SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

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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 VIOLANTE,

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.

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AFFIRMATION

Steuben County Index No. E2022-0116CV

A.D. No. CAE 22-00506

Misha Tseytlin, an attorney admitted to practice in the State of New York, affirms under the penalties of perjury as follows:

1. I am a Partner at Troutman Pepper Hamilton Sanders LLP, attorneys for Petitioners in this CPLR Article 4 special proceeding. I am familiar with the facts and circumstances of the proceedings in this matter.

2. I submit this affirmation in opposition to Respondents' request for a stay of the Decision And Order of Supreme Court, Steuben County (McAllister, J.S.C.), entered on March 31, 2022, Decision And Order ("Decision And Order"), NYSCEF No.243, Attached as Exhibit A, and in support of Petitioners' request to dissolve any stay that might attach to that Decision And Order.[1]

3. The fundamental question in these stay proceedings is whether constitutional maps will govern the elections in 2022, or whether the Legislature and Governor that so brazenly violated the 2014 Anti-Gerrymandering Amendments will get the benefit of their unconstitutional conduct for one election cycle. If Respondents succeed in their cynical efforts at delaying the Supreme Court's remedy past the 2022 elections here, future Legislatures will have every incentive to violate the 2014 Anti-Gerrymandering Amendments, knowing that even though their maps will surely fail in court, they will get one unfettered, gerrymandered election, where they get to knock out the other party's incumbents and install new incumbents of their own, even in a case—like this one—where the challengers acted with the fastest

[1] All NYSCEF documents cited in this Affirmation, unless otherwise noted, have been filed in the Supreme Court below and are available at https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=kmywkTvfcaoSsQ66zseQsg==&display=all&courtType=Steuben%20County%20Supreme%20Court&resultsPageNum=1 (all websites last visited Apr. 5, 2022).

possible dispatch, filing their Petition challenging that unconstitutional action on the very day that the Governor signed the unconstitutional maps.

4. On March 31, 2022, the Supreme Court issued its Decision And Order invalidating the 2022 congressional, state Senate, and state Assembly maps as unconstitutional for violating the 2014 Anti-Gerrymandering Amendments both on procedural and substantive gerrymandering grounds. The Supreme Court determined that the Legislature failed to comply with the constitutionally mandated, exclusive process for enacting redistricting maps, thereby invalidating the 2022 congressional, state Senate, and state Assembly maps and their enacting legislation on that ground. The Supreme Court further concluded that the Legislature enacted the 2022 congressional map with the intent to aid the Democratic Party and Democratic politicians, in violation of Article III, Section 4(c)(5) of the New York Constitution, which bans drawing districts "to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." N.Y. Const. art. III, § 4(c)(5). As a result, the Supreme Court held that the 2022 maps are "void and not usable"; held that the post-2010-census maps "are longer valid due to unconstitutional malapportionment"; granted Petitioners a permanent injunction prohibiting Respondents and their agents from in any way using those maps in future elections; provided the Legislature the opportunity to submit bipartisan maps, if it so desired, consistent with the New York Constitution;

and provided that the Supreme Court would appoint an independent, neutral expert to draw maps after April 11, if the Legislature did not submit bipartisan maps by that time. Decision And Order at 17–18.

5. The Supreme Court's decision received positive reactions across the political spectrum. Michael Li of the liberal-leaning Brennan Center explained: "When it comes to the merits of this case, these are maps that I think should be struck down," given that "[t]hey are among the more aggressive (gerrymandered) maps that we've seen in the country," while also noting that this case presents "a big test about to what extent state courts can be a backstop [against] . . . partisan gerrymandering." Brian Lee, '*A Lot of Eyes Are on New York': Lawyers Map Road Ahead as Steuben County Judge Upends Congressional Maps*, N.Y. L.J. (Apr. 1, 2022).[2] Jeremy M. Creelan, who worked as an aide to Governor Andrew Cuomo and helped draft the 2014 Anti-Gerrymandering Amendments, commented that the Supreme Court's decision was evidence that "the [2014] constitutional amendment served the critical reform function that was intended." Nicholas Fandos, *Judge Tosses N.Y. District Lines, Citing Democrats' 'Bias'*, N.Y. Times (Mar. 31, 2022).[3] And the nonpartisan

[2] Available at https://www.law.com/newyorklawjournal/2022/04/01/a-lot-of-eyes-are-on-new-york-lawyers-map-road-ahead-as-steuben-county-judge-upends-congressional-maps/.

[3] Available at https://www.nytimes.com/2022/03/31/nyregion/judge-new-york-redistricting-gerrymandering.html.

League of Women Voters of New York State noted that any "unsettl[ing] [of] the 2022 election process" that might follow the Decision And Order "is solely the responsibility of the state Legislature for ignoring the 2014 Constitutional amendment and the will of the voters," and calling upon the Legislature to "promptly adopt redistricting lines with bipartisan support that comply with the Constitutional standards." League of Women Voters of New York State, *LWVNYS Statement on New York Court Invalidating Redistricting Maps* (Mar. 31, 2022).[4]

6. Respondents request that this Court either declare that the March 31, 2022 Decision And Order has no present effect under CPLR § 5519(a)(1), or stay the Decision And Order pending appeal. Petitioners now ask this Court to deny this request, or, in the alternative, vacate any stay under CPLR § 5519(a)(1).

7. Respondents' claim that CPLR § 5519(a)(1) operates to stay the Decision And Order is obviously wrong. Nothing in the decretal provisions of the Decision And Order "command[s]" that Respondents "do an[y] act." *Pokoik v. Dep't of Health Servs. Cnty. of Suffolk*, 220 A.D.2d 13, 15 (2d Dep't 1996).

8. This Court should deny Respondents' request for a stay pending appeal *or* vacate any automatic stay under CPLR § 5519(a) that may have arisen after entry of the Supreme Court's March 31, 2022 Decision And Order and subsequent filing

[4] Available at https://twitter.com/lwvnys/status/1509656741713260546.

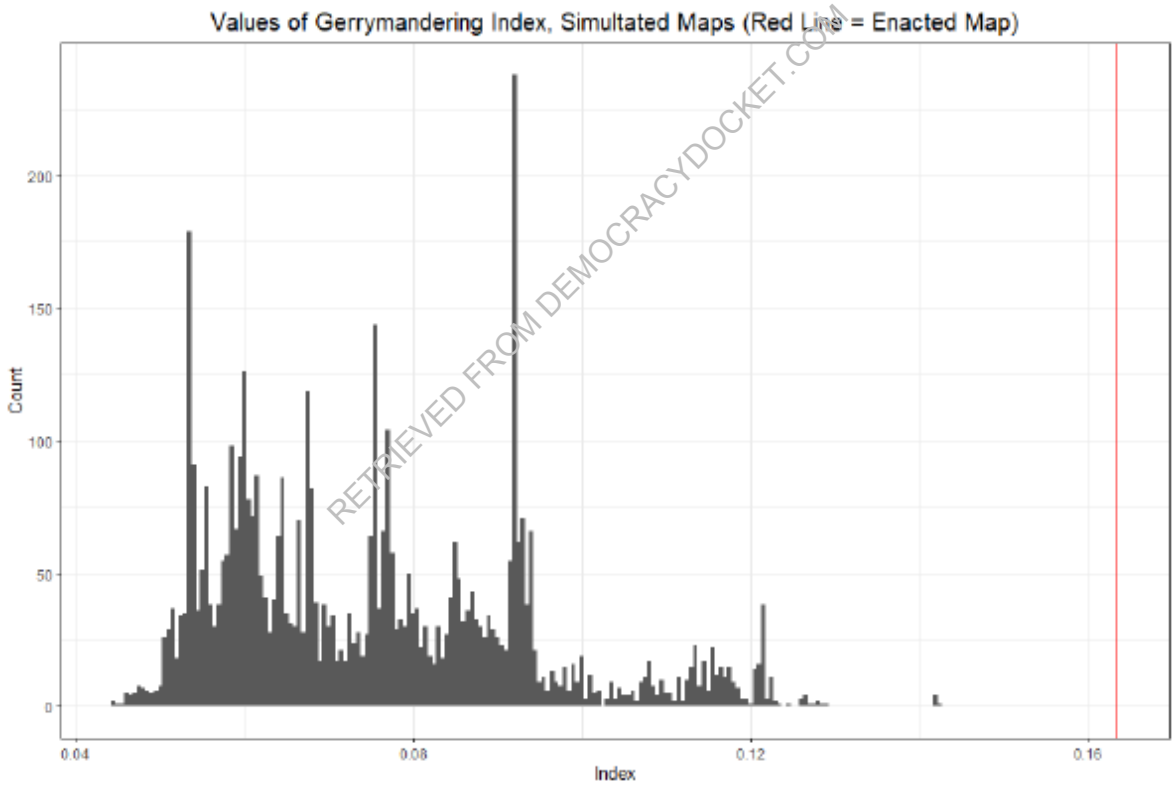
of notices of appeal, since Respondents fail to satisfy the stay elements, while Petitioners meet all elements for vacatur of a stay.

9. Respondents have no likelihood of success on appeal.

10. Respondents' maps are procedurally unconstitutional under the 2014 Anti-Gerrymandering Amendments because the Legislature failed to follow "***[t]he*** process for redistricting," that "***shall govern***" all redistricting in New York. N.Y. Const. art. III, § 4(e) (emphasis added). The Legislature violated the requirement that it receive and vote on two sets of maps submitted by the Independent Redistricting Commission ("IRC") before enacting its own redistricting legislation. Respondents have no response to the Constitution's text, and their policy-based arguments are entirely meritless. Indeed, Respondents well understood that they needed to amend the Constitution to adopt redistricting legislation outside of the IRC process, which is why they proposed to the People just last year a constitutional amendment that would allow Respondents to use the procedure they employed here. The People rejected that amendment, which ends Respondents' arguments.

11. Respondents' 2022 congressional map is also obviously and egregiously unconstitutional as a matter of substance, "packing" Republican voters into certain districts and "cracking" them out among others, thereby diluting their votes. The result of this packing and cracking is what the left-leaning Brennan Center called a "master class in how to draw an effective gerrymander," Nicholas

Fandos, Luis Ferré-Sadurní & Grace Ashford, *A 'Master Class' in Gerrymandering, This Time Led by N.Y. Democrats*, N.Y. Times (Feb. 2, 2022).[5] Indeed, this masterclass was so ruthlessly effective that the map's four most republican districts are more Republican in the adopted map than in any of 5,000 neutral, computer situations, while the next nine districts—the previously competitive districts—are more Democratic than in any of the 5,000 simulations. The map is so egregiously gerrymandered that it is more Democrat-favorable than any of those 5,000 maps:



[5] Available at https://www.nytimes.com/2022/02/02/nyregion/redistricting-gerrymandering-ny.html.

12. Respondents have no serious answer for any of this. As the Supreme Court noted below, experts from both sides agree that the Legislature transformed a 19-8 Democratic-Republican congressional map under a neutral, federal-court-drawn map from 2012, into a 22-4 Democratic-Republican map in a typical (non-wave) election year. On appeal, Respondents have largely abandoned their lead argument in support of their map—that a 22-4 district map is pro-Republican because it guarantees four seats for Republicans. Instead, they take a spaghetti-against-the-wall approach, attempting to distract the court with arguments that were not timely raised below, which apply accordingly to Respondents' own experts or only on the state Senate map simulations, and/or which are demonstrably meritless.

13. All equitable considerations strongly support denial of a stay. Petitioners and the public would suffer grievous harms if in the very first election cycle where the Anti-Gerrymandering Amendments are operative, maps that violate those Amendments are permitted to govern. That is not how other States are approaching the problem of gerrymandering after *Rucho v. Common Cause*, 139 S. Ct. 2484, 2521 (2019), as these other States are enforcing state-level prohibitions for this election cycle. On the other end of the equitable balance, the Respondents who so egregious violated the Anti-Gerrymandering Amendments now come to the courts saying that it is too late to do anything about their actions. That is plainly false. As the Co-Executive Director for the New York State Board of Elections

explained below, there is ample time to run an election under constitutional maps, as primaries can be held as late as August, just as in other States.

14. Further, if this Court is inclined to grant (or permit) any stay of the March 31, 2022 Decision And Order—and Petitioners strongly believe that it should not—***under no circumstance should this Court stay the remedial aspect of Supreme Court's Decision And Order in decretal paragraphs 7 and 8***. Allowing the remedial proceedings—including the April 11 date (or April 15, if one were to adjust that deadline in light of the temporary stay issued on Monday, April 4) for the Legislature to adopt bipartisan maps or for the appointment of a neutral Special Master—will allow this Court and/or the Court of Appeals to decide whether the replacement/remedial maps or the unconstitutional adopted maps should govern the 2022 elections. Importantly, any delay in the remedial process will needlessly leave either this Court and/or the Court of Appeals with fewer remedial options for 2022, as we all deal with—in the words of the nonpartisan League of Women Voters of New York—an "unfortunate situation [that] is ***solely the responsibility of the state Legislature for ignoring the 2014 Constitutional amendment and the will of the voters***." League of Women Voters of New York State, *supra* (emphasis added).[6]

[6] Available at https://twitter.com/lwvnys/status/1509656741713260546.

15. Finally, if this Court is considering issuing any stay—which, again, it should not—it should consider the three maps at issue here differently. The case for permitting the Supreme Court's decision on the congressional map to stand for the 2022 election is overwhelming, given that this map is both a procedurally and substantively unconstitutional partisan gerrymander. It would be deeply unfair to the People to force them to vote in 2022 under a map that unconstitutionally packs some Republican voters into four districts and spreads others Republican voters across multiple other districts, taking the congressional district makeup from a 19–8 map to a 22–4 map, a point that even Respondents' experts cannot meaningfully dispute. As to the state Senate map, that map is procedurally unconstitutional, and while Petitioners strongly believe that it is also substantively unconstitutional, they did not prevail on that substantive claim below. Still, the map was adopted with an unconstitutional process and jammed through without any Republican input or support, so it should not govern in 2022. As for the Assembly map, Petitioners did not challenge that map. And while the map is procedurally unconstitutional, the Legislature negotiated and agreed on a bipartisan basis as to that map, in contrast to the congressional and state Senate maps.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Redistricting Process in New York

1. The Redistricting Process Before 2014

16. Under the New York Constitution, the State must redraw new state and congressional districts following each decennial census to adjust for population changes. *See* N.Y. Const. art. III, §§ 4, 5. Congressional and state Senate districts must be redrawn so each district is contiguous, contains an equal number of inhabitants, to the extent possible, and is compact as possible. *See id.*

17. Before 2014, legislators seeking partisan advantage had primary responsibility over New York's redistricting process. David Freedlander, *Backgrounder: How Redistricting Will Reshape New York's Battle Lines*, Observer (Dec. 27, 2010).[7] Specifically, the Legislative Task Force On Demographic Research And Reapportionment ("LATFOR"), a partisan body established in 1978 that consists of four legislators and two non-legislators, would act as an aid to the Legislature by consistently preparing proposed partisan redistricting maps.

18. By using the LATFOR process in a partisan manner, legislators could in effect control redistricting by selecting "who winds up on [LATFOR]—those who

[7] Available at http://observer.com/2010/12/backgrounder-how-redistricting-will-reshape-new-yorks-battle-lines/.

make it are likely to be the favorites of [incumbent legislative leaders] and are likely to get exactly the districts that they want." Freedlander, *supra*.

19. Before 2014, New York courts interpreted the then-applicable constitutional provisions as not prohibiting partisan gerrymandering, leaving the Legislature's rank partisanship unchecked. *See, e.g.*, *Bay Ridge Cmty. Council, Inc. v. Carey*, 103 A.D.2d 280, 284 (2d Dep't 1984), *aff'd* 66 N.Y.2d 657 (1985) (order).

2. The Redistricting Process After The 2014 Reforms

20. In 2014, the People changed the prior, failed regime. Specifically, New Yorkers amended Article III, Sections 4 and 5 of the New York Constitution and added a new Section 5-b to the same Article (collectively, "the 2014 Anti-Gerrymandering Amendments").

21. This Proposition 1 amended the Constitution such that primary redistricting responsibility is now vested in the newly created IRC and established numerous procedural safeguards against the Legislature's continued gerrymandering practices. N.Y. Const. art. III, § 5-b.

22. One of the procedural safeguards is the IRC's 10-member composition. Two Commissioners are appointed by the New York State Senate Majority Leader and Temporary President, two are appointed by the New York State Senate Minority Leader, two are appointed by the Speaker of the New York State Assembly, and two are appointed by the New York State Assembly Minority Leader. The final two

members are then selected by these eight appointees and cannot have enrolled as a Democrat or Republican in the past five years.

23. Article III, Section 4 of the New York Constitution requires the IRC to hold public hearings in cities and counties around the State and release draft plans, data, and related information to facilitate public review of proposed district lines. Draft plans must be made available at least thirty days before the first public hearing and no later than September 15 of the year following the census.

24. Article III, Section 5-b(f) and (g) of the New York Constitution governs IRC voting and the procedure for approving and submitting redistricting maps to the Legislature. Five members of the IRC constitute a quorum. IRC approval of a plan requires seven votes, which must include a member appointed by each of the legislative leaders. If no plan gets seven votes, the IRC must submit the plan(s) with the highest vote to the Legislature.

25. Under New York's new redistricting system, before January 15 of the second year after the census, the IRC also must submit to the Legislature an initial set of redistricting maps and the necessary implementing legislation. N.Y. Const. art. III, § 4(b). The Legislature then votes on the maps and implementing legislation as provided, without any amendment. *Id.* If this first set of maps and implementing legislation is not adopted or enacted, then the redistricting process reverts to the IRC to submit a second set of maps and implementing legislation to the Legislature,

subject to the requirements outlined above, no later than February 28. *Id.* As with the first set of maps and implementing legislation, the Legislature then must vote on the second set without any amendment. *Id.* Only if the Legislature fails to adopt this second set of maps and implementing legislation can it amend the IRC's proposed maps and enact its own, subject to the same substantive criteria for drawing maps as applied to the IRC. *Id.*; *see also* N.Y. Legis. Law § 93(1).

26. Article III, Section 4 has three substantive anti-gerrymandering prohibitions. It prohibits drawing districts (1) "to discourage competition," (2) "for the purpose of favoring or disfavoring incumbents" party, and (3) "for the purpose of favoring or disfavoring . . . political parties." N.Y. Const. art. III, § 4(c)(5).

3. The Legislative Democrats Fail To Derail These Reforms With A Proposed 2021 Constitutional Amendment

27. In 2021, leading up to the current redistricting cycle, the Legislature sought to gut the 2014 Anti-Gerrymandering Amendments' reforms, but the People decidedly rejected those efforts.

28. Seeking to allow itself to introduce implementing legislation "with any amendments . . . [it] deem[ed] necessary" if the IRC failed to approve a plan by the required deadline, *2021 Statewide Ballot Proposals, New York State Board of Elections*,[8] the Legislature referred a constitutional amendment to New York voters

[8] Available at https://www.elections.ny.gov/2021BallotProposals.html.

that would have altered the 2014 Anti-Gerrymandering Amendments' exclusive framework by allowing the Legislature to bypass the IRC if the IRC did not complete its constitutional process. The People voted this measure down. Ballot Proposition 1, 2021 General Election Results (Nov. 2, 2021).[9]

29. Within days of the People's rejection of the proposed 2021 constitutional amendment, the Legislature on November 12, 2021, delivered to the Governor for signature a bill that sought to achieve largely the same result as the failed amendment. On November 24, 2021, ignoring the will of the People and the Constitution, the Governor signed this unconstitutional bill. *See* L.2021, c. 633, § 1.

30. Respondent Governor Hochul also promised to "use [her] influence to help Democrats expand the House majority through the redistricting process," and help the Democratic Party "regain its position that it once had when [she] was growing up." Katie Glueck & Luis Ferré-Sadurní, *Interview with Kathy Hochul: "I Feel a Heavy Weight of Responsibility"*, N.Y. Times (Aug. 25, 2021).[10]

[9] Available at https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.elections.ny.gov%2FNYSBOE%2Felections%2F2021%2FGeneral%2FGE2021_BallotProp1.xlsx&wdOrigin=BROWSELINK/.

[10] Available at https://www.nytimes.com/2021/08/25/nyregion/kathy-hochul-interview.html.

B. The 2012 Congressional Map And 2012 State Senate Map Are Unconstitutional Under The New York Constitution

31. Following the 2010 census, New York had a population goal of 719,298 residents for each of its 27 congressional districts, and a goal of 313,242 residents for each of its 50 state Senate districts. *See* Expert Report of Sean P. Trende at 23 ("Trende.Rep."), NYSCEF No.26, Attached as Exhibit B (citing Redistricting Data Hub, New York[11]). After the 2010 census, the Legislature redrew New York's state legislative districts, adopting new maps in 2012, 2011–2012 N.Y. Reg. Sess. Leg. Bills S.6696 and A.9525 (as technically amended by S.6755 and A.9584), but lawmakers failed to agree on new congressional districts. After appointing a federal magistrate judge, Roanne Mann, to draw a congressional map for New York, a federal judicial panel imposed a new congressional map on March 19, 2012, which map largely resembled the map issued by Judge Mann. *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012).

32. Over the last decade, population shifts across the State caused the congressional districts and state legislative districts to become unconstitutionally malapportioned. Trende.Rep.23–25.

[11] Available at https://redistrictingdatahub.org/state/new-york.

C. Respondents Violated The Constitution In Adopting Replacement Maps In 2022

1. Respondents Circumvented the Mandatory Constitutional Process For Adopting New Maps

33. The 2021–2022 redistricting cycle was the first cycle governed by the 2014 Anti-Gerrymandering Amendments' exclusive process, *supra* ¶¶ 22–26, which mandatory process granted the IRC and Legislature specifically defined roles, *see* N.Y. Const. art. III, §§ 4(b), 5.

34. The Legislature appointed the members of the IRC before the post-decennial census at the start of the post-2020 decennial-census redistricting cycle. *See* N.Y. Const. art. III, § 5-b(a)–(b). Democratic leaders in the Legislature appointed the "Democratic Caucus" of the IRC; while Republican leaders in the Legislature selected the "Republican Caucus." *See id.*

35. Beginning in June 2021, the IRC began a series of nine public meetings across the State on the redistricting process and subsequently released initial draft maps to the public. N.Y. Const. art. III, § 4(c). The Republican Caucus endeavored to release a single bipartisan set of draft maps, "negotiated and presented jointly" by the full Commission, but the Democratic Caucus refused to meet over the weekend before the IRC released its draft maps. *See* Rebecca C. Lewis & Zach Williams,

Takeaways From New York's (Competing!) Redistricting Draft Maps, City & State N.Y. (Sept. 15, 2021).[12]

36. Thereafter, the IRC worked to prepare a single, consensus set of maps for the Legislature's consideration, holding an additional fourteen public hearings through November of 2021 to help guide the process. N.Y. State Indep. Redistricting Com'n, *Meetings*.[13] Despite prior agreements, on December 22, 2021, Democratic Commissioner David Imamura abruptly announced that the Democratic Caucus would no longer negotiate bipartisan maps and instead would only negotiate on the latest iteration of its partisan maps, which it unexpectedly released the day before. Testimony of Jack Martins at 9:16–9:49, Virtual Public Meeting of the NYIRC, Jan. 3, 2022 ("1/3/22 IRC Meeting").[14]

37. When the IRC met on January 3, 2022, to vote on a first set of consensus maps to send to the Legislature, the Democratic Caucus again refused to negotiate with the full IRC, rebuffing Republicans' attempts to discuss the bipartisan maps and declining to agree to any concessions. *See id.* The IRC voted on two

[12] Available at https://www.cityandstateny.com/policy/2021/09/new-yorks-first-draft-2022-redistricting-maps-have-been-released/185374/.

[13] Available at https://www.nyirc.gov/meetings.

[14] Available at https://totalwebcasting.com/view/?func=VOFF&id=nysirc&date=2022-01-03&seq=1.

redistricting plans, with each receiving five votes, and delivered both sets of plans to the Legislature, as required by the Constitution. *Id.*

38. The Legislature rejected both plans out-of-hand, 2021–2022 N.Y. Reg. Sess. Leg. Bills A.8587, A.8588, A.8589, A.8590, S.7631, S.7632, S.7633, S.7634, meaning that the IRC had until January 25 to submit a revised plan. N.Y. Const. art. III, § 4(b). When the full IRC met to discuss a single plan for its final submission to the Legislature, the Democratic members refused any further discussion of consensus maps and instead wanted to re-submit virtually the same plan that the Legislature had rejected—despite multiple entreaties from the Republican Caucus to resume negotiations on the previously negotiated bipartisan maps. *See* 1/3/22 IRC Meeting; Affidavit of Senate Minority Leader Robert G. Ortt ("Ortt Aff."), ¶¶ 6–9, NYSCEF No.28, Attached as Exhibit G. At an impasse, the IRC failed to submit revised maps to the Legislature by the constitutional deadline.

39. Despite the IRC's failure to vote on and present a second set of maps, and in direct contravention of the New York Constitution's mandatory, exclusive redistricting process under Article III, Section 4, the Legislature went ahead and crafted its own redistricting maps as if the Anti-Gerrymandering Amendments had not been enacted. Acting entirely behind closed doors and without any Republican input, Democratic legislative leaders pushed through legislation for a new congressional map, releasing the Legislature's proposed map late on Sunday,

January 30. Ortt Aff. ¶¶ 10–14. Two days later, Democratic leaders likewise hastily compiled and pushed through new maps for the state Senate. *Id.*

40. On February 2, 2022, the Democrats in the Assembly and Senate adopted the unconstitutional 2022 congressional map, with all Republican members of the Legislature voting against the map. *See* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196 and A.9039-A (as technically amended by A.9167). On February 3, 2022, legislative Democrats adopted the unconstitutional 2022 state Senate and state Assembly maps on a vote of 118–29 in the Assembly and 43–20 (a straight party line) in the Senate. *See* 2021–2022 N.Y. Reg. Sess. Leg. Bills A.9040-A and A.9168. That same day, Governor Hochul signed both maps. 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196, A.9039-A, A.9040-A, and A.9168; *see* Trende.Rep.10.

41. The backlash was swift. Political analysts explained the obvious: Dave Wasserman, a nonpartisan national elections expert, noted that "the Dems' gerrymander [of the 2022 congressional map] could lead to the single biggest seat shift in the country (19D-8R to 22D-4R)." Trende.Rep.10–11. Betsy Gotbaum, the executive director of good-government group Citizens Union, explained that "[t]here was no public input." Jacob Kaye, *State Legislature Shares Version of Congressional Redistricting Map*, Queens Daily Eagle (Feb. 1, 2022).[15] Laura Ladd

[15] Available at https://queenseagle.com/all/state-legislature-shares-version-of-congressional-redistricting-map.

Bierman, the executive director of the League of Women Voters of New York, similarly criticized the Legislature's actions, stating that "New Yorkers deserve a transparent and fair redistricting process, and it is shameful that the Legislature has denied them this." Marina Villeneuve, *NYC Would Get More Seats in State Senate Under Proposed Maps*, AP News (Feb. 1, 2022).[16] And a top attorney for the left-leaning Brennan Center for Justice, Michael Li, opined that the congressional map is "a master class in gerrymandering, . . . tak[ing] out a number of Republican incumbents very strategically." Trende.Rep.11.

2. The Resulting Congressional Map Is An Unconstitutional Partisan Gerrymander And Thus Invalid Under The New York Constitution

42. The Legislature's unlawful circumvention of the exclusive constitutional process resulted in an egregious, nationally-embarrassing gerrymandered congressional map.[17] The Legislature's 2022 congressional map is undoubtedly "an effective [Democratic] gerrymander," Grace Ashford & Nicholas Fandos, *N.Y. Democrats Could Gain 3 House Seats Under Proposed District Lines*,

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[16] Available at https://apnews.com/article/new-york-new-york-city-legislature-redistricting-9d58870a5b1c511928fa96d180ce7e3d.

[17] While Petitioners continue to believe that the 2022 state Senate map is also substantively unconstitutional as a partisan- and incumbent-protecting gerrymander, the Supreme Court ruled that Petitioners failed to carry their beyond-a-reasonable-doubt burden on that point, so it is not subject to this stay application or appeal. Decision And Order at 14.

N.Y. Times (Jan. 30, 2022),[18] shifting New York's congressional delegation from a 19-8 Democratic majority to a 22-4 Democratic majority, while violating all three substantive anti-gerrymandering aspects of the 2014 Anti-Gerrymandering Amendments—helping Democrats and undermining competition by packing Republicans overwhelmingly into only four districts and then making many previously competitive districts more pro-Democrat, helping Democrat incumbents in the previously competitive districts, and harming Republican incumbents in competitive districts. *See* N.Y. Const. art. III, § 4(c)(5).

43. Moreover, as further explained below, *infra* ¶¶ 140–46, the Legislature concocted numerous individual congressional districts with boundaries with no honest explanation except for impermissible partisan and incumbent-favoring gerrymandering. *See* Trende.Rep.12–14; Expert Report of Claude A. LaVigna at 2–3 ("LaVigna.Rep."), NYSCEF No.27, Attached as Exhibit C.

44. Enacting these maps after New Yorkers made their will clear by voting to ban partisan gerrymandering has dealt a crushing blow to the State's representative democracy and the faith of the People in those governing them. Respondents' unconstitutional, partisan- and incumbent-protecting gerrymandered maps harm voters all over the state of New York, including Petitioners, by diluting

[18] Available at https://www.nytimes.com/2022/01/30/nyregion/new-york-redistricting-congressional-map.html.

the power of voters' votes on the basis of politics and diminishing the effects of voters' political-action efforts. *See* Affidavit of Lawrence Garvey ¶¶ 5–6, NYSCEF No.29; Affidavit of Alan Nephew ¶¶ 5–6, NYSCEF No.107; Affidavit of George Dooher Jr. ¶¶ 5–6, NYSCEF No.108; Affidavit of Guy C. Brought ¶¶ 5–6, NYSCEF No.109; Affidavit of Jay Frantz ¶¶ 5–6, NYSCEF No.110; Affidavit of Jerry Fishman ¶¶ 5–6, NYSCEF No.111; Affidavit of Lawrence Canning ¶¶ 5–6, NYSCEF No.112; Affidavit of Linda Fanton ¶¶ 5–6, NYSCEF No.113; Affidavit of Marianne Violante ¶¶ 5–6, NYSCEF No.114; Affidavit of Patricia Clarino ¶¶ 5–6, NYSCEF No.115; Affidavit of Stephen Evans ¶¶ 5–6, NYSCEF No.116; Affidavit of Susan Rowley ¶¶ 5–6, NYSCEF No.117.

D. Citizens Challenge The Constitutionality Of The Replacement Maps And Now-Malapportioned 2012 Maps

1. The Petition And Amended Petition

45. Petitioners here challenged the congressional map on the very same day it was enacted, *see* Petition, NYSCEF No.1, and the new state Senate map three days later; Amended Petition ¶¶ 179–212 ("Amend. Pet."), NYSCEF No.18. Petitioners alleged in their Amended Petition[19] that the Legislature's new maps are unconstitutional on two separate and independent bases. *First*, the maps are

[19] The Supreme Court granted Petitioners leave to amend at the March 3 hearing. NYSCEF No.231.

procedurally invalid because the Legislature did not follow the exclusive process for enacting replacement redistricting maps set out in Sections 4 and 5 of Article III of the New York Constitution, which create and empower the IRC. *See* Amend. Pet., First Cause Of Action, ¶¶ 234–45; N.Y. Const. art. III, §§ 4–5. *Second*, the maps are substantively invalid because they are blatantly partisan and incumbent-protecting gerrymanders, in violation of Article III, Section 4(c)(5) of the New York Constitution, which prohibits redistricting maps drawn "for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." *See* Amend. Pet., Third Cause Of Action, ¶¶ 256–63 (quoting N.Y. Const. art. III § 4(c)(5)); *see generally* Amend. Pet., Second & Fourth Causes of Action, ¶¶ 246–55, 264–74 (also asserting that the existing maps are now unconstitutionally malapportioned and seeking a declaratory judgment as to all claims).

46. Petitioners requested two remedies: First, on their procedural claim, Petitioners requested that the Supreme Court draw maps itself and adopt them in time for the 2022 elections because there is nothing the Legislature can do to "correct" its circumvention of "[t]he process for redistricting" in this State, N.Y. Const. art. III, § 4(e), the 2022 maps are "invalid in whole," and the Legislature has no authority to adopt replacement maps, *id.* § 5. Second, as for their substantive claims, Petitioners asked that the Supreme Court strike down the maps and require

the Legislature to draw new maps that substantively and procedurally complied with the requirements of Article III, Section 4 of the New York Constitution.

2. Evidence Below

47. In support of their Petition, Petitioners submitted the affidavit of Senate Minority Leader Robert G. Ortt, NYSCEF No.28, the expert reports of Mr. Sean Trende, NYSCEF No.26, and Mr. Claude A. LaVigna, NYSCEF No.27, and the judicially noticeable proceedings before the Legislature and the IRC.

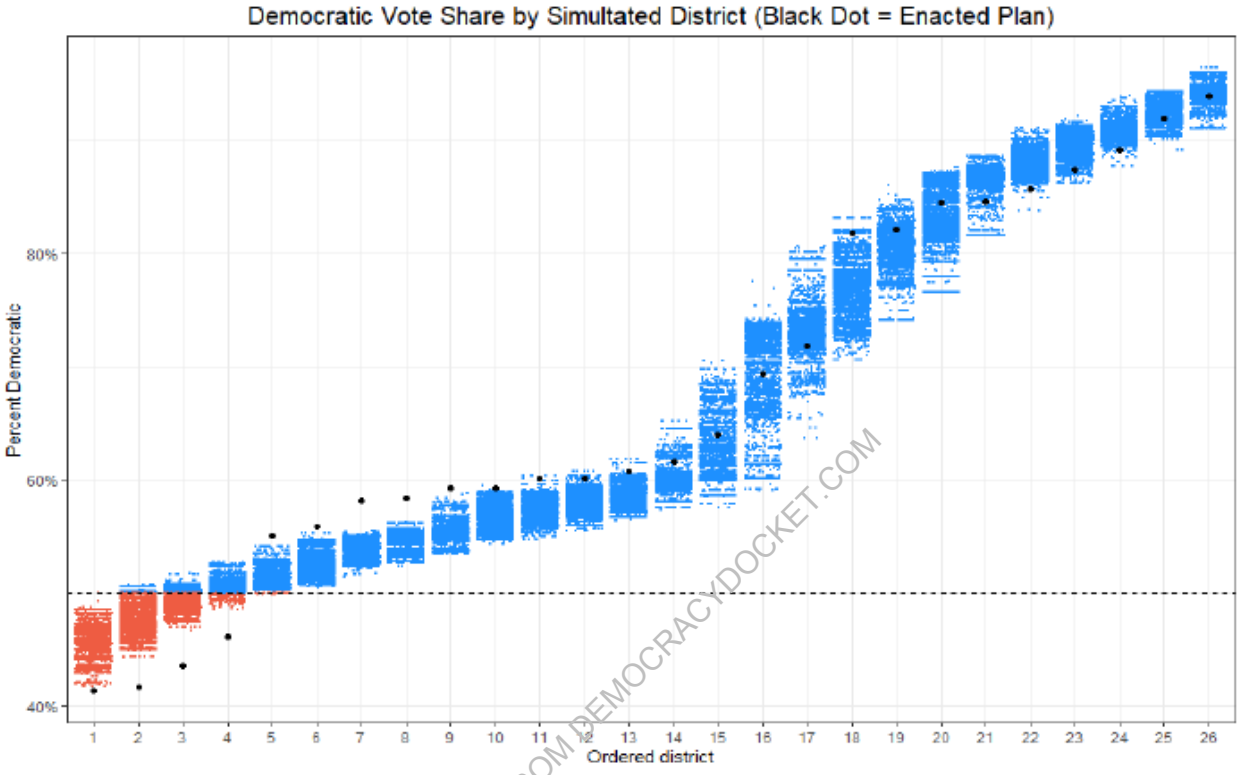
48. Minority Leader Ortt explained—in an affidavit unrebutted by Respondents (and, indeed, stipulated to by one of Respondents' counsel at closing arguments)—that legislative Democrats controlled the entire map-drawing process, allowing for no Republican input or involvement. Ortt Aff. at ¶¶ 10–13; *see also* Transcript at 10–12, 20–21, Session, New York State Assembly (Feb. 2, 2022).[20] Democratic leaders hastily drew the new congressional map over only a few days and behind closed doors, releasing the congressional map on Sunday evening, January 30, without holding even one public hearing. Ortt Aff. at ¶¶ 10–13. Then, the Democrats did not engage in any negotiations with the Republicans prior to their enactment of the map, Ortt Aff. at ¶¶ 10–13, which explains why every Republican

[20] Available at https://legislation.nysenate.gov/pdf/transcripts/2022-01-10T15:51/.

in the Assembly and the Senate voted against it, *see id.*; 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196 and A.9039-A (as technically amended by A.9167).

49. Mr. Trende—a renowned expert on redistricting who was also recently selected by the Supreme Court of Virginia as a special master to redraw successfully Virginia's maps, Trende.Rep.2–4—submitted his opening expert report analyzing the congressional map by using the well-accepted method of comparing the map to 5,000 computer-generated maps. Trende.Rep.10–24. Mr. Trende generated those 5,000 maps to follow New York's redistricting requirements of compactness, contiguity, and avoiding county splits, without considering partisan advantage. Trende.Rep.11–13. Then, he calculated a "gerrymandering index" from these 5,000 maps, showing that the enacted congressional map was more pro-Democrat than any of those 5,000 maps. Trende.Rep.12–13. Further, Mr. Trende generated a dotplot (pictured below) to compare the partisanship of the districts in the 2022 congressional map with the districts in the simulated maps. Trende.Rep.14–15. This reveals the "DNA of a gerrymander" in the map, and it shows that the four most Republican districts in the State are *more* Republican in the 2022 congressional map than in any of the 5,000 neutral maps, while the next 9 or so most Republican districts have more Democrats in them in the 2022 congressional map than in most (if not all) of the 5,000 neutral maps. Trende.Rep.14–15. Thus, Mr. Trende's dotplot

graphically depicted precisely how legislative Democrats packed and cracked Republicans across the State for their own partisan advantage. Trende.Rep.16–18.



50. Next, Mr. LaVigna submitted his opening expert report, which analyzed each district and explained all of the legislative Democrats' partisan-line-drawing changes in full detail, NYSCEF No.27, consistent with the description below, *see infra* ¶¶ 140–46. Consistent with Mr. Trende's expert report, Mr. LaVigna's expert report shows that legislative Democrats packed Republicans into four districts while also making numerous other Republican districts more Democratic. *See generally* LaVigna.Rep.

51. Respondents then timely submitted three expert reports of their own as to the congressional map—the expert report of Dr. Michael Barber, NYSCEF No.86,

the expert report of Dr. Stephen Ansolabehere, NYSCEF No.92, and Dr. Kristopher R. Tapp, NYSCEF No.73.

52. Dr. Barber argued in his expert report that the 2022 congressional map was actually *pro-Republican*, because it effectively guaranteed Republicans four seats, NYSCEF No.86 at 11–14, 17, without even purporting to consider the map's impact on the remaining seats, including the nine previously competitive seats in Mr. Trende's dotplot, see Trial Tr. Day 2 at 110, 114–15 (Mar. 15, 2022), Attached as Exhibit I. Dr. Barber replicated *50,000* simulated maps using Mr. Trende's parameters, and admitted he reached results in his simulations consistent with Mr. Trende's simulations. NYSCEF No.86 at 7–11; Trial Tr. Day 2 at 109.

53. Dr. Tapp submitted an expert report that, just like Dr. Barber, concluded that Mr. Trende's analyses reveal that the 2022 congressional map was pro-Republican because it created four strong Republican districts. NYSCEF No.73 at 4–5, 9–11. Dr. Tapp also criticized Mr. Trende for not considering a number of other factors when generating the 5,000 neutral maps, including protection of the voting power of racial or minority-language groups and the avoidance of splitting cities and towns. NYSCEF No.73 at 12–13. Finally, Dr. Tapp criticized Mr. Trende for generating only 5,000 maps. NYSCEF No.73 at 17.

54. Finally, Dr. Ansolabehere, like Dr. Barber and Dr. Tapp, concluded that Mr. Trende's simulations show that the 2022 congressional map actually favors

Republicans because it guarantees them four seats. NYSCEF No.92 at 9. Dr. Ansolabehere's report also includes a discussing of the features and partisan leanings of the districts and disputed various statements in Mr. LaVigna's report and his categorization of certain districts as Democratic or Republican. NYSCEF No.92 at 5–8, 9–15. Dr. Ansolabehere ultimately admitted on cross-examination that he agreed with Mr. LaVigna that multiple districts currently represented by Republican members of Congress are now more Democratic under the 2022 congressional map. *See* Trial Tr. Day 2 at 196–99.

55. Petitioners then submitted rebuttal reports from both Mr. Trende, *see* NYSCEF No.103, and Mr. LaVigna, *see* NYSCEF No.104.

56. Mr. Trende's rebuttal report addressed and refuted the criticisms from Respondents' experts. Specifically, Mr. Trende increased the number of his simulations to 10,000 neutral maps—responding to the critique that 5,000 simulations was somehow too few—and again found the same results, including as to the dotplot. NYSCEF No.103 at 16–20. In doing so, Mr. Trende also addressed the claim that he failed to consider the avoidance of city and town splitting and minority-vote dilution, by re-running 10,000 simulated maps that considered these factors and found the same results as his original expert report—including as to his dotplot results. NYSCEF No.103 at 14–20.

57. Mr. LaVigna's rebuttal expert report refuted Dr. Ansolabehere's district-specific conclusions. In particular, he noted that Dr. Ansolabehere incorrectly identified districts currently represented by Republicans as Democratic districts and that Dr. Ansolabehere did not dispute that these districts were now more Democratic under the 2022 congressional map. NYSCEF No.104 at 3–13.

58. Finally, Respondents also attempted to submit various additional expert reports that addressed both the congressional and state Senate maps, although only the portions of the reports addressing the state Senate maps were timely. *See* Trial Tr. Day 3 at 32, 70 (Mar. 16, 2022), Attached as Exhibit I.

59. Respondents attempted to submit an additional expert report of Dr. Tapp, which had portions addressing the state Senate map (which portions were timely), *see, e.g.*, NYSCEF No.153 at 11–15, and other portions speculating about the congressional map (which other portions were not timely), *see* NYSCEF No.153 at ¶¶ 7, 12–25, 37–49. Dr. Tapp's additional report alleged that Mr. Trende's state Senate ensemble (*i.e.*, the set of neutral maps that Mr. Trende generated via computer) had a "redundancy problem." *See, e.g.,* NYSCEF No.153 at 14 & n.3. Then, Dr. Trapp's speculated without support that Mr. Trende's congressional ensemble may have suffered from this same redundancy problem. *E.g.,* NYSCEF No.153 at 20 n.5 & 21. The Supreme Court refused to consider these speculations related to the congressional map in Dr. Tapp's additional report, due to their patent

untimeliness, thus these unsupported musings about Mr. Trende's congressional ensemble are not part of this appeal (and were never subject to adversarial testing). Trial Tr. Day 3 at 32, 70.

60. Next, Respondents submitted an expert report of Dr. Jonathan N. Katz, who attempted to offer expert opinions related to both the state Senate map (which opinions were timely), and the congressional map (where were not timely). NYSCEF No.156. Here too, the Supreme Court declined to consider Dr. Katz's untimely opinions regarding the congressional map, thus they are not part of this appeal (and were never subjected to adversarial testing). Trial Tr. Day 3 at 32, 70.

61. Finally, Respondents submitted the expert report of Mr. Todd A. Breitbart, which related only to the state Senate map and so is not relevant to the appeal here. NYSCEF No.149 at 3.

3. Dispute Over Timing Of The Remedy

62. When Petitioners first filed this lawsuit, they included within their prayer for relief a request that the Supreme Court "[s]uspend[ ] or enjoin the operation of any other state laws that would undermine this Court's ability to offer effective and complete relief to Petitioners for the November 2022 elections and related primaries." NYSCEF No.1 at 67. And Petitioners reiterated and further specified their need for such an injunction in their Amended Petition, filed only days later. NYSCEF No.18 at 82.

63. For that reason, Respondent Senate Majority Leader Andrea Stewart-Cousins well-understood that if Petitioners proved their claims, the remedy would involve changes to the 2022 election calendar. As she told the press, such changes would not be problematic at all, as the Legislature and legislative leaders are fully capable of "be[ing] nimble should [they] have to be" with election deadlines and processes. Nick Reisman, *State Senate Districts Will Also Face Legal Challenge in New York*, Spectrum News 1 (Feb. 9, 2022).[21]

64. Despite Respondent Senate Majority Leader's forthright admission, throughout this case Respondents' counsel have, time and again, sought to delay any remedy until 2024, continually claiming that it is too late to order relief for 2022. *See* NYSCEF Nos.72 at 29–30, 74 at 3–7, 82 at 24–27, 234 at 3–13, 237 at 3–4.

65. At the March 3, 2022 hearing, the Supreme Court preliminarily concluded that Petitioners' requested interim relief against election deadlines was unnecessary because, in part, of the possibility of holding special elections in 2023 under new, constitutional maps, NYSCEF No.231 at 70:12–15.

[21] Available at: https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2022/02/09/state-senate-districts-will-also-face-legal-challenge-in-new-york.

66. On March 16, 2022, the Supreme Court allowed the parties to submit supplemental briefing on the issue of the timing of any remedy, including whether 2023 special elections were permissible. NYSCEF No.199 at 2.

67. Petitioners explained that holding a special election in 2023 under replacement maps would violate the U.S. Constitution. NYSCEF No.232 at 2–4. Further, Petitioners explained, with evidence from the Co-Executive Director for the New York State Board of Elections, Todd D. Valentine, NYSCEF No.239, that the Supreme Court has ample time and authority to order new maps for 2022, as the New York Constitution contemplates, N.Y. Const. art. III, § 5, including by postponing election-related deadlines to the extent necessary, in order to protect the rights of New York voters and safeguard the validity and integrity of elections held in the State. NYSCEF No.232 at 4–10. Co-Executive Director Valentine explained that the primary election could be moved to August with no real trouble to state and local elections officials, and ample time to complete all legal election requirements, NYSCEF No.239 ¶¶ 6–14, so Petitioners asked the Supreme Court to order just that, NYSCEF No.232 at 6–7.

E. The Supreme Court Invalidates The 2022 Maps As Unconstitutional Partisan Gerrymanders, While Giving Petitioners Less Relief Than They Had Requested

68. After hearing final arguments from the parties, the Supreme Court issued its decision on March 31, 2022, in which it accepted some of Petitioners'

arguments, rejected other arguments, and granted Petitioners less relief than they requested and are constitutionally entitled to.

69. The Court held that the Legislature failed to follow this exclusive process for enacting replacement maps. Decision And Order at 10. Because "the IRC failed to act and submit a second set of maps," the Legislature was precluded from stepping in to draw its own maps under the Constitution. *Id.* "The People of the State of New York again spoke loudly when they soundly voted down the proposed 2021 Constitutional amendment that would have granted authority to the Legislature to bypass the IRC redistricting process." *Id.* Finding that the Legislature's November 2021 legislation, "which purported to authorize the legislature to act in the event the IRC failed to act," in fact "substantially altered the Constitution," *id.*, the Court struck down the law, *id.* at 17–18 (striking down L.2021, c.633, § 1).

70. The Court also held that the congressional map was unconstitutionally gerrymandered beyond a reasonable doubt. Decision And Order at 10, 14. Finding the expert evidence put forth by Petitioners persuasive, the Court emphasized how the map packed Republicans into four districts and eliminated competitiveness in the previously competitive districts, which now favored Democratic candidates. *Id.* at 12–14. The Court further noted that "the testimony of virtually every expert" "is that at least in the congressional redistricting maps the drawers packed Republicans

into four districts, thus cracking the Republican voters in neighboring districts and virtually guaranteeing Democrats winning 22 seats." *Id.* at 13.

71. The Supreme Court rejected Petitioners' arguments on the substantive gerrymandering of the state Senate map, including based upon the evidence and expert report submitted by Mr. Breitbart, which is not relevant to this appeal. Decision And Order at 14.

72. The Decision And Order's specific decretal language relevant here:

> ORDERED, ADJUDGED, and DECREED that the process used to enact the 2022 redistricting maps was unconstitutional and therefore void *ab initio*; and it is further
>
> ORDERED, ADJUDGED, and DECREED that with regard to the enacted 2022 Congressional map the Petitioners were able to prove beyond a reasonable doubt that the map was enacted with political bias and thus in violation of the constitutional prohibition against gerrymandering under Article III Sections 4 and 5 of the Constitution; and it is further
>
> ORDERED, ADJUDGED, and DECREED that the maps enacted by 2021-2022 N.Y. Reg. Sess. Leg. Bills S8196 and A.9039-A (as technically amended by A.9167) be, and are hereby found to be void and not usable; and it is further
>
> ORDERED, ADJUDGED, and DECREED that the maps enacted by 2021-2022 N.Y. Reg. Sess. Leg. Bills S9040-A and A.9168 be, and are hereby found to be void and not usable; and it is further
>
> ORDERED, ADJUDGED, and DECREED that congressional, state senate and state assembly maps that were enacted after the 2010 census are no longer valid due to unconstitutional malapportionment and therefore can not be used; and it is further
>
> * * *
>
> ORDERED, ADJUDGED, and DECREED that in order to grant appropriate relief the court hereby grants to Petitioners a permanent injunction refraining and enjoining the Respondents, their agents,

> officers, and employees or others from using, applying, administering, enforcing or implementing any of the recently enacted 2022 maps for this or any other election in New York, included but not limited to the 2022 primary and general election for Congress, State Senate and State Assembly; and it is further
>
> ORDERED, ADJUDGED, and DECREED that the Legislature shall have until April 11, 2022 to submit bipartisanly supported maps to this court for review of the Congressional District Maps, Senate District Maps, and Assembly District Maps that meet Constitutional requirements; and it is further
>
> ORDERED, ADJUDGED, and DECREED that in the event the Legislature fails to submit maps that receive sufficient bipartisan support by April 11, 2022 the court will retain a neutral expert at State expense to prepare said maps[.]

Id. at 17–18.

73. After the Supreme Court issued its Decision And Order, some Respondents filed notices of appeal, asking this Court to reverse the Supreme Court's decision, NYSCEF Nos. 245, 246, and thereafter filed stay requests.

74. On April 4, 2022, this Court granted an interim discretionary stay of the Supreme Court's Decision And Order, pending further order of this Court.

NO AUTOMATIC STAY ARISES FROM THE MARCH 31, 2022 DECISION AND ORDER, AND THE COURT SHOULD DENY RESPONDENTS' REQUEST FOR A STAY

I. The Automatic-Stay Provision Of CPLR § 5519(a)(1) Does Not Apply To The Supreme Court's March 31, 2022 Decision And Order

75. CPLR § 5519(a)(1) creates a limited automatic-stay provision, which applies *only* to proceedings to enforce judgments mandating that the State engage in specific action. This rule states that "a notice of appeal or an affidavit of intention

to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal" in those appeals where "the appellant or moving party is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state." CPLR § 5519(a)(1). Because CPLR § 5519(a)(1) applies solely to "proceedings to *enforce* the judgment or order" against the State, *id.* (emphasis added), this automatic-stay rule must apply only to judgments *mandating that* the State complete some action, as opposed to judgments merely *prohibiting* the State from taking some action or *declaring* legal conclusions.

76. Cases applying CPLR § 5519 comport with this reading of the statute, holding that CPLR § 5519's automatic-stay rule is inapplicable to judgments *prohibiting* the State from taking some action or declaring legal conclusions. As Siegel's New York Practice straightforwardly states, New York courts have held—following CPLR § 5519's plain text—"that when the appealed decision directs the [State] not to do something . . . the automatic stay is not operative to allow the [State] to do the prohibited thing during the pendency of the appeal." Injunctions and Stays, Siegel, N.Y. Prac. § 535 (6th ed.). In *State v. Town of Haverstraw*, 219 A.D.2d 64 (2d Dep't 1996), for example, the court held that "no automatic stay is available" under CPLR § 5519(a)(1) for an order that "prohibits certain conduct" of the State, as these "[p]rohibitory injunctions" that "*prohibit* future acts" are "self-executing

and need no enforcement procedure to compel inaction on the part of the [State]." *Id*. at 65 (emphasis in original). Further, in *Pokoik v. Department of Health Services County of Suffolk*, 220 A.D.2d 13 (2d Dep't 1996), the court held that CPLR § 5519(a)(1) "is restricted to the executory directions of the judgment or order appealed from which *command a person to do an act*," so "the stay does not extend to matters which are not commanded but which are the sequelae of granting or denying relief"—which includes "the declaratory provisions of a judgment." *Id*. at 15 (emphasis added); *see also Spillman v. City of Rochester*, 132 A.D.2d 1008, 1009 (4th Dep't 1987); David M. Cherubin & Peter A. Lauricella, *The "Automatic" Stay of CPLR 5519(a)(1): Can Differences in It Application Be Clarified?*, 71-Nov. N.Y. St. B.J. 24 (Nov. 1999).

77. Earlier proceedings in this case show the narrow scope of CPLR § 5519(a)(1). After Justice Lindley entered his decision that allowed Petitioners to seek expedited discovery here, some Respondents appealed that decision to the Appellate Division, following their view that filing a Notice Of Appeal automatically stays the Supreme Court's discovery decision. Petitioners then moved the Appellate Division to vacate any automatic stay of the Supreme Court's discovery decision that may have issued under CPLR § 5519(a)(1). Justice Lindley rejected Petitioners' motion in part, holding that a "motion to vacate the supposed automatic stay is unnecessary . . . *because there is no automatic stay in effect*."

NYSCEF No.134, Ex.A at 1. (citations omitted; emphasis added). As Justice Lindley explained, "CPLR § 5519(a) does not stay all proceedings," instead it "only" applies to "'proceedings to enforce the judgment or order appealed from.'" *Id.* (quoting CPLR § 5519(a)). Additionally, "[w]hat constitutes a 'proceeding to enforce' is strictly construed," *id.*, which shows the very narrow breadth of CPLR § 5519(a)'s automatic-stay rule. In particular, and as relevant here, Justice Lindley stated that only proceedings to enforce a judgment containing "executory directions that *command a person to do an act* beyond what is required under the CPLR" come within CPLR § 5519(a)'s automatic-stay rule. *Id.*, Ex.A at 2 (citations omitted; emphasis added). Accordingly, since the discovery decision there did "not command a person to do an act beyond what is required under CPLR," Justice Lindley rejected Petitioners' motion to vacate any automatic stay as unnecessary. *Id.*

78. This is also consistent with public officials' understanding of stay procedures in recent high-profile cases. For example, in a recent lawsuit filed in Richmond County, on Staten Island, *Goldenstein, et al. v. N.Y.C. Dep't of Health & Mental Hygiene, et al.*, Index No. 85057/2022 (Richmond Cnty. Sup. Ct.), the Supreme Court entered an interim order granting the petitioners a declaratory judgment that the colloquially labeled "toddler mask mandate" in New York City was "arbitrary, capricious, and unreasonable," and granted them a permanent

injunction against the mandate, which became "void and unenforceable," *Goldenstein*, Index No. 85057/2022, NYSCEF Doc. No.34 at 1. The municipal-official respondents understood CPLR § 5519(a)(1)'s automatic stay would not operate to stay that prohibitory-injunction order pending appeal, and so those respondents appealed to the Appellate Division, Second Department, *id.*, NYSCEF Doc. No.36, "request[ing] a stay" of the decision from the appellate court, pending appeal, Bernadette Hogan, et al., *NYC Judge Nixes Mask Mandates for Toddlers, Eric Adams Plans to Appeal*, N.Y. Post (Apr. 1, 2022).[22]

79. Here, CPLR § 5519(a)(1) does not apply to the March 31, 2022 Decision And Order, as that Order contains no "command" to Respondents "to do an act." *Pokoik*, 220 A.D.2d at 15. The Supreme Court issued its March 31, 2022 Decision And Order enjoining the unconstitutional 2022 congressional, state Senate, and state Assembly maps, as variously infringing the procedural and the substantive requirements of Article III, Sections 4 and 5 of the New York Constitution, while also affording the Legislature the opportunity to file bipartisan maps with the court by April 11, if the Legislature decides to do so. Decision And Order at 17–18.

80. Nowhere do the Supreme Court's Decision And Order's decretal paragraphs "command[ ]" an "affirmative act" of Respondents in any way, *Town of*

[22] Available at https://nypost.com/2022/04/01/nyc-judge-nixes-mask-mandates-for-toddlers-eric-adams-plans-appeal/.

Haverstraw, 219 A.D.2d at 65; therefore, CPLR § 5519(a)(1)'s automatic-stay rule does not come into force to stay any portion of this Order.

81. Beginning with decretal paragraphs numbered 1–5 above, they do not contain any "executory directions of the judgment or order appealed from which command a person to do an act." *Pokoik*, 220 A.D.2d at 15. Rather, these paragraphs only declare the 2022 maps unconstitutional and, as relevant, "void *ab initio*" or "void and not usable," and then they declare that the post-2010-census maps are "no longer valid." Decision And Order at 17. All of these paragraphs are "self-executing and need no enforcement procedure to compel inaction" per the Court's declaration that the maps are unconstitutional and void. *Town of Haverstraw*, 219 A.D.2d at 65. Therefore, CPLR § 5519(a)(1) does not apply to automatically stay these decretal paragraphs.

82. Turning to decretal paragraph 6 of the Decision And Order, it too is outside of CPLR § 5519(a)(1)'s scope, as it just awards Petitioners a permanent injunction against the 2022 maps' implementation. This paragraph is an "order[ ] or judgment[ ] which prohibit[s] future acts," which "[p]rohibitory injunctions are self-executing and need no enforcement procedure to compel inaction on the part of the person or entity restrained." *Town of Haverstraw*, 219 A.D.2d at 65. This is distinct from mandatory injunctions that "direct the performance of a future act," as prohibitory injunctions like decretal paragraph 6 "operate[ ] to restrain the

commission or continuance of an act and to prevent a threatened injury," and "the automatic stay provision of CPLR 5519(a)(1) d[oes] not operate to relieve [Respondents] from the duty to obey the terms of a prohibitory injunction pending appeal therefrom." *Id.* at 65–66; *see also* Siegel, N.Y. Prac. § 535.

83. Finally, as for the remaining decretal paragraphs—paragraphs 7 and 8—they likewise do not "command" Respondents to take any action, thus CPLR § 5519(a)(1) does not stay their operation either. *Pokoik*, 220 A.D.2d at 15. Instead, these final decretal paragraphs just grant the Legislature a reasonable period of time to draw new, bipartisan maps, affording the Legislature the *option* to file such constitutional maps with the court, at the Legislature's sole discretion, on or before April 11, 2022. Decision And Order at 18. Yet, CPLR § 5519(a)(1) does not affect Respondents' "voluntary . . . compliance" with this decretal paragraph pending appeal, *Pokoik*, 220 A.D.2d at 15. Therefore, decretal paragraph 7 simply recognizes "[f]uture acts which are not expressly directed by the order or judgment appealed," and "no automatic stay is available" for such "[f]uture acts," although they "may nevertheless have the effect of changing the status quo and thereby defeating or impairing the efficacy of the order which will determine the appeal." *Id.* at 15–16. Further, decretal paragraph 8 does not order Respondents to do anything, but rather just announces the Supreme Court's follow-up "matters which are not commanded but which are the sequelae of granting or denying relief." *Id.* at 15.

84. Respondents erroneously contend that CPLR § 5519(a)(1) applies because the Decision And Order "directs elections officials and others responsible for administering the election that is already underway to violate the statutes that govern such election administration," listing off various affirmative duties within the New York Election Laws that Respondents contend election officials must violate. Leg. Resp. MOL 6. But, as Petitioners explained above, the Decision And Order merely *prohibits* Respondents and their agents from using the unconstitutional 2022 maps going forward, and CPLR § 5519(a)(1) does not operate to enjoin such prohibitory injunctions. *Town of Haverstraw*, 219 A.D.2d at 65.

85. No better is Respondents' contention that the Decision And Order "directs the Legislature to enact and submit 'bipartisanly supported' redistricting legislation within 11 days of entry of the Order, thereby commanding the entire Legislature to undertake myriad actions not otherwise required by the CPLR." Leg. Resp. MOL 7. Rather, the Decision And Order merely provides that "the Legislature *shall have until April 11, 2022 to submit bipartisanly supported maps*," thereby granting the Legislature the option to do so, but not mandating anything. Decision And Order 18. Thus, the Decision And Order plainly does not "*command* [the Legislature] to do an act," so CPLR § 5519(a)(1) does not apply. *Pokoik*, 220 A.D.2d at 15 (emphasis added).

86. Notably, this decrial paragraph provides Petitioners *less* than Petitioners are entitled to. As Petitioners explained below, because there is no way for the Legislature "to correct the law's legal infirmities" related to its procedural failure to enact the 2022 maps through the exclusive and mandatory IRC process, *see* N.Y. Const. art. III, § 4(b), no matter how "full and reasonable [an] opportunity" the Legislature is given, *id.* § 5, the Supreme Court should not have provided the Legislature opportunity to cure. That the Supreme Court gave Petitioners *less* than they asked for and gave the Legislature *an option* they did not have under the Constitution and which is "not commanded but which [is] the sequelae of granting or denying relief," *Pokoik*, 220 A.D.2d at 15, cannot create the basis for a stay.

II. The Court Should Deny Respondents' Request For A Stay, Or, If The Court Concludes That CPLR § 5519(a)(1) Applies To The March 31 Decision And Order, Vacate The Automatic Stay

87. To receive a stay pending appeal, the movant must meet the same standard applicable to a Court's decision whether to grant a preliminary injunction, *Matter of Riccelli Enters., Inc. v. Worker's Comp. Bd.*, 117 A.D.3d 1438, 1439 (4th Dep't 2014): "(1) a likelihood of success on the merits, (2) irreparable injury in the absence of injunctive relief, and (3) a balance of the equities in its favor." *Eastview Mall, LLC v. Grace Holmes, Inc.*, 182 A.D.3d 1057, 1058 (4th Dep't 2020).

88. On the other hand, if this Court were to conclude that any automatic stay under CPLR § 5519(a)(1) did attach to the Supreme Court's March 31, 2022

Decision And Order, this Court can and should vacate that stay under CPLR § 5519(c). This Court maintains discretion to vacate an automatic stay under CPLR § 5519(c) upon Petitioners' showing of "[a] reasonable probability of ultimate success in the action, as well as the prospect of irreparable harm." *DeLury v. City of N.Y.*, 48 A.D.2d 405, 405 (1st Dep't 1975).

89. As discussed in detail below, Respondents have not met any of the elements for a stay, and Petitioners meet all elements to vacate.

A. Respondents Have No Likelihood Of Prevailing On This Appeal

1. Respondents Contravened The Mandatory Exclusive Redistricting Process Enshrined In New York's Constitution

90. The 2022 congressional and Senate maps are procedurally unconstitutional, as the Supreme Court correctly held. Decision And Order at 8–10. The 2014 Anti-Gerrymandering Amendments established an exclusive process for redistricting, outlining each stage and explicitly defining roles for the IRC and the Legislature. N.Y. Const. art. III, §§ 4–5. Respondents failed to follow this mandatory redistricting procedure, Decision And Order at 3–10, and their arguments to the contrary, including their attempts to "free[ ] themselves from the constitutional process and [statutory] limitation[s]" by enacting the November 2021 legislation, have no legal basis and cannot be sustained on appeal, *id.* at 8.

91. The Constitution vests primary redistricting responsibility in the IRC, requiring the Legislature to consider two rounds of maps created and submitted by

the Independent Redistricting Commission ("IRC") before it has any authority to draw maps itself—that is "***[t]he process*** for redistricting," which "***shall govern redistricting in this state***." N.Y. Const. art. III, § 4(b), (e) (emphases added).

92. The Constitution first requires the IRC to prepare and submit to the Legislature "a redistricting plan to establish senate . . . and congressional districts," which the Legislature must then vote on "without amendment." *Id.* § 4(b). If the Legislature fails to approve these initial maps, it must notify the IRC "that such legislation has been disapproved." *Id.* The Constitution then provides the IRC with a minimum of 15 days from disapproval to "prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan," which plan the IRC must submit "in no case later than February twenty-eighth," *id.*, as the Supreme Court recognized, Decision And Order at 6 ("By the Constitution the IRC's drop dead date for submitting a plan was February 28th."). Once again, the Legislature must then vote on these second-round maps "without amendment." N.Y. Const. art. III, § 4(b). If—*and only if*— these maps fail to pass in the Legislature, or if the Governor vetoes them, does redistricting responsibility pass to "each house of the Legislature [to] introduce" their own maps and "implement[] legislation with any amendments each house of the legislature deems necessary." *Id.*

93. ***The plain and ordinary meaning of Article III, Section 4, see Matter of Sherrill v. O'Brien, 188 N.Y. 185, 207 (1907), is unequivocal that the***

Legislature may only adopt redistricting maps through the "process" articulated in Article III, Section 4. The Constitution explicitly states that all the procedures outlined in Article III, Sections 4, 5, and 5-b "*shall govern* redistricting in this state." N.Y. Const. art. III, § 4(e) (emphasis added). The word "shall" in the law ordinarily "commands an action" and provides "no discretion." *Brusco v. Braun*, 84 N.Y.2d 674, 680 (1994). This is particularly true when related sections provide permissive, or "may," clauses, emphasizing the obvious contrast between mandatory and permissive directions within the same legal framework. *People v. Golo*, 26 N.Y.3d 358, 362–63 (2015). Article III, Section 4(b)—enacted as part of the same 2014 Anti-Gerrymandering Amendments —provides that "[t]he redistricting plans for the assembly and the senate shall be contained in and voted upon by the legislature in a single bill, and the congressional district plan *may* be included in the same bill *if the legislature chooses to do so*." N.Y. Const. art. III, § 4(b) (emphases added). Conversely, the Constitution *requires* that the IRC procedures outlined in Article III, Section 4—including the IRC's unassailable primary duty to present two sets of maps to the Legislature before the Legislature has any authority to draw maps itself, N.Y. Const. art. III, § 4(b)—"*shall govern* redistricting in this state," *id.* § 4(e) (emphasis added). The plain language of Article III, Section 4 does not provide the Legislature with any "discretion" to vary from those requirements, *Brusco*, 84 N.Y.2d at 680, as the Legislature unconstitutionally did here.

94. The Constitution's use of the definite article "the" underscores the exclusive nature of redistricting process. Courts must apply proper grammatical and usage rules to interpret words, and "the" is a "function word . . . indicat[ing] that a following noun or noun equivalent is definite or has been previously specified by context." *Nielsen v. Preap*, 139 S. Ct. 954, 965 (2019); *see also Work v. U.S. ex rel. McAlester-Edwards Coal Co.*, 262 U.S. 200, 208 (1923). In New York, the courts have long recognized that the definite article "the" evinces the intent to restrict meaning to a specific referent. *Shaffer v. Mason*, 29 How. Pr. 55, 1865 WL 3674 (N.Y. Sup. Ct. 1865) ("If any significancy or effect is to be given to the amendment by inserting the definite article 'the,' the insertion of that word was intended to limit or define the general signification of the word . . . ."); *see also In re Leonard's Will*, 73 N.Y.S.2d 770, 772 (Queens Cnty. Sup. Ct. 1947) ("Moreover the use of the definite article 'the' qualifies the word 'children' and limits its meaning . . . ."). Because Article III, Section 4(e) indicates that the process for redistricting after the 2014 Anti-Gerrymandering Amendments—including requiring the Legislature to accept and vote on at least two rounds of maps from the IRC, N.Y. Const. art. III, § 4(b)—is "*[t]he* process for redistricting . . . in this state," the Constitution explicitly creates a single, mandatory, exclusive process for adopting redistricting maps. *Id.* § 4(e) (emphasis added). The People's purpose for voting for the 2014 Anti-Gerrymandering Amendments supports this reading of Article III, Section 4.

Sherrill, 188 N.Y. at 207. The People expected the amendments to eliminate the Legislature's exclusive partisan control over New York's redistricting process, N.Y. Const. art. III, § 4(b), believing the IRC's primary involvement in the map-drawing process would result in less partisanship in redistricting. *Supra* ¶¶ 20–26. Further, the exclusive process incentivized the Legislature to use its appointment powers to broker compromise, *see* N.Y. Const. art. III, § 5-b(a)–(b), by appointing commissioners who would complete the process. Decision And Order at 5.

95. Thus, the Constitution unambiguously requires that the Legislature first receive and vote upon two sets of maps before it has any authority to enact its own redistricting law. *See* Decision And Order at 6 ("The legislature is not free to ignore the IRC maps and develop their own.").

96. Just prior to commencement of the 2022 redistricting process, the People considered amending the Constitution to allow much the same redistricting process that the Legislature employed here, but decidedly rejected that approach. Ahead of the November 2021 election, the Legislature referred to the ballot a new constitutional amendment, under which it would be empowered to enact its own redistricting maps if "the redistricting commission fails to vote on a redistricting plan and implementing legislation by the required deadline," 2021 Statewide Ballot

Proposals, New York State Board of Elections,[23] allowing "the legislature [to] create and the Governor enact its own redistricting plan in the event the IRC committee failed to carry out its constitutionally prescribed duties." Decision And Order at 7. The amendment "was voted down by the people of the State of New York—Republicans, Democrats, and Independents alike." Decision And Order at 7. Nevertheless, "[j]ust three (3) weeks later, the legislature enacted legislation signed by the governor giving themselves the power to do exactly what the people of the State of New York had just voted down three (3) weeks earlier." Decision And Order at 7. The new law, L.2021, c. 633, § 1, provided that "if the commission does not vote on any redistricting plan or plans, for any reason, by the date required for submission . . . each house shall introduce such implementing legislation with any amendments each house deems necessary." L.2021, c. 633, § 1.

97. The Legislature's obvious and ineffectual attempt to replicate the failed 2021 constitutional amendment in statutory form cannot alter or remove requirements that the Constitution imposes upon it. *City of N.Y. v. N.Y. State Div. of Hum. Rts.*, 93 N.Y.2d 768, 774 (1999). Both Article III, Section 4's plain text and the relevant history of 2021 Ballot Proposal 1 confirm that "the N.Y. Constitution prohibited the Legislature from enacting" L.2021, c. 633, § 1, given that the new

[23] Available at https://www.elections.ny.gov/2021BallotProposals.html.

statute "violates the explicit constitutional provision at issue," *White*, 181 A.D.3d at 80. The Constitution does not empower the Legislature to act before the IRC's submission of second-round maps, N.Y. Const. art. III, § 4(b), and the Legislature cannot "override [the] constitutional barrier by passing a law," *City of N.Y.*, 93 N.Y.2d at 774. The statutory and constitutional history preceding this statutory amendment further stresses the unconstitutionality of L.2021, c. 633, § 1. *See N.Y. Pub. Interest Rsch. Grp., Inc. v. Steingut*, 40 N.Y.2d 250, 258 (1976); *White v. Cuomo*, 181 A.D.3d 76, 80 (3d Dep't 2020). The Constitution "is the supreme law of the state," *Matter of New York Juvenile Asylum*, 172 N.Y. 50, 57 (1902), and the Legislature "lacks the authority to override a constitutional barrier by passing a law specifically to negate" a constitutional requirement, *City of N.Y. v. N.Y. State Div. of Hum. Rts.*, 93 N.Y.2d 768, 774 (1999).

98. If the legislative "process" for enacting a statute is "clearly inconsistent with the intent of the drafters of the [ ] amendment to the N.Y. Constitution," *Delgado v. State*, 194 A.D.3d 98, 104 n.3 (3d Dep't 2021), any law enacted by following that process is void, *Petition of Orans*, 257 N.Y.S.2d 839, 859–60 (N.Y. Cnty. Sup. Ct. 1965), *aff'd sub nom In re Orans*, 15 N.Y.2d 339 (1965); *see also Robinson*, 204 A.D. at 583 (a procedurally improper law "is wholly void, and in legal contemplation is as inoperative as if it had never been passed"). Thus, where "[t]he Constitution prescribes the respective powers of the Executive and the

Legislative Branches as to how a passed bill becomes a law," the Legislature is "not allowed" to circumvent those procedures. *King v. Cuomo*, 81 N.Y.2d 247, 250, 252–53 (1993); *see also People v. Devlin*, 33 N.Y. 269, 277–78 (1865). The Legislature's unconstitutional 2021 statutory amendment cannot circumvent the Constitution to permit the Legislature to ignore the exclusive, constitutional redistricting process, and thus, L.2021, c. 633, § 1 is "wholly void." *Robinson*, 204 A.D. at 583.

99. The 2022 maps are unconstitutional for failure to follow the exclusive redistricting process enshrined in the Constitution. Here, the Legislature circumvented the Constitution's exclusive process for redistricting, rendering the enacted maps ultra vires and void. After the Legislature notified the IRC that it had rejected of the Commission's first set of maps on January 10, 2022, *see* Transcript at 18–21, Session, New York State Assembly (Jan. 10, 2022);[24] Transcript at 70:8–79:16, Regular Session, New York Senate (Jan. 10, 2022),[25] the IRC had 15 days at minimum to submit a second set of maps for the Legislature's consideration, but it never developed these maps, Transcript at 6, Session, New York State Assembly (Feb. 2, 2022), *supra*. Nevertheless, the Legislature authorized LATFOR to create the Legislature's maps, Assembly Speaker Carl E. Heastie, News Release, *Speaker*

[24] Available at https://www.nyassembly.gov/av/session/.

[25] Available at https://legislation.nysenate.gov/pdf/transcripts/2022-01-10T15:51/.

Heastie Announces Assemblymember Zebrowski Appointed Temporary Co-Chair of LATFOR (Jan. 18, 2022);[26] *see* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196, A.9039-A, A.9040-A, and A.9168, without waiting for the necessary predicates under the Constitution, taking action long before the IRC's absolute deadline of February 28, 2022, Decision And Order at 6, rendering the redistricting legislation unconstitutional and ultra vires, *Robinson*, 204 A.D. at 583.

100. Respondents' contrary arguments are wholly without merit. *See* Leg. Resp. MOL 10–22; Exec. Resp. Aff. ¶¶ 38–42.

101. *First*, without even engaging with the text of N.Y. Const. art. III, § 4(b), Respondents rely instead on a pre-2014 case in *Cohen v. Cuomo*, 19 N.Y.3d 196 (2012). Leg. Resp. MOL 12–15. There, the Court of Appeals recognized that because the Constitution is silent on the method of calculating the number of Senate seats, the Legislature "must be accorded a measure of discretion" to address this silence. *Cohen*, 19 N.Y.3d at 202. *Cohen* does not help Respondents here. Unlike in *Cohen*, the Constitution is *not* silent on the procedural issue here, as the text provides "[t]he process" that "shall govern" redistricting, including the necessity of two rounds of IRC maps before the Legislature may take the helm on redistricting, N.Y. Const. art. III, § 4(b). By unambiguously requiring that only "the process"

[26] Available at https://www.nyassembly.gov/Press/?sec=story&story=100542.

allows for the adoption of new maps, the Constitution thereby unambiguously forecloses the alternative "process" that the Legislature employed here.

102. *Second*, Respondents raise a policy argument, contending that "the trial court's holding would lead to the absurd result that any four Commissioners could unilaterally block the Legislature from enacting any redistricting plan." Leg. Resp. MOL 15. But this only highlights a critical *feature* of the exclusive, IRC-driven process—the mandate for bipartisan buy-in. The People expected that the Legislature would seriously deliberate before naming IRC Commissioners, so that any Commission map that the Legislature *must* thereafter consider would have *bipartisan* buy-in. And if the Legislature failed to vet Commissioners sufficiently, there is an easy fix: legislative leadership's power to appoint eight of the ten members of the IRC, N.Y. Const. art. III, § 5-b(a)(1)–(4), includes the plenary "power to remove," *Melendez v. Bd. of Educ. of Yonkers City Sch. Dist.*, 34 A.D.3d 814, 814 (2d Dep't 2006); *see also Sharkey v. Thurston*, 268 N.Y. 123, 127 (1935), any IRC Commissioners who may seek to undermine the redistricting process, *Bartlett v. Bedient*, 47 A.D.2d 389, 390 (4th Dep't 1975) (per curiam), and appoint new members who will discharge their duties, N.Y. Const. art. III, § 5-b(a)(1)–(4).

103. ***The only "absurd result" here, therefore, derives from Respondents' contention that the legislative leadership can always render the entire IRC process meaningless by appointing IRC members whom the legislators know will refuse to***

agree on a map or otherwise delay the process. That is, under Respondents' view, legislative leadership can deliberately torpedo the whole IRC process by stacking the commission with their political allies who will deliberately shutdown the IRC map-drawing process, *thereby transferring the power to redistrict back to the Legislature and its political processes*. Yet, that is the *precise* evil that the People of New York amended the Constitution in 2014 to guard against.

104. *Third*, Respondents wrongly assert that the record has "uncontradicted evidence that it was the Republican Commissioners, not the Democrats, who purposefully stymied the Commission process." Leg. Resp. MOL 16–17. This false assertion is legally irrelevant, as whether the maps at issue here are procedurally invalid turns on the purely legal question of whether the redistricting process set forth in Sections 4 and 5 of Article III of the New York Constitution is *exclusive* under the Constitution's text, ***as all parties agreed below***. NYSCEF No.94 at 8–12; NYSCEF No.95 at 7–9; NYSCEF No.96 at 12–13. The Supreme Court did not rely at all on this finger-pointing blame of factions of the IRC, *see* Decision And Order 8–10, so Respondents' arguments on this point are irrelevant.

105. But even assuming this issue was a factual one in any respect (which it is not), Respondents misrepresent the record. Respondents complain that the Supreme Court "willfully ignored the uncontested evidence" based on the Senate Majority's sworn Answer to the Amended Petition that speaks on behalf of all

"Senate Democrats." Leg. Resp. MOL 16. This pleading only speaks for the Senate Majority, *not* for the entire Democratic party. Further, the judicially noticeable public record, *Matter of Siwek v. Mahoney*, 39 N.Y.2d 159, 163 n.2 (1976), shows that on December 22, 2021, Democratic Commissioner David Imamura abruptly announced that the Democratic Caucus would no longer negotiate bipartisan maps and instead would only negotiate on the latest iteration of its partisan maps, which maps it unexpectedly released the day before. Testimony of Jack Martins at 9:16–9:49, Virtual Public Meeting of the NYIRC, Jan. 3, 2022 ("1/3/22 IRC Meeting").[27] And while Respondents contend that "Petitioners had the opportunity to contest this evidence with evidence of their own, but they were unable to do so," Leg. Resp. MOL 16, they ignore that Petitioners were only "unable to do so" because of Respondents' and the Democratic IRC members' evasion of the Supreme Court's discovery order. Specifically, Petitioners had noticed depositions of certain Respondents and a Democratic IRC member, yet these parties failed to appear. *See* NYSCEF Nos.186–95. Petitioners had no time to cure Respondents' violation, as the Supreme Court's discovery period closed the very next day. NYSCEF No.126 at 3.

[27] Available at https://totalwebcasting.com/view/?func=VOFF&id=nysirc&date=2022-01-03&seq=1.

106. *Fourth*, Respondents attack the Supreme Court's remedy for this procedural violation of permitting the Legislature to submit new "'bipartisan' redistricting plans that are the result of 'compromise,'" because the Constitution "uses neither of those words." Leg. Resp. MOL 17–21. Respondents' complaints are completely devoid of merit, as they attack the Supreme Court for affording them *more* opportunity than the Constitution would allow.

107. Below, Petitioners explained that the remedy on their procedural claim must constitutionally be the courts drawing remedial maps for the State. NYSCEF No.25 at 16–17. Because there is no way for the Legislature "to correct the law's legal infirmities" related to its procedural failure to enact the 2022 maps through the exclusive IRC process, *see* N.Y. Const. art. III, § 4(b), the Supreme Court should not provide the Legislature opportunity to cure. By rejecting Petitioners' requested remedy and allowing Respondents the opportunity to resubmit bipartisan maps, the Supreme Court provided Respondents with an *extra* option to participate in redistricting than the Constitution contemplates. Respondents thus have no basis to complain about this remedial aspect of the Supreme Court's Order, as it merely gives them an extra option beyond what they are entitled to. Indeed, the Supreme Court's bipartisan option *harms Petitioners*, since it fails to award Petitioners the full remedy that they are constitutionally entitled to on the procedural constitutional violation they proved: immediate, court-drawn remedial maps. Thus, the most this argument

would lead to is a stay the bipartisan-drawing option of the Supreme Court's injunction, thereby requiring the Supreme Court to appoint a special master immediately to oversee the remedial-map-drawing process.

2. The 2022 Congressional Map Is An Obvious Partisan Gerrymander

108. The New York Constitution prohibits drawing districts "to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties," imposing three separate prohibitions on partisan and incumbent-favoring activity within redistricting. N.Y. Const. art. III, § 4(c)(5). The text of Section 4(c)(5) is plain, *Sherrill*, 188 N.Y. at 207; *Majewski*, 91 N.Y.2d at 583, referencing the map drawer's purpose when stating that district lines may not "be drawn" with the "purpose of favoring or disfavoring incumbents or other particular candidates or political parties," N.Y. Const. art. III, § 4(c)(5) (emphasis added), *see People v. Smith*, 79 N.Y.2d 309, 314 (1992); *see also PURPOSE*, Black's Law Dictionary (11th ed. 2019); "Purpose, n.," Oxford English Dictionary Online, (Dec. 2021).[28] Section 4(c)(5) pairs the passive-voice verb "be drawn" with the adverbial infinitive "to discourage," which refers to the "motive or purpose" of the map drawers, especially in context here. The Chicago Manual Of

[28] Accessed at www.oed.com/view/Entry/154972.

Style §§ 5.112, 5.107 (15th ed. 2003); *see Sassi v. Mobile Life Support Servs., Inc.*, 37 N.Y.3d 236, 241 (2021); *accord Sherrill*, 188 N.Y. at 207.

109. The history of partisan-gerrymandering litigation in this State prior to 2014, *see Steingut*, 40 N.Y.2d at 258, further supports the plain-text interpretation of Section 4(c)(5), given that the People adopted Section 4(c)(5) specifically to overturn certain court decisions finding no constitutional authority to strike down maps drawn with partisan purpose, *see Carey*, 103 A.D.2d at 284.

110. In determining whether a map is a partisan gerrymander, state and federal courts generally consider three factors indicative of partisan intent, with any of the three factors being sufficient alone to find partisan intent. *See Szeliga v. Lamone*, Nos. C-02-CV-21—001773, -001816, slip op. at 88–94 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022);[29] *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, ___N.E.3d___, 2022 WL 110261, at *24 (Ohio 2022); *Harper v. Hall*, ___S.E.2d___, 2022 WL 343025, at *2 (N.C. 2022); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 808, 825 (Pa. 2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 387 (Fla. 2015); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1094–96 (S.D. Ohio 2019), *vacated and remanded*, 140 S. Ct. 102 (2019); *Common Cause v. Rucho*, 318 F.

[29] Available at http://circuitcourt.org/images/pdf/C-02-CV-21-001816/Memorandum-Opinion-032522-SIGNED.pdf.

Supp. 3d 777, 861–62 (M.D.N.C. 2018), *vacated and remanded*, 139 S. Ct. 2484 (2019); *Whitford v. Gill*, 218 F. Supp. 3d 837, 887–90 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916 (2018).

111. First, these state and federal courts considered whether the "map-drawing process" itself was partisan. *See Szeliga*, slip op. at 93; *League of Women Voters*, 2022 WL 110261 at *24–25; *Detzner*, 172 So. 3d at 379–86, 388–89, 392–93; *Householder*, 373 F. Supp. 3d at 1096. These courts often determined that the process itself was partisan—and, therefore, that the map drawers acted with impermissible partisan intent—when it was "directed and controlled by one political party's legislative leaders," *League of Women Voters*, 2022 WL 110261 at *24–25; *see also Householder*, 373 F. Supp. 3d at 1093–96 (map was drawn with partisan intent where one party controlled the map-drawing process); *Common Cause*, 318 F. Supp. 3d at 861–64 (same); *Whitford*, 218 F. Supp. 3d at 887–90 (same); *League of Women Voters*, 178 A.3d at 817 (same); *Detzner*, 172 So. 3d at 390–93 (same).

112. Second, these courts concluded that map drawers harbored partisan intent after considering the overall partisan impact or effect of the map—that is, whether the map "diminish[es] or dilut[es]" a "voter's voting power on the basis of his or her [political] views," *e.g.*, *Harper*, 2022 WL 343025 at *2; *League of Women Voters*, 178 A.3d at 804—including as measured by the latest social science. On this point, Justice Kagan explained the clear import of social science in situations near

identical to what the Democrats did here—"[b]y any measure a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State's political geography and districting criteria built in) reflects "too much" partisanship. *Rucho*, 139 S. Ct. at 2521 (Kagan, J., dissenting). Through such social science metrics, Justice Kagan explained how mapmakers "pack[ ] supermajorities of [disfavored] voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail," while also "crack[ing] the rest across many more districts, spreading them so thin that their candidates will not be able to win." *Id.* at 2513–14. For example, the Supreme Court of Ohio recently struck down Ohio's congressional redistricting map as a partisan gerrymander after considering, among other statistical evidence, an expert report that had "generate[d] 5,000 possible district plans, none of which favored a party as strongly as the plan adopted by the [map drawers]." *League of Women Voters*, 2022 WL 110261 at *23, *26; *see also League of Women Voters*, 178 A.3d at 818 ("two sets of 500 computer-simulated Pennsylvania redistricting plans"). More recently still, on March 25, 2022, the Maryland Circuit Court for Anne Arundel County issued a memorandum opinion and order and declaratory judgment, declaring Maryland's 2021 Congressional Plan to be an unconstitutional partisan gerrymander after giving "great weight to the testimony and evidence presented by and discussed by Sean

Trende," including his computer-simulated maps, gerrymandering index, and dotplot analysis. *Szeliga*, slip op. at 83.

113. Third, these courts found that map drawers drew their maps with partisan intent after considering whether specific district lines subordinated traditional redistricting criteria for partisanship reasons. *League of Women Voters*, 178 A.3d at 816–19, 20–21; *see League of Women Voters*, 2022 WL 110261 at *26; *Harper*, 2022WL343025 at *2–3; *Detzner*, 172 So. 3d at 386.

114. Petitioners have plainly shown all three factors—any one of which can be sufficient on its own to establish their case—proving that the Legislature drew the 2022 congressional map with impermissible partisan intent.

a. The Map-Drawing And Adoption Process Itself For The 2022 Congressional Map Was Entirely Partisan, And Respondents Do Not Even Attempt To Argue To The Contrary

115. The Legislature and the Governor's process in drafting and enacting the 2022 congressional map was itself entirely partisan, demonstrating that these state actors acted with impermissible partisan intent, and thus ending this case. *See League of Women Voters*, 2022 WL 110261 at *24–25; *Detzner*, 172 So. 3d at 379–86, 388–89, 392–93; *Householder*, 373 F. Supp. 3d at 1096; *Common Cause*, 318 F. Supp. 3d at 868–70; *Whitford*, 218 F. Supp. 3d at 890–96.

116. As the undisputed record shows, the legislative Democrats hurriedly drew the 2022 congressional map without any Republican input or involvement.

Ortt Aff. ¶¶ 10–14; Transcript at 10–12, Session, New York State Assembly (Feb. 2, 2022), *supra*. In the words of one Republican Assemblymember, the Democratic members "just went ahead and came up with their own map," "without any meeting, without any input from any Republican members." Transcript at 10, Session, New York State Assembly (Feb. 2, 2022).

117. Senator Ortt explained—without any refutation, evidence, or arguments to the contrary by Respondents—how legislative Democrats controlled the legislative process and imposed their partisan will. Democrats in the Legislature "unilaterally, secretly, and without any public input, drafted new maps" without *any* Republican involvement. Ortt Aff. ¶¶ 10, 12. Simply put, Democrats gave Republicans "no input or involvement in the drafting or creating of the congressional . . . map[ ] that the Legislature adopted." Ort. Aff. ¶ 14.

118. Respondents had no rejoinder for Senator Ortt's explanation of the one-sided, wholly partisan process legislative Democrats employed to force through their overtly partisan congressional map.

119. The legislative Democrats passed their single-party drawn congressional map, which the Democratic Governor signed into law, despite every Republican in the Assembly and Senate voting against it. *See* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196 and A.9039-A (as technically amended by A.9167). This single-party-supported map was drawn with impermissible partisan intent, like many

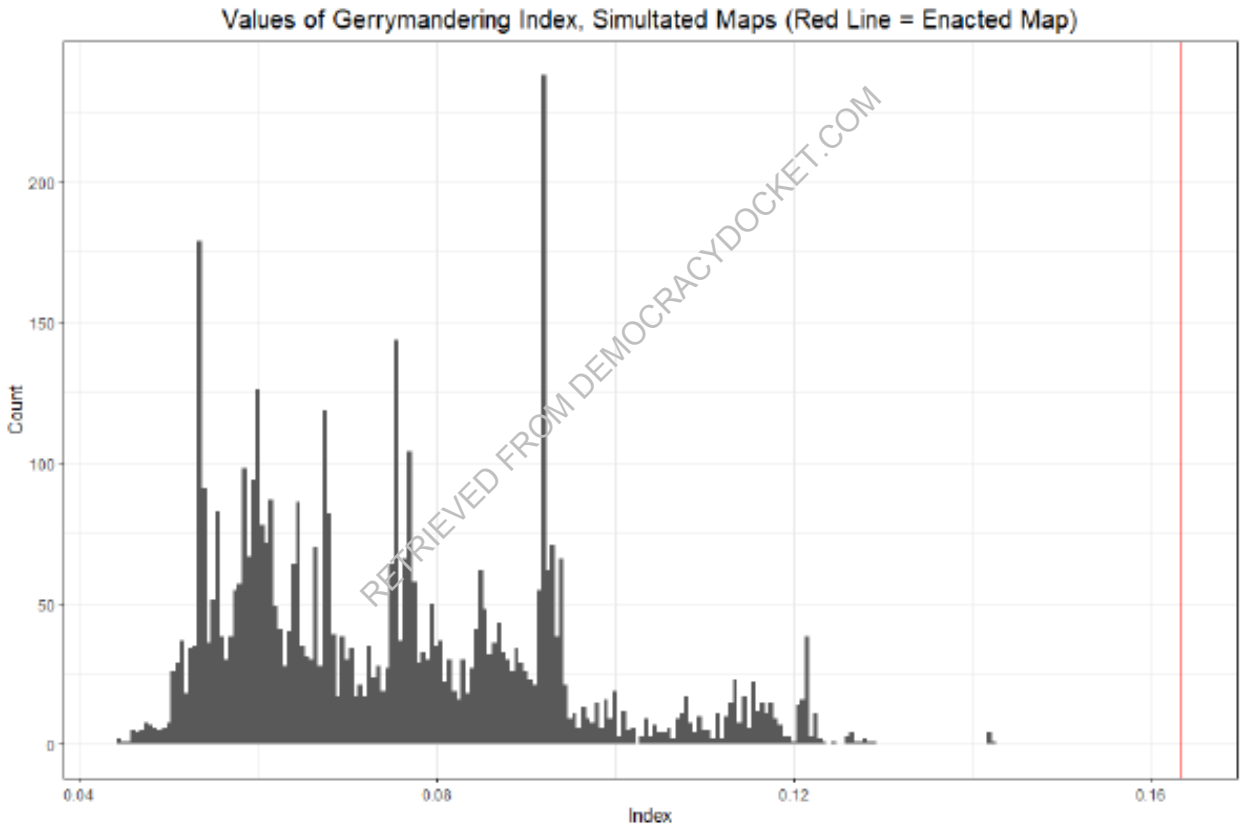
prior single-party-supported maps that have been struck down by courts across the country. *Householder*, 373 F. Supp. 3d at 1093–96; *Common Cause*, 318 F. Supp. 3d at 861–64; *Whitford*, 218 F. Supp. 3d at 887–90; *League of Women Voters*, 178 A.3d at 817; *Detzner*, 172 So. 3d at 390–93.

120. Finally, Governor Kathy Hochul expressly promised to "use [her] influence to help Democrats expand the House majority through the redistricting process," thus helping the Democratic Party "regain its position that it once had when [she] was growing up." Glueck & Ferré-Sadurní, *supra*. This promise shows clear partisanship in the process of adopting the 2022 congressional map.

b. The 2022 Congressional Map Has An Extreme, Starkly Partisan Effect

121. The 2022 congressional map has an extreme partisan effect, that the Legislature plainly intended, highlighted most clearly by the simulations in Mr. Trende's expert report. As part of his analysis of the 2022 congressional map, Mr. Trende analyzed 5,000 neutral, computer-generated maps, and then 10,000 maps more, employing methodology grounded in the academic literature and commonly used by courts, including recently by state courts in Ohio and Maryland. *See, e.g.*, *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, ___ N.E.3d ___, 2022 WL 110261, at *23 (Ohio Jan. 12, 2022); *Szeliga, et al. v. Lamone, et al.*, Nos. C-02-CV-21-001816, C-02-CV-21-001773 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022) (copy available at NYSCEF No.240). Specifically, using the simulated

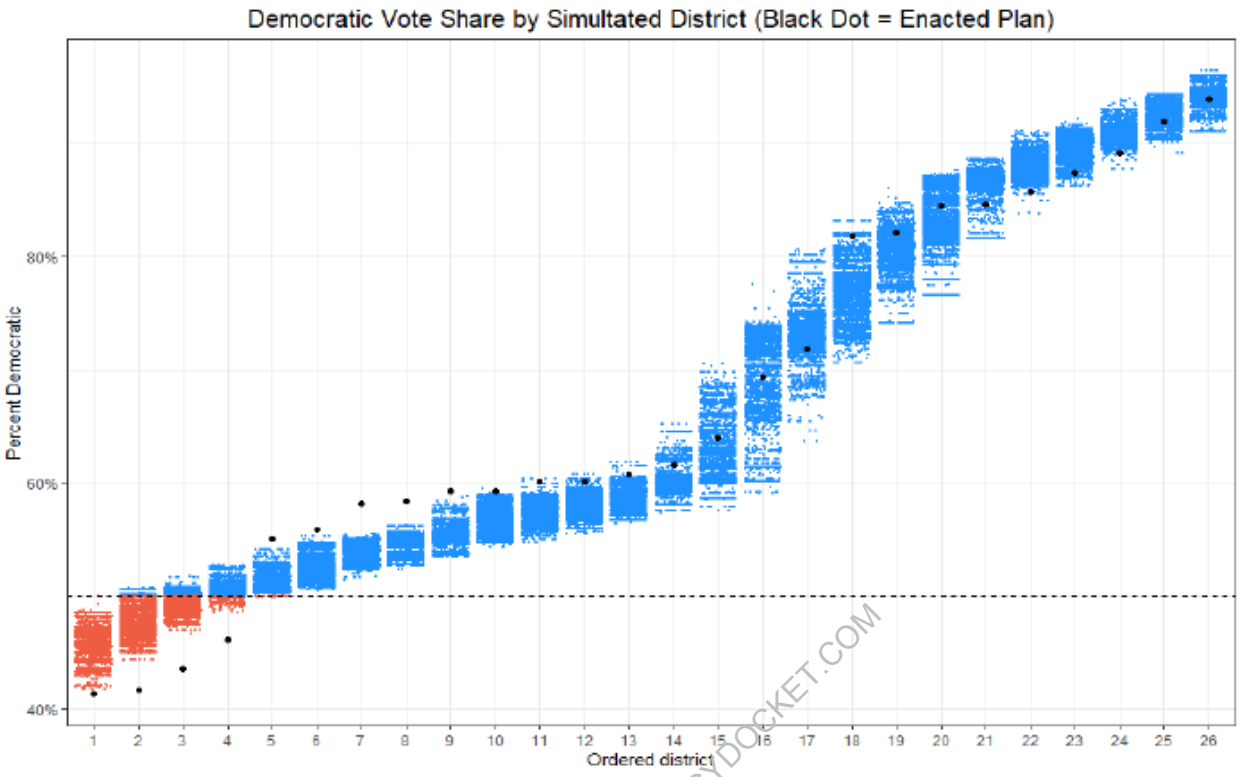
maps, Mr. Trende calculated a "gerrymandering index," which is a reliable and accepted metric to measure partisanship showing how much of an outlier the 2022 congressional map is in terms of its partisanship. Trende.Rep.12–13. The simulated maps had, on average, an index of around 7.5%, while the congressional map had an index of 17%—almost six standard deviations from the mean. *Id.* at 14 (graph reproduced below).



122. Mr. Trende concluded from the index data that "it is implausible, if not impossible" that the 2022 congressional map "was drawn without a heavy reliance upon political data and was likely drawn to favor or disfavor a political party." *Id.*

Put another way, the 2022 congressional map was more biased in favor of New York Democrats than all of the 5,000 apolitical maps. *Id*.

123. Mr. Trende also generated a dotplot model to compare the 2022 congressional map's partisan effects with the 5,000 simulated maps, which model is pictured below. *Id.* at 19–23. The dotplot lists all 26 congressional districts in individual columns along the x-axis, and then scores each district in each map in terms of "percent Democratic" along the y-axis. *See id.* As the dotplot shows, the columns are arranged according to the percent composition of Democratic/Republican the districts are: column 1 is the most Republican district in the State in a given map, while the column 26 is the most Democratic/least Republican district in the State in the given map. *See id.* The red and blue bands in each dotplot column represent the percent-Democratic scores of each district from the 5,000 simulated maps, while the black dot in each dotplot column represent the percent-Democratic score of the districts in the 2022 congressional map. *See id.* So, for example, the most Republic district in the 2022 congressional map (column 1, the leftmost column) is *more* Republican than all of the most Republican district in the 5,000 simulated maps, since the black dot fall below the band. *See id.*



124. This dotplot starkly reveals the "DNA of a gerrymander" in the redistricting map. Trende.Rep.23. That is, it reveals how the Legislature here "pack[ed] supermajorities of [disfavored] voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail," while also "crack[ing] the rest across many more districts, spreading them so thin that their candidates will not be able to win." *Rucho*, 139 S. Ct. at 2513–14 (Kagan, J., dissenting). Specifically, if the map drawers of the 2022 congressional map did *not* draw the map to have a pro-Democratic partisan effect, then one would expect the black dots in each column in the dotplot to fall within the *middle* of each red/blue band. This would mean that the most Republican district in the 2022 congressional map would have had about the same number of Republicans as the most-Republican

district in the average generated map within the set of 5,000 generated maps (leftmost column); the second-most Republican district in the 2022 congressional map would have had about the same number of Republicans as the second-most-Republican district in the average generated map within the set of 5,000 generated maps (second leftmost column); and so on, up to and including the maps' most Democratic district (rightmost column). If, however, the map drawers *gerrymandered* the map, the dotplot would show how they "packed" Republicans "into a relatively few districts" and then "cracked" the remaining Republicans "across many more districts." *Id.* The dotplot would reflect the "packing" by showing the black dots in the leftmost columns falling below the vast majority of each red/blue band—meaning that the most Republican districts in the 2022 congressional map were far *more* Republican ("packed" with Republicans) than all or almost all of the most-republican districts in each of the 5,000 generated maps. The dotplot would reflect the "cracking" by showing the black dots in *many* other leftward columns as above the vast majority of each red/blue band—meaning that many other more-Republican districts in the 2022 congressional map have more *Democrats* in them (Republicans "cracked" across these many other districts).

125. Mr. Trende's dotplot shows the "DNA of a gerrymander" that is the 2022 congressional map, as it reveals that the legislative Democrats engaged in clear "packing" and "cracking" of Republicans. Trende.Rep.23. The four leftmost

columns, representing the four most Republican districts in the map, have a black dot falling clear below each red/blue band. Trende.Rep.23. This means that legislative Democrats "packed" Republicans in these four districts "in numbers far greater than needed for their preferred [Republican] candidates to prevail." *Rucho*, 139 S. Ct. at 2513–14 (Kagan, J., dissenting). Then, the next 10 or so columns, representing the next 10 or so most-Republican districts in the State, each have black dots above all or almost all of the red/blue bands. Trende.Rep.23. This means that legislative Democrats "cracked" Republicans across these many districts by adding large numbers of Democrats to them, meaning that the Republicans were "spread[ ] . . . so thin that their [Republican] candidates will not be able to win." *Rucho*, 139 S. Ct. at 2513–14 (Kagan, J., dissenting).

126. The Supreme Court heard testimony from all the expert witnesses and concluded that Mr. Trende's analysis was the best methodology, in part based upon the "quality and credibility of the expert testimony." Decision And Order 12. This Court gives "great deference" to a trial court's "credibility determinations," and Respondents give no reason whatsoever for this Court to "reject the court's credibility determinations here," *People v. Travis*, 156 A.D.3d 1399, 1400 (4th Dep't 2017), further underscoring the unlikelihood that Respondents will prevail on appeal. *See also Matter of Jamal V.*, 159 A.D.2d 507, 508 (2d Dep't 1990) (where a "case was tried before a court without a jury . . . the greatest respect must be

accorded the determination of the hearing court in assessing the credibility of witnesses and resolving disputed questions of fact"); *People v. Lee*, 96 N.Y.2d 157, 162 (2001) ("As a general rule, the admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court.").

127. Respondents have no serious response for Mr. Trende's devastating conclusions, which is why they take a spaghetti-against-the-wall approach.

128. As the Supreme Court correctly explained, Respondents' own experts all either confirmed or failed to rebut Mr. Trende's core thesis that the 2022 congressional map packs republicans into four congressional districts, to give Democrats a stronger chance to win New York's competitive districts, thereby effectively turning what is currently a what is currently a 19-8 Democrat–Republican congressional delegation under a neutral, federal-court drawn map, into a 22-4 Democrat advantage, in a typical (non-wave) election year.

129. Beginning with Dr. Barber and Dr. Tapp, the testimony of Respondents' experts did not even address legislative Democrats' attempts to pack Republicans into four districts in order to dilute their voting power in other, previously competitive districts. Dr. Tapp explicitly admitted this point, stating that he "did not address" this core "thesis" of Petitioners and thus "did not refuse that thesis." Trial Tr. Day 3 at 139–40.

130. Dr. Barber and Dr. Tapp remarkably concluded that the 2022 congressional map favored Republicans simply because it effectively guaranteed Republican's four seats, due to legislative Democrats' packing of Republicans, ***without even considering the map's impact on the other, previously competitive districts***. *Compare* NYSCEF No.86 at 11–14, 17 (Dr. Barber), *and* NYSCEF No.73 at 4–5, 9–11 (Dt. Tapp), *with* NYSCEF No.103 at 7–14 (Mr. Trende rebuttal). This is because Dr. Barber's and Dr. Tapp's "methodology" for categorizing a district as Republican or Democrat was simply whether the average Democratic performance of that district in certain statewide races was greater than 50%. NYSCEF No.103 at 7–8. Thus, these experts determined that a district where Democrats get 50.01% of the statewide average was a "Democratic District," while one where the average is 49.99% Democratic in statewide races was a "Republican District"—with no further recognition of the complexity of competitive districts. *Id.*; *see* Trial Tr. Day 2 at 112–13 (testimony of Dr. Barber at trial, admitting that he does not "really believe that a seat that is at the 50.1 percent mark is just as likely to elect a Democrat as a seat that is at that 70 percent mark"). That is a nonsensical "methodology" that contradicts even basic principles of election analysis, which explains why no political analyst or court has used this approach before, and why Respondent's own expert Dr. Katz testified at trial that it was "not correct." Trial Tr. Day 3 at 191.

131. Dr. Ansolabehere, for his part, applied the same frankly silly "methodology" as Dr. Barber and Dr. Tapp to conclude that the packing of Republicans into four districts somehow created a pro-Republican map, NYSCEF No.92 at 9, while ultimately admitting on cross-examination that the map makes many previously Republican-leaning districts more Democratic, *see* Trial Tr. Day 2 at 196–99 (Mar. 15, 2022), Attached as Exhibit I.

132. Respondents now claim that Mr. Trende's analysis is too "new" and unproven to support a claim of gerrymandering, but that desperate argument fails. Leg. Resp. MOL 23. The methodology Mr. Trende used to analyze New York's 2022 congressional map is fully grounded in the academic literature and routinely used by courts analyzing gerrymandering challenges, including in this very redistricting cycle. *Supra* ¶ 49–51, 112; *League of Women Voters of Ohio*, 2022 WL 110261, at *23; *Szeliga*, *supra* (copy found at NYSCEF No.240).

133. Respondents contend that Mr. Trende's use of 5,000 and then 10,000 more simulations was insufficient to measure against the enacted congressional map, Leg. Resp. MOL 23–24, but that is not a serious assertion.

134. There is no doubt that Mr. Trende's 5,000 and then 10,000-map ensemble here was more than sufficient to allow for reliable conclusions regarding whether the congressional map is a partisan gerrymander. For example, in *Rucho*, 139 S. Ct. 2484, Justice Kagan approved of the use of only "1,000 maps," *id.* at 2518

(Kagan, J., dissenting), and "3,000 randomly generated maps" to support a conclusion that an enacted map "reflects too much" partisanship, *id.* at 2521, which is obviously far less than Mr. Trende's robust ensemble. Other Courts have relied upon similar analyses with 5,000 maps, *see, e.g.*, *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, ___N.E.3d___, 2022 WL 110261, at *23 (Ohio Jan. 12, 2022), and Dr. Imai—the pioneer of this method of analysis—uses 5,000 maps as well, Reply Of Sean P. Trende ("Trende.Reply") at 24, NYSCEF No.103, Exhibit D. And Dr. Barber "came up with the same results" as Mr. Trende's report while using *50,000 maps*, with the 2022 congressional map scoring far and away the "worst," Decision And Order 12, which powerfully shows that Mr. Trende's own 10,000 ensemble used in this case allowed for reliable and valid conclusions.

135. Notably, Respondents have waived any argument that any of the 5,000 and then 10,000 maps in Mr. Trende's congressional ensemble were "redundan[t], ***as they only properly developed and preserved such an argument for the state Senate map, which is not at issue in this appeal***. NYSCEF No.153 at 14 & n.3; Trial Tr. Day 3 at 32, 70 (Mar. 16, 2022), Attached as Exhibit I.

136. Respondents attempt to compare negatively Mr. Trende's methodology here with the expert report he submitted to a Maryland circuit court in *Szeliga*, where that court struck down Maryland's 2021 Congressional Plan as an unconstitutional partisan gerrymander, is waived and meritless. Leg. Resp. MOL 23–24. The

Maryland Court "gave great weight to the testimony and evidence presented by and discussed by Sean Trende," noting that his work "was an example of a deliberate, multifaceted, and reliable presentation" to the Court. *Szeliga*, slip op. at 83–84. Respondents had full opportunity to cross-examine Mr. Trende on his approach in Maryland in this case, *see generally* Maryland Trende Report at 62 (showing that Mr. Trende submitted his Maryland expert report on February 28, 2022, prior to the trial below), but they asked him no questions about this issue during their lengthy cross-examination, Trial Tr. Day 1 at 51–160 (Mar. 14, 2022), Attached as Exhibit I, and only raised this complaint for the first time in closing arguments. Had they asked Mr. Trende these questions, his response would have been devastating to Respondents' untimely speculations on this point. Mr. Trende's decision to generate 750,000 maps for his analysis in *Szeliga*, Leg. Resp. MOL 23–24, was due entirely to unique constraints of Maryland's geography and the Maryland General Assembly's enactment of plans with two districts with a Black Voting Age Population (BVAP) well in excess of 50%. Report of Sean P. Trende ("Maryland Trende Report"), Appx. I at 4, *Szeliga v. Lamone*, Case No. C-02-CV-21-001816 (Md. Cir. Ct. Anna Arundel Cnty.), Attached as Exhibit H. Because of these unique-to-Maryland constraints, a generation of 5,000 maps alone would produce only 600 valid maps to use as comparators in Maryland. *See* Maryland Trende Report ¶¶ 86–87 & App. I at 4. Critically and entirely refuting Respondents' arguments here, when

Mr. Trende ran an additional analysis in Maryland related to minority-majority districts that "froze" the Maryland majority-minority districts—thereby eliminating the 600/5,000 problem discussed immediately above—he used 5,000 total simulations, Maryland Trende Report, Appx. I at 4. When Mr. Trende used this "freeze" methodology in the present case for New York's majority-minority districts, he ran 10,000 simulations. Trende.Reply at 14.

137. Respondents contend that they are likely to prevail on appeal because Mr. Trende's simulations "did not adequately account for some of New York's constitutionally mandated redistricting criteria," such as the avoidance of city and town splits and of minority-vote dilution Leg. Resp. MOL 25.[30] Mr. Trende's reply report devastates this argument. In that reply report, Mr. Trende controlled for both of these additional criteria, and *found the same results as his original expert report, including his dotplot results*. NYSCEF No.103 at 14–20.

138. And Respondents' further criticism that Mr. Trende's simulations did not control for communities of interest in his simulations likewise fails. Mr. Trende cannot build that amorphous consideration into his ensemble because of the contested nature of the communities-of-interests considerations, as even Dr. Tapp

[30] As noted above, Mr. Trende's simulations did control for New York's compactness requirement, using the same compactness calibration as Dr. Tapp, as Dr. Tapp himself admitted at trial in response to the Supreme Court's questioning.

conceded. *See* Leg. Resp. MOL 27. That is also why Mr. Trende did not control for communities-of-interest considerations in his Maryland simulations in *Szeliga*. *Szeliga*, slip op. at 66. Importantly, when Mr. Trende did control for *objective* factors related to communities of interests that are controllable in a simulation analysis—municipal splits—and then ran 10,000 simulations, he obtained the exact same gerrymandering results. *See* Trende.Reply at 21. Respondents offer absolutely nothing to suggest that if Mr. Trende had somehow controlled for communities of interest in the same way, the fundamental conclusions of the gerrymandering index and dotplot analysis would have been different.

139. Finally, Respondents contend that Mr. Trende's analysis is not to be trusted because "the[ ] simulated maps are not in the record," and their absence requires the Courts of this State to ignore Mr. Trende's data analysis and defer to the Legislature's "very wide discretion" in redistricting. Leg. Resp. MOL 29–31. This argument is frivolous. Respondents' own expert, Dr. Barber, generated *50,000 maps* using the same parameters as Mr. Trende successfully replicated Mr. Trende's own results, NYSCEF No.86 at 7–11; Decision And Order at 12, demonstrating the soundness of Mr. Trende's methodology. In any event, Respondents could have sought from the Supreme Court leave to take expert discovery of Mr. Trende, and Petitioners would have been glad to turn those maps over to Respondents. Respondents did not take this sensible approach, however, because they knew that

Mr. Trende's maps were valid given Dr. Barber's own 50,000 map replication analysis.[31] This explains why Respondents waited to launch this objection until after evidence closed, feigning concern about this nonissue.

c. Multiple Individual Lines In Both Maps Subordinate Traditional Redistricting Principles For No Reason Other Than Partisanship

140. Multiple specific lines in the 2022 congressional and state Senate maps subordinate traditional redistricting principles for no honest reason other than to gain a partisan advantage for Democrats. The Legislature concocted numerous individual congressional districts with boundaries with no honest explanation except for impermissible partisan and incumbent-favoring gerrymandering. *See* Trende.Rep.12–14; LaVigna.Rep. at 2–3. The new map packed Republicans into four districts and reconfigured what were previously the most competitive districts to favor Democratic candidates, as noted immediately above. Trende.Rep.11–12; LaVigna.Rep. at 3–7. Indeed, the Legislature's congressional gerrymander was so effective and so biased in favor of Democrats, that the new map is more favorable to Democrats than any of the 5,000 computer simulated maps (and then 10,000

[31] This is also why Respondents could only point to a comically small collection of Mr. Trende's ensemble maps, handpicked by Dr. Imai as supposedly unrealistic, as supposed "evidence" of the entire 10,000-map ensemble's invalidity. Leg. Resp. MOL 26.

additional simulated maps) designed specifically to follow New York's redistricting requirements without aiming to increase partisan advantage. Trende.Rep.12–14.

141. In Long Island, the Legislature reshaped CDs 1 and 2, exchanging Republican voters for Democratic voters. LaVigna.Rep.3–4. The Legislature placed heavily Republican areas into new Congressional District 2 and shifted solidly Democratic communities into Congressional District 1. *Id.* The Legislature effectively flipped CD1—which consistently elected Republicans and has a Republican incumbent, Representative Lee Zeldin—by packing Republicans into CD2. *See* Rebuttal Report of Claude A. LaVigna ("LaVigna.Rebuttal.Rep.") at 4–5, NYSCEF No.104, Attached as Exhibit E.

142. To create the new CDs 8, 9, 10, and 11, the Legislature radically splintered established communities of interest in Brooklyn for the purpose of creating a partisan advantage and unseating the Republican incumbent in CD11, Representative Nicole Malliotakis. LaVigna.Rebuttal.Rep.6–7. The new map broke apart closely knit, concentrated Orthodox Jewish and Russian communities with strong social and cultural ties, resulting in conservative Republican-leaning voters spread or "cracked" across multiple districts. *Id.* at 8–9. This gerrymander splintered communities of interest—in CD10, the Legislature divided an established Asian community by moving half of it into Congressional District 11. *Id.* at 9. Formerly covering Staten Island and adjacent southern portions of Brooklyn, the

new CD11 delved deep into the heavily liberal areas of Brooklyn—changing the district's political composition and giving Democrats a vastly better chance of flipping the seat—for partisan advantage. *Id.* at 6–9.

143. The gerrymander of CD16 removes Republican voters from the center CD18 and places them into a strong Democratic district, "improving" CD18 into a more safely Democratic district without at all risking the Democratic Party's interests in Congressional District 16. LaVigna.Rep.5. In the new map, the towns of Putnam Valley, Carmel, Yorktown, and Somers—strongly Republican areas—are awkwardly connected to highly populated Democratic communities, neutralizing Republican votes. LaVigna.Rebuttal.Rep.9–10. By drawing these odd lines, the legislative Democrats not only improved their party's chances in CD18, but also protected incumbent Democratic Congressman Sean Maloney, the newly elected chair of the Democratic Congressional Campaign Committee. *Id.*

144. The Legislature's "packing" of Republicans into CDs 21, 23, and 24 enabled Democrats to gain a partisan advantage in CD22. LaVigna.Rep.6–7; LaVigna.Rebuttal.Rep.12–14. The Legislature gerrymandered CD21 by combining Republican communities with strong Democratic cities and towns. LaVigna.Rebuttal.Rep.12. By packing additional Republican voters into this single district, the Legislature eliminated their ability to make surrounding districts more competitive for Democratic candidates. *Id.* at 12–13. The Legislature similarly

gerrymandered CD23 by "packing" as many Republican votes into this district as it could, again for partisan gain. *Id.* The old District had included some heavily Democratic areas in Tompkins County, but the Legislature extracted those areas, as noted above, placing them in CD22 to flip that district. *Id.* As a result, CD23 became less competitive. *Id.* at 12–13 The Legislature also packed CD24. *Id.* Formerly compact, the revised District now spanned four media markets, connecting numerous areas located across more than 250 miles with little or nothing in common. *Id.* As a result, the Legislature transformed CD24 from an extremely competitive Democratic district into a very strong Republican district, designed to protect the surrounding districts from any serious Republican challenge. *Id.* at 13. In CD22, the Legislature replaced Republican areas with Tompkins County, including the city of Ithaca, flipping the District from a competitive Republican district to a strong Democratic one. *Id.* at 12–13. As a result, District 22 underwent a massive political swing, changing from a highly competitive Republican district to a strong Democratic district. *Id.*

145. These Democrat-protecting districts all reflect exactly what Mr. Trende's dotplot data showed—the Democrats crafted a map that drew Republican voters into four overwhelmingly Republican districts (more Republican than in any of Mr. Trende's 5,000 simulations), while removing competitiveness from the next nine or so most Republican districts by dispersing Republican voters among them.

Trende.Rep.14–15. By turning what likely should have been competitive, open districts where both parties could make inroads with voters into safely Democratic districts with no real risk to Democratic incumbents and candidates, the Democrats in legislative leadership were able to gerrymander an overwhelmingly Democratic congressional delegation.

146. In response to all of these obvious examples of Democratic gerrymandering found in the 2022 congressional map, Respondents could only muster the Affirmation of Dr. Stephen Ansolabehere. NYSCEF No.92. But Dr. Ansolabehere acknowledged on cross-examination that the 2022 congressional map made *multiple* districts that are currently represented by Republicans much more pro-Democratic than they were before. *See* Trial Tr. Day 2 at 196–99 (Mar. 15, 2022), Attached as Exhibit I. So even Dr. Ansolabehere's analysis acknowledged the obvious—Democrats packed and cracked their way to a safe 22-4 Democratic advantage in New York's congressional delegation.

3. The Supreme Court Properly Granted The Appropriate Remedy By Ordering The Adoption Of Remedial Maps Before The Next Election And, In Fact, Granted Petitioners Lesser Relief Than They Are Legally Entitled To

147. The Supreme Court properly invalidated the 2022 maps immediately, before the 2022 elections, consistent with the Constitution's plain language and Petitioners' rights. The New York Constitution contemplates that successful challengers under the 2014 Anti-Gerrymandering Amendments will receive relief in

the first election cycle under the new map. The Constitution authorizes judicial review of the newly adopted redistricting, requiring that if a court finds the maps "violate the provisions of" Article III, Sections 4 and 5, the court must "invalid[ate]" those maps "in whole or in part." N.Y. Const. art. III, § 5 (emphasis added); *see Goldstein v. Rockefeller*, 257 N.Y.S.2d 994, 1004 (Sup. Ct. Monroe Cnty. 1965); *Landes v. Town of N. Hempstead*, 20 N.Y.2d 417, 421 (1967). Article III, Section 5 imposes on the court a strict, 60-day deadline (ending April 4, 2022, in this case) to "render its decision" whether New York's congressional and state Senate maps are unconstitutional—months before any election is scheduled—thereby envisioning immediate judicial consideration and subsequent effect of the Court's ruling, should it "invalid[ate]" any maps. N.Y. Const. art. III, § 5. It would make very little sense for the Constitution to mandate such expedited proceedings if any remedy were not meant to take effect immediately before the impending election season, including in a case like this one, where the challengers filed their Petition on the very day that the Governor signed the maps into law. NYSCEF No.1.

148. Moreover, there is no risk to New York's election processes from the Supreme Court's decision to invalidate the maps immediately, before the 2022 elections. The evidence below established that there is ample time for drawing and adopting new maps, to be implemented well in advance of election day and absentee balloting. While the Supreme Court suggested that drawing and implementing

remedial maps as necessary could take at least "a few weeks or even a couple of months," NYSCEF No.231 at 70:6–12, even assuming, *arguendo*, that that timeline is correct, that would still provide ample time to push the primary elections back from June 28, 2022 to August, and hold general elections on November 8, 2022, as prescribed by federal law, *see* 2 U.S.C. § 7, including accommodating the 45-day federal-law requirement under the Uniform and Overseas Citizens Absentee Voting Act, as amended by the Military and Overseas Voter Empowerment Act, 52 U.S.C. § 20302(a)(8)(A). Moving back the primary election to August would permit candidates ample time to obtain signatures on designating petitions, *see* N.Y. Election Law §§ 6-134(4), 6-158(1), and the Board of Elections a full week to authorize primary petitions, *see* N.Y. Election Law § 6-120(3), and sufficient time to certify the primary ballot, *see* N.Y. Election Law § 4-110, all while complying with the federal requirements noted above, 52 U.S.C. § 20302(a)(8)(A). Indeed, such adjustments would fall well within the State's capabilities and Respondent Senate Majority Leader Stewart-Cousins' boast that "[the Legislature] can be nimble should [it] have to be" on election deadlines. *State Senate Districts Will Also Face Legal Challenge in New York*, Spectrum News 1 (Feb.2, 2022).[32] And this extension

[32] Available at: https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2022/02/09/state-senate-districts-will-also-face-legal-challenge-in-new-york.

of these primary deadlines would in no way implicate the general-election deadlines, which do not begin until September. N.Y. Election Law §§ 4-112, 4-114, 10-108, 11-204. Moreover, an August primary would not only allow for full consideration of the merits of this case but would also be consistent with the approach taken by fourteen other states that have scheduled primary elections in August 2022, fully consistent with federal law, *see* Fed. Voting Assistance Program, Primary Elections By State and Territory (2022).[33]

149. Moving statutory election deadlines is consistent with the approach taken by state courts across the nation in just this election cycle during various redistricting challenges.

150. For example, in Maryland, the Court of Appeals very recently moved primary election deadlines from June 28, 2022, to July 19, 2022, to determine the constitutionality of a legislative redistricting plan that is subject to a partisan gerrymandering challenge. *See* Order, *In re 2022 Legislative Districting of the State of Maryland*, No. COA-MISC-0025-2021 (Md. Mar. 15, 2022).[34]

151. In Pennsylvania, courts temporarily suspended election calendar dates pending those courts' review of challenges to reapportionment plans by

[33] Available at: https://www.fvap.gov/guide/appendix/state-elections

[34] Available at: https://mdcourts.gov/sites/default/files/import/coappeals/highlightedcases/2022districting/20220315orderelectiondates.pdf.

Pennsylvania's Legislative Reapportionment Commission. *See* Order, *Benninghoff v. 2021 Legislative Reapportionment Comm'n*, Nos. 4 WM 2022, 11 MM 2022, 14 MM 2022, 16 MM 2022, 17 MM 2022, 18 MM 2022, 7 WM 2022, 11 WM 2022, 12 WM 2022 (Pa. Mar. 16, 2022)[35] ; Order, *In re: Petitions for Review Challenging the Final 2021 Legislative Reapportionment Plan, Judicial Administration*, Dkt. No. 569 (Pa. Feb. 23, 2022)[36] ; Order, *Carter v. Chapman*, No. 7 MM 2022 (Pa. Feb. 23, 2022)[37] ; Order, *Carter v. Chapman*, No. 7 MM 2022 (Pa. Feb. 9, 2022).[38]

152. And in North Carolina, the State Supreme Court delayed primary elections for over two months to permit sufficient consideration of pending redistricting challenges. *Harper v. Hall*, 865 S.E.2d 301, 302 (N.C. 2021).

153. Moreover, as just a small sample of the 2012 redistricting cycle, state courts similarly moved election deadlines during their consideration of redistricting

[35] Available at https://www.pacourts.us/assets/opinions/Supreme/out/18mm2022pco%20-%20105081192165697317.pdf#search=%222021%20Legislative%20Reapportionment%20Commission%22.

[36] Available at https://www.pacourts.us/assets/opinions/Supreme/out/amended%20order%20entered%20-%20105056320163589068.pdf#search=%22Petitions%20for%20Review%20Challenging%20the%20Final%202021%20Legislative%20Reapportionment%20Plan%22.

[37] Available at https://www.pacourts.us/assets/opinions/Supreme/out/7%20mm%202022%20-%20order%20adopting%202022%20congressional_plan.pdf#search=%22carter%20v.%20chapman%22.

[38] Available at https://www.pacourts.us/assets/opinions/Supreme/out/7mm2022pco%20-%202-9-2022.pdf#search=%227%20mm%202022%22.

challenges. In Kentucky, a court enjoined various filing deadlines during its consideration of a challenge to the state's post-2010 decennial census maps. *See Legislative Research Comm'n v. Fischer*, No. 2012-SC-000091 (Ky. Apr. 26, 2012). And in Pennsylvania, the Pennsylvania Supreme Court "adjust[ed] the primary election schedule" during the trial court's hearing of "objections to nominating petitions" as part of consolidated challenges to the post-2010 decennial census redistricting. *Holt v. 2011 Legislative Reapportionment Comm'n*, No. 7 MM 2012 (Pa. Feb. 3, 2012), at 14 n.10.1.

154. Contrary to Respondents' arguments, Leg. Resp. MOL 44–47; Exec. Resp. Aff. ¶ 60, granting Petitioners' requested relief would not run afoul of *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), or its progeny. Under *Purcell*, "a State on its own" may modify "its election laws close to a State's elections," *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring), which plainly includes state courts moving those deadlines, as in the examples described below. Only "lower federal courts" are prohibited from "alter[ing] . . . [State] election rules on the eve of an election," to avoid voter confusion, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). Any action by this Court to supervise and administer redistricting because of Petitioners' challenge is "precisely the sort of state judicial supervision of redistricting [the U.S. Supreme Court] ha[s] encouraged." *Growe v. Emison*, 507 U.S. 25, 34 (1993). This

observation is supported by the U.S. Supreme Court's recent and different treatment of appeals from state-court judgments versus federal-court judgments. *See, e.g.*, *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1 (2020); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020). And given that Petitioners seek only to delay certain election deadlines with ample time for the State to advise voters while this Court considers the Petition, such changes do not "require complex or disruptive implementation," so the State can "easily" make these changes "without undue collateral effects." *Merrill*, 142 S. Ct. at 881 n.1 (Kavanaugh, J., concurring).

155. Respondents also erroneously contend that the Supreme Court was wrong to invalidate the 2022 maps immediately because although the 2014 Anti-Gerrymandering Amendments "required the trial court to issue its decision within 60 days of the lawsuit's commencement," those amendments did "not require replacement maps to become effective at any particular time," and the Court should have "approved the [2022 maps] for th[e upcoming] elections, notwithstanding the unconstitutionality." Leg. Resp. MOL 48–49 (citing *Wells v. Rockefeller*, 394 U.S. 542, 547 (1969)). Respondents' reliance on *Wells* ignores the subsequent 2014 Anti-Gerrymandering Amendments and their imposition of specific decisional deadlines, which deadlines are *constitutionally* mandated. And, given that this Court can expeditiously consider this appeal, already setting a briefing schedule that will complete by April 18, 2022, App. Div. Dkt. 13 at 1, the weighty constitutional issues

Petitioners have raised can be fully considered well in advance of any election day, avoiding any "chaos and confusion" as a result, Leg. Resp. MOL 50.

B. Respondents Will Suffer No Harm From Denial Or Vacatur Of A Stay, While A Stay Will Cause Irreparable Harm To Petitioners By Depriving Them Of Their Constitutional Right To A Fairly Drawn, Constitutional Map

156. As Petitioners have explained throughout this case, they "regularly vote for Republican candidates in local, state, and federal elections, and engage in campaign activity for Republicans running for Congress and state legislative office," but Respondents' unconstitutional gerrymandering "dilutes the power of [their] vote[s] based on [their] political beliefs and diminish[es] the effect of [their] political action efforts." *See* NYSCEF Nos. 29, 107–17. These infringements of their right to vote and right to expression in favor of Republican candidates and causes "unquestionably constitutes irreparable injury" to Petitioners. *Times Square Books, Inc. v. City of Rochester*, 223 A.D.2d 270, 278 (4th Dep't 1996) (citation omitted). Petitioners will suffer grave, constitutional harm if unconstitutional maps are kept in place for the 2022 election. ***Indeed, since those maps control only five election cycles, they will have lost 20% of their constitutionally mandated remedy entirely***.

157. Respondents will suffer no irreparable harm if this Court denies their request for stay or vacates any automatic stay arising from the March 31, 2022 Decision And Order, and permits the 2022 elections to proceed under constitutional maps. *See Destiny USA Holdings*, 69 A.D.3d at 223. The process for enacting new

maps can be expedited, such that it would avoid any "drastic changes to the electoral calendar," Exec. Resp. Aff. ¶ 44, and still meet all election-related deadlines. *See supra* ¶¶ 148–49. The Board of Elections and local officials have a noted history of successfully altering election processes at the eleventh hour to accommodate exigent circumstances, performing well under such conditions. NYSCEF No.239 ¶¶ 4–5, 8–14 (Affidavit of Todd D. Valentine). The impact of establishing a later primary date to accommodate this Court's and the Court of Appeals' review would have at most a minimal impact on county elections boards. *Id.*

158. The New York Constitution specifically permits "the supreme court" to review any "redistricting of congressional or state legislative districts" for whether it "violate[s] the provisions of [Article III]," N.Y. Const. art. III, § 5 while prohibiting Respondents from adopting and enacting redistricting legislation and congressional districts that are "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)(5) (emphasis added). Given the clear mandate following the 2014 Anti-Gerrymandering Amendments, Respondents cannot claim any irreparable harm from continuing their unconstitutional actions.

159. The public interest similarly supports denying or vacating any stay and allowing the 2022 elections to be conducted under remedial, constitutional maps starting immediately. *See Destiny USA Holdings*, 69 A.D.3d at 223. Petitioners

have successfully sought to defend the People's constitutional right to a fair map for the next decade of elections, *see* N.Y. Constitution, art. III, § 4(c)(5). Thus, the Court must review "the enormous public interests involved." *Destiny USA Holdings*, 69 A.D.3d at 223 (citation omitted). The public has already determined where its interests lie here, given that the People voted overwhelmingly in favor of the 2014 Anti-Gerrymandering Amendments, revoking the Legislature's authority to engage in bald-faced partisanship in the redistricting process. *2014 N.Y. State Prop. No. 1: An Amendment Revising State's Redistricting Procedure*;[39] N.Y. Const. art. III, §§ 4–5, 5-b. In outlawing the practice of partisan gerrymandering, the People of New York declared it the interest of the public and State to root out and remove partisan intent from the redistricting process. Consistent with that goal, the public interest clearly lies with denying or vacating the stay and ensuring that constitutional remedial maps are in place for the 2022 general elections.

160. Respondents' arguments on harms and public interest simply fail. Leg. Resp. MOL 36–43; Exec. Resp. Aff. ¶¶ 43–58.

161. *First*, Respondents' hyperbolic claim that the failure to stay the Supreme Court's order would throw the 2022 electoral cycle "into chaos" is simply false. Leg. Resp. MOL 37; Resp. Aff. ¶ 43. Respondents reference the supposed

[39] Available at https://www.elections.erie.gov/Files/Election%20Results/2014/11042014/2014-General.pdf.

challenges and burden placed on state and local elections officials to ensure the voting process, from collecting designating-petition signatures to certifying, printing, and mailing ballots, runs smoothly. Leg. Resp. MOL 39–40; Exec. Resp. Aff. ¶¶ 45–53. But, as already explained, the process for creating new maps can be expedited, such that it would avoid any "drastic changes to the electoral calendar," Exec. Resp. Aff. ¶ 44, and still meet all election-related deadlines.[40] Indeed, as the evidence below shows, the Board of Elections and local officials have a noted history of successfully altering election processes on short notice to accommodate exigent circumstances, performing well under such conditions, and the impact of establishing a later primary date to accommodate this Court's and the Court of Appeals' review would have at most a minimal impact on county elections board. NYSCEF No.239 ¶¶ 4–5, 8–14 (Affidavit of Todd D. Valentine).

162. *Second*, Respondents claim that absent a stay, they will lose their right to appellate review and the right to enact legislative-district maps. Leg. Resp.

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[40] Respondents also contend that complying with the Supreme Court's order "will likely conflict with a Federal Court order," that enjoined New York's federal primary to occur on the fourth Tuesday in June to allow mailing of ballots to overseas military personnel. Leg. Resp. MOL 40. Not so. The very "Federal Court order" they claim precludes adjusting the election schedule, Leg. Resp. MOL 40, specifically notes that it should not be interpreted to "preclude[ ] New York from reconciling their differences and selecting [ ] different date[s]" for New York's elections, "so long as the new date fully complies with UOCAVA," *United States v. New York*, No. 1:10-cv-1214, 2012 WL 254263, at *2 (N.D.N.Y. Jan. 27, 2012).

MOL 37–38. These concerns are unwarranted. The Legislature could completely obviate any such concerns itself by adopting replacement maps and implementing legislation that would expressly become void if they prevail in this appeal. Moreover, like the map-drawing process, appellate review here will be expedited, consistent with the Constitution's admonition that "any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings." N.Y. Const. art. III, § 5.

163. *Third*, Respondents continual assertions of the "*Purcell* Principle" as supporting a stay similarly fail, Leg. Resp. MOL 44–47; Exec. Resp. Aff. ¶ 60, for the reason explained above, *see supra* ¶ 154.

164. *Finally*, Respondents argue that statewide voters would suffer irreparable harm from not knowing which candidates are representing them from the change in district lines. While no such harm would arise here, the highest priority should be ensuring that the maps used to conduct elections in New York comply with the Constitution. And while Respondents glibly suggest that voters would suffer harm if the 2022 maps were later found to be valid, Exec. Resp. Aff. ¶ 56; Leg. Resp. MOL 43, Petitioners would suffer irreparable harm if the stay was issued and 2022 maps were later found to be unconstitutional, as the Supreme Court found.

III. Respondents' Reliance On The Statutory 30-Day "Tentative" Order Provision Is Waived, Entirely Meritless, And Irrelevant

165. Respondents contend for the first time in this case that a provision within the very redistricting bills that the Supreme Court found void operates to make that decision merely "tentative" for 30 days. Leg. Resp. MOL 3–4. Respondents cannot rely on the very unconstitutional laws the Supreme Court struck down to circumscribe that Court's authority. Respondents' reliance on this provision is waived, meritless, and legally irrelevant.

166. L.2022, ch.13, § 3(i) provides that "no order of the court invalidating this act or part thereof shall be entered in a manner which will deprive the legislature of an opportunity to discharge its constitutional mandate," and purports to require that "[i]n any proceeding for judicial review of the provisions of this act, the determination of the court shall be embodied in a tentative order which shall become final 30 days after service of copies thereof upon the parties." *See also* L.2022, ch.14, § 2 (same for state Senate and state Assembly maps).

167. As an initial matter, Respondents failed to raise this issue before the Supreme Court, "thereby fail[ing] to give the [lower] court an opportunity to consider the question before the proceeding against him progresses further," and thereafter "rely[ing] upon the [legal] issue as a ground for reversal" on appeal. *People v. Martin*, 50 N.Y.2d 1029, 1031 (1980) (rejecting late-raised constitutional issue). Because that "issue was not preserved for appellate review," it is "precluded" from review by this Court. *People v. Casanova*, 62 A.D. 3d 88, 91 (1st Dep't 2009).

168. Even if Respondents did not waive their new argument, it is irrelevant to this Court's stay decision because the Supreme Court determined that the process used to enact L.2022 as a whole, of which the 30-day provision is only one part, was unconstitutional and, therefore, the statute is void *ab initio*. "The general rule is that a statute or part of a statute found to be unconstitutional is void ab initio." *Town of Islip v. Paliotti*, 196 A.D.2d 648, 649 (2d Dep't 1993). "A successful facial [constitutional] challenge," as occurred here "means that the law is 'invalid in toto—and therefore incapable of any valid application.'" *People v. Stuart*, 100 N.Y.2d 412 (2003) (citations omitted). As a result, the only question for this Court is whether the Supreme Court was right to find L.2022 as a whole unconstitutional, not whether it should have followed the statute's 30-day provision in its remedial order, notwithstanding its finding that the statute is unconstitutional.

169. Respondents' argument is also irrelevant because the Supreme Court's decision is based on its constitutional authority to invalidate unconstitutional redistricting legislation "in whole or in part," subject only to the requirement that the Legislature "have a full and reasonable opportunity to correct the law's legal infirmities." N.Y. Const. art. III, § 5. After finding the Legislature's redistricting maps unconstitutional in their entirety for failing to follow the redistricting process set forth in the Constitution, the Supreme Court adjudged and decreed "that the Legislature shall have until April 11, 2022 to submit bipartisanly supported maps to

this court for review," or, failing that, the Supreme Court would "retain a neutral expert . . . to prepare said maps." Decision And Order at 18. Thus, the Supreme Court has given the Legislature the "full and reasonable opportunity to correct the law's legal infirmities" required by the Constitution. L.2022's 30-day provision, even if not unconstitutional and, therefore, void, does not somehow trump the courts' constitutional authority to remedy *constitutional* violations.

170. Finally, the 30-day provision is also irrelevant because new maps that the Supreme Court adopts after engaging a neutral redistricting expert can simply go into effect on April 30, with still plenty of time for an August primary election date, *see supra* ¶¶ 148–53, which would moot this issue entirely.

Dated: Chicago, Illinois
April 5, 2022

Misha Tseytlin

CERTIFICATE OF CONFORMITY PURSUANT TO N.Y. CPLR § 2309(c)

I, Sean T.H. Dutton, do hereby certify and attest that I am an attorney duly admitted to practice law in the State of Illinois.

I make this certification for purposes of compliance with New York State Civil Practice Law & Rules Section 2309(c) with regard to the foregoing Affirmation of Misha Tseytlin, to be filed in the Appellate Division, Fourth Department, in Rochester, New York.

Said Affirmation, acknowledged and sworn by Mr. Tseytlin, is and appears to be, based upon my review of said document and notarization thereof, in conformity with the laws of the State of Illinois for the making of an affirmation.

Sworn before me
on this 5th day of April, 2022

NOTARY PUBLIC

OFFICIAL SEAL
SHELIA M TURNBOW-WILLIAMS
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 08/03/2025