combine the Orthodox Jewish and Russian communities of interest into CD10—communities that share economic, social, and other community ties—consistent with the powerful testimony submitted to the IRC on this point. *See, e.g.*, Public Statement of Louis Jerome; Public Statement of Nachman Mostofsky.⁵ In revised district CD11, Petitioners' remedial map merely tweaks the Special Master's district lines to restore the traditional boundaries found in the 2012 federal-court-drawn map. For example, Petitioners' revisions keep the Dyker Heights

⁵ All available at https://www.nyirc.gov/storage/archive/Kings_Richmond_Redacted.pdf.

neighborhood community of interest whole in CD11, as it was in the 2012 map as well. *See* Public Statement of Barbara Slattery.⁶



Turning to the Hudson Valley, Petitioners again only propose limited, sensible changes. In CD18, Petitioners included all of Sullivan County, reflecting the voluminous testimony that Sullivan and Orange Counties are generally a community of interest, *see* Public Statement of Clay Boone; Public Statement of Councilman Robert Courtenay; Public Statement of County Clerk Annie Rabbitt,⁷ as well as more specifically that the Orthodox Jewish communities in Sullivan and Orange Counties were a large and growing community of interest that deserves consistent representation in Congress, *see, e.g.,* Public Statement of Abraham Rutner; Public Statement of

⁶ Available at https://www.nyirc.gov/storage/archive/Kings_Richmond_Redacted.pdf.

⁷ All available at https://nyirc.gov/storage/archive/Mid-Hudson_Capital_Region_Redacted.pdf.

Isaac Hirsch; Public Statement of Joel Fried; Public Statement of Israel Weinstock;⁸ Public Testimony of James LoFranco 1:44:25–1:45:41, Virtual Public Meeting of the NYSIRC, Aug. 2, 2021.⁹ To accommodate this inclusion of Sullivan County in CD18, Petitioners’ proposed revisions place part of Ulster County in CD19, for population purposes, as well as to correct the Special Master’s splitting of the City of Kingston into two districts, now keeping Kingston whole within CD19, consistent with the demands of local officials. *See* Patricia R. Doxsey, *Officials Decry Kingston Split as Part of Two Congressional Districts*, Daily Freeman (May 17, 2022, 7:07 PM).¹⁰ Additionally, Petitioners’ revisions remove Tompkins, Cortland, and Tioga Counties from CD19 and place them with their fellow Finger Lakes and Southern Tier communities. Revised CD19 is now comprised of all of Schoharie County, Montgomery County, Fulton County, Broome County, Chenango County, Columbia County, Greene County, Otsego County, northern portions of Ulster County, and southern portions of Herkimer County.

Petitioners’ proposed revisions in Upstate New York are similarly limited. Congressional District 21 in Petitioners’ revised submission reflects both the historic composition of the district and IRC testimony, keeping Jefferson County whole within the congressional district, including the City of Watertown and Fort Drum. *See, e.g.*, Public Statement of James Wright.¹¹ CD23 restores the district to the one found in the 2012 court-drawn congressional map, by placing Tompkins County and related Finger Lakes counties in the region that make up this Southern Tier district, consistent with testimony before the IRC. *See, e.g.*, Public Statement/Resolution of

⁸ All available at https://nyirc.gov/storage/archive/Mid-Hudson_Capital_Region_Redacted.pdf.

⁹ Available at <https://www.youtube.com/watch?v=7HgDIwfiMmw>.

¹⁰ Available at <https://www.dailyfreeman.com/2022/05/17/ulster-officials-urge-judge-to-keep-kingston-within-a-single-congressional-district/>.

¹¹ Available at https://nyirc.gov/storage/archive/NC_MV_Redacted.pdf.

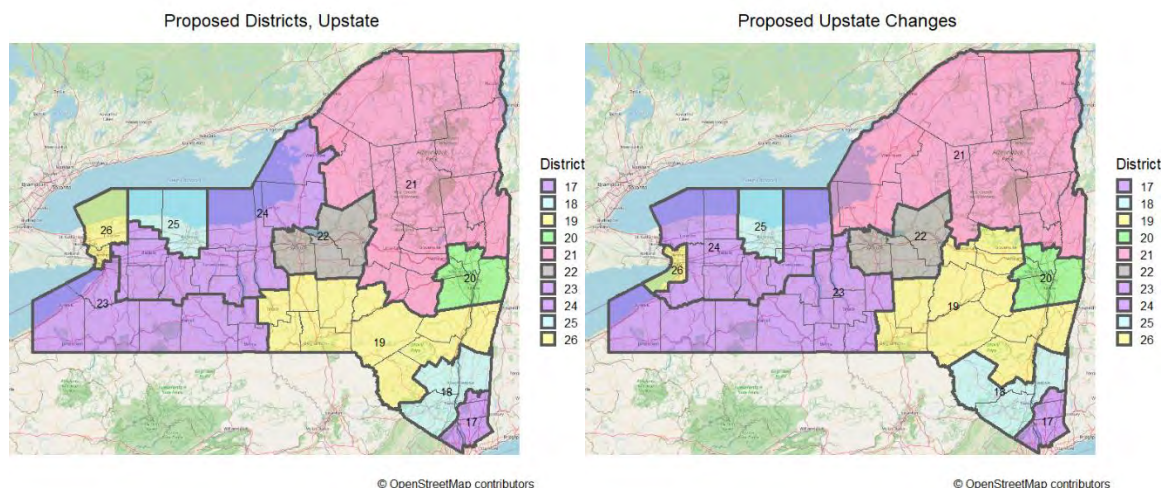
Allegany County Board of Legislators; Public Statement of Andrea Windoft; Public Statement of Benjamin Troché; Public Statement of Brenda Malarkey; Public Statement of Brent Ellis.¹² Revised CD24 is a very compact district that is similar to its counterpart in the 2012 map, while being designed specifically to keep counties whole, inasmuch as it was possible, fixing the problems with both the Legislature's unconstitutional plan and the Special Master's submission, which both created a district spanning 200 miles. Moreover, adding the balance of Erie County and Niagara County to CD24 is consistent with the 2012 plan and eliminates the need to extend this district far to the north and east to incorporate Oswego and parts of Jefferson counties. Removing the Erie County towns from CD23 restores the existing composition of the Southern Tier seat and eliminates an unnecessary division of Erie into three districts, consistent with public testimony before the IRC. *See, e.g.*, Public Statement/Resolution of Allegany County Board of Legislators; Public Statement of Andrea Windoft; Public Statement of Benjamin Troché; Public Statement of Brenda Malarkey; Public Statement of Brent Ellis.¹³ Revised CD25 is a compact district comprising all of Monroe County and only a small portion of Ontario County—the town of Victor and a small portion of the town of Bloomfield—which is part of the greater Rochester area and which is well known as a commuting suburb of Rochester, without including and dividing unrelated rural areas of Orleans County. And revised CD26 is an Erie-County-only, Buffalo-centric district that does not erroneously combine these urban Buffalo areas with Niagara County, limiting the district to Buffalo and first-ring suburbs, which is consistent with the 2012 design.

Placing Tompkins, Cortland, and Tioga Counties in CD23, in particular, has beneficial impacts on each adjacent district, particularly CD19, CD21, and CD24. This choice eliminates the

¹² All available at https://nyirc.gov/storage/archive/West_FL_CNY_ST_Redacted.pdf.

¹³ All available at https://nyirc.gov/storage/archive/West_FL_CNY_ST_Redacted.pdf.

three-county split of Erie to just two, and reduces the geographic sprawl of CD24 by reincorporating Jefferson and Oswego counties to CD21. Further, it reduces the unnecessary sprawl of CD19, which begins on the Massachusetts border east of the Hudson River and goes no further west than Broome County. Moreover, it keeps Otsego County whole and returns Schoharie County and the balance of Montgomery County back to CD19 where it currently exists.



III. The New York Constitution And United States Constitution Prohibit Adjusting The Special Master's Proposed Maps Based Upon Considerations That Respondents' Amici—Who Were The Primary Beneficiaries Of The Unconstitutional Gerrymander—Have Publicly Raised

Since the Special Master released his proposed congressional map, certain of Respondents' *amici*¹⁴—that is, Democratic Party members of Congress who were the primary beneficiaries of

¹⁴ See Brief Of *Amici Curiae* Candidates For Congressional Office & N.Y. Voters In Support Of The Congressional Districts Enacted By The N.Y. State Legislature & Respondents-Appellants, *Harkenrider v. Hochul*, No.60 (N.Y. Apr. 24, 2022), available at <https://vhdshf2oms2wcnsvk7>

the Legislature’s unconstitutional congressional gerrymander—have raised certain objections to that proposed map. Petitioners briefly respond to those objections below, explaining that this Court adjusting the Special Master’s map based upon these considerations would violate the New York Constitution and/or the United States Constitution, respectively.

First, it would not be constitutionally permissible for this Court to adjust the Special Master’s proposed map to avoid incumbent pairings. *Contra* Rep. Hakeem Jeffries, *Rep. Jeffries Blasts Draft Map That Viciously Targets Black Representation*, Press Release (May 16, 2022).¹⁵ The New York Constitution explicitly prohibits drawing districts “for the purpose of favoring or disfavoring incumbents,” N.Y. Const. art. III, § 4(c)(5), so any objection that the Special Master’s proposed maps place multiple incumbents within a single district would not be a constitutionally permissible basis to adjust any of the Special Master’s proposed district lines.

Second, it would not be constitutionally permissible for this Court to adjust the Special Master’s congressional map on community-of-interest and core-retention-for-a-specific-district grounds in a manner that would further increase that proposed maps’ already problematic, significant tilt in favor of the Democratic Party in violation of Article III, Section 4(c)(5)’s partisan fairness requirement. *See, e.g.*, Erin Durkin, *Nadler, Maloney Could Face Off in Primary with Redrawn District*, Politico.com (May 16, 2022 5:39 PM) (quoting Congressman Nadler). The New York Constitution requires that districts do not “result in the denial or abridgement of racial or language minority voting rights,” “shall contain as nearly as may be an equal number of inhabitants,” “shall consist of contiguous territory,” “shall be as compact in form as practicable,”

sdv3so.blob.core.windows.net/thearp-media/documents/Amici_Brief_Cong._Candidates_and_Voters_4.24.22.pdf.

¹⁵ Available at <https://jeffries.house.gov/2022/05/16/rep-jeffries-blasts-draft-map-that-viciously-targets-black-representation/>.

and “shall not be drawn 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)(1)–(5), and thereafter only notes that the mapdrawer must “*consider* the maintenance of cores of existing districts . . . and of communities of interest,” *id.* § 4(c)(5) (emphasis added). Pursuant to this Court’s direction, the Special Master scrupulously reviewed the record developed by the IRC, NYSCEF No.342 at 1, read all of the written submissions from the parties and public, and listened carefully to a full day of testimony largely centered on the importance of maintaining various communities of interest relevant to his mapdrawing work. Accordingly, the Special Master surely “consider[ed]” these constitutional factors in drawing his proposed map, which consideration—if adopted by this Court—would be entitled to significant deference. *See Schneider*, 31 N.Y.2d at 428–29; *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 80 (1992).

Given this context, this Court should take the community-of-interest and core-retention-for-a-specific-district objections raised by the primary beneficiaries of the Legislature’s unconstitutional gerrymander for what they are: an effort to get this Court to violate Article III, Section 4(c)(5)’s partisan fairness requirement even further by tilting the Special Master’s map further in favor of the Democratic Party, in general, and these specific politicians, in particular. As Justice Kagan explained in *Gill v. Whitford*, 138 S. Ct. 1918 (2018), modern technology allows gerrymandering mapdrawers to “meet[] traditional districting requirements (compactness, contiguity, and the like),” without difficulty, while still crafting a map that “capture[s] every last bit of partisan advantage,” resulting in gerrymanders that are “more extreme and durable, insulating officeholders against all but the most titanic shifts in the political tides,” *id.* at 1941 (Kagan, J., concurring). Gerrymanders can cite community-of-interest considerations—in

particular—to further these partisan ends, given that communities of interest are so malleable and subject to differing interpretation. *See Harkenrider I*, 2022 WL 1193180, at *4.

It is thus critically important for this Court to consider whether a party is pointing to community-of-interest and core-retention-for-a-particular-district considerations to explain changes that *improve* the Special Master’s proposed congressional map on constitutionally mandatory criteria—including on partisan fairness and competitiveness grounds under Article III, Section 4(c)(5), or compactness grounds under Article III, Section 4(c)(4)—or whether the party is simply seeking to invoke these malleable considerations to make the map more unfairly partisan and less competitive. Petitioners, for their part, have pointed to community-of-interest and core-retention considerations as explanations for changes that would, in fact, improve upon the Special Master’s proposed map on partisan fairness and competitiveness grounds, as well as on the number of counties split and compactness. Nothing about Respondents’ *amici*’s public statements suggests that those objective considerations actually play any role in their effort to invoke community-of-interest and core-retention for partisan and incumbent-protective gain.

Finally, to the extent that these *amici* incumbents ground their desired changes to the Special Master’s proposed remedial map in race-qua-race-based concerns, including by focusing on the percent of racial groups in various districts, *see* Rep. Hakeem Jeffries, Press Release, *supra*, Petitioners submit that making any changes to the Special Master’s proposed remedial map on these grounds would very likely violate the Equal Protection Clause of the Fourteenth Amendment. As the U.S. Supreme Court recently explained, “districting maps that sort voters on the basis of race are by their very nature odious,” so any time “race is the predominant factor motivating the placement of voters in or out of a particular district, the State bears the burden of showing that the design of that district withstands strict scrutiny,” meaning “narrowly tailored to comply with the

VRA.” *Wis. Legislature*, 142 S. Ct. at 1248 (citation omitted). If this Court were to adjust any of the Special Master’s proposed districts in response to race-based objections, that would raise a very strong inference that “race is the predominant factor motivating the placement of voters in or out of a particular district,” *id.*, thereby putting the final map in the same grave constitutional danger that recently doomed a Wisconsin-Supreme-Court-adopted map before the U.S. Supreme Court, *id.* Indeed, given that no party in this case has ever attempted to make a showing that Section 2 of the Voting Rights Act requires race-based districting to achieve any particular majority-minority district in the maps at issue here, it is hard to see how any such race-focused changes to the Special Master’s proposal could survive under the U.S. Supreme Court’s recent decision in the Wisconsin Supreme Court case. *Id.* at 1250.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court adopt adjusted versions of the Special Master’s proposed maps.

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May 18, 2022

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CERTIFICATION

I hereby certify that the foregoing memorandum complies with the bookmarking requirement and word count limitations set forth in Rule 202.8-b of the Uniform Rules of Supreme and County Courts. *See* 22 NYCRR § 202.8-b. This memorandum contains 4,784 words, excluding parts of the document exempted by Rule 202.8-b(b).

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