CUTI HECKER WANG LLP

305 BROADWAY, SUITE 607
NEW YORK, NY 10007

ERIC HECKER
212.620.2602 TEL
212.620.2612. FAX

EHECKER@CHWLLP.COM

April 23, 2022

By Email

John P. Asiello, Clerk of the Court
New York Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: *Harkenrider v. Hochul*, APL-2022-00012

Dear Mr. Asiello:

We represent the Senate Majority Leader, Andrea Stewart-Cousins, in this case. Pursuant to the Court's April 22, 2022 letter, we hereby submit these comments and arguments in connection with our appeal from the Memorandum and Order of the Appellate Division, Fourth Department dated April 21, 2022, 430 CAE 22-00506 (the "Order").

PRELIMINARY STATEMENT

The Appellate Division correctly rejected Petitioners' baseless challenge to the Legislature's authority to enact congressional, Senate, and Assembly redistricting plans. As four justices recognized, neither the language nor the structure of the Constitution compels the conclusion that any time the Independent Redistricting Commission (the "Commission") fails to perform any of its mandatory duties, all three plans must be drawn from scratch by whatever court an opportunistic litigant selects.

The Appellate Division nevertheless held, over a two-justice dissent, that the congressional redistricting plan was drawn with an improper partisan purpose. As we have shown, Petitioners have not met their formidable burden of proving impermissible intent beyond a reasonable doubt. Petitioners put all of their eggs in two unpersuasive baskets – their dubious computer simulations methodology, and the testimony of a second "expert" whose analysis was so obviously wrong that he disappeared from the case. The efforts by the Appellate Division plurality to push the insufficient record over the finish line are not enough. The fact that we come to this Court from a 3-2 decision itself goes a long way toward showing that there is reasonable doubt, and when the entire record is considered, the existence of such doubt becomes undeniable.

STATEMENT OF JURISDICTION

We appeal as of right on two independent bases. First, we appeal as of right pursuant to CPLR § 5601(a) because two justices dissented from the Order on a question of law (*i.e.*, whether the Petitioners have proven beyond a reasonable doubt that the enacted plan violated the Constitution). Second, we appeal as of right pursuant to CPLR § 5601(b)(1) because the Order invalidated a duly enacted statute on the ground that it conflicts with the New York Constitution.

In the alternative, to the extent there is any question about whether we may appeal as of right, the Court should permit this appeal pursuant to CPLR § 5602 because it involves a question of law that concerns an issue of the utmost public importance, namely whether the imminent 2022 congressional election may proceed under the district lines established by the Legislature.

The Order is a final order within the meaning of article VI, § 3(b)(1) of the Constitution because it "disposes of all the issues" in the case. *See* CPLR § 5611. The Order dismissed the Petitioners' claim "that the 2022 congressional and state senate maps were unconstitutionally enacted," Order at 2, and affirmed that portion of the trial court's judgment that invalidated the congressional map as an unconstitutional partisan gerrymander, *see id*. Those were the only claims raised in the Petition, and the Order finally disposed of them.[1]

Assuming *arguendo* that the Order is not final, this Court has jurisdiction to hear an appeal from a non-final order where it "would be unfair to deny the losing party an opportunity for an immediate appeal and a stay pending such appeal to protect him from being irreparably injured by enforcement of an interlocutory judgment which might ultimately be reversed or modified." Karger, Powers of the New York Court of Appeals, § 5:1 (2021). That standard is met here because leaving the Order in place would sow confusion and threaten the orderly administration of the 2022 election. R2315-25 (March 21, 2022 Affidavit of Thomas Connolly, Co-Executive Director for the New York Board of Elections).

---

[1] The Order vacates those portions of the trial court's order that established a special master process. Order at 2 (vacating 13th decretal paragraph of trial court's order). Consistent with article III, § 5 of the Constitution, the Order affords the Legislature an opportunity to correct any infirmities in the congressional plan. Were this Court to find any such infirmities, the Legislature would avail itself of its right to enact remedial legislation. That the Order contemplates such possible future action by the Legislature does not render it non-final. *See Sofair v. State Univ. of New York Upstate Med. Ctr. Coll. of Med.*, 44 N.Y.2d 475, 479 (1978).

ARGUMENT

I. THE COMMISSION'S FAILURE TO ACT DID NOT EXTINGUISH THE LEGISLATURE'S AUTHORITY TO ENACT REDISTRICTING PLANS

The Appellate Division correctly held that the Legislature was authorized to enact reapportionment plans when the Commission unexpectedly failed to present a second set of recommendations. Applying well-established principles of constitutional law, *see, e.g., White v Cuomo*, __ N.Y.3d __, 2022 NY Slip Op 01954, at *4 (Mar. 22, 2022); *Cohen v. Cuomo*, 19 N.Y.3d 196, 201-02 (2012), the panel recognized that: (a) the Constitution is silent regarding who has the authority to act when the Commission fails to perform its mandatory duties; (b) "[n]othing in the Constitution . . . expressly prohibits the Legislature from assuming its historical role of redistricting and reapportionment if the IRC fails to complete its own constitutional duty"[2]; and (c) the Legislature's enactment of L.2021, c. 633, § 1, which provides that it may consider public input to the Commission together with any draft or submitted Commission plans and then enact reapportionment plans with any amendments it deems necessary, is consistent with the Constitution's clear grant of that very same power in the event that the Legislature rejects any second Commission proposal. Order at 4.

---

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

Justice Curran offers an alternative "view" of the constitutional text, but his analysis ignores that the Constitution nowhere even mentions the possibility that the Commission might fail to perform its mandatory duties, let alone what must follow if that happens. At most, Justice Curran identifies ambiguities in overlapping judicial review provisions in sections 4(e) and 5 of the Constitution. His analysis does not establish – at all, let alone beyond a reasonable doubt – that sections 4(e) and 5 compel the conclusion that every time the Commission fails to take any required action, all legislative power is extinguished, and the judiciary must draw all redistricting plans from scratch.

Justice Curran asserts that the plurality's analysis renders the language in section 4(e) mere surplusage, but he is mistaken. Section 4(e) contemplates different judicial remedies for different circumstances, including circumstances that are not covered by section 5, which specifically addresses legal challenges to plans enacted by the Legislature. Depending on what is "required" under section 4(e), a court may order "the adoption of, or changes to, a redistricting plan." Thus, for example, to the extent that the Legislature has failed to enact any redistricting plan at all – which is what happened during the 2012 cycle, shortly before the 2014 amendments were enacted and ratified – a court would be required to adopt a new plan, a scenario that is contemplated in section 4(e), but not section 5. With respect to a plan enacted by the Legislature, however, nothing in the language of sections 4(e) or 5 compels Justice Curran's conclusion that the words "violation of law" under section 4(e) are "a broader concept" than the words "legal infirmities" in section 5, or that section 4(e) was intended to supplant the Legislature's redistricting authority.

Justice Curran contends that the plurality's analysis renders the Commission "a useless formality," but that plainly is not so. Here, the Commission conducted two dozen hearings, collected voluminous public submissions, and submitted initial proposed plans that the Legislature considered and were the subject of extensive discussion in this litigation. To be sure, the Commission did not draw the district lines that ultimately became law. But nothing in the Constitution suggests that it must, or that such an outcome was ever expected. *See Leib v. Walsh*, 45 Misc. 3d 874, 881 (N.Y. Sup. Ct. Albany Cnty. 2014) (holding that "the Commission's plan is little more than a recommendation to the Legislature, which can reject it for unstated reasons and draw its own lines"). That the Legislature ultimately exercised its discretion to enact redistricting legislation, as the Constitution expressly provides that it may do, did not vitiate the procedural changes made by the 2014 amendments.

II. PETITIONERS FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE CONGRESSIONAL PLAN IS AN UNCONSTITUTIONAL PARTISAN GERRYMANDER

At bottom, the plurality appears to have been motivated by the concern that if Petitioners do not prevail in this case, no redistricting plan could ever be successfully challenged because "smoking gun" evidence of impermissible partisan intent supposedly is rare. That concern is misplaced. The cases from other jurisdictions that have relied in part on computer simulations highlight the many other methods that are available to demonstrate impermissible partisanship. In the Ohio case, for example, the plan was egregiously asymmetrical, giving the Republicans far more representation than they would have under a neutral map, as shown through expert statistical analysis using well-established partisan symmetry rubrics. *League of Women Voters of Ohio v. Ohio Redistricting Commission*, __ N.E.3d __, 2022 WL 110261, at *25 (Ohio 2022). In the Maryland case, the primary issue was that the congressional districts at issue were egregiously non-compact, as Mr. Trende himself showed by applying four different compactness measures. *Szeliga v. Lamone*, Nos. C-02-CV-21-001773, -001816, slip op. at 61-62 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022) (R2392-93). And in Pennsylvania, the Court considered computer simulation evidence alongside statistical analysis of partisan bias by a different expert, all of which merely corroborated the court's meticulously detailed "lay examination of the Plan, which reveals tortuously drawn districts" that were severely non-compact and gratuitously and unnecessarily violated other applicable redistricting criteria. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 819 (Pa. 2018).

In this case, in stark contrast, it is undisputed that the plan does not tilt unfairly toward the Democrats and, if anything, has a slight Republican lean[3]; there

[3] The plurality appears to have accepted that the enacted congressional plan "created more republican-leaning districts than the majority of Trende's simulated maps." Order at 7. It nevertheless criticized the Legislature for "boldly asserting" that the statistical evidence in the record confirms that the plan has, if anything, a slight Republican lean, holding that *the mere act of making that observation* somehow "created a further inference" that the Legislature acted with impermissible "partisan purpose." Order at 8. That is striking. Dr. Katz, one of the foremost partisan symmetry experts in the nation, confirmed that the congressional plan has, if anything, a slight Republican lean; Petitioners adduced no contrary evidence; and numerous experts testified that Mr. Trende's own data confirms the plan's slight Republican lean. The fact that the plurality stated expressly that it was inferring impermissible intent in part from the fact that the Legislature correctly observed that the plan has a slight Republican lean shows that the plurality did not afford the Legislature the presumption of good faith that this Court's precedents require. *See White*, 2022 NY Slip Op 01954, at *4 ("[e]very

is no claim that the enacted districts are impermissibly non-compact; and the record contains a wealth of objective evidence showing that there are legitimate reasons justifying the composition of each district.

The problem in this case is not that "smoking gun" evidence is difficult to adduce where there has been wrongdoing. State courts in Ohio, Maryland, and Pennsylvania have readily found such evidence, though only in connection with plans that were very different from this one. The problem is the way *these Petitioners* conceived and tried *this case*. They rested their entire case on their two "experts," neither of whom – independently or collectively – came close to carrying their heavy burden. They relied on Claude Lavigna, a pollster who has never testified as an expert in any case, has never been involved in a redistricting process, and was not even qualified by the trial court below as an expert on the subject of redistricting, who insisted repeatedly that there supposedly is "no coherent explanation" for various districts when that was shown time and again to be false. Mr. Lavigna was so thoroughly neutralized on cross-examination that Petitioners did not even mention him in their summation, the trial court did not rely on him, and the Appellate Division plurality did not mention him either. And Petitioners relied on a simulations neophyte who had never before done anything like this exercise in any case and who admittedly never examined his own ensemble to check for redundancy or to "sanity check" (his words) whether the algorithm he used drew "crazy" simulated districts, which Petitioners did not even bother to put into the record. The issue is not that the law imposes an insurmountable burden. The issue is that Petitioners challenged a demonstrably fair and reasonable redistricting plan, and they did it in a way that was not persuasive.

The plurality attempted to paper over these concerns, drawing the inference that the Legislature acted in bad faith beyond a reasonable doubt based on three things: "the largely one-party process used to enact the 2022 congressional map, a comparison of the 2022 congressional map to the 2012 congressional map, and the expert opinion and supporting analysis of Sean P. Trende." Order at 5. We respectfully submit that the plurality's analysis and conclusion are incorrect, and that the congressional map is not unconstitutional.

With respect to the legislative process, enacting legislation without obtaining votes from the other side of the aisle is not itself evidence of improper intent, especially on this record. When the Commission unexpectedly failed to present a second set of plans in late January, it was barely a month before the petitioning period was to begin, and the Legislature had no new Commission proposals even to assess. As this Court has repeatedly observed, drawing a redistricting plan (let alone three) is an enormously complicated endeavor, and making any changes to

---

intendment is in favor of the validity of statutes" (quoting *People ex rel. Sturgis v. Fallon*, 152 N.Y. 1, 11 (1897)).

one aspect of a plan can have cascading effects across regions. *See, e.g.*, *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79 (1992) (cautioning that courts cannot "ignore the fact that a redistricting plan must form an integrated whole").

The Constitution expressly prescribes the number of votes that are necessary to enact redistricting plans and does not distinguish among legislators based on party affiliation. N.Y. Const., art. III, § 4(b)(1)-(3). More than the required number of Legislators in both houses agreed that under the circumstances, it was appropriate for the Legislature to act decisively based on the voluminous record that the Commission had developed and transmitted. Especially given the serious exigencies, there is nothing suspicious about the legislative process, much less something so nefarious as to support the inference of unconstitutional intent beyond a reasonable doubt. This case is not remotely like the other cases that have struck down redistricting plans based in part on process grounds because, for example, the legislature destroyed material evidence and misled the public through sham hearings. *See, e.g.*, *League of Women Voters of Fl. v. Detzner*, 172 So. 3d 363, 390-93 (Fla. 2015).

The plurality even went so far as to suggest that every time the Legislature enacts a redistricting plan, regardless of the process involved, there must be impermissible partisan intent because of "the tendency of legislatures to engage in political gerrymandering." Order at 8. As the two dissenting justices correctly observed, however, the Legislature is presumed to have acted in good faith, the enacted plan is entitled to a strong presumption of constitutionality, and it cannot be that the mere fact that the Legislature drew the lines comes anywhere close to supporting an inference of impermissible intent beyond a reasonable doubt.

Nor can anything relevant be gleaned by comparing the ten-year-old, badly malapportioned 2012 congressional plan with the 2022 congressional plan. The reason why the Constitution requires decennial redistricting is that things change during the course of a decade. Even though there currently are eight Republican incumbents in New York's congressional delegation, it is undisputed that the outgoing 2012 plan currently has, based on 2020 Census data, 23 Democratic-leaning districts out of 27. R1037. Any characterization of the 2012 plan as a 19-8 plan is therefore at best misleading. Moreover, it is undisputed that one Republican seat under the 2012 plan, former District 22, had to be eliminated altogether due to substantial population shifts and New York's loss of a district. An apples-to-apples comparison shows that the plan went from 23-4 to 22-4. To the extent that specific districts became more or less Democratic-leaning, the record contains copious unrebutted evidence providing explanations for the changes to each district. R1119-46 ¶¶ 275-507. The plurality's false comparison ignores these facts.

Notably, even the plurality expressly acknowledged that neither of the two points discussed above, standing alone or in combination, is enough to carry

Petitioners' heavy burden. Order at 5 (holding that "those two points were not enough, by themselves, to constitute proof beyond a reasonable doubt"). This brings us to Mr. Trende's flawed computer simulations.

Mr. Trende is a graduate student who had never testified as a computer simulations expert before this case. Unlike other redistricting simulations experts who have testified in other cases, Mr. Trende is not capable of coding his own simulations algorithm, so he borrowed a proposed new algorithm that Dr. Imai discussed in a draft paper that has not been peer-reviewed or even published. The validation study that Dr. Imai applied to his proposed new algorithm in his draft paper was based on a hypothetical three-district map compromised of 50 precincts, and yet Mr. Trende did no additional validation studies before using that proposed new algorithm to simulate New York plans with 26 districts comprising more than 15,000 precincts. Mr. Trende barely accounted for, and utterly failed to balance, important constitutional criteria, arbitrarily setting compactness to "1" because no other setting worked, crudely turning the county preservation toggle "on," and using a core preservation setting that he never disclosed and does not even remember.

Most glaringly, Mr. Trende made no effort to identify and maintain communities of interest even though the New York Constitution expressly requires map-drawers to do so. Petitioners have repeatedly boasted about Mr. Trende's role in drawing Virginia's congressional districts last year, but in that case, Mr. Trende went out of his way to identify and heed established Virginia communities of interest, and Mr. Trende conceded on cross-examination in this case that the Virginia districts "would have looked different" if he had not considered and respected those communities. R2601:24-2602:8.

We ask this Court to review Exhibits S-3 and S-4 carefully, as the two dissenting justices clearly did. Exhibit S-3, R3263-65, shows that there was a strong bipartisan consensus among the Republicans and Democrats on the Commission that, after eliminating one district from the upstate region as required by the reduction in the State's congressional delegation, there should be four Democratic-leaning districts encompassing the four upstate urban areas (Albany, Syracuse, Rochester, and Buffalo), a Republican-leaning district uniting the Southern Tier, a Republican-leaning district uniting the North Country, and a third Republican-leaning district along Lake Ontario. Exhibit S-4, R3266, shows three examples of how Dr. Imai's simulations, using the same algorithm that Mr. Trende used, drew these upstate districts when starting from a "blank page" without considering communities of interest.

In the first sample simulation shown in Exhibit S-4, Schuyler County is joined in the same congressional district as Franklin County more than 250 miles to the northeast, in a way that would have flipped Representative Elise Stefanik's district from Republican-leaning to Democratic-leaning. Mr. Trende admitted on

cross-examination that this simulation was "not pretty" and drew districts that look "crazy." R2614:13-R2615:10. He further admitted that he did not bother to look at *any* of his simulated maps to see if they similarly drew districts in a way that did not match what an actual New York map-drawer reasonably would do, and that nobody else can do so because nobody else has seen or can see his simulated maps. R2615:11-2616:5.

Given what Exhibits S-3 and S-4 clearly show, it is no wonder that Mr. Trende concluded, falsely, that the congressional plan supposedly "packs" Republicans in the upstate districts. "Packing" is a concept that requires a neutral baseline from which to compare the allegedly "packed" districts. The fatal flaw in Mr. Trende's methodology is that his baseline is a "blank page," one that makes no effort to account for established communities of interest – including, for example, the strong bipartisan consensus that the Southern Tier should be united in a single district. This problem is illustrated by the way that the three sample simulations in Exhibit S-4 treat the Southern Tier. Each of those simulations cracks the Southern Tier into multiple districts that are much less Republican-leaning than anyone on the Commission recommended. The mere fact that Mr. Trende ignored the bipartisan consensus that the Southern Tier should be unified hardly means that the Southern Tier district (District 23) is "packed." Heeding a strong bipartisan consensus about preserving the core of an existing district and/or maintaining an established community of interest is not "packing" just because doing so happens to result in a district that is more Republican-leaning than in Mr. Trende's simulations.

Then there is the troubling redundancy issue. It is well known that Dr. Imai's proposed new algorithm is prone to generating redundant maps, and after that issue was raised in this case, Mr. Trende increased his sample size from 5,000 or 10,000 in this case to three tranches of 250,000 each in the Maryland case, where he found massive redundancy. *See Szeliga*, Nos. C-02-CV-21-001773, -001816, slip op. at 63 ¶ 99 (R2394). The plurality claims that we "failed to object" to this, Order at 7, but we actually objected vigorously. To be sure, we did not lodge what the plurality calls a "foundational" objection. The reality is that this was an unusually expedited bench trial, each side's proposed experts were allowed to testify, we expressly preserved our objection to the weight of Mr. Trende's analysis,[4] R2530:15-16, and we presented compelling evidence through Dr. Tapp that Mr. Trende's

[4] Notably, Petitioners never even offered Mr. Trende as a computer simulations expert. They merely offered him as "an expert in elections analysis with particular knowledge of redistricting." R2530. We did not object to this characterization of Mr. Trende's area of expertise, with the important caveat that we consented to his qualification as an expert "subject to cross-examination." *Id.*

ensemble suffered from a fatal redundancy problem. R858-61 ¶¶ 50-59, R1207-08 ¶¶ 34-36, R1210-14 ¶¶ 44-49, R3021:4- 3048:22.

Like the trial court, the plurality faulted us for failing to submit our "own competing simulation[s]," Order at 7, but as the two dissenting justices correctly observed, "the high burden in this case is on *petitioners* to establish beyond a reasonable doubt that the 2022 congressional map conflicts with the Constitution," Order at 11 (Whalen, P.J., and Winslow, J., dissenting) (emphasis in original). Faulting Respondents for Petitioners' failure to examine their ensemble of simulations for redundancy, or their failure to account for constitutionally required redistricting criteria that renders their ensemble nothing more than an array of unlawful maps, is improperly reversing the burden of proof. Doing so is particularly problematic where the standard is beyond a reasonable doubt.

The plurality further put its thumb on the proverbial scale by saying that Mr. Trende's simulations analysis supposedly was "further supported" by his so-called "gerrymandering index." Order at 6. That alleged metric adds nothing to the discussion. Contrary to its misleading name, the "gerrymandering index" provides no information about whether the enacted map favors one party or the other or encourages or discourages competition. It only measures how much the enacted map differs from the simulated maps, and in this case, the "outlier" is Mr. Trende's ensemble, not the enacted plan, because Mr. Trende's ensemble admittedly did not account for mandatory redistricting criteria that guided how the enacted plan was drawn.

No prior case has ever relied on computer simulations to prove impermissible intent where considering and maintaining communities of interest was a mandatory redistricting requirement. Moreover, no prior case has ever relied on computer simulations without additional compelling evidence of wrongdoing such as clear partisan asymmetry, egregious non-compactness, or other clear district-specific evidence that lines were drawn in ways that violated constitutional criteria and had not been adequately explained. We have nothing like that in this case, which is why Petitioners are asking this Court to rely on computer simulations in a way that is entirely unprecedented. Because there clearly is, at a bare minimum, reasonable doubt about the validity of the congressional plan, it must be upheld.

III. PETITIONERS LACK STANDING

The plurality held that Petitioners "have standing to seek review of the legislature's redistricting plans" because article III, § 5 provides for judicial review of a redistricting plan upon a petition brought by "any citizen." Order at 3. That broad language is not sufficient to confer standing on Petitioners to challenge specific congressional districts.

As we observed below, the Supreme Court squarely held in *Gill v. Whitford* that because partisan gerrymandering claims are by definition "district specific," there is no standing unless the allegedly aggrieved voter pleads and proves that she lives in the district being challenged. 138 S. Ct. 1916, 1920-21 (2018). This sensible rule is consistent with this Court's endorsement of both the constitutional "injury in fact" and the prudential "zone of interests" rules developed by the federal courts. *See Soc'y of Plastics Indus. v. Cnty. of Suffolk*, 77 N.Y.2d 761, 771-74 (1991). Under *Gill* and *Society of Plastics*, a petitioner challenging the constitutionality of a congressional district is not within the "zone of interests" unless she lives in, or at a minimum adjacent to, the district she is challenging.

The plurality failed to engage with this well-established rule. Instead, it sidestepped the issue by addressing standing only in connection with Petitioners' procedural challenge to the Legislature's authority to act, which presents a statewide question. The plurality did not address standing at all in the context of Petitioners' challenges to specific congressional districts.

The plurality failed even to state which congressional districts it was striking down as unconstitutional, apparently invalidating the entire map even though many districts were not even challenged, and even though Respondents offered extensive neutral explanations for each district that was challenged. Indeed, it is notable that the simulations upon which the plurality relied are *inherently incapable* of identifying specific districts that allegedly are problematic. Sen. Reply Br. at 27-28. Under *Gill*, this kind of generalized analysis, without more, does not confer standing.

IV. THE LEGISLATURE MUST BE AFFORDED A REASONABLE OPPORTUNITY TO CORRECT ANY INFIRMITIES IN THE CONGRESSIONAL PLAN

Should the Court invalidate any part of the enacted congressional plan, it already is too late to implement any remedy in connection with the 2022 election because doing so would sow confusion and chaos that would disrupt the orderly administration of the election process. Sen. Opening Br. at 60-62; Sen. Reply Br. at 28-29.

In any event, it is undisputed that article III, § 5 of the Constitution requires that the "legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." Heeding this constitutional command would require this Court to do two critical things in the event that it finds that any part of the congressional plan is infirm.

First, it would be imperative for the Court to provide the parties and the lower courts with specific guidance about which congressional districts are invalid

and need to be redrawn. Neither the trial court's order nor the Appellate Division plurality's opinion identifies or even suggests which districts supposedly are unlawful, and without such basic guidance from this Court, the Legislature would not reasonably know how to correct whatever infirmities are deemed to exist, thereby compromising its express right to cure. As a practical matter, moreover, continuing to decline to engage in a district-by-district analysis or to provide district-specific guidance would further complicate and delay these proceedings because the parties inevitably would intensively re-litigate whether specific districts are or are not infirm, and the non-prevailing parties inevitably would appeal again.

Second, it would be imperative for the Court to afford the Legislature a reasonable amount of time to enact remedial legislation. The Order provides that the "legislature has until April 30, 2022 to enact a constitutional replacement for the congressional map," after which the case will be remitted back to the trial court. Order at 8. The April 30, 2022 deadline is based on N.Y. Legis. 13, 2022 Sess. Law News of N.Y. Ch. 13 (A.9039-A), § 3(i) (McKinney's), which provides in relevant part that any determination that invalidates any part of the statute that includes the congressional plan "shall be embodied in a tentative order which shall become final 30 days after service of copies thereof upon the parties." Although this statute provides that a trial court's decision must be provisional for thirty days to afford the Legislature a minimum window in which to act, nothing suggests that the 30-day provisional period is an outside limit on the Legislature's authority to enact a remedial plan. The Legislature is entitled to obtain a ruling from this Court before enacting replacement redistricting legislation that would supersede the prior plan and moot this appeal.

Even if this Court rules on the same day that it hears argument, only five days would remain until the current April 30, 2022 deadline. That would not leave enough time to complete the complex process of drafting a redistricting statute and to allow for the minimum three days between the introduction of a statute and a vote. We respectfully submit that the Legislature should be given at least ten days from the date of this Court's forthcoming decision to enact legislation correcting any infirmities that this Court may find. Any lesser period would deny the Legislature the opportunity to cure that the Constitution expressly assures and ignore this Court's critical admonition that the judiciary may draw district lines "only as a last resort." *In re Orans*, 15 N.Y.2d 339, 352 (1965).

* * * * *

We thank the Court for its attention to the issues raised in this letter. I will be arguing this matter on behalf of the Senate Majority Leader on Tuesday, and I look forward to exploring these issues with the Court further at that time.

Respectfully submitted,

Eric Hecker

cc: All Counsel of Record