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April 24, 2022

By Email

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

Re: Motion for Leave to File Amicus Brief in *Harkenrider v. Hochul*, APL-2022-00042

Dear Mr. Asiello:

Pursuant to this Court's April 22, 2022 letter, and Rule 500.23 of the Rules of Practice of this Court, United States Representatives for the State of New York Jamaal Bowman, Yvette Clarke, Adriano Espaillat, Hakeem Jeffries, Sean Patrick Maloney, Gregory Meeks, Grace Meng, Jerrold Nadler, Paul Tonko, and Ritchie Torres, who are all running for re-election in 2022; candidates for the United States House of Representatives for the State of New York Vanessa Fajans-Turner, Laura Gillen, Jackie Gordon, and Josh Lafazan; and New York voters Abigail S. Bradford, Andrae Evans, Lauren Foley, Lauren Furst, Courtney Gibbons, Judith Jerome, Eric Levine, Mark Lieberman, Daniel Lloyd, Jacob McNamara, Seth Pearce, Leah Rosen, E. Paul Smith, Steve Spicer, Gayle L. Syposs, Nancy Van Tassel, Verity Van Tassel Richards, and Ronnie White Jr. (collectively, "Proposed Amici Curiae"), respectfully seek leave to file the attached amicus brief in the above-referenced case.

Proposed Amici Curiae's brief urges this Court to reinstate use of the congressional map enacted by the New York Legislature and signed by the Governor on February 3, 2022 (the "Congressional Plan") for the reasons set forth in the brief. Proposed Amici Curiae meet the standards for participation articulated in Rule 500.23(a)(4)(i). They each have an important interest in this case, and their brief offers unique perspectives and arguments that are distinct from those raised by the Respondents-Appellants. Proposed Amici Curiae are 14 current office holders and/or candidates for the U.S. House of Representatives for the State of New York and 18 New York voters. They reside in, and some seek to represent, districts 1, 3, 4, 5, 6, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 22, 23, 25, and 26 in the Congressional Plan. Proposed Amici Curiae believe that the Fourth Department's decision invalidating the Plan on partisan gerrymandering grounds constituted legal error and should be reversed.

Moreover, the 2022 election cycle is already well underway. Requiring New York to create a new map at this late stage in the election cycle will invite chaos and cause irreparable injury to the candidates who have already invested significant resources into campaigning and qualifying for the ballot in the districts established by the previously enacted Congressional Plan. In an

election cycle, resources are finite and the injury to candidates cannot be remedied post-election. If this Court upholds the Supreme Court's order striking down the Congressional Plan, the candidates would have to expend additional resources to start the ballot qualification and campaigning process over again, but now on a compressed timeline in front of a new audience of voters. In addition to the candidates, Proposed Amici Curiae include 18 voters. As explained in the proposed brief of Amici, the Congressional Plan groups together important communities of interest in the voters' districts, accurately reflecting their communities, and would allow them to elect representatives who embody their values and priorities. There is no guarantee that any remedial map would do the same. In fact, it is highly likely that in attempting to "remedy" the purported issues identified by the Supreme Court, the voters will see their communities of interest unjustifiably fractured, which will make it harder for them to elect representatives that truly reflect the communities in which they live.

Proposed Amici Curiae's brief raises arguments that will assist the Court in rendering a decision in this appeal. As current officeholders, candidates for congressional office, and New York voters who live in the districts—and communities—at issue, Proposed Amici Curiae have perspectives distinct from the Respondents-Appellants in this case, all of whom are state-level government actors. Proposed Amici Curiae's brief presents unique perspectives on the harms of altering the congressional district lines at this late stage in the election cycle, and raises arguments that have not been highlighted in the proceedings thus far, including the impact of the federal district court's decision in *United States v. New York*, No. 1:10-cv-1214, 2012 WL 254263 (N.D.N.Y. Jan. 27, 2012), which constrains the timing of the primary election. Their brief also provides important arguments on the significance of the expert report of Dr. Stephen Ansolabehere, Professor of Government at Harvard University, which was overlooked by the lower courts.

Under Rule 500.23(a)(4)(iii), Proposed Amici Curiae make the following disclosures: DCCC (d/b/a Democratic Congressional Campaign Committee) contributed money to fund the preparation and submission of the attached brief. No party or party's counsel participated in the preparation of the brief or contributed money to fund the preparation or submission of the brief.

We appreciate the Court's consideration of this letter and Proposed Amici Curiae's submission, and respectfully request that the Court grant leave to file the attached brief in this appeal.

Respectfully submitted,

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cc: All Counsel of Record (via email with consent)

COURT OF APPEALS OF THE STATE OF NEW YORK

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

Petitioners-Respondents,

-against- APL-2022-00042

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 CAR HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, and THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents-Appellants,

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BRIEF OF AMICI CURIAE CANDIDATES FOR CONGRESSIONAL OFFICE AND NEW YORK VOTERS IN SUPPORT OF THE CONGRESSIONAL DISTRICTS ENACTED BY THE NEW YORK STATE LEGISLATURE AND RESPONDENTS-APPELLANTS

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PRELIMINARY STATEMENT

The circumstances giving rise to this appeal are as problematic as they are extraordinary. One month after candidates began collecting signatures to qualify for the primary election ballot, and after the trial court stated that it would *not* order changes to New York's redistricting maps for the 2022 election cycle, that court abruptly reversed course and issued a sweeping order invalidating in their entirety New York's Congressional, State Senate, and State Assembly Plans. Remarkably, a challenge to one of those maps—the Assembly Plan—was not even affirmatively before the court. It simply announced it was invalidating it *sua sponte*. As for the Congressional Plan, which had been enacted by the Legislature and signed by the Governor on February 3, 2022, the trial court found that it was invalid (1) on partisan gerrymandering grounds, and (2) due to purported procedural deficiencies.

The state appealed and on April 21, 2022, the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department ("Fourth Department") affirmed the trial court's finding that the Congressional Plan was enacted with impermissible partisan bias, but reversed the trial court's finding that the enactment of the Plan was procedurally deficient. The Fourth Department ordered the legislature to enact a "constitutional" replacement for the Congressional Plan by April 30, 2022. Order at 8.

This matter is now before this Court of last resort. Proposed Amici Curiae are current members of the U.S. House of Representatives for the State of New York who are running for re-election, candidates presently running to represent New York in the House of Representatives who have spent substantial resources campaigning and collecting signatures under the Congressional Plan as enacted by the Legislature, and New York voters who live in districts that stand to be reconfigured as a result of the lower courts' decisions. Proposed Amici Curiae submit this brief to respectfully urge this Court to reinstate use of the Congressional Plan by (1) reversing the Fourth Department's decision affirming the lower court's invalidation of the Plan on partisan gerrymandering grounds, and (2) affirming the Fourth Department's holding that the redistricting process and role of the Independent Redistricting Commission (the "IRC") was constitutional.

The Fourth Department committed several legal errors in affirming the trial court's decision to invalidate the Congressional Plan on partisan gerrymandering grounds. First, Petitioners-Respondents ("Petitioners") bear the burden of demonstrating *beyond a reasonable doubt* that the enacted Congressional Plan was drawn with unconstitutional partisan intent. The trial court and the Fourth Department inexplicably, and in a clear error of law, reversed that burden. Second, the Fourth Department concluded that the map was an impermissible partisan gerrymander by crediting an expert report by Mr. Sean Trende that is so

methodologically flawed that it revealed virtually nothing about any partisan bias in the Congressional Plan—much less any partisan intent on the part of the map-drawers. Of particular note, Mr. Trende's methodology shows that the purportedly gerrymandering party (the Democratic Party) is expected to win *fewer* seats under the challenged Congressional Plan than it would under a plan drawn according to Mr. Trende's specifications. Both the Supreme Court and Fourth Department inexplicably and impermissibly ignored this strikingly significant evidence that the Congressional Plan is not a partisan gerrymander. If anything, under Mr. Trende's own assumptions, a map yielding four Republican-leaning districts, *as the enacted Congressional Plan creates*, would demonstrate a slight bias *towards* the Republican Party. Third, and finally, the Fourth Department's order mistakenly assumes that because the majority party in the Legislature drew a map, there must be partisan intent—even though Petitioners failed to make that showing and despite credible, contrary evidence in the record. As Dr. Stephen Ansolabehere, Respondents-Appellants' ("Respondents") expert, testified, a comprehensive review of the Congressional Plan indicates that it was not drawn with impermissible partisan bias. To the contrary, the Congressional Plan is consistent with the New York Constitution and traditional redistricting criteria; it reflects the significant population loss in Upstate New York; it maintains the cores of existing districts; and it respects existing communities of interest and protects minority voting rights. Additionally,

this Court should affirm the Fourth Department's holding that Petitioners' "procedural" claim is meritless. As the Fourth Department correctly held, "the legislature's exercise of its historically recognized redistricting authority upon the failure of the IRC to complete its constitutionally appointed tasks is consistent with Constitutional intent." Order at 4.

At this late date in the election cycle, the trial court's order invalidating the Congressional Plan and ordering a new one to be implemented for the 2022 elections, and the Fourth Department's decision affirming that decision, have sown chaos and confusion amongst candidates and voters alike. The June 28 primary election—a date that was fixed by a federal court order over ten years ago and cannot be moved absent legislation and federal court approval—is less than 10 weeks away. And in 20 days, ballots for military and overseas voters must be mailed to voters. The enacted Congressional Plan comports with the requirements of the New York Constitution. Moreover, given the serious and substantial questions about the propriety of the decisions below, the chaos and uncertainty that affirming those decisions at this late stage in the election cycle to require the enactment of a new map for the 2022 elections, is unjustifiable.

The enacted Congressional Plan is constitutional. Petitioners have not presented any credible evidence to support their substantive partisan intent claims, and their procedural claims fail as a matter of law. This Court should move swiftly

to declare that the Congressional Plan already passed by the Legislature is constitutionally sound and should be used in the 2022 elections and for the next decade.

STATEMENT OF QUESTIONS INVOLVED

1. Did the Fourth Department err in reversing the burden of proof and upholding the Supreme Court's ruling striking down the legislatively-enacted Congressional Plan as a violation of Article III, § 4(c)(5) of the New York Constitution? Yes.

2. Did the Fourth Department correctly hold that the legislatively-enacted Congressional, State Senate, and State Assembly Plans are procedurally valid? Yes.

3. Did the Fourth Department err in ordering a remedy that enjoins the Congressional Plan for the 2022 election and ordering the Legislature to develop a new plan? Yes.

INTEREST OF AMICI CURIAE

Proposed Amici Curiae are 14 officeholders who are running for re-election and candidates for the U.S. House of Representatives, and 18 New York voters. They reside in, and some seek to represent, congressional districts 1, 3, 4, 5, 6, 8, 9, 10, 11, 13, 15, 16, 17, 18, 19, 20, 22, 23, 25, and 26 in the Congressional Plan. Based on their significant familiarity with the districts at issue, the candidates and voters submit that the Congressional Plan groups together important communities of interest in the districts in which they are running and live, and as a result, they are invested in maintaining the composition of those districts. In addition, at this point in the election cycle, the candidates have already invested significant resources into

campaigning and qualifying for the ballot in those districts, as set forth in the Congressional Plan. If this Court upholds the Fourth Department's Order striking down the Congressional Plan, the candidates would have to expend additional resources to start the ballot qualification and campaigning process over again, but on a compressed timeline in front of a new audience of voters. In an election, financial resources are finite, and the forced expenditure of funds forever lost campaigning under the new invalidated map means that the candidates will have less funds to use to help advance their campaigns. The 18 New York voters are deeply concerned that any new plan, necessarily drawn on a highly expedited basis, will irreparably harm them by cracking their communities so as to make it harder for them to elect representatives who embody their values and priorities.

ARGUMENT

I. The Congressional Plan is constitutional.

A. The Congressional Plan was not enacted for the purpose of favoring Democratic candidates.

The Fourth Department erred in concluding that the Legislature enacted the Congressional Plan for the purpose of favoring Democrats. After acknowledging that courts afford legislation a presumption of validity, the Fourth Department ignored that presumption and *assumed* that the Legislature acted with partisan intent simply because it found that the Congressional Plan lacked bipartisan support and resulted in more Democratic-leaning districts than the previous map. On top of that,

the Fourth Department overtly reversed the burden of proof, questioning why *Respondents* did not submit simulated maps to prove that the Legislature acted without partisan intent, while ignoring Respondents' experts' reports and testimony that (1) discredited the simulations prepared by Sean Trende (upon which the Supreme Court relied), which purported to prove partisan gerrymandering, and (2) explained how the Congressional Plan reflects deliberations rooted in traditional redistricting criteria, rather than naked partisan interests. This Court should reverse the Fourth Department's finding of partisan gerrymandering because the evidence in this case precludes a finding beyond a reasonable doubt that the Congressional Plan violates the New York Constitution.

i. The Fourth Department reversed the burden of proof and did not give the Congressional Plan the presumption of validity owed to all legislative enactments.

Petitioners bear the burden of proof in this case, and their burden is extraordinarily high. They were required to prove beyond a reasonable doubt that the Congressional Plan was enacted for the purpose of favoring Democratic candidates. *See* Order at 3. Legislative enactments are "supported by a presumption of validity so strong as to demand of those who attack them a demonstration of invalidity beyond a reasonable doubt," *Van Berkel v. Power*, 209 N.E.2d 539, 541 (N.Y. 1965). Courts accordingly strike down legislative enactments as unconstitutional "only as a last unavoidable resort." *Id.* This standard requires courts

to pursue "every reasonable mode of reconciliation of the statute with the Constitution," and to exercise the power of judicial review only if "reconciliation has been found impossible." *Matter of Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992) (applying the "beyond a reasonable doubt standard" to a challenge to the constitutionality of a redistricting plan).

The Fourth Department failed to properly apply this legal standard. Instead, it reversed the presumption of constitutionality and placed the burden on Respondents to justify the Congressional Plan. This Court should correct that clear and reversible error of law.

The most error-ridden example of the Fourth Department's reversal of the burden of proof is its treatment of Mr. Trende's simulations. Like the trial court, the Fourth Department relied heavily on Mr. Trende's simulations to find partisan intent. *See* Order at 5–7. Although it selectively acknowledged Respondents' experts' criticisms of Mr. Trende, it ultimately concluded that "none of respondents' experts presented their own competing simulation reflecting how the results might have changed had Trende conducted his model in a manner that they opined to be more appropriate." *Id.* at 7. In this way, the Fourth Department called on Respondents to disprove partisan gerrymandering, instead of requiring Petitioners to prove partisan gerrymandering—which they failed to do.

Especially given the flaws in Mr. Trende's analysis, the Fourth Department's reversal of the burden of proof was clear error. In reversing the burden, the Court afforded Mr. Trende's report and testimony a presumption of accuracy, without examining *any* of the contrary evidence. For example, in contrast to the simulations used by experts in litigation in North Carolina, Ohio, and Pennsylvania as referenced by the Fourth Department, Order at 5-8, Mr. Trende's methodology shows that the purportedly gerrymandering party is expected to win *fewer* seats under the challenged Congressional Plan than it would under a plan drawn according to Mr. Trende's specifications. Respondents' experts confronted this shortcoming in Mr. Trende's analysis. *See, e.g.*, Ansolabehere Rep., NYSCEF Doc. No. 92, ¶¶ 42-43 (Feb. 24, 2022), R872-73; Tapp Rep., NYSCEF Doc. No. 73, ¶ 15(a) (Feb. 24, 2022), R848 (reaching same conclusion). Indeed, under Mr. Trende's own assumptions, a map yielding four Republican-leaning districts, as the enacted Congressional Plan creates, would demonstrate a slight bias *towards* Republicans. Ansolabehere Rep. ¶¶ 42-43, R872-73; *see also* Barber Rep., NYSCEF Doc. No. 86, ¶ 33 (Feb. 24, 2022), R1002 (explaining, "[i]f anything, the Enacted plan generates fewer Democratic-leaning districts than the typical simulation").

Rather than explain how Mr. Trende's simulations serve as proof of Democratic partisan bias beyond a reasonable doubt, the Fourth Department offered the conclusory retort that Republicans won more seats under the prior congressional

plan adopted in 2012. Order at 8. The record, however, shows the increase in Democratic seats under the 2022 Congressional Plan is attributable to legitimate factors that the Fourth Department ignored in its holding—such as population *decreases* in Republican-leaning areas and population growth in Democratic-leaning areas. *See* Ansolabehere Rep. ¶ 18, R869.

The Fourth Department further erred in relying on Mr. Trende's simulations because his simulated plans did not employ the full range of legitimate redistricting criteria that the New York Constitution required the Legislature to consider. *See, e.g.*, N.Y. Const. art. III, § 4(c)(1) (requiring protection of minority voting rights); Trende Reply Rep. at 16, R1040 (explaining that he did not run a racially polarized voting analysis); see also N.Y. Const. art. III, § 4(c)(5) (requiring consideration of communities of interest); Trende Reply Rep. at 19, R1043 ("I was not asked to look at communities of interest by counsel.").

Furthermore, like the trial court, the Fourth Department did not actually engage with any criticisms of Mr. Trende's analysis. It did not even mention Dr. Ansolabehere's report, stating only that it was "implausible" that Mr. Trende's failure to account for communities of interest could undermine his purported results.

Order at 6.[1] In so doing, the Fourth Department failed to adequately consider that possibility, or the record evidence that protecting communities of interest, alongside uneven population loss, core retention, and protecting minority voting rights, explain the Congressional Plan.

In short, the Fourth Department reversed the burden of proof, relied exclusively on non-credible expert testimony that explicitly failed to consider required constitutional redistricting criteria, and ignored contrary expert evidence. Under any standard, and particularly under a "beyond a reasonable doubt" standard, this constitutes reversible error. This Court must apply the correct standard and correct the errors made by the lower courts.

ii. The Fourth Department, consistent with its reversal of the burden of proof, ignored alternative, non-partisan explanations for the Plan.

Respondents' expert evidence demonstrates that the Legislature's enacted Congressional Plan is consistent with the New York Constitution and traditional redistricting criteria for at least four distinct reasons.

First, the evidence shows that the enacted Congressional Plan is consistent with a redistricting plan which needed to shed one congressional district due to

[1] Dr. Ansolabehere of Harvard University is a renowned expert in redistricting, whose own analyses in this field have been repeatedly credited by federal and state courts alike.

population loss in Upstate New York. Ansolabehere Rep. ¶ 18, R869. The Legislature's first task in redrawing any congressional plan after a decennial census is, of course, to achieve population equality. As Dr. Ansolabehere explained, shrinking population in Upstate New York meant "one of the rural Upstate [congressional districts] had to be eliminated in order to achieve population equality across all [congressional districts]." *Id.* That is precisely what the enacted Plan did, which inevitably had ripple effects across the state, requiring the Legislature to adjust all congressional district boundaries. *Id.*

Second, the evidence demonstrates that the enacted Plan is consistent with a redistricting plan that aimed to keep voters within the cores of their existing districts, a value the New York Constitution expressly encourages. *See* N.Y. Const. art. III, § 4(c)(5) (ordering map makers to "consider the maintenance of cores of existing districts" in drawing congressional districts). The enacted Congressional Plan did just that: it maintained 75% of New Yorkers in their existing congressional districts, which, as Dr. Ansolabehere explained, "is a high level of core population retention, especially considering that one district had to be eliminated." Ansolabehere Rep. ¶ 35, R871. Notably, in drawing the enacted Congressional Plan, the Legislature was not working off of an existing plan from the 2010 cycle that it drew, but a court-drawn plan, created by Special Master Nathaniel Persily. *See Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928216, at *20 (E.D.N.Y. Mar. 12, 2012), *report and*

recommendation adopted as modified, No. 11-CV-5632 RR GEL, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012) ("For the reasons detailed above, and in the accompanying Persily Affidavit, it is the recommendation of this Court that the Three–Judge Panel adopt the Recommended Plan as the congressional redistricting plan for the State of New York."). That congressional plan expressly did not favor any particular political party: When that court drew New York's congressional maps, the court explicitly disavowed consideration of incumbency and partisanship. In fact, as the Special Master explained, the new map "deliberately ignore[d] political data, such as voter registration or election return data, as well as incumbent residence." Aff. of Professor Nathaniel Persily, *Favors v. Cuomo*, No. 1:11-cv-05632, (E.D.N.Y Mar. 12, 2012) ECF Nos. 223-1 at 20. The fact that the enacted Congressional Plan "exhibits a high degree of core retention," with respect to a neutral, court-drawn map, Ansolabehere Rep. ¶ 38, R871, alone serves as important evidence that the enacted Congressional Plan was not drawn for the purpose of favoring or disfavoring one political party.

Third, the evidence demonstrates the enacted Congressional Plan is consistent with a redistricting plan which attempted to unite communities of interest, which, like maintaining the cores of prior districts, is explicitly encouraged in the New York Constitution. *See* N.Y. Const. art. III, § 4(c)(5) (ordering map makers to "consider the maintenance of. . . communities of interest" in drawing congressional districts).

As Dr. Ansolabehere explained, "the configuration of congressional districts by the state legislature clearly follows the need to respect communities of interest." Ansolabehere Rep. ¶ 16, R868. As one example, Dr. Ansolabehere found "the configuration of the 2022 Map in Upstate New York follows the same communities of interest as were reflected in the 2012 Map, creating four urban upstate districts to represent Albany, Buffalo, Rochester and Syracuse and four upstate rural districts." *Id.* ¶ 71, R877. Dr. Ansolabehere also found the enacted Congressional Plan maintained communities of interest in Long Island, New York City, and Mid-Hudson. *Id.* ¶¶ 72-82, R877-79.

Fourth, and finally, the evidence demonstrates that the enacted Congressional Plan is consistent with a desire to safeguard minority voting rights, which is similarly required by the New York Constitution. *See* N.Y. Const. art. III, § 4(c)(1) (ordering map makers to respect the voting rights of language and racial minorities). The Legislature, of course, was also constrained by the federal Voting Rights Act ("VRA"). Compliance with the VRA is not an afterthought in New York. Indeed, the state has a long history of VRA litigation in its congressional districts. *See, e.g.*, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 442 (S.D.N.Y.), *aff'd*, 543 U.S. 997 (2004) (VRA claim to congressional districts); ***P.R. Legal Def. and Educ. Fund v. Gantt***, 796 F. Supp. 698, 700 (E.D.N.Y. 1992) (same). As Dr. Ansolabehere found, the legislatively-enacted Plan is consistent with a plan that sought to protect minority

voting rights by "maintain[ing] nine congressional districts in which minorities are the majority of the population and would be able to elect their preferred candidates." Ansolabehere Rep. ¶ 17.

Ultimately, after reviewing the Plan against this backdrop, Dr. Ansolabehere concluded "[t]he 2022 New York Congressional District Map is a fair map" and "[t]he State Legislature appears to have followed traditional redistricting principles in creating this map." *Id.* ¶¶ 83-84, R879.

In short, Dr. Ansolabehere showed that the enacted Congressional Plan was driven by four guiding principles: (1) uneven population growth resulting in the loss of one congressional district in Upstate New York, which had suffered population loss, (2) maintenance of the cores of existing districts, (3) maintenance of communities of interest, and (4) preservation of minority voting rights. *See generally Id.* ¶¶ 14-17, R868 (summary), ¶¶ 18-26, R869-70 (population findings); ¶¶ 27-38, R870-72 (core retention of districts); ¶¶ 65-82, R876-79 (communities of interest); ¶ 54 (minority voting protection). Dr. Ansolabehere's findings matched those of other experts, including Dr. Jonathan Katz, a well-respected redistricting expert from Caltech who has regularly testified on behalf of Republicans, and who concluded after conducting a statistical analysis of the partisan bias of the enacted Congressional Plan that "I find that the enacted 2022 Congressional plan shows no statistically significant partisan bias in favor of either party." Katz Rep., NYSCEF

Doc. No. 156, at 1 (Mar. 10, 2022), R1226. The Fourth Department ignored these alternative explanations for the Congressional Plan.

B. The enacted maps are procedurally valid.

The Fourth Department correctly found the enacted Congressional Plan is the result of adherence to a lawful process. There is no dispute that, every ten years, New York's district maps must be redrawn to account for population shifts reflected in the Census. *See Wesberry v. Sanders*, 376 U.S. 1, 9 (1964); *see also* N.Y. Const. art. III § 1 (requiring legislation to enact any proposed map), *see also id.* ("The legislative power of this state shall be vested in the senate and assembly."). There is also no dispute that New York amended its Constitution in 2014 to create the IRC, but that the amendment is entirely silent on how the Legislature shall comply with its duty if the IRC fails to send maps to the Legislature for a vote. *See* N.Y. Const. art. III, § 4(b). As the Fourth Department appropriately recognized, absent an express limitation on legislative power, the Legislature retains the power to draw redistricting maps. *See* Order at 4 ("Nothing in the Constitution, however, including subdivisions 4 (b) and 4 (e) of article III, expressly prohibits the legislature from assuming its historical role of redistricting and reapportionment if the IRC fails to complete its own constitutional duty."); *see also id.* (quoting *Cohen v. Cuomo*, 19 N.Y.3d 196, 202 (2012), for the idea that where the Constitution is silent, "the [l]egislature must be accorded a measure of discretion in [redistricting] matters").

The trial court's decision striking down the Congressional Plan on procedural grounds was incorrect. The Legislature's enactment of the 2021 Legislation is reconcilable and fully compliant with the New York Constitution. Prior to the 2014 Amendment, the first opportunity to draw new redistricting maps after a Census rested with the Legislature. *See* N.Y. Const. art. III (eff. Jan. 1, 2002). The 2014 Amendment changed this insofar as it created the IRC and a new scheme for map-drawing, which involves the IRC proposing maps to the Legislature, and the Legislature then approving or rejecting those maps. Importantly, however, the Constitution does not give the IRC power to enact maps under any scenario; that power remains solely with the Legislature. *See id.* art. III, § 4(b) (requiring IRC proposals to be approved by the Legislature and signed by the Governor). Nothing in the 2014 Amendment or the New York Constitution purports to limit the authority of the Legislature to pass legislation for the purpose of enacting maps where the IRC has failed to act. *See* N.Y. Const. art. III § 1 (requiring legislation to enact any proposed map), § 1 ("The legislative power of this state shall be vested in the senate and assembly."). It follows, therefore, that circumstances not addressed by the 2014 Amendment remain fully within the unimpeded purview of the Legislature. This purview includes the ability to pass legislation enacting maps where the IRC has failed to propose maps. The 2021 Legislation thus does not conflict with or alter the

Constitution; it merely fills in the remaining parts of the process that the 2014 Amendment did not address.

The Constitution gives the Legislature the power to enact maps. The 2014 Amendment changed the process, but it did not override the Legislature's authority where the IRC fails. Petitioners' request, on the other hand, is that this Court give the minority party the ability usurp the Legislature's power to engage in redistricting. For that reason and the others expressed herein, as the Fourth Department found, the trial court erred in finding the enacted Congressional Plan void *ab initio*.

II. The date of the 2022 primary election cannot be moved absent action by both the Legislature and by the federal court, and it would be impossible to implement a new map prior to the scheduled June primary.

The Fourth Department also erred by ordering that new congressional districts be drawn for use in the fast-approaching 2022 elections. It overlooked key case law in reaching this decision. First, the Fourth Department failed to appreciate that a New York court cannot simply move the date of the primary election. Under a federal court order, doing so requires a vote of the Legislature and the approval of the Northern District of New York. *See United States v. State of N.Y.*, 1:10-CV-1214, 2012 WL 254263, at *3 (N.D.N.Y. Jan. 27, 2012) ("New York's non-presidential federal primary date shall be the fourth Tuesday of June, unless and until New York enacts legislation resetting the non-presidential federal primary election for a date that complies fully with all UOCAVA requirements, and is approved by this court.").

Contrary to the Fourth Department's assumptions, the primary election cannot simply be delayed by a New York state court. Further, as the Fourth Department did not consider because of this error, it would be unworkable for a new map to be implemented in time for the current June 28 primary election.

Implementing a new congressional map at this point in the election cycle would significantly burden candidates, including many of the Proposed Amici Curiae, and create voter confusion. As of the date of this filing, the June primary is a mere 65 days away. As a result, several important deadlines in this election cycle have already passed and others are fast-approaching. The Fourth Department's decision comes nearly two months after candidates began collecting signatures from their districts to qualify for the June primary, after the close of the candidate qualifying period, and after designating petitions were due to boards of elections. Separately, the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") requires absentee ballots to be sent 45 days before the primary in federal elections,[2] which means that absentee ballots must be mailed within two weeks of the adoption of new congressional maps under the Fourth Department's

[2] *See* 52 U.S.C. §§ 20302(a)(1), (a)(8)(A); MOA Between the United States and the State of Ohio, Mar. 18, 2022, https://www.justice.gov/opa/press-release/file/1484976/download, at 2.

Order, which would not be feasible. Order at 8 (requiring the adoption of new maps by April 30, 2022).

Within that short two-week time period, a series of actions—which typically occur over the course of several months—would need to take place. First, it appears that the new congressional map would need to be approved by the trial court before it can be implemented. *See* Order at 8 (holding that after the Legislature draws a new map, "[t]he matter will then be remitted to Supreme Court for further proceedings"). This approval process is unlikely to be immediate in any case, but is nearly guaranteed to take more time here. The Fourth Department's Order contains no discernable standard with which the Legislature could even attempt to comply. The Order directs that the Legislature must be given "a full and reasonable opportunity to correct the law's legal infirmities," N.Y. Const. art III, § 5, but is entirely unclear about what legal infirmities the Legislature is supposed to correct, and how it is supposed to correct them. *Id.* at 8 (quoting N.Y. Const., art. III, § 5). As a result, there is little certainty that new maps submitted by the April 30 deadline would meet the Fourth Department's ambiguous standard.

If the Legislature passes a congressional map that is later reviewed by the trial court, candidates would presumably need to re-petition for inclusion on the ballot, *see, e.g.*, Decision & Order at 16, R22 (noting candidates would gather signatures after a new map is drawn). This process would involve once again collecting

signatures from voters who were originally told they could only sign one petition per office. *See* N.Y. Elec. Law § 6-134(3) (stating that if a voter signs more than one petition for the same office, only the first signature is valid). Asking those same voters to sign petitions a second time will likely cause confusion and make it more difficult for candidates to meet the signature requirement. Subsequently, candidates' nominating petitions would need to be reviewed by the State Board of Elections or a local board of elections to determine which candidates qualify to appear on the ballot. The boards also must hear challenges to the petitions. Then, the boards of elections can begin printing the ballots. All of these actions would have to occur in a two-week timeframe, when they usually take several months.

This Court can, and should, remedy the present confusion and prevent electoral chaos by reversing the Fourth Department's Order and clarifying that elections will be held under the enacted 2022 Congressional Plan. New York's election calendar demonstrates that the time for enjoining the Congressional Plan—at least prior to the 2022 elections—has passed. In another error, the Fourth Department failed to recognize that courts have declined to revise redistricting plans affecting elections set to occur even later in the calendar. *See Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Mem.) (holding it was too late for relief where the primary election was 106 days away); *see also Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, No. 1:21-CV-5337-SCJ, 2022 WL 633312, at *74 (N.D. Ga. Feb. 28,

2022) (holding it was too late for relief where the primary election was 85 days away). A decision to uphold the enacted Congressional Plan would be consistent with precedent establishing that courts are generally reluctant to make drastic changes to an election regime in the period close to an election. *See, e.g.*, *Quinn v. Cuomo*, 69 Misc. 3d 171, 177-78 (N.Y. Sup. Ct. Queens Cnty. 2020); *In re Khanoyan*, 637 S.W.3d 762, 764 (Tex. 2022); *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 215-16 (Iowa 2020) (per curiam); *In re Hotze*, 627 S.W.3d 642, 645 n.18 (Tex. 2020); *All. for Retired Ams. v. Sec'y of State*, 240 A.3d 45, 54 (Me. 2020); *Jones v. Sec'y of State*, 239 A.3d 628, 631 (Me. 2020); *see also Fay v. Merrill*, 256 A.3d 622 (Conn. 2021); *Ohio Democratic Party v. Larose*, 159 N.E.3d 852 (Ohio Ct. App. 2020); *Singh v. Murphy*, No. A-0323-20T4, 2020 WL 6154223, at *14-15 (N.J. Super. Ct. App. Div. Oct. 21, 2020); *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 387 (Fla.); *Liddy v. Lamone*, 919 A.2d 1276, 1287-88 (Md. 2007); *Chi. Bar Ass'n v. White*, 898 N.E.2d 1101, 961, 1107-08 (Ill. App. Ct. 2008).

CONCLUSION

For the reasons stated above, Proposed Amici Curiae respectfully request that this Court reverse the Fourth Department's ruling as to the constitutionality of the Plan, and uphold the ruling with respect to the constitutionality of the process.

Date: April 24, 2022

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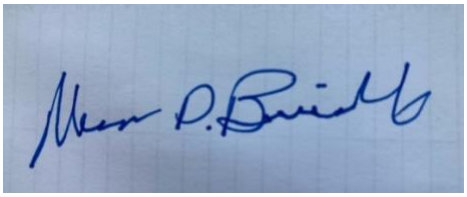
By: 

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