SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

_____x

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,

-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

Index No. E2022-0116CV

Mot. Sequence No.: 001

Justice Patrick F. McAllister

MEMORANDUM OF LAW OF THE SENATE MAJORITY LEADER AND THE SPEAKER OF THE ASSEMBLY IN OPPOSITION TO THE PETITION

CUTI HECKER WANG LLP
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600

Attorneys for Respondent
Senate Majority Leader
Andrea Stewart-Cousins

GRAUBARD MILLER
405 Lexington Avenue, 11th Floor
New York, NY 10174
(212) 818-8800

Attorneys for Respondent
Speaker of the Assembly
Carl Heastie

Table of Contents

Table of Authorities

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

Senate Majority Leader Andrea Stewart-Cousins and Speaker of the Assembly Carl Heastie, by and through their attorneys, Cuti Hecker Wang LLP and Graubard Miller, respectfully submit this memorandum of law in opposition to the Petition.

PRELIMINARY STATEMENT

Because Petitioners are challenging the constitutionality of a duly enacted redistricting plan, the law imposes an extremely high standard: they must prove their claims beyond a reasonable doubt. Petitioners come nowhere close to meeting this formidable burden with respect to either of their claims.

Petitioners first contend that the 2014 amendments to the New York Constitution, which created the New York State Independent Redistricting Commission (the "Commission") and delegated to the Commission authority to develop redistricting plans, hold public hearings, and submit recommendations to the Legislature, somehow extinguished the Legislature's authority to do anything if the Commission abdicates its duty to submit a final proposed redistricting plan to the Legislature. As discussed in Point I below, this strained argument cannot be reconciled with the plain language of the Constitution, which makes clear that the Legislature retains wide discretion to accept or reject any Commission recommendation for any reason and to make any amendments it deems necessary, and with more than two centuries of judicial precedent, which makes clear that redistricting fundamentally is a legislative prerogative.

Petitioners also claim that the enacted congressional plan is an unconstitutional partisan gerrymander. Far from proving that claim beyond a reasonable doubt, the record before this Court contains no evidence supporting that claim. Indeed, Petitioners have barely submitted any evidence at all, relying almost entirely on the unsworn allegations in their unverified Petition and the unsworn reports of their purported experts. Petitioners' simulations expert, moreover,

concludes stunningly that the enacted congressional plan *actually favors Republicans*, not Democrats, because at least one more district in the enacted plan is likely to be carried by Republicans than in the vast majority of Petitioners' thousands of simulated plans. And Petitioners' district-specific criticisms fail because they lack standing to challenge most of the districts at issue, because their criticisms are confused and often internally inconsistent, and because the objective characteristics of the enacted plan confirm that it complies with all constitutional requirements.

Finally, as discussed in Point III below, even if Petitioners were able to prove beyond a reasonable doubt that either of their claims had merit, this Court could not order any of the remedies they boldly seek. Article III, section 5 of the Constitution provides unambiguously that in the event of a successful redistricting challenge, the Legislature must be afforded "a full and reasonable opportunity to correct the law's legal infirmities," and this Court therefore may not draw its own plan from scratch as Petitioners' baselessly invite it to do. Petitioners' alternative suggestion that the Court should strike down the enacted congressional plan and force the federal courts to draw a replacement plan is even more peculiar and is foreclosed by United States Supreme Court precedent. And this Court may not unilaterally "pause" New York's statutorily prescribed election calendar, which legions of cases make clear would sow confusion and otherwise impermissibly threaten orderly election processes.

For these and other reasons, Respondents respectfully submit that the Petition should be dismissed.

BACKGROUND

The New York Constitution may be amended in either of two ways: the People may amend the Constitution themselves, with no participation by the Legislature, through a

constitutional convention, a process that requires three separate statewide elections (one to call a convention, a second to elect convention delegates, and a third to ratify any proposed amendments that are adopted at the convention), *see* N.Y. Const. art. XIX, § 2; or the Legislature may amend the Constitution, which requires two successive Legislatures to enact the identical proposed amendments, which are then submitted to voters for approval, *see id.* § 1.

The 2014 amendments at issue in this special proceeding were twice considered and twice enacted by the Legislature – once in 2012, A.9526/S.6698, and then a second time in 2013, A.2086/S.2107. The voters approved the Legislature's proposed amendments in 2014.

Given that the Legislature itself was the impetus behind the 2014 amendments, it is not surprising that the 2014 amendments expressly preserve the Legislature's traditional role, authority, and discretion in enacting redistricting plans following each decennial census. The 2014 amendments delegated authority to the Commission to hold hearings and make redistricting plan recommendations, but the 2014 amendments provide unambiguously that the Legislature has unfettered discretion to reject any Commission proposal for any reason, and that if the Legislature rejects a Commission proposal, the Legislature may enact any plan it chooses by making "any amendments" it "deems necessary." *See* N.Y. Const. art. III, § 4(b).

The 2014 amendments expressly prescribe a specific schedule. The Commission was required to publish draft redistricting plans and relevant supporting data by September 15, 2021. *Id*. § 4(c)(6). The Commission was then required to hold at least one public hearing in each of twelve locations throughout the State to enable the "public to review, analyze, and comment upon such plans and to develop alternative redistricting plans for presentation to the commission at the public hearings." *Id*. The Commission was then required to submit a proposed redistricting plan to the Legislature between January 1 and January 15, 2022, which the

Legislature had unfettered discretion to adopt or reject for any reason. *Id*. § 4(b). If the Legislature declined to adopt the first Commission proposal, the Commission was then required to submit a second proposed plan to the Legislature within fifteen days of the Legislature's rejection of the first proposed plan, and in no event later than February 28, 2022. *Id*.

The process of running for Congress in New York in 2022 officially starts on March 1, the day after the last possible deadline for the Commission to submit its final proposed plan to the Legislature. To get on the ballot for the June 2022 congressional primary in New York, a candidate must submit designating petitions to the Board of Elections containing the required number of signatures from voters residing in the congressional district in which the candidate is seeking to run. The deadline for submitting designating petitions with all required signatures is April 7, 2022, and candidates are allowed to begin collecting signatures on March 1, 2022. N.Y. Election Law § 6-158(1). Each voter may sign only one petition, and any signatures collected outside of this 37-day window are void. *Id*. § 6-134(3)-(4). Because signatures count only if the voter signing the petition resides in the congressional district in which the candidate is seeking to run, *id*. § 6-136(2), it is impracticable for candidates to begin collecting signatures on March 1 if the new congressional district lines have not yet been established or if there is uncertainty about which redistricting plan is operative.

Given that the 2014 amendments allow the Commission to submit its final proposed redistricting plan to the Legislature as late as February 28, 2022, the day before the designating petition signature collection process begins, and after the Commission has already completed an extensive public hearing and comment process, the 2014 amendments do not contemplate that the Legislature itself will hold any public hearings before it decides whether to accept or reject the Commission's final proposal and, if necessary, amend the final proposal. Instead, the 2014

amendments contemplate that the Legislature will rely on the expansive record that the Commission is required to develop during the required public hearings. *See* N.Y. Const. art. III, § 4(c) (the Commission "shall report the findings of all such hearings to the legislature upon submission of a redistricting plan").

The 2014 amendments impose important new constraints on the redistricting process. These amendments require that congressional districts (a) avoid the denial or abridgement of racial or language minority voting rights, (b) ensure that racial and minority language groups do not have less opportunity to participate in the political process than other members of the electorate and to elect representatives of their choice, (c) consist of contiguous territory, (d) be as compact as practicable, (e) refrain from drawing districts to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties, (f) maintain the cores of existing districts, (g) unite communities of interest, and (h) consider pre-existing political subdivisions, including counties, cites, and towns. *Id.* §§ 4(c)(1), (3), (4), (5). The United States Constitution further requires that congressional districts vary in population by no more than one person. *See Karcher v. Daggett*, 462 U.S. 725 (1983).

Although there is no doubt that constraining partisanship and creating a role for the Commission to develop redistricting plans were important aspects of the 2014 amendments, those amendments plainly provide that the Legislature continues to have the final word with respect to approving or disapproving the Commission's proposals and, if the Legislature deems it necessary for any reason, enacting its own redistricting plan.

The 2014 amendments assume that the Commission will faithfully discharge each of the mandatory duties that the Constitution expressly and unambiguously imposes on it. The 2014

amendments do not address what happens if the Commission abdicates its mandatory duty to submit a final proposed redistricting plan or plans for the Legislature to consider.

In 2020 and 2021, the Legislature attempted to improve the new redistricting process that it had enacted through the 2014 amendments. The Legislature proposed new constitutional amendments that would have, among other changes, fixed the number of Senate seats at 63; required that district lines be based on total population of all residents, including non-citizens; required that incarcerated individuals be counted at their place of last residence, instead of at their place of incarceration; changed the Commission's quorum rules; advanced the timetable for the redistricting process by two months to allow more time for it to be completed before the beginning of the designating petition period; and clarified that if the Commission fails to present a final proposed redistricting plan to the Legislature, the Legislature has the same discretion to enact its own plan that it has when the Commission presents a final recommendation. The Legislature enacted these proposed amendments twice, A.10839/S.8833 of 2020; A.1916/S.515 of 2021, but voters did not approve them in the 2021 election.

Meanwhile, in June 2021 – approximately five months *before* voters declined to approve the proposed 2021 amendments – the Legislature enacted a statute that addresses what happens if the Commission abdicates its duty to submit a final proposed redistricting plan. The statute provides that "if the commission does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan," then the Legislature "shall introduce such implementing legislation with any amendments each house deems necessary." L.2021, c. 633, § 1.

Between July 20 and December 5, 2021, the Commission held 24 public hearings comprised of dozens of hours of testimony from officials and members of the public about

communities of interest, minority voting strength, and myriad other redistricting issues. On January 3, 2022, the Commission submitted its first proposed congressional plans to the Legislature for consideration. Because the Commission deadlocked along party lines and was unable to form a bipartisan consensus, it submitted two proposed plans, one urged by the Democrats and one urged by the Republicans. The Legislature rejected both plans on January 10, 2022. The Commission then had fifteen days, until January 25, 2022, to present its final proposal or proposals for the Legislature to consider.

On January 24, 2022, the day before the deadline, the Commission announced that it remained hopelessly deadlocked along party lines, and that it would not be meeting again or presenting any final proposal to the Legislature. The Democratic Commissioners issued a statement asserting that the Republican Commissioners had sabotaged the process by refusing to meet to vote on a final proposed plan or plans, and the Republican Commissioners likewise issued a statement blaming the Democrats for the impasse.

In the absence of a Commission proposal to consider, and with the designating petitioning period fast approaching, the Legislature did what the Constitution, the June 2021 statute, and two centuries of precedent plainly allowed it to do: it enacted a new congressional plan. In doing so, the Legislature balanced a complex array of often competing considerations, including the need to comply with the strict population equality requirement – which, given that the State's congressional delegation was reduced from 27 to 26 seats, and given that the State's significant population growth during the last decade was unevenly distributed between the downstate and upstate regions, required drawing a very different congressional map – the need to avoid diluting minority voting strength, and the need to join communities of interest, among

other considerations. The Legislature enacted the plan on February 2, 2022, and the Governor signed it into law on February 3, 2022.

Petitioners commenced this special proceeding on February 3, 2022. Because a special proceeding "is analogous" to a "summary judgment motion," it "is designed to go to hearing and determination promptly." Siegel, *New York Practice* §§ 554, 556 (6th ed. 2021); *Buckley v. Zoning Board of Appeals of City of Geneva*, 189 A.D.3d 2080, 2081 (4th Dep't 2020). Petitioners therefore should have submitted all of their proof and arguments together with the Petition. Instead, they filed an unverified Petition, no fact affidavits (other than an attorney affirmation attaching legal provisions that are subject to judicial notice), no expert affidavits, and no memorandum of law.

Five days later, on February 8, 2022, Petitioners filed a motion for leave to file an Amended Petition that would greatly expand the scope of this special proceeding. Whereas the Petition challenges only the congressional plan, the proposed Amended Petition seeks to challenge the Senate plan as well. Once again, Petitioners submitted no verified allegations, no fact affidavits, no expert affidavits, and no memorandum of law in support of the claims in their proposed Amended Petition. The Court set a return date of March 3, 2022 for the motion to amend. Unless and until the Court grants Petitioners leave to file the Amended Petition, the only operative pleading is the Petition.

On February 14, 2022, eleven days after they commenced this special proceeding, Petitioners finally filed their memorandum of law in support of the Petition. Petitioners also filed two unsworn expert reports. The only evidence that Petitioners submitted was an affidavit by one Petitioner, Lawrence Garvey, attempting to address his alleged standing to sue, and an affidavit by Senate Minority Leader Robert Ortt, who laments that the Legislature relied on the

extensive public record developed by the Commission and enacted a redistricting plan quickly after the Commission's unexpected abdication of its duty to submit a final proposed plan.

STANDARD OF REVIEW

"It is well settled that acts of the Legislature are entitled to a strong presumption of constitutionality." *Cohen v Cuomo*, 19 N.Y.3d 196, 201 (2012). In the redistricting context, courts may not "upset the balance struck by the Legislature and declare the [redistricting] plan unconstitutional" unless the challengers have proven "beyond reasonable doubt that it conflicts with the fundamental law," and "until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible, the statute will be upheld." *Id*. at 201-02 (quoting *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992) (internal quotation marks omitted); *Matter of Fay*, 291 N.Y. 198, 207 (1943)); *see also People ex rel. Carter v. Rice*, 135 N.Y. 473 (1892) (redistricting plan may not be invalidated unless proven to be unlawful beyond a reasonable doubt); *Bay Ridge Cmty. Council v. Carey*, 115 Misc. 2d 433, 445 (N.Y. Sup. Ct. Kings Cnty. 1982), *aff'd sub nom. Bay Ridge Cmty. Council, Inc. v. Carey*, 103 A.D.2d 280 (2d Dep't 1984), *aff'd*, 66 N.Y.2d 657 (1985) (same).

ARGUMENT

I. THE COMMISSION'S FAILURE TO PERFORM ITS DUTY DID NOT STRIP THE LEGISLATURE OF ITS AUTHORITY TO ENACT A PLAN

Petitioners claim that the 2014 amendments extinguished the Legislature's authority to reapportion legislative districts in the event of a failure by the Commission to submit a final proposed plan, and that any time that happens, only a court can draw new redistricting plans. This strained claim is belied by the text of the Constitution, historical practice, judicial precedent, common sense, and the balance of power between the Legislature and the courts.

We begin with what is not in dispute. The Constitution unambiguously required the Commission to recommend a proposed plan or plans to the Legislature between January 1 and January 15 and unambiguously afforded the Commission no discretion not to do so. The Constitution then unambiguously vested the Legislature with unfettered discretion to accept or reject the Commission's initial recommendation for any reason. If the Legislature declined to enact the initial Commission recommendation, the Constitution unambiguously required the Commission to submit a second recommendation within fifteen days. Once again, the Commission had no discretion not to submit a second recommendation by that deadline, and once again, the Legislature had unfettered discretion to accept or reject the Commission's second recommendation for any reason. Critically, if the Legislature chose in its discretion to reject the Commission's second recommendation, the Constitution unambiguously afforded the Legislature broad discretion to enact its own plan by making "any amendments" it "deems necessary."[1]

[1] By continuing to afford the Legislature broad discretion to enact any redistricting plan it deems necessary, the 2014 amendments uphold more than two centuries of history, tradition, and judicial precedent. *See Matter of Sherrill*, 188 N.Y. 185, 202 (1907) (describing broad "power of apportionment" granted to Legislature in "the first Constitution and the amendment of 1801"); *see also People ex rel. Carter v. Rice*, 135 N.Y. 473, 490-91 (1892) (holding that Legislature possessed exclusive authority to apportion legislative districts); *In re Reynolds*, 202 N.Y. 430, 444 (1911) (affirming "the power vested in and imposed upon the legislature to pass a constitutional apportionment bill"); *Burns v. Flynn*, 268 N.Y. 601, 603 (1935) ("Apportionment is a duty placed by the Constitution on the Legislature, over which the courts have no jurisdiction."); *Matter of Fay*, 291 N.Y. 198, 206-07 (1943) (upholding constitutionality of redistricting plan and affording broad deference to Legislature); *Matter of Orans*, 15 N.Y.2d 339, 352 (1965) (confirming "[t]here is no doubt that reapportionment is within the legislative power"); *Schneider v. Rockefeller*, 31 N.Y.2d 420, 430 (1972) (upholding plan where "the legislative determination [wa]s reasonable"); *Bay Ridge Cmty. Council, Inc. v. Carey*, 103 A.D.2d 280 (2d Dep't 1984), *aff'd,* 66 N.Y.2d 657 (1985) (rejecting challenge to legislative redistricting plan); *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 77-80 (1992) (acknowledging limitations on judiciary's role in redistricting, and confirming that "[b]alancing the myriad requirements imposed by both the State and the Federal Constitution is a function entrusted to the Legislature"); *Cohen v. Cuomo*, 19 N.Y.3d 196, 201-02 (2012) (approving Legislature's addition of Senate seat in redistricting because "acts of the Legislature are entitled to a strong

The Constitution does not address what happens if the Commission abdicates its duty to present a first or second recommendation to the Legislature. The Legislature addressed that silence in June of 2021 by passing legislation that reasonably provides that if the Commission fails to make a recommendation, the Legislature may enact its own plan – just as the Legislature unquestionably may do if it chooses for any reason not to enact a Commission recommendation. L.2021, c. 633, § 1. This statute complements, and does not conflict with, the text of the Constitution. Petitioners nevertheless contend that this statute is unconstitutional because, they say, the only possible conclusion that can be drawn is that any time the Commission abdicates its duty to recommend a plan, redistricting must be done by the courts.

Petitioners' argument cannot be squared with the holding in *Cohen v. Cuomo*, 19 N.Y.3d 196 (2012), in which the Court of Appeals addressed the Constitution's silence with respect to the formula for calculating the size of the Senate. The Constitution did "not provide any specific guidance on how to address" the confusion that had arisen with respect to the Senate size formula, such that "two different methods" were potentially valid. *Id*. at 200. The petitioners claimed that although it would be permissible to use either method, the Legislature could not "use different methods for different parts of the state in the same adjustment process." *Id*. at 201. The Court rejected this claim, observing that the Legislature has broad discretion to fill a void created by "the Constitution's silence." *Id*. at 202. The Court emphasized that legislative acts "are entitled to a strong presumption of constitutionality," and that a court may strike down a statute filling a gap in the Constitution "only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law" and only after "every reasonable mode of reconciliation of

---

presumption of constitutionality"). These decisions remain controlling precedent, unless and until the Court of Appeals says otherwise.

the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Id*. (quoting *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992); *Matter of Fay*, 291 N.Y. 198, 207 (1943)). Under *Cohen*, the only question for a court is whether a legislative enactment amounted to "a gross and deliberate violation of the plain intent of the Constitution and a disregard of its spirit and the purpose for which express limitations are included therein." *Id*. at 202 (quoting *Matter of Sherrill*, 188 N.Y. 185, 198 (1907)).

The deference afforded to the Legislature in *Cohen* reflects that "except as restrained by the constitution, the legislative power is untrammeled and supreme." *Silver v. Pataki*, 96 N.Y.2d 532, 537 (2001) (quotation marks and ellipses omitted). Article III grants the Legislature "broad power and functional responsibility to consider and vote on legislation," *id.*, and "the separation of powers requires that the Legislature make the critical policy decisions." *Saratoga Cty. Chamber of Com., Inc. v. Pataki*, 100 N.Y.2d 801, 821-22 (2003) (quotation marks omitted). Courts may not expand the text of the Constitution to diminish the Legislature's authority. *People v. Davis*, 13 N.Y.3d 17, 24-25 (2009) (courts may not infer a limitation where the Constitution "does not speak" to the Legislature's power to supplement an existing procedure described in the Constitution).

Petitioners have not met their formidable burden because there is no conflict between the statute and the Constitution.[2] If the Commission performs its mandatory duties, then each step enshrined in the Constitution proceeds as described. And if the Commission abdicates its duty to present a second recommendation to the Legislature, then the Legislature has the same discretion

[2] Petitioners opine at length on the meaning of the words "shall" and "the," Pets. Br. 10-11, but their syntactic exegesis is irrelevant. The issue is not what the Constitution says expressly – that is undisputed – but rather "the Constitution's silence," *Cohen*, 19 N.Y.3d at 202, about what happens if the Commission makes no second recommendation.

to enact its own plan that it has when the Commission presents any second recommendation. That conclusion comes nowhere close to the "impossible" "conflict[] with fundamental law" and "gross and deliberate violation" of the plain intent of the Constitution that *Cohen* made clear a challenger must show before a court may reject the Legislature's resolution of a constitutional ambiguity. 19 N.Y.3d at 202.

Nor can Petitioners' claim be reconciled with article III, section 5 of the Constitution, which expressly provides that if a court invalidates a redistricting plan in whole or in part, then "*the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities*" (emphasis added). Even after the 2014 amendments, the intent of the Constitution remains that the Legislature, and not the courts, must have the first opportunity to correct any errors in a reapportionment plan. Any holding by this Court that it may draw new apportionment plans, before the Legislature has had an opportunity to do so, would improperly usurp the Legislature's express constitutional prerogative and violate the separation of powers.

Petitioners' theory also would lead to the absurd result that any four Commissioners could unilaterally block the Legislature from enacting any redistricting plan. Petitioners assert falsely that the Commission needs a quorum of five Commissioners to act. Petition, Dkt. No. 1 ("Pet.") ¶ 48. In fact, article III, section 5-b(f) states clearly that the quorum requirement is seven Commissioners. Thus, as Petitioners would have it, any time a bloc of four Commissioners wished to deprive the Legislature of its authority to enact a plan and kick the entire redistricting process to whatever court an opportunistic litigant might select, those Commissioners could simply refuse to meet. It would be absurd, and therefore improper, to read the Constitution to vest a minority of four Commissioners with the unilateral power to stymie the legislative redistricting process. *See In re Dowling*, 219 N.Y. 44, 56 (1916) (upholding

Legislature's decision concerning Senate size and holding that "[i]n the construction of a statutory or constitutional provision a meaning should not be given to words that are the subject of construction that will defeat the purpose and intent of the statutory provision or that will make such provision absurd"); *In re Fay*, 291 N.Y. 198, 216 (1943) (same); *see also Anderson v. Regan*, 53 N.Y.2d 356, 362 (1981) (court must avoid constitutional interpretation that "would lead to an absurd conclusion").[3]

The linchpin of Petitioners' argument is its wholly conclusory but oft-repeated assertion that section 4(b) sets forth the "exclusive" procedure for enacting new districts. Although the word "exclusive" appears thirteen times in Petitioners' brief, it appears nowhere in any of the relevant provisions of the Constitution. The only language that Respondents cite in ostensible support of their "exclusive" procedure argument is article III, section 4(e) of the Constitution, but all that section 4(e) says is that the requirements of section 4 and section 5 must be followed unless a court says otherwise. There is no dispute that all of the requirements of section 4 and section 5 must be followed, but neither section 4(e) nor any other provision of the Constitution addresses what happens if the Commission unlawfully fails to act. For the reasons discussed above, Petitioners have come nowhere close to proving beyond a reasonable doubt that the course the Legislature chose was unlawful.

Petitioners attempt to support their strained reading of the Constitution by asserting that "the People" supposedly intended the 2014 amendments "to remove the Legislature's complete

[3] Petitioners falsely allege that the Democratic Commissioners caused the Commission impasse. Pet. ¶¶ 99-104. For purposes of evaluating Petitioners' legal argument, it does not matter which side was at fault. As Petitioners would have it, four out of five Republican Commissioners *could have* blocked the Legislature from enacting a plan, thereby unilaterally empowering the courts to draw districts from whole cloth, which is absurd and shows they are wrong.

and exclusive partisan control over the redistricting process." Pets. Br. at 11-12. Although it is undisputed that the 2014 amendments were intended to constrain partisanship in redistricting, this statement is inaccurate in two important respects.

First, Petitioners ignore that far from removing the Legislature from the redistricting process, the 2014 amendments plainly provide that the Legislature will continue to have the final word with respect to crafting redistricting plans, including broad discretion to completely reject any Commission proposal for any reason and to enact a plan with any amendments it "deems necessary." To be sure, in exercising its broad discretion, the Legislature is bound by the same criteria that apply to the Commission, including the rule against favoring or disfavoring incumbents, candidates, or parties. But subjecting the Legislature to the same rules that apply to the Commission is a far cry from excising the Legislature from the process altogether, or even subordinating the Legislature's historical role, which the 2014 amendments do not do.[4]

Second, Petitioners' populist invocation of "the People" ignores that the Legislature itself enacted the 2014 amendments, twice, before they were submitted to voters. A.9526/S.6698 of 2012; second passage A.2086/S.2107 of 2013. It strains credulity to suggest that the Legislature itself subjected its exclusive constitutional authority to apportion legislative districts to the whims of a minority of Commission members. To the contrary, the fact that the Legislature enacted L.2021, c. 633, section 1 in the first redistricting cycle after the amendments signifies

[4] In *Leib v. Walsh*, 45 Misc. 3d 874 (N.Y. Sup. Ct. Albany Cnty. 2014), the petitioners challenged the language of the proposed ballot proposition describing the 2014 amendments, arguing that it was misleading for the proposition to refer to the Commission as "independent" given the power to enact reapportionment legislation retained by the Legislature. The Court agreed, holding that the Legislature retained so much power under the amendment that referring to the Commission as "independent" would be unlawfully misleading. *Id*. at 881 (observing that "the Commission's plan is little more than a recommendation to the Legislature, which can reject it for unstated reasons and draw its own lines").

that it understood from the outset that it would be responsible for enacting maps even if the Commission failed to perform its duties. S*ee New York Public Interest Research Group, Inc. v. Steingut*, 40 N.Y.2d 250, 258 (1976) (court may look to actions of Legislature for guidance on what constitutional amendment means); *Easley v. New York State Thruway Auth*., 1 N.Y.2d 374, 379 (1956) ("Legislatures are presumed to know what . . . is intended by constitutional amendments approved by the Legislature itself.").

Petitioners cite no case that supports their cramped view of legislative authority. Some of Petitioners' cases affirmatively undermine their position. *See*, *e.g.*, *Steingut*, 40 N.Y.2d at 257 (reaffirming that "every legislative enactment is deemed to be constitutional until its challengers have satisfied the courts to the contrary"); *Delgado v. State*, 194 A.D.3d 98, 104 n.3 (3d Dep't 2021) (upholding legislative enactment that was "not clearly inconsistent with the intent of the drafters" of the constitutional amendment); *Robinson v. Robins Dry Dock & Repair Co.*, 204 A.D. 578, 583 (2d Dep't 1923) (reversed by Court of Appeals, 238 N.Y. 271, 280 (1924), because the statute in dispute "was reasonable and this exercise of the legislative power should not be declared invalid because of a constitutional limitation of doubtful application"). Other cases cited by Petitioners are inapposite. *See, e.g.*, *City of New York v. New York State Div. of Hum. Rts.*, 93 N.Y.2d 768, 771 (1999) (striking down statute because Legislature enacted a new law specifically to override the Court of Appeals' interpretation of a constitutional provision); *King v. Cuomo*, 81 N.Y.2d 247 (1993) (Legislature had no authority to withdraw bill after it was presented to the Governor because doing so directly violated a prescribed constitutional procedure); *People v. Devlin*, 33 N.Y. 269 (1865) (same). In no case cited by Petitioners did a court substitute its judgment for the Legislature's with respect to a question left open by "the

Constitution's silence," *Cohen*, 19 N.Y.3d at 202, let alone a question left to the Legislature's sole discretion under the Constitution's plain language.

For all of these reasons, Petitioners' argument that the Legislature had no authority to enact any redistricting plans fails.

II. PETITIONERS HAVE NOT MET THEIR BURDEN OF PROVING THAT THE CONGRESSIONAL PLAN IS UNCONSTITUTITONAL

Petitioners have not submitted any evidence supporting their claim that the enacted congressional plan purposefully disfavors Republicans, much less have they submitted enough evidence to prove that claim "beyond reasonable doubt." *Cohen*, 19 N.Y.3d at 201-02. Petitioners rest their entire case on their unverified Petition and two unsworn "expert" reports. These unsworn documents, which do not constitute evidence, come nowhere close to carrying Petitioners' heavy burden. Indeed, the centerpiece of Petitioners' presentation is the remarkable opinion of their purported simulations expert that the enacted congressional plan *actually favors Republicans* by making it likely that *Republicans will win one more seat* in the enacted plan than in almost all of his simulated plans. That Petitioners' own expert has concluded that the enacted congressional plan favors Republicans, not Democrats, is reason enough for this Court to swiftly dismiss the Petition. Moreover, Petitioners lack standing, and even if they had standing, an objective assessment of the districts they challenge confirms that the plan is lawful.

A. Petitioners' Simulations, to the Extent They Are Reliable Enough to Be of Any Value, Actually Show that the Enacted Plan Favors Republicans, Not Democrats

Petitioners rely primarily on their purported simulations expert, Sean Trende. Mr. Trende is a graduate student who has never held an academic appointment. He apparently has never published a peer-reviewed article related to the subject matter of his expert report. In fact, Mr. Trende apparently has never published a peer-reviewed article about anything.

Leaving aside Mr. Trende's dubious qualifications and the flaws in his methodology that are discussed below, the most notable feature of his expert report is that his core conclusion is the opposite of what Petitioners claim. The graph on page 15 of Mr. Trende's report is devastating for Petitioners' case. That graph orders the 26 congressional districts from most Republican-leaning (to the left) to most Democrat-leaning (to the right). The dots show the likely election results in the enacted plan, and the bars show the likely results in Mr. Trende's simulated plans. With respect to the enacted plan, the graph shows that Mr. Trende expects the Democratic candidate to win in 22 districts, and that he expects the Republican candidate to win in 4 districts (the dots are below the 50% line in the first four districts and above that line in the next 22 districts). With respect to the simulated plans, the graph shows that in almost all of Mr. Trende's simulations, the Republican candidates would win no more than three seats (because nearly all of the bars are below the 50% line in the first three districts, and almost all of the bars are above that line in the fourth district). Thus, according to Mr. Trende, whereas the Legislature enacted a plan in which Democrats are likely to win 22 seats, the simulations show that a "neutral" plan would give the Democrats at least 23 and quite possibly 24 seats.

In other words, Mr. Trende found that the enacted congressional plan significantly benefits Republicans because it is likely to give the Republicans one seat more than in almost all of the simulated plans, and two or three more seats than in many simulated plans. This damning fact alone is reason enough for the Court to dismiss the Petition. The Assembly Speaker's expert, Dr. Michael Barber, a Brigham Young University professor with a PhD from Princeton University, reviewed Mr. Trende's report, conducted 50,000 simulations of his own, and likewise concluded that the enacted plan favors Republicans, not Democrats.

Even if the Trende report said anything that helped Petitioners, its validity is at best questionable. The Senate Majority Leader's expert, Dr. Kristopher R. Tapp (the Chair of the Mathematics Department at Saint Joseph's University, whose research focuses principally on the mathematics of measuring partisan gerrymandering, including the complex computer simulations that Mr. Trende attempted to design and execute, and who has published numerous peer-reviewed articles on that and related subjects in top academic journals) has submitted a sworn affidavit explaining that Mr. Trende provides almost no information about his methodology. Mr. Trende's report does not evidence a deep understanding of the underlying algorithm he employs, which itself is a new and little-tested algorithm. Tapp Aff. ¶¶ 38, 40. It is well known that using this algorithm to create a representative ensemble of maps presents significant challenges, but Mr. Trende does not explain whether he adopted generally accepted measures to ensure the reliability of his findings. Based on what Dr. Tapp is able to determine, it appears, among other concerns, that Mr. Trende did not produce a sufficient number of maps in his ensemble to ensure a statistically reliable sample, and also that he did not customize the algorithm sufficiently to ensure that the maps it produced represent a random sample of possible maps.

Nor did Mr. Trende instruct his computer to simulate redistricting plans that comply with all of the legal requirements that apply to the enacted congressional plan. He claims that he instructed his computer to draw substantially equipopulous and reasonably compact districts and to avoid county splits. But Mr. Trende did not instruct his computer to draw districts that comply with other important legal requirements, such as avoiding splitting cities and towns, maintaining the cores of existing districts, uniting communities of interest, and complying with federal and New York constitutional rules regarding minority vote dilution. N.Y. Const. art. III, § 4(c). As Dr. Tapp explains, because Mr. Trende's simulations respect, at most, some but not

all of the applicable legal requirements, they are not a representative sample created from a pool of legally compliant nonpartisan maps. Comparing the enacted congressional plan to an ensemble of thousands of redistricting plans that may be unlawful provides no basis to strike down a duly enacted legislative redistricting plan.

Finally, as Dr. Tapp explains, Mr. Trende fundamentally misunderstands what the so-called "gerrymandering index" does and does not measure. The gerrymandering index does not provide any information about which party is favored by the enacted map relative to the ensemble, or even whether there is a favored party, and the most likely explanation for the relatively high gerrymandering index that Mr. Trende found is that the enacted congressional plan significantly benefits Republicans. Tapp Aff. ¶¶ 29-34. Dr. Barber similarly explains that the "gerrymandering index" is disfavored as a measurement tool and an inferior method to analyze the results of the simulations in this case. Barber Aff. ¶¶ 29-32.

B. Petitioners Lack Standing to Challenge Most of the Districts They Criticize

New York courts, like federal courts, have strict standing requirements. "[A] party challenging governmental action must meet the threshold burden of establishing that it has suffered an 'injury in fact' and that the injury it asserts 'fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [government] has acted.'" *Matter of Mental Hygiene Legal Serv. v Daniels*, 33 N.Y.3d 44, 50 (2019). The Court of Appeals has expressly endorsed the "injury in fact" and "zone of interests" rules developed by the federal courts. *See Soc'y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 771-74 (1991).

In the redistricting context, the Supreme Court has held that although a malapportionment claim may be brought on a statewide basis, gerrymandering claims are by definition "district

specific"; and, accordingly, in order to have standing to assert a gerrymandering claim, an allegedly aggrieved voter must plead and prove that he or she lives in the district being challenged and cannot bring a statewide claim. *Gill v. Whitford*, 138 S. Ct. 1916, 1930-31 (2018); *accord Bay Ridge Cmty. Council v. Carey*, 115 Misc. 2d 433, 443 (N.Y. Sup. Ct. Kings Cnty. 1982) (holding that petitioner who did not live in district at issue had no standing to assert gerrymandering claim), *aff'd*, 103 A.D.2d 280 (2d Dep't 1984), *aff'd*, 66 N.Y.2d 657 (1985).

Here, the only Petitioner who has submitted any evidence of residence is Lawrence Garvey, who states under oath that he lives in New City in District 17. Dkt. No. 29. Petitioners therefore have no standing to challenge any district other than District 17. Indeed, when Petitioners submitted their brief and additional supporting materials on February 14, 2022, eleven days after they commenced this special proceeding, they *still* failed to present any evidence that any Petitioner has standing to challenge any district other than District 17. And moreover, even if there were a way for Petitioners to cure this fatal defect, Petitioners only allege that they live in Districts 10, 11, 16, 17, 18, 19, 22, and 23. Pet. ¶¶ 10-23. No Petitioner even claims to live in Districts 1-9, 12-15, 20-21, or 24-26. *Id*. The Court therefore cannot address Petitioners' criticisms of any of those districts, either individually or through an unauthorized attack on the redistricting plan as a whole.

C. Even If Petitioners Had Standing, Their Unsworn Allegations Prove Nothing and Are Belied By the Objective Characteristics of the Enacted Plan

The Petition contains a variety of unsworn allegations about what the enacted congressional plan supposedly does and supposedly could have done, which Petitioners say prove that the Legislature acted with unconstitutional intent to disfavor Republicans. They also offer the unsworn report of a second purported "expert," Claude Lavigna, a political operative with no academic or scientific credentials, who merely parrots the unsworn allegations in the

Petition.[5] Those allegations are easily rebutted by the objective characteristics of the enacted congressional plan, and nothing contained in the unverified Petition or in Mr. Lavigna's unsworn report comes close to overcoming the strong presumption of constitutionality that New York courts have long afforded to legislative redistricting plans. *See, e.g.*, *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79 (1992) (affording the Legislature broad discretion and upholding plan); *Schneider v. Rockefeller*, 31 N.Y.2d 420, 429-35 (1972) (same); *People ex rel. Carter v. Rice*, 135 N.Y. 473, 501 (1892) (holding that "courts have no power in [a redistricting case] to review the exercise of a discretion [e]ntrusted to the legislature by the Constitution, unless it is plainly and grossly abused").

To begin with, Petitioners ignore that because New York lost one of its 27 congressional seats despite a population increase of 823,147 people, and because the congressional plan is subject to a strict population equality requirement, nearly all of the 2012 districts had to be reconfigured substantially. Petitioners further ignore that because the downstate region experienced far more population growth during the last decade than the upstate region, the reconfiguration that was necessary to comply with the equal population rule was even more significant than it would have been if New York's population changes had been evenly

[5] The Assembly's expert, Dr. Barber, explains that Mr. Lavigna provides no data or quantitative analysis of the enacted congressional plan to support his conclusions. Barber Aff., ¶¶ 7-8. Instead, he refers to particular districts as "Republican-leaning" or "Democratic-leaning" and avers there is "no coherent explanation" for the shape of certain districts, without indicating what data or evidence he used to arrive at his conclusions and without comparing the districts to other past or potential districts. *Id*. ¶ 8. Mr. Lavigna's report utterly fails as a qualitative social science analysis because it employs no standards and reflects no systematic process to determine whether a district constitutes a gerrymander. Mr. Lavigna's report is "more akin to 'casual observation,' rather than rigorous social science." *Id*. ¶ 10.

distributed geographically. Thus, to the extent that the districts in the enacted congressional plan are different from the 2012 plan, they had to be.

Petitioners also ignore the complexity of the redistricting process above and beyond the significant challenges posed by population shifts and the loss of a district. First, as the Court of Appeals has observed, New York's geography imposes unique constraints on the redistricting process. *Schneider*, 31 N.Y.2d at 430 (holding that "it is manifest that our State, with its irregular boundaries, its islands, rivers, lakes and other geographical features is not susceptible of division into circular planes or squares"); *see also Bay Ridge Cmty. Council*, 103 A.D.2d at 282 (articulating and applying the same principle). Especially in the context of congressional districts, "the requirement of . . . numerical equality may necessitate boundaries that are ragged at best." *Schneider*, 31 N.Y.2d at 429-30.

Additionally, the New York Constitution expressly requires the Legislature to consider communities of interest, and it (and federal law) expressly prohibits diluting minority voting strength. These weighty considerations, when combined with other reapportionment criteria, make the redistricting process extraordinarily complex. Even a modest change to a district necessarily affects adjacent districts, and because of the limits on the extent to which some districts can be changed, any alteration of one district has the potential to cascade across regions.

The Court of Appeals has long recognized this, making clear that the Legislature is entitled to very wide discretion in balancing the complex array of often competing principles that guide the redistricting process, and cautioning that courts "cannot focus solely on the challenged districts and ignore the fact that a redistricting plan must form an integrated whole." *Wolpoff*, 80 N.Y.2d at 79. The Court of Appeals has explained that:

> Balancing the myriad requirements imposed by both the State and the Federal Constitution is a function entrusted to the Legislature. It is not the role of this, or indeed any, court to second-guess the determinations of the Legislature, the elective representatives of the people, in this regard. We are hesitant to substitute our own determination for that of the Legislature even if we would have struck a slightly different balance on our own.

Id.; *see also id*. at 80 (recognizing that the Legislature must engage in "a complex analysis of population trends and voting patterns, and the way in which both must be accommodated in order to comply" with all requirements, holding that "it is not appropriate for [courts] to substitute our evaluation of the relevant statistical data for that of the Legislature"); *Cohen v. Cuomo*, 19 N.Y.3d 196, 202 (2012) ("It is not our task to address the wisdom of the methods employed by the Legislature in accomplishing its constitutional mandate.").

Crucially, the question for this Court is not whether the Legislature could have enacted a plan that would have been more to Petitioners' liking. *See Schneider*, 31 N.Y.2d at 427 ("[I]t is not our function to determine whether a plan can be worked out that is superior to that set up[.]"); *Matter of Orans*, 17A N.Y.2d 7, 10 (1966) ("It must be conceded that no reapportionment plan can be perfect in every detail, and none can be drawn that will be satisfactory to everyone."); *Bay Ridge Cmty. Council*, 115 Misc. 2d at 445 ("[A] judicial review of a New York reapportionment statute is not a contest to select the 'best' reapportionment that can be submitted by any citizen of the State, but is limited to the sole question as to whether the statute before the Court passes constitutional muster."). The Court must dismiss the Petition unless "the methods chosen [by the Legislature] amount to 'a gross and deliberate violation of the plain intent of the Constitution.'" *Cohen*, 19 N.Y.3d at 202 (citing *Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 198 (1907)).

Especially with those considerations in mind, Petitioners' unsworn criticisms fall far short of meeting their heavy burden. The relevant characteristics of the enacted plan are

addressed in detail in the Senate Majority's Answer and Counterstatement, which is incorporated herein by reference. A summary review of districts in each region confirms that Petitioners' arguments are meritless.

In Districts 1, 2, and 3, Petitioners ignore that the enacted plan creates a united district of South Shore communities in District 2, unites communities of interest along the North Shore in District 1, and unites other communities of interest, and responds to testimony presented by the public to the Commission. Answer and Counterstatement ¶¶ 281-85, 314-16. Petitioners' criticism of the shape of District 3 ignores that District 3 had to shift west to add necessary additional population, and that District 3 could not have shifted to its south, nor could it have shifted into central Queens, nor could it have shifted substantially into the Bronx, without disrupting the cores of existing districts and implicating potentially significant minority voting strength issues. *Id*. ¶¶ 290-313, 316.

Petitioners' criticisms of Districts 8, 9, 10, and 11 in New York City misunderstand the demographics of Sunset Park and ignore that the enacted plan unites Chinese-speaking communities of interest across a large swath of Brooklyn, which causes ripples throughout this cluster of districts. *Id.* ¶¶ 354-61. Petitioners disregard concerns related to the dilution of minority voting strength under both the Voting Rights Act and the New York State Constitution, *id*. ¶¶ 330-36, 346, make baseless and factually incorrect claims regarding Orthodox Jewish and Russian-speaking communities, *id*. ¶¶ 337-45, and ignore that District 10 maintains substantially the same shape as the prior version of the district, *id*. ¶ 348.

Petitioners' criticisms of Districts 16, 17, 18, and 19 in the Hudson Valley Region ignore the substantial population pressure from multiple directions that required significant changes to these districts. *Id*. ¶¶ 380-86, 389-90, 412. Petitioners disregard the commonalities between

towns that were united on either side of the Westchester/Putnam border, *id*. ¶¶ 396-99, again make baseless arguments regarding Orthodox Jewish communities, *id*. ¶¶ 403-04, and ignore the repercussions of the elimination of former District 22, *id*. ¶¶ 413. Petitioners' allegations further rest on false assumptions about the partisan leanings of these districts and internally inconsistent arguments about pockets of voters that Petitioners single out. *Id.* ¶¶ 409-10, 417, 419.

Petitioners' criticisms of Districts 21, 22, 23, 24, and 25 incoherently compare new districts to the wrong districts in the prior plan and ignore the substantial consensus regarding the upstate region reflected in both Commission-proposed plans and in the enacted congressional plan. *Id*. ¶¶ 433, 441-43, 445, 448, 452, 455. Petitioners further ignore that a district was eliminated in this region, *id*. ¶¶ 433, 441, significant public testimony before the Commission about the desire for a united Southern Tier district, *id*. ¶ 447, and the unique constraints on complying with the equal population rule in this sparsely populated area, *id*. ¶¶ 438-39, 457.

Petitioners are simply engaging in the redistricting version of playing Monday morning quarterback, and in doing so, their arguments are inaccurate and often internally inconsistent. Decades of judicial precedent require this Court to defer to the product of the Legislature's balancing of the complex and often competing redistricting principles that were at play.

Nor is there any merit to Petitioners' criticisms of the process through which the congressional plan was enacted. Petitioners decry that the Legislature itself did not conduct public hearings before enacting the plan, but the specific requirements prescribed in the Constitution say nothing about hearings before the Legislature. Rather, the Constitution expressly required *the Commission* to conduct hearings. The Commission conducted 24 public hearings spanning dozens of hours in which scores of citizens and public officials testified. The Legislature therefore had a great deal of public input to consider. It makes sense, moreover, that

the Constitution did not require the Legislature to conduct additional hearings given the serious exigencies the constitutionally prescribed process presented: the designating petition period began only a month after the deadline for the Commission to present a final plan or plans to the Legislature for consideration. There thus was nothing remotely untoward, much less a clear "conflict[] with the fundamental law," *Cohen*, 19 N.Y.3d at 202, in the Legislature's reliance on the extensive public record created before the Commission.

The Legislature reasonably prioritized completing the redistricting process with alacrity in order to facilitate the ability of candidates and voters to begin the impending nominating process with clarity as opposed to chaos.[6] The process that was followed here is a far cry from the abusive procedures that were questioned in the cases Petitioners cite. *See, e.g.*, *League of Women Voters of Fl. v. Detzner*, 172 So. 3d 363, 390-93 (Fla. 2015) (inferring evidence of improper intent because the Legislature destroyed material evidence and misled the public through sham hearings while secretly conspiring with national Republican consultants); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1099-1104 (S.D. Ohio 2019) (inferring partisan intent because of "a severe disconnect between the outward face of the map-drawing process and its true inner workings"; the legislature sought to mislead the public through purported open hearings, while working secretly with national Republican consultants who directed the line-drawing process), *vacated and remanded*, 140 S. Ct. 101 (2019).

Finally, lest we lose the forest for the trees, we repeat that Petitioners' own expert has confirmed that any incidental bias in the enacted congressional plan favors Republicans, not

[6] Because of the January/February deadlines set forth in the New York Constitution, New York is one of the last states in the country to complete its decennial redistricting. The constitutional amendment presented to voters last November, which was not approved, would have advanced the deadlines for the Commission to submit plans to avoid an unduly compressed schedule.

Democrats. Given this finding, Petitioners' lack of standing to challenge anything except District 17, the deficiencies in their district-specific complaints, and the decades of judicial precedent that require deference to how the Legislature balanced complex and competing redistricting principles, the Court should uphold the congressional plan.

III. THE REMEDIES PETITIONERS SEEK ARE UNAVAILABLE

Petitioners have not just failed to prove their case. They also seek judicial remedies that are not available.

First, Petitioners invite this Court to draw a new congressional map from whole cloth when the Constitution expressly provides that in the event of a successful redistricting challenge, "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." N.Y. Const. art. III, § 5; *see also Matter of Orans*, 15 N.Y.2d 339, 352 (1965) (holding courts may intervene "only as a last resort" after the Legislature has been allowed to fix any defects in an enacted redistricting plan).

In the alternative, Petitioners surprisingly ask this Court to strike down the congressional plan, take no further action, and hand over the redistricting process to a federal court. Pets. Br. at 16, 17, 57. But the Supreme Court has held that federal intervention in redistricting "is unwelcome because drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-government." *League of United Latin American Citizens v.* Perry, 548 U.S. 399, 415-16 (2006); *see also Wise v. Lipscomb*, 477 U.S. 535, 539-40 (1978) (holding that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt"). Especially where, as here, the Legislature already has enacted a redistricting plan and is available to exercise its constitutional prerogative to address any infirmities a state court

might find, punting the redistricting process to the federal courts is not an available course.

In the final paragraph of their brief, Petitioners also cryptically ask this Court to "pause" New York's imminent statutory deadlines relating to candidate designating petitions, as well as "other" unspecified "affected deadlines" relating to the 2022 election cycle. Pets. Br. at 56. The Court should swiftly reject this request.

To get on the ballot for the June 2022 primary, a candidate must submit designating petitions containing the required number of voter signatures. Candidates are allowed to begin collecting signatures on March 1, 2022, and the deadline for submitting petitions is April 7, 2022. N.Y. Election Law § 6-158(1). Each voter may sign only one petition, and any signatures collected outside of this 37-day window are void. *Id*. § 6-134(4). Because signatures count only if the voter signing the petition resides in the district in which the candidate is seeking to run, *id*. § 6-136(2), it is impracticable for candidates to begin collecting signatures on March 1 if the new district lines have not yet been established or if there is uncertainty about those lines.

The Supreme Court has repeatedly admonished that courts should not enjoin state election laws in the period close to an election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). As Justice Kavanaugh explained earlier this month:

> When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others.

Merrill v. Milligan, 142 S. Ct. 879, 880-81 (Feb. 7, 2022) (Kavanaugh, J., concurring).

Although the *Purcell* doctrine is aimed primarily at federal courts, the common-sense principle that courts must not sow confusion by tinkering with election rules during an election cycle has been widely embraced by state courts as well. *See In re Khanoyan*, 65 Tex. Sup. Ct. J. 207, 2022 WL 58537 (Jan. 6, 2022); *Alliance for Retired Americans v. Secretary of State*, 240

A.3d 45, 54 (Me. 2020); *Singh v. Murphy*, Doc. No. A-0323-20T4, 2020 WL 6154223, at *14-15 (N.J. App. Div. 2020); *League of United Latin American Citizens of Iowa v. Pate*, 950 N.W.2d 204, 216 (Iowa 2020); *In re Hotze*, 627 S.W.3d 642, 645-46 (Tex. 2020); *Ohio Democratic Party v. LaRose*, 159 N.E.3d 852, 879 (Ohio 2020); *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 387 (Fl. 2015); *Dean v. Jepsen*, 51 Conn. L. Rptr. 111, 2010 WL 4723433, at *7 (Conn. Super. Ct. Nov. 3, 2010); *Chicago Bar Ass'n v. White*, 386 Ill. App. 3d 955, 961 (2008); *Quinn v. Cuomo*, 69 Misc. 3d 171, 177-78 (N.Y. Sup. Ct. Queens Cnty. 2020).

New York courts have made clear in the reapportionment context that even when a plan may be unconstitutional, a fast-approaching election should nevertheless proceed under the plan. *See Honig v. Bd. of Sup'rs of Rensselaer Cnty.*, 31 A.D.2d 989, 989 (3d Dep't 1969)*, aff'd* 24 N.Y.2d 861 (1969); *Duquette v. Bd. of Sup'rs of Franklin Cnty.*, 32 A.D.2d 706 (3d Dep't 1969); *Pokorny v. Bd. of Sup'rs. of Chenango Cnty.*, 59 Misc. 2d 929, 934 (N.Y. Sup. Ct. Chenango Cnty. 1969); *see also Abate v. Mundt*, 33 A.D.2d 660, 663 (2d Dep't), *aff'd* 25 N.Y.2d 309 (1969), *aff'd* 403 U.S. 182 (1971) (reapportionment plan upheld; dissenting judges agreed that election should proceed given exigencies). Courts have repeatedly refused to implement the extreme remedy Petitioners seek. *See, e.g.*, *Burns v. Flynn,* 155 Misc. 742, 744 (N.Y. Sup. Ct. Albany Cnty. 1935), *aff'd*, 245 A.D. 799 (3d Dep't 1935), *aff'd*, 268 N.Y. 601 (1935).

The only authority Petitioners cite in support of their request for a blanket "pause" is *Carter v. Chapman*, No. 7 MM 2022 (Pa. Sup. Ct. Feb. 9, 2022). But that is a *legislative impasse* case in which there is no operative congressional redistricting plan and no question that the Pennsylvania Supreme Court must adopt one. *Carter* therefore provides no support for Petitioners' extraordinary request that this Court upend New York's statutory election calendar with the stroke of a pen.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the Petition should be dismissed.

Dated: February 24, 2022
New York, New York

By: /s/ Eric Hecker
Eric Hecker
Alexander Goldenberg
Alice G. Reiter

CUTI HECKER WANG LLP
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600

Attorneys for Respondent Senate Majority Leader Andrea Stewart-Cousins

/s/ C. Daniel Chill
C. Daniel Chill
Elaine M. Reich

GRAUBARD MILLER
405 Lexington Avenue, 11th Floor
New York, NY 10174
(212) 818-8800

Attorneys for Respondent Speaker of the Assembly Carl Heastie

ATTORNEY CERTIFICATION

I, Eric Hecker, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this memorandum of law complies with the bookmark requirement in section 202.5(a)(2) of the Uniform Civil Rules for the Supreme Court and the word count limitation set forth in the Parties' stipulation for 10,000 words for Principal Briefs because it contains 9,681 words, not including the parts of the memorandum excluded under section 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum.

Dated: February 24, 2022
New York, New York

/s/ Eric Hecker
Eric Hecker