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

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

Petitioners,

-against-

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

Respondents.

A.D. Dkt. No. CAE 22-00506

Steuben County Index No. E2022-0116CV

REPLY MEMORANDUM OF LAW OF THE SENATE MAJORITY LEADER AND THE SPEAKER OF THE ASSEMBLY IN FURTHER SUPPORT OF APPELLANTS' MOTION TO CLARIFY THAT THE TRIAL COURT'S ORDER IS NOT IN EFFECT OR, IN THE ALTERNATIVE, TO CONTINUE THE STAY PENDING APPEAL

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PRELIMINARY STATEMENT

Senate Majority Leader Andrea Stewart-Cousins and Speaker of the Assembly Carl Heastie, by and through their attorneys, Cuti Hecker Wang LLP, and Graubard Miller and Phillips Lytle LLP, respectfully submit this reply memorandum of law in further support of their motion to confirm that the Trial Court's order is not in effect and/or to continue the discretionary stay pending appeal.

Behind blustering attacks and false accusations that the Legislature "brazenly violated" the Constitution (Tseytlin Aff. ¶ 3), the weakness of Petitioners' substantive case is glaring. Even their hand-picked judge in Steuben County declined to find that the Senate map improperly favors Democrats. Petitioners themselves admit that the Assembly plan was the product of "bipartisan" negotiations — effectively conceding that the Trial Court erred by ordering the Legislature, *sua sponte*, to draft yet another "bipartisanly supported" Assembly plan. *Id.* ¶ 15. And with respect to the Congressional plan — the only one the Trial Court found substantively unconstitutional — Petitioners attempt to evade scrutiny of Mr. Trende's grossly deficient flawed analysis by quoting tweets, headlines, and other inadmissible hearsay that is outside the record.

Petitioners' claim of procedural unconstitutionality withers under scrutiny, as well. Redistricting has been the Legislature's prerogative for two

centuries. The 2014 amendments did not change that. Petitioners claim that after the Independent Redistricting Commission failed to submit a second set of proposed maps, the Legislature should have sat on its hands and left the State without maps for 2022, unless and until an opportunistic plaintiff ran to court. But the Constitution simply does not address what happens if the Commission abdicates its responsibility; the The Legislature plainly has the authority to fill any gap and avert a constitutional crisis, and the Constitution by its terms prohibits the judiciary from drawing maps before the Legislature is given "a full and reasonable opportunity" to do so.

Petitioners misstate the "fundamental question" of these stay proceedings. The true questions presented are these: Should this Court ignore the statutory provisions that render the Trial Court's Order tentative for 30 days? Should it step aside so that a single judge in Steuben County can engage an unknown person to redraw New York's legislative districts, which will govern this State for the next decade, before the appellate process is complete? Should it slam the brakes on an election cycle already in full swing? The answer to each question is no. The stay should remain in effect.

ARGUMENT

I. THE TRIAL COURT'S ORDER IS NOT IN EFFECT

The Trial Court's order is not in effect because the statutes that enacted the redistricting plans mandate that any order invalidating the maps shall be tentative and shall not become final for 30 days. L. 2022, ch.13, § 3(i); L. 2022, ch. 14, § 2. Petitioners' arguments to the contrary are unavailing.

Petitioners attempt to read into the Trial Court's order language that it does not contain – namely that because the Trial Court held that "the process used to enact the 2022 redistricting maps was unconstitutional," every portion of the enacting legislation is "void *ab initio*." Tseytlin Aff. ¶ 168. But that strained conclusion is belied by the clear language of the decretal paragraphs, which Petitioners parse so carefully elsewhere in their papers. In particular, decretal paragraphs 5 and 6 state that the order invalidates *only* "the maps enacted by" the 2022 legislation. *See* Order at 17. They say nothing about the statute itself, which contains severability, savings, and construction clauses.[1] *See* L.2022, c. 13, §§ 2, 3(a), (j); L.2022, c. 14, §§ 3, 127, 128; *see also St. Joseph Hosp. of Cheektowaga v. Novello*, 43 A.D.3d 139, 146 (4th Dep't 2007) (quoting *Alaska Airlines, Inc. v.*

[1] By contrast, the Trial Court made it abundantly clear when it intended to invalidate a statute in its entirety. *See* Order at 17 ("ORDERED, ADJUDGED, and DECREED that the enacted legislation L. 2021 c, 633 §1 be and is hereby found to be void and not usable and shall be stricken from the books.").

Brock, 480 U.S. 678, 686 (1987)) (severability clause "creates a presumption that the Legislature 'did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision.'"). And they ignore that the language mandating that any order invalidating any portion of the statute is tentative and not in effect was in effect before the February 2022 legislation and has existed in every redistricting statute for at least the past several decades. *See* L. 2002, ch. 86, § 3(i); L. 2012, ch. 16, § 2; L. 2002, ch. 35, § 2; L. 1992, ch. 76, § 2. The Trial Court had no power to bind the Legislature to obey his Order immediately, *see* L. 2022, ch. 13, § 3(i); L. 2022, ch. 14, § 2, and there is no basis to excuse the Trial Court's failure to follow the law.

Perhaps reflecting their awareness that this law means what is says, Petitioners insist that Appellants somehow waived the argument that no order invalidating the redistricting plans can go into effect before the Legislature has been afforded 30 days advance notice. *See* Tseytlin Aff. ¶ 167. That is baseless. To begin, there is nothing for Appellants to have waived. The statute directly requires that a court's order invalidating a redistricting plan be made tentative and not take effect for 30 days. No action is required to trigger the court's obligation.

In any event, this mandatory provision serves the public interest in affording the Legislature itself an opportunity to "discharge its constitutional mandate." L. 2022, ch. 13, § 3(i); L. 2022, ch. 14, § 2. Unlike a law that provides

personal benefits (such as a statute of limitation), which may be waived, statutes that serve a public purpose cannot be waived by a party. *See Hammelburger v. Foursome Inn Corp.*, 76 A.D.2d 646, 649 (2d Dep't 1980) ("[W]hen a right has been created for the betterment or protection of society as a whole, an individual is incapable of waiving that right; it is not his to waive.") (citing *Parthey v. Beyer*, 228 A.D. 308 (2d Dep't 1930), and *Sturm v. Truby*, 245 A.D.357 (4th Dep't 1935)); *see also Simonson v. Cahn*, 27 N.Y.2d 1 (1970); *Murphy v. Solomon*, 28 Misc. 2d 157, 159-60 (Sup. Ct. Kings Cnty. 1961).

Even if the mandatory and automatic 30-day delay in the effectiveness of the Trial Court's Order somehow could be construed to require a party to invoke the statute, there was no occasion for Appellants to do so. Petitioners requested that the Trial Court halt the election, and Appellants' papers addressed the myriad reasons why the Trial Court should not do so. It was not incumbent on Appellants to presume that if the Trial Court granted Petitioners the relief they sought, it would do so in a way that violates the law. In any event, because Petitioners could not have avoided the 30-day tentative order requirement had Appellants addressed it before the Trial Court, it has not been waived. *See Oram v. Capone*, 206 A.D.2d 839, 840 (4th Dep't 1994) ("A question of law appearing on the face of the record may be raised for the first time on appeal if it could not have been avoided by the opposing party if brought to that party's attention in a timely manner.").

Even assuming that the 30-day tentative order provision is somehow not in effect, the Trial Court order is stayed automatically under CPLR 5519(a). In arguing that the automatic stay does not apply, Petitioners fail to acknowledge the realities of the current crisis. The Order commands a reversal of the *status quo*. Petitioners' parsing of the decretal language in the Order to support application of the "prohibitory injunction" label cannot obscure that a stay is necessary here to maintain the *status quo* and prevent sowing injurious chaos. Use of the enacted plans *is already underway*; candidates and elections official throughout the State have been operating under these district lines for months. The Order required all such activities to cease. If the stay in effect is dissolved, the Trial Court's Order will require thousands of people to perform countless affirmative acts not otherwise required by the CPLR, including taking steps to change the political calendar. *See* Affidavit of Thomas Connelly dated April 2, 2022 ¶¶ 8-14.[2] The Trial Court's effective command

[2] Petitioners' citation to a recent Richmond County Supreme Court decision preliminarily enjoining enforcement of the "toddler mask mandate" in Staten Island is unpersuasive. *See Goldenstein v. N.Y.C. Dep't of Health and Mental Hygiene*, Index No. 85057/2022 (Sup. Ct. Richmond Cnty.). First, how an entirely unrelated municipal party chooses to style its appellate papers has no bearing on this case. Second, and more critically, an injunction to not enforce a mandatory policy that is the subject of the legal challenge (thus preserving the *status quo* that existed prior to the implementation of the challenged policy) is entirely different from an order requiring thousands of state and local officials to violate existing statutes that are not subject to legal challenge and government actors to affirmatively alter the political calendar to effectuate the injunction. The Trial Court's Order requires actions to be taken that are not required by the CPLR, and the Order is therefore automatically stayed. *See LaRossa, Axenfeld & Mitchell v.*

to do such acts falls squarely within the purview of the automatic stay, which is animated by an intention to preserve the *status quo*. *See State v. Town of Haverstraw*, 219 A.D.2d 64, 65 (2d Dep't 1996) ("The objective of the automatic stay provided by CPLR 5519(a)(1) is to maintain the *status quo* pending the appeal.").

II. THIS COURT SHOULD EXERCISE ITS DISCRETION TO STAY THE ORDER PENDING APPEAL

Continuing the discretionary stay would serve the same purpose of preserving the *status quo*. Automatic or not, permitting the Trial Court's directives to stand during the course of the substantive appeal would "threaten[] to defeat or impair [this Court's] exercise of jurisdiction." *Matter of Schneider v. Aulisi*, 307 N.Y. 376, 384 (1954) (affirming issuance of stay pursuant to court's inherent power because underlying pending motion would have been "valueless without a stay"). Indeed, Petitioners rely heavily on *Matter of Pokoik v. Dep't of Health Servs. of Cnty. of Suffolk* to oppose an automatic stay here, but the very language they cite underscores that where an automatic stay may not be available because of a so-called "prohibitory injunction," the court may nevertheless issue a stay in its discretion. 220 A.D.2d 13, 16 (2d Dep't 1996) (where "[f]uture acts which are not expressly directed by the order or judgment appealed from may nevertheless have the effect of changing the *status*

Abrams, 62 N.Y.2d 583, 586 (1984) (stating that Attorney General had "obtained an automatic stay" of a preliminary injunction enjoining it from enforcing subpoenas pending hearing on other motions).

quo and thereby defeating or impairing the efficacy of the order which will determine the appeal" the court may stay the order). Here, continuing the discretionary stay that is in effect is imperative because immediate enforcement of the Trial Court's Order would obviate the purpose of appellate review and facilitate the Trial Court's usurpation of the redistricting process and legislative function.

The parties do not dispute that whether a discretionary stay should issue or whether an automatic stay should be vacated require the same analysis. *See Eastview Mall, LLC v. Grace Holmes, Inc.*, 182 A.D.3d 1057, 1058 (4th Dep't 2020) (stay is appropriate where movant demonstrates "(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"); *DeLury v. City of New York*, 48 A.D.2d 405, 405 (1st Dep't 1975) (automatic stay vacated where movant demonstrates likelihood of success on the merits and irreparable injury). As demonstrated in Appellants' opening papers and as shown further below, Appellants are likely to succeed on the merits and will suffer irreparable if the stay pending appeal is not continued.

A. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS

1. The Trial Court Erred in Holding that the Commission's Failure to Act Stripped the Legislature of Its Authority to Enact Congressional, Senate, and Assembly Plans.

The Trial Court struck down the congressional, Senate, and Assembly plans on the ground that the Legislature lacked the authority to enact them. The

question at the core of this ruling, and beneath Petitioners' contorted and misleading arguments, is straightforward: if the Commission fails to submit a second plan or plans to the Legislature, who if anyone has the authority to correct the malapportioned 2012 districts?

No matter how many times Petitioners use the words "exclusive process" in their submissions, they cannot escape a fatal textual problem: the Constitution does not say – anywhere – that the Legislature is stripped of its authority to legislate if the Commission fails to perform its mandatory duties. The Constitution says nothing at all about what happens if the Commission fails to act.

Petitioners insist that because the Constitution describes "the process" that "shall govern redistricting" if the Commission does its job, it necessarily follows that if the Commission fails to act, the redistricting plans must be drawn by whatever Trial Court an opportunistic plaintiff chooses. Petitioners cite nothing in the Constitution that even suggests such a wholesale surrender of the Legislature's authority to the judiciary.

Petitioners' argument fails for at least four reasons. First, Petitioners rely on the flawed premise that "[t]he Constitution vests primary redistricting responsibility in the IRC." Tseytlin Aff. ¶ 91. In fact, the Constitution is clear that the Commission's authority is limited to making recommendations to the Legislature, and that at every stage of redistricting, the Legislature – and only the

Legislature – has the authority to decide what district lines become law. To be sure, the Commission plays an important role in conducting public hearings, considering the record, and making recommendations. But only the Legislature may decide whether the Commission's first recommendation becomes law; only the Legislature may decide whether the Commission's second recommendation becomes law; only the Legislature may decide what amendments it "deems necessary" if no Commission plan is enacted; and only the Legislature may cure any infirmities identified by a reviewing court. N.Y. CONST. art. III, §§ 4(b), 5. As recognized by the only other court to opine on the 2014 amendments, "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." *Leib v. Walsh*, 45 Misc. 3d 874 (N.Y. Sup. Ct. Albany Cnty. 2014).

All of Petitioners' strained arguments ignore the decisive role the Constitution confers on the Legislature with respect to the redistricting process. They argue, for example, that in approving the 2021 legislation in June, the Legislature attempted to "gut the Constitution" by enacting a statute that allows it to pass a plan "with any amendments . . . [it] deem[ed] necessary" if the Commission fails to act. Tseytlin Aff. ¶¶ 27-28. But they ignore that the Constitution affords the Legislature precisely that same authority if the

Commission proposes two plans and the Legislature decides, in its sole discretion, to reject them.

Moreover, Petitioners mischaracterize the circumstances of the June 2021 legislation. The June 2021 statute sought to fill the gap created by the silence in the 2014 amendments regarding what happens if the Commission fails to fulfill its duties. Petitioners allege falsely that the June 2021 statute achieved "largely the same result as the failed amendment." Tseytlin Aff. ¶ 29. That is not the case. Most of the November 2021 amendment proposed changes to constitutional language that could only be implemented through constitutional amendment, such as fixing the size of the Senate at 63 districts, eliminating the block-on-border rule, changing the schedule for Commission-proposed plans, and excising language from the Constitution that federal decisions had invalidated. A.10839/S.8833 of 2020; A.1916/S.515 of 2021. The same is not true for the June 2021 statute, which did not alter or amend any constitutional text. The mere fact that the gap-filling language in the statute did not become part of the Constitution hardly prohibited the Legislature and Governor from enacting the law.

Second, Petitioners ignore the standard of review, which requires courts to afford a very high degree of deference to the Legislature. Where the Constitution is silent on a question – here, with respect to who has the power to act if the Commission process breaks down – courts must defer to the Legislature's

judgment about how to fill the void. *Cohen v. Cuomo*, 19 N.Y.3d 196, 202 (2012). A statute must be upheld "until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Id.* at 201-02 (quoting *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992) (internal quotation marks omitted); *Matter of Fay*, 291 N.Y. 198, 207 (1943)). Neither the Trial Court nor Petitioners have made any serious effort to reconcile the 2021 statute with the Constitution.[3]

Third, Petitioners seek to avoid *Cohen* by alleging that Appellants have refused to "engag[e] with the text of the Constitution," which they argue is not silent and defines a specific redistricting process. Tseytlin Aff. ¶ 101. The problem with Petitioners' argument is two-fold. First, it proves too little, because the Constitution does not actually say what Petitioners wish it said, *i.e.*, that the Legislature is permitted to act "*if–and only if*" the Commission proposes a second

[3] Remarkably, the only case Petitioners cite for the proposition that a "procedurally improper law" is "wholly void" and "inoperative as if it had never passed" is *Robinson v. Robins Dry Dock & Repair Co.*, 204 A.D. 578, 583 (2d Dep't 1923), Tseytlin Aff. ¶ 98, which was *reversed* by the Court of Appeals because the statute in dispute "was reasonable and this exercise of the legislative power should not be declared invalid because of a constitutional limitation of doubtful application." 238 N.Y. 271, 280 (1924); *see also Delgado v. State*, 194 A.D.3d 98, 104 n.3 (3d Dep't 2021) (cited by Petitioners, but upholding legislative enactment that was "not clearly inconsistent with the intent of the drafters" of the constitutional amendment).

set of plans. Tseytlin Aff. ¶ 92 (emphasis in original). Such language is found nowhere in article III.

Petitioners' argument also proves too much because if, as they contend, the Constitution "unambiguously forecloses" any "alternative process" to the one described in the Constitution, Tseytlin Aff. ¶ 101, then a process by which a court draws legislative districts from scratch – the "alternative process" that Petitioners propose – is "unambiguously foreclose[d]" by the very same language on which Petitioners rely. Put differently, if Commission inaction forecloses intervention by one co-equal branch of government because the Constitution allows for only a single "process," logic dictates that it must also foreclose intervention by the other branches, especially because the Constitution assigns the judiciary and executive no role whatsoever in drawing district lines in the first place.

Fourth, Petitioners' theory is meritless because it cannot avoid the conclusion that in any redistricting cycle in which the Commission fails to act, the entire process, and all redistricting power, inescapably would be transferred to the courts. That cannot be correct because the Constitution states clearly and unequivocally that in the event that a court finds any violation with a redistricting plan, the Legislature "shall have a full and reasonable opportunity to correct the

law's legal infirmities."[4] N.Y. Const. art III, § 5. In discussing article III, section 4(e), Petitioners engage in a lengthy syntactic exegesis about the meanings of "shall" and "the," with citations to dictionaries and a host of other sources to prove a point that nobody disputes (what the words "shall" and "the" mean, and the process that governs redistricting when the Commission fulfills its mandatory duties). Tseytlin Aff. ¶¶ 93, 94. But when it comes to the express, unambiguous, and unequivocal language in section 5 that the Legislature "shall have a full and reasonable opportunity to correct the law's legal infirmities," Petitioners leave their dictionaries at home.

Petitioners decline to confront this textual problem because they have no answer. Neither did the Trial Court. But at least the Trial Court was forthright: after holding, incorrectly, that the Legislature lacked the power to redistrict in the first place, it recognized that its decision did not enable it to allow the Legislature to correct the supposed problem because if the Legislature did not have the authority to act the first time, then it similarly lacked the authority to correct

[4] Article III, section 5 states: "In any judicial proceeding relating to redistricting of congressional or state legislative districts, any law establishing congressional or state legislative districts found to violate the provisions of this article shall be invalid in whole or in part. In the event that a court finds such a violation, the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." This sweeping language applies to "any law" found to violate any provision of article III, and does not distinguish between alleged procedural or substantive defects.

anything the second time. The Trial Court therefore tried to get creative, essentially conjuring some kind of odd constitutional time machine in which the Legislature is sent back in time to mimic the process the Trial Court thinks should have happened at the Commission, resulting in "bipartisanly supported" plans. But as we have observed, the Constitution says nothing about that, and the Trial Court's proposed remedy, which Petitioners never suggested, and which effectively rewrites the Constitution's text, proves that the Trial Court's holding cannot stand.

Finally, Petitioners' spin regarding the breakdown of the Commission process misreads both the Constitution and the record. Petitioners continue to insist incorrectly, as they did below, that five commissioners constitute a quorum. That is wrong. The quorum requirement, once all ten commissioners are in place (as was the case here), is seven commissioners. N.Y. Constit., art. II, section 5-b(f). That mistake is crucial because it suggests falsely that the commissioners appointed by the majority party could fulfill the Commission's constitutional obligations without participation by the minority-appointed commissioners. That is untrue, and it is the reason we are here. The record confirms that it was the

Republicans on the Commission, not the Democrats, who stymied the process by refusing to meet and vote on a final plan or plans.[5]

2. The Trial Court Erred in Holding that the Congressional Plan Is an Unconstitutional Partisan Gerrymander

Throughout their submission, Petitioners repeatedly assert that the Legislature supposedly "transformed a 19-8 Democratic-Republican congressional map" into "a 22-4 Democratic-Republican map." Mr. Trende's own analysis confirms that that is false. Not only does Petitioners' statement conflate the 27-seat 2012 plan with a 26-seat plan that necessarily required substantial change, but Mr. Trende's analysis shows that a 19-8 map (or a 19-7 map) would be an extreme pro-Republican gerrymander under New York's political geography and far more favorable to Republicans than any of the simulated maps drawn by Mr. Trende's algorithm.

We urge the Court to take a close look at the "dot plot" graph in Paragraph 49 of the Tseytlin Affirmation. Mr. Trende calculated the partisanship

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[5] Petitioners contend that they were deprived of the opportunity to adduce evidence to refute the Legislature's claim that the Republican commissioners stymied the Commission process because they supposedly did not have time to depose the Democratic commissioners. Tseytlin Aff. ¶ 105. That is nonsense. Petitioners did not bother to subpoena the Republican commissioners for an obvious reason: they did not need subpoenas to speak with them. Petitioners had no problem coaxing Senate Minority Leader Ortt and State Board of Elections Commissioner Valentine to provide testimony voluntarily. Surely the Republican commissioners would have been available to provide affidavits if they had been able to state truthfully, under oath, that the Democrats stymied the process.

of each of the districts in each of his simulated maps, and he reported the partisanship of each simulated district in this illustration. The colored stripes show the range of outcomes for each of Mr. Trende's simulations, ordering them from the most Republican district to the most Democratic district. This graph clearly shows that in substantially all of his simulations, the computer drew no more than four Republican-leaning districts (because the fifth through twenty-sixth districts come out blue, or Democratic-leaning, every time), and in the great majority of his simulations, the computer only drew three Republican-leaning districts (because the fourth district came out blue, or Democratic-leaning, far more than half the time).

Mr. Trende's findings are consistent with the conclusions drawn by Dr. Katz, the esteemed Caltech professor. Dr. Katz engaged in a comprehensive statistical analysis of the enacted Senate and congressional plans, using the same methodology he has used in dozens of other redistricting cases, and testified that that there is no statistically significant evidence of partisan bias in either plan, and that if anything, each plan slightly benefits Republicans.[6]

[6] Dr. Katz used the exact same methodology for the Senate and congressional plans, and he reported his results in the same report. It makes no sense that the Trial Court accepted and credited Dr. Katz's findings with respect to the Senate plan but not the congressional plan.

Of course, Republican candidates may win more than four congressional seats in November. Or they may win fewer. But the mere fact that there currently are eight Republican congressional incumbents under a ten-year-old map is irrelevant. The upstate region is losing a congressional district, which itself makes the "19-8" spin grossly misleading. And as Mr. Trende's simulations, Dr. Katz's analysis, and the testimony of other experts in this case confirm, there simply is nothing surprising or unfair about the fact that the enacted plan contains 22 Democratic-leaning districts, one fewer than in nearly all of Mr. Trende's simulations. Petitioners' assertion that the congressional plan has "an extreme partisan effect," Tseytlin Aff. ¶ 121, is not just unsupported. It is belied by the overwhelming weight of the record, including the analysis of their own expert.

Petitioners' criticisms of the "process" are similarly wide of the mark. The question in this case is whether Petitioners have proven beyond a reasonable doubt that the Legislature drew district lines intentionally to disfavor Republicans. The question is *not* whether the duly elected Democratic supermajorities in both houses of the Legislature gave the Republican minorities the seat at the table that they hoped for. The Constitution says nothing about bipartisan consensus, much less does it command the Democratic supermajorities that the voters sent to both the Senate and Assembly to consult with the minority political party. Article III of the Constitution expressly prescribes *the number of votes* that were needed to

secure enactment – not the party affiliation of those voting. Petitioners insist without citing any authority that the Legislature's decision not to consult with Republicans "end[s] the case," Tseytlin Aff. ¶ 115. Far from dispositive, it is not even relevant to whether the enacted plans comply with the Constitution.

Moreover, Petitioners continue to ignore the serious exigencies that were presented (the Commission process broke down only a little more than a month before the petitioning process was set to begin) and the uncontested fact that the Commission already had held 24 public hearings. Given the voluminous record that the Commission had developed and the serious exigencies presented by the looming election calendar, the Legislature acted reasonably in making it a priority to complete the redistricting process with alacrity.

The process that was followed here is a far cry from the extraordinarily abusive procedures that were questioned in the cases Petitioners cite. *See, e.g.*, *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 390-93 (Fla. 2015) (inferring evidence of improper intent because the Legislature destroyed material evidence and misled the public through sham hearings while secretly conspiring with national Republican consultants); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1099-1104 (S.D. Ohio 2019) (inferring partisan intent because of "a severe disconnect between the outward face of the map-drawing process and its true inner workings"; the legislature sought to

mislead the public through purported open hearings, while working secretly with national Republican consultants who directed the line-drawing process), *vacated and remanded*, 140 S. Ct. 101 (2019).

Petitioners' spin on Mr. Trende's simulation analysis is highly misleading, as was his sworn testimony in this case. As shown in Appellants' prior brief, after Dr. Tapp exposed the likely fatal redundancy problem in Mr. Trende's methodology, Mr. Trende went on to perform 750,000 simulations in the Maryland case (three tranches of 250,000) and discovered that *most of his simulated maps were exact duplicates*. *See Szeliga v. Lamone*, Nos. C-02-CV-21-001816, at ¶ 99 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022) (NYSCEF Dkt. No. 240) ("In each of Mr. Trende's simulations he used 250,000 maps . . . ; he discarded duplicative maps and arrived at between 30,000 and 90,000 maps to be sampled for each simulation.").

Petitioners respond that Appellants somehow "waived" this issue because Appellants supposedly "had full opportunity to cross-examine Mr. Trende on his approach in Maryland in this case." Tseytlin Aff. ¶¶ 135-36. But Appellants had no such opportunity because Mr. Trende *never disclosed in this case* – despite Dr. Tapp's vociferous criticism of his decision to run only 5,000 or 10,000 simulations and the substantial evidence of a serious redundancy problem – that he had just run 750,000 simulations in the Maryland case and found massive

redundancy. As Petitioners acknowledge, Mr. Trende submitted his Maryland expert report on February 28, 2022 – two weeks before he testified in this case – but because Appellants are not parties in the Maryland case, and because Mr. Trende did not disclose his Maryland simulations in this case, Appellants did not know about his Maryland report when he was cross-examined on March 14, 2022. Appellants did not find out that Mr. Trende ran 750,000 simulations and discovered massive redundancy in Maryland until that Court ruled on March 25, 2022.

Especially with this timeline in mind, Mr. Trende's sworn testimony in this case about the redundancy problem was at best troublingly incomplete. Appellant's counsel confronted Mr. Trende under oath about the striking bimodal distribution in the compactness scores of his simulations – instead of a bell curve, the results were all strongly clustered around two compactness scores, suggesting that his simulations were mostly modest variations of two maps – and Mr. Trende ducked the questions without acknowledging, *as he already knew, but as Appellants' counsel did not know*, that he had run 75 times as many simulations in Maryland and found huge duplication issues. We urge the Court to carefully consider this colloquy from the trial transcripts:

> Q. You see that on the top of Page 22 of your original report, you have the Polsby-Popper scores for all of the simulated Senate maps?
>
> A. That's correct. Yes.

Q. Does anything look weird to you about that?

A. It's how the districts came out. No.

Q. Well, I know it's how they came out. Does how they came out look weird to you? Doesn't it look like there's two very significant clusters, one around the .23 range and the other about the .26 range?

A. It's a standard bimodal distribution, yes.

Q. What do you mean by "standard bimodal distribution"?

A. There are two humps.

Q. Is it your testimony that there's nothing noteworthy about that?

A. Not without going through the maps and looking at them individually.

Q. Did you go through the maps and look at them individually?

A. No.

Tr. 3/14/22 at 74:5-75:1.

When Mr. Trende gave this sworn testimony, he knew (a) that Dr. Tapp had submitted a report in this case criticizing Mr. Trende's decision to run only 5,000 to 10,000 simulations and opining that the bimodal compactness distribution discussed in this colloquy was strong evidence of a fatal redundancy problem; (b) that Mr. Trende had just run 750,000 simulations in Maryland using the same methodology, looked at the simulated maps, and found a massive redundancy problem; and (c) that Appellants' counsel had no way to know about

the Maryland simulations because Mr. Trende had not disclosed them in this case. When Mr. Trende was asked if the bimodal distribution looked "weird" and "noteworthy," instead of saying "not without going through the maps and looking at them individually," the forthright answer would have been "yes, it does look weird, and to determine whether I ran into the same duplication issue here that I ran into in Maryland, I would have to go through the maps and look at them individually, as I did in Maryland, but as I did not do in this case."

Nor have Petitioners come close to grappling with the undisputed fact that Mr. Trende's simulations failed to consider communities of interest even though the Constitution unequivocally requires that they be considered. Critically, Mr. Trende – who boasted to the Virginia Supreme Court that he and his co-map-drawer had carefully identified, considered, and heeded communities of interest when they drew the congressional lines in Virginia last year – expressly conceded on cross-examination that those Virginia districts "would have come out different" if they had not considered communities of interest. Tr. 3/14/22 at 89:16-25. He further acknowledged that there was a "pretty strong consensus" between Republicans and Democrats on the Commission about how to heed established communities of interest in the upstate region in this case, *id.* at 95:18-96:6, but that he had not considered that at all, *id.* at 92:7-18, and that his simulations instead started with a "blank page," *id.* 93:23-94:5.

Petitioners' attempt to address the sample New York simulations created by Dr. Imai – which are reflected in Exhibit S-4, and which show that simulated maps using the Imai algorithm look nothing like any actual New York map-drawer would draw – is grossly confused. Petitioners apparently think, mistakenly, that Exhibit S-4 shows examples of Mr. Trende's ensemble, but Appellants have been clear that Exhibit S-4 shows the three sample simulations that *Dr. Imai* published on his ALARM Project website from the ensemble *that he separately created*, not in connection with this case. This is not a "comically small collection of Mr. Trende's ensemble maps," nor did Appellants "handpick[]" them. Tseytlin Aff. ¶ 139 n.31. These are the three maps that Dr. Imai himself – the simulations luminary who proposed in his draft paper the algorithm that Mr. Trende used in this case – chose to publish on his website as emblematic of how the algorithm draws New York districts. Mr. Trende conceded on cross-examination that the Imai sample simulated districts reflected in Exhibit S-4 look "crazy" and "not pretty." Tr. 3/14/22 102:4-17.

Petitioners attempt to deflect from Mr. Trende's fatally problematic failure to account for communities of interest by observing that "Mr. Trende did not control for communities-of-interest considerations in his Maryland simulations" either. Tseytlin Aff. ¶ 135. But *the Maryland Constitution does not*

require the consideration of communities of interest. Article III, § 4 of the Maryland Constitution says only that:

> Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.

Article III, section 4(c)(5) of the New York Constitution, in stark contrast, expressly requires map-drawers to "consider the maintenance of . . . communities of interest." Thus, whereas simulating districts in Maryland without considering communities of interest may well be an apples-to-apples exercise, simulating districts in New York without considering communities of interest does nothing more than generate an array of unlawful maps, ones that simply do not reflect what an actual map-drawer would do.[7]

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[7] The cases Petitioners cite in which Ohio and Pennsylvania courts relied on simulations only further confirm that Mr. Trende's flawed analysis yields no reliable conclusions here. In *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), one expert conducted *one trillion* simulations, another expert relied on a well-established simulation algorithm that had been peer-reviewed, and both experts provided their complete algorithms and computer code so that the parties and the court could see what the simulated maps actually looked like. In *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, ___ N.E.3d___, 2022 WL 110261 (Ohio 2022), the court looked to expert analysis because the Ohio constitution, unlike the New York Constitution, required it to determine whether the plan at issue achieved proportional representation; the simulations were not the centerpiece of the court's analysis, but rather merely augmented the court's analysis of copious partisan symmetry statistical analysis offered by other experts; the intent of the Ohio Legislature was irrelevant to the case; and the legal standard was nowhere close to beyond a reasonable doubt. Critically, moreover, the redistricting criteria in both Pennsylvania and Ohio are fundamentally different

Nor do Petitioners have a meaningful response to the glaring problem that Mr. Trende's simulated maps were never put into the record in this case, such that nobody can verify whether they contain redundancies or draw districts that fail to heed constitutional criteria and that no reasonable map-drawer would create. Petitioners say only that they "would have been glad to turn those maps over" if there had been time for expert discovery in this case. Tseytlin Aff. ¶ 136. But it was Petitioners' burden to prove beyond a reasonable doubt that the Legislature purposefully disfavored Republicans, and it is their problem that they failed to introduce the simulated maps upon which they are relying all but exclusively.

This brings us to Petitioners' half-hearted effort to resurrect Mr. Lavigna, the pollster whom they never mentioned in summation and whose completely discredited testimony was not relied upon by the Trial Court. Petitioners begin by citing Mr. Lavigna's testimony about Districts 1 and 2 on Long Island, Tseytlin Aff. ¶ 141, but they ignore Dr. Ansolabehere's testimony that the adjustments to Districts 1 and 2 were consistent with population shifts and resulted in an even swap between those districts that caused no partisan shift on Long Island. Dr. Ansolabehere testified that District 1 "[went] from a Republican

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and less complex than in New York, and neither state requires the consideration of communities of interest.

district to a swing district" and that District 2 went from "a swing district to a Republican district." Tr. 3/15/22 179:12-20.

With respect to Districts 8-11 in Brooklyn, Petitioners carelessly repeat Mr. Lavigna's provably false assertion that "in CD10, the Legislature divided an established Asian community by moving half of it into Congressional District 11." Tseytlin Aff. ¶ 142. In fact, that is the opposite of what happened. As Mr. Lavigna was forced to concede at trial, the 2012 plan had cracked the Chinese-American community between Districts 10 and 11, and the 2022 plan unites that community of interest by moving Chinese-Americans from former District 11 and uniting them in District 10 with the Chinatown neighborhoods in Brooklyn and Manhattan. Tr. 3/15/22 at 48:3-50:1. We noted this critical concession in our prior brief, but Petitioners chose to double down and cited the same discredited Lavigna mistake without even acknowledging that it has been proven wrong.

Petitioners' criticisms of Districts 16 and 18 in the Hudson Valley Region ignore the substantial population pressure from multiple directions that required significant changes to these districts, Tr. 3/15/22 at 174:22-175:10, 175:14-20, and the commonalities between towns that were united on either side of the Westchester/Putnam border as explained in detail in the counterstatement of facts included the Senate Respondents' Verified Answer to the Amended Petition.

Petitioners' insistence that the Legislature supposedly "pack[ed] . . . Republicans into CDs 21, 23, and 24" to "enable[] Democrats to gain a partisan advantage in CD22," Tseytlin Aff. ¶ 144, is particularly odd. As discussed previously, the Legislature hewed closely to the strong bipartisan consensus on the Commission regarding how to draw the upstate region consistent with established communities of interest. The Legislature did not "pack" Republicans into those districts. The Legislature recognized the consensus that there should be four urban districts encompassing Albany (20), Syracuse (22), Rochester (25), and Buffalo (26), and that there should be Southern Tier (23) and North Country (21) districts, and a Lake Ontario district (24) filling in the rest of the population. Placing Republican voters in districts because it makes sense to do so is not "packing" them, even if the resulting districts are not particularly competitive. Petitioners' focus on the fact that Tompkins County is included in District 22 along with Onondaga County makes no sense because both Commission plans did the same.

The record in this case is so bad for Petitioners that it is no wonder that they resort to out-of-context quotations from pundits and newspaper articles that are not part of the record and do not reflect the trial testimony. Such a haphazard attempt to prove a claim through untested, unsworn, non-record evidence would be problematic enough in a preponderance case. It obviously has

no place in a proceeding in which Petitioners' burden is to prove unconstitutional intent to inflict political injury beyond a reasonable doubt.

B. PETITIONERS IGNORE THE IMMEDIATE, IRREPARABLE HARM THAT WOULD RESULT FROM VACATING THE STAY

Petitioners contend that the Trial Court's Order, if allowed to take effect, would cause only minimal harm. Their position ignores reality and should be rejected.

1. It Is Too Late to Change the Maps Governing the 2022 Elections Without Causing Substantial Upheaval

Petitioners claim there is "ample time" to put the ongoing election cycle on hold for some unknown period while the appellate process runs its course. Tseytlin Aff. ¶ 13. Not even the Trial Court believed that: rather, it expressed "concern[ ] about the relatively brief time in which everything would need to happen to draw new maps" and noted that, as a result of its Order, New York might not have maps in time for the 2022 elections. Order at 15, 17.

Petitioners' misguided position is based, in part, on states that hold primaries in August. Tseytlin Aff. ¶ 13. Holding a regularly scheduled primary in August is one thing. But what Petitioners suggest is quite another: to take a primary scheduled for June, complete the ballot-access petitioning period, pause everything, redraw legislative-district lines, and then restart the election process

from scratch with a few months to spare, while election officials are still preparing for June primaries in a host of local races.

A Federal Court already recognized the difficulty of holding primary elections in August, even under normal circumstances. In *United States v. New York*, Chief Judge Sharpe rejected a suggestion by one of the parties that New York conduct congressional primary elections in August. 2012 WL 254263, at *2 (N.D.N.Y. Jan. 27, 2012). Such a late primary, the Court determined, would jeopardize New York's compliance with the Federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA). *Id.* at *1. That statute requires transmission of primary- and general-election ballots to certain overseas citizens 45 days before the election. *Id.* Chief Judge Sharpe ordered that "New York's non-presidential federal primary date shall be the fourth Tuesday of June, unless and until New York enacts legislation resetting the [primary election] for a date that complies fully with [UOCAVA] requirements, *and is approved by this court.*" *Id.* at *3 (emphasis added). Thus, the congressional primary cannot be moved without Chief Judge Sharpe's approval. Petitioners' assertion to the contrary, Tseytlin Aff. ¶ 161 n.40, is simply wrong.

Todd Valentine's affidavit submitted to the Trial Court, *see* NYSCEF Trial Court Dkt. No. 239, does not help Petitioners, either. It does little more than conclude, without explanation, that "there is no real reason" not to jam new maps

into the 2022 elections. Dkt. No. 239, ¶ 5. In fact, real reasons abound, and they are described in detail in the two affidavits of Thomas Connolly, Director of Operations for the State Board of Elections.

To summarize, interfering in the 2022 elections at this late stage would cause upheaval. Petitioners' unrealistic assertions to the contrary should be rejected.

2. Other States' Decisions to Move Their Primary Dates Offer No Justification for this Court to Do the Same in New York

Petitioners emphasize that the Courts of three States — Maryland, Pennsylvania, and North Carolina — have attempted to resolve redistricting lawsuits in time for the current election cycle. Tseytlin Aff. ¶¶ 150–52. But those States are hardly models worth following. In Maryland, for instance, "state and local election officials are losing sleep right now thinking about how they're going to deal with whatever emerges from . . . court challenges to state maps."[8] And in Maryland, the redistricting plan that remained in limbo was a congressional plan containing only eight districts. By contrast, the Trial Court here discarded 239 legislative districts in a significantly larger and more complex state. Moreover, it

[8] Tim Henderson, *Redistricting Delays Scramble State Elections*, THE PEW CHARITABLE TRUSTS (STATELINE), Mar. 10, 2022, 2022 WLNR 8066659 (quotation marks omitted).

was Maryland's highest court, the Court of Appeals, that pushed back Maryland's election calendar, not a Trial Court or intermediate appellate court.

In Pennsylvania, the State Supreme Court briefly stayed election deadlines, but it had no choice to do otherwise. The state legislature and governor had reached an impasse, and there therefore indisputably were no congressional districts in which candidates could run. The Supreme Court approved a map on February 23, 2022, more than a month ago. In North Carolina, a remedial plan also was implemented in February. In neither state had primaries moved forward and reached critical stages before judicial disruption, unlike in New York. In any event, New York should seek to avoid, not emulate, states with uncertain elections.

In contrast, the 2022 elections in at least four states will proceed under challenged maps. Opening Mem. at 49–50 & n.8. A Federal District Court in Georgia, for instance, refused to enjoin election deadlines while a redistricting challenge was pending. *Alpha Phi Alpha Fraternity Inc. v. Raffensberger*, 2022 WL 633312, at *74 (N.D. Ga. Feb. 28, 2022). The Court recognized that "elections are complex and election calendars are finely calibrated processes, and significant upheaval and voter confusion can result if changes are made late in the process." *Id.* When the Court declined to grant the injunction, the candidate-qualification process in Georgia was scheduled to *begin* in six days; here, it *ends* tomorrow, April 7, 2022. There, like here, "it would not be proper to enjoin the

2022 election cycle for which the election machinery is already in progress." *Id.* A Kentucky state court judge reached a similar decision, employing stronger language: "the Court refuses to serve as the ringmaster of a three-ring circus by creating a new filing deadline and throwing the 2022 election cycle into turmoil."[9] These courts chose the wiser path.

3. Petitioners Mischaracterize the Applicability of *Purcell* in State Courts

As Appellants explained, the *Purcell* principle is based on common sense: Courts should not change election rules when an election is near, let alone when an election has already begun. Opening Mem. at 46. Petitioners suggest that the United States Supreme Court has encouraged state courts to ignore *Purcell*. Tseytlin Aff. ¶ 154. In doing so, Petitioners mischaracterize *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Mem) (Kavanaugh, J., concurring), and *Growe v. Emison*, 507 U.S. 25 (1993). Neither opinion supports state-court tinkering with imminent elections; at most, they recognize that federalism is an additional reason why federal courts should adhere to the *Purcell* principle.

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[9] Joe Sonka, *Judge denies motion to halt Kentucky redistricting. Here's what it means for the election*, COURIER JOURNAL (Feb. 18, 2022), https://www.courier-journal.com/story/news/politics/ky-general-assembly/2022/02/18/judge-wont-halt-kentucky-redistricting-but-lets-lawsuit-continues/6835720001/ (last accessed Apr. 5, 2022).

Petitioners have no answer to the many state courts that have adopted and followed *Purcell*. Opening Mem. at 46-47. Nor do they address *Badillo v. Katz*, 32 N.Y.2d 825 (1973), or *Honig v. Board of Supervisors of Rensselaer County*, 24 N.Y.2d 861 (1969), in which the New York Court of Appeals allowed imminent elections to proceed under illegal plans. Opening Mem. at 47-48. Petitioners also decline to take seriously United States Supreme Court decisions recognizing that "if a [redistricting] plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); Opening Mem. at 48-49.

4. Lifting the Stay Would Deprive Appellants of Their Right to Appellate Review

Appellants explained that without a stay of the Trial Court's Order, they will lose their right to appellate review. Opening Mem. at 37. Absent a stay, the Trial Court will start drawing its own maps for the Assembly, Senate, and Congress on April 11,

- before this appeal will even be perfected;
- before this Court and the Court of Appeals have had any opportunity to review and validate the plans that the Trial Court erroneously annulled; and,
- before any challenges to individual candidates' designating petitions collected in reliance upon those maps can be adjudicated in time

for the June 28 primary under the schedule set by the Court of Appeals, *see* https://nycourts.gov/ctapps/news/nottobar/nottobar03012022.pdf.

In response, Petitioners assert that the Legislature should simply enact replacement plans now "that would expressly become void if [Appellants] prevail in this appeal." Tseytlin Aff. ¶ 162. Similarly, they urge that "***under no circumstance***" should this Court continue to stay the remedial process ordered by the Trial Court. *Id.* ¶ 14 (emphasis in original).

These arguments miss the point. "In our tripartite form of government, the Legislature determines the public policy of this State, recalibrating rights and changing course when it deems such alteration appropriate as it grapples with enduring problems and rises to meet new challenges facing our communities." *Regina Metro. Co. v. N.Y. State Div. of Hous. and Cmty. Renewal*, 35 N.Y.3d 332, 348 (2020). Consistent with this prerogative, the State Constitution confers upon the Legislature a "full and reasonable" opportunity to draw new redistricting maps for congressional, Senate, and Assembly districts. N.Y. Const. art. III, § 5. That means, in part, an opportunity to draw maps without a judicially imposed – indeed, a judicially invented – bipartisanship requirement. The Trial Court's Order does not allow the Legislature to enact new maps under the rules set forth in the Constitution. *Compare* Order at 18, *with* N.Y. Const. art. III, § 4(b). Instead, the Trial Court gave the Legislature's Republican minority the

ultimate trump card – agree to their demands, or a single Acting Supreme Court Justice in Steuben County will undertake an admittedly "expensive" process, Order at 17-18, to engage an unknown individual to draw district plans to govern the entire State for the next decade, even though the State Constitution grants him no authority to do so.

Petitioners' novel suggestion is also misguided for another reason: nothing in state law suggests that two sets of reapportionment plans can exist simultaneously. *See* Tseytlin Aff. ¶ 14 (contending that Legislature should enact new lines, so that the appellate courts can decide which lines should govern the elections). In order to enact new redistricting plans, the Legislature would either need to concede the validity of the Trial Court's Order or repeal the prior enacted plans by statute, either of which would forfeit the right to appeal. Not only would this greatly prejudice Appellants, but it would sow unimaginable confusion. Under Petitioners' theory, the Legislature should enact new plans next week, which election officials would need to implement and candidates would need to start running on, notwithstanding that shortly thereafter, when this Court rules, the entire process would revert and start over if Appellants prevail. That makes no sense.

Finally, Petitioners impugn Appellants' integrity, contending that this appeal is a "cynical effort[ ]" intended to cause an election to proceed on

unconstitutional maps. Tseytlin Aff. ¶ 3. But the Legislature is merely seeking to do what every Legislature has done since the Constitution first provided for judicial review of redistricting plans in 1894 – obtain the benefit of appellate review. The last time that state courts invalidated decennial redistricting plans, the Trial Courts' decisions were reversed on appeal, and the maps were upheld. *See Wolpoff v. Cuomo*, 80 N.Y.2d 70 (1992). Appellants are confident the same result will follow here. Their effort to defend duly enacted laws – and the integrity of New York's election process – is hardly "cynical."

For these reasons, the only way to preserve Appellants' right to appellate review of the district maps the Legislature enacted in February 2022, and to avoid confusion in the meantime as to the presumptive validity of the petitions being filed this week to designate candidates for Congress, Senate, and Assembly, is to leave the stay in place.

C. PETITIONERS EXAGGERATE THE HARM THEY WOULD SUSTAIN IF THE STAY REMAINS IN PLACE

Petitioners assert they "will suffer grave, constitutional harm if unconstitutional maps are kept in place for the 2022 election." Tseytlin Aff. ¶ 88. Petitioners' argument is misleading, because they: (1) ignore that the Trial Court found only one map (*viz.*, delineating New York's Congressional districts) to be substantively unconstitutional; and (2) gloss over their admission that the Assembly plan was never at issue and was created through a bipartisan process.

Petitioners cannot argue that they will suffer severe constitutional harm when the Trial Court found only New York State's newly enacted congressional plan – not its Senate or Assembly plans – was substantively unconstitutional. The Trial Court stated in its Decision and Order, albeit erroneously, that the congressional plan "was enacted with political bias and thus in violation of the constitutional prohibition against gerrymandering." Order at 17. In contrast, the Senate and Assembly plans were found only to be "void and no longer useable" on procedural grounds. *Id.* Petitioners assert that the Senate plan is "procedurally unconstitutional" and "substantively unconstitutional" but acknowledge that they "did not prevail on that substantive claim." Tseytlin Aff. ¶ 15.

Petitioners further admit that they never challenged the constitutionality of the Assembly plan and believe it to be the result of a bipartisan process. *Id.* They cannot reasonably argue that they will suffer "grave, constitutional harm" on account of a stay of the Trial Court's effort to invalidate and redraw the enacted Assembly plan, Tseytlin Aff. ¶ 156, when they admit that plan was not gerrymandered or challenged, *id.* ¶ 15, and in fact was not even at issue prior to the Trial Court's *sua sponte* ruling, Order at 17. In their previous briefing, Petitioners emphasized that their requested remedy was one "*affecting only the elections for Congress and state Senate, not any other state or local*

elections." Trial Court NYSCEF Dkt. No. 238 at 6-7 (emphasis in original). Petitioners now accept without question that "the Legislature negotiated and agreed on a bipartisan basis as to [the Assembly plan]," Tseytlin Aff. ¶ 15, even as they allege elsewhere in the same affirmation that all "the 2022 maps are unconstitutional," *id.* ¶ 99.

Petitioners greatly exaggerate the constitutional harms they allege when they have admitted that two of the three maps were not found to be substantively unconstitutional.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in their principal Memorandum of Law dated April 3, 2022, Appellants respectfully submit that the Court should enter an order clarifying that the Trial Court's Order is not in effect and/or should continue the already-issued stay pending appeal.

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Dated: April 6, 2022
New York, New York

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