To be argued
By: JEFFREY W. LANG
15 minutes requested

Supreme Court of the State of New York
Appellate Division – Fourth Department

No. CAE 22-00506

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,

v.

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

Respondents-Appellants,

and

NEW YORK STATE BOARD OF ELECTIONS,

Respondents.

BRIEF FOR GOVERNOR AND LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE

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Dated: April 13, 2022

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PRELIMINARY STATEMENT

In this special proceeding, petitioners challenge as unconstitutional the process by which the Legislature enacted the 2022 redistricting plans, as well as the maps for congressional and Senate apportionment. In a judgment (denominated "decision and order") Supreme Court, Steuben County (McAllister, J.), concluded that the Legislature failed to follow constitutional procedures when it enacted the electoral maps for congressional, assembly, and senate districts, voided those maps, and enjoined their use in the current election. The court additionally struck the 2021 legislation that was intended to fill in a gap left by earlier amendments to the Constitution regarding redistricting procedures. And the court found the congressional maps to be an invalid partisan gerrymander. Justice Lindley stayed the court's judgment pending appeal, with a limited exception allowing Supreme Court to retain an expert to draw congressional maps.

This Court should reverse. As an initial matter, Supreme Court erred when it held that the Governor and the Lieutenant Governor ("executive respondents") are proper parties to this litigation. The Lieutenant Governor should be dismissed because he was not involved in

the redistricting process. Petitioners also failed to demonstrate that the Governor played any role in the design of the challenged electoral maps. And to the extent her participation as a party hinges on the fact that she signed the 2022 redistricting plans into law, she is entitled to legislative immunity for such action.

Supreme Court further erred when it held the gap-filling 2021 legislation unconstitutional. Laws designed to fill a void left by the Constitution are entitled to a strong presumption of constitutionality, and may only be struck when reconciliation with the Constitution is impossible. Here, the legislation may be easily reconciled, both because it addressed a circumstance on which the Constitution was silent, and because it is line with the Legislature's longstanding and continued central role in redistricting in the State.

Supreme Court also erred when it held that petitioners demonstrated beyond a reasonable doubt that the congressional map is an unconstitutional partisan gerrymander. Executive respondents refer the Court to the papers and supporting expert testimony submitted by the Senate Majority Leader and the Speaker of the Assembly ("legislative

respondents"), demonstrating the constitutionality of this apportionment plan.

This Court should therefore vacate the judgment in its entirety, reject the challenges brought by petitioners, and dismiss the petition.

Alternatively, if the Court affirms in any part, it should nevertheless vacate the remedy imposed by Supreme Court and defer the implementation of any remedial electoral maps until the next election cycle. Any change in district lines at this point would cause chaos and confusion. For just this reason, the United States Supreme Court has recently reiterated that courts should not interfere with the election cycle at such a late stage. Here, immediate implementation of a remedy would destabilize an election process that is already well underway, sowing uncertainty for voters, candidates, and state and local election officials alike.

QUESTIONS PRESENTED

1. Whether executive respondents should be dismissed because they are not proper parties to the litigation?

2. Whether the 2021 legislation is constitutional because it fills a gap left by the State Constitution?

3. Whether the 2022 congressional map is constitutional?

4. Whether, even if this Court affirms in part, it should vacate Supreme Court's remedy and defer the implementation of any remedial electoral maps until the next election cycle?

STATEMENT OF THE CASE

A. Statutory and Factual Background

In 2014, after passage by two successive Legislatures, voters approved a set of amendments to the State Constitution aimed at eliminating partisan gerrymandering in the drawing of electoral districts (the "2014 amendments"). Under the 2014 amendments, "[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." N.Y. Const. art. III, § 4(c)(5).

The 2014 amendments also created an Independent Redistricting Commission ("IRC") consisting of ten members appointed by the majority and minority party leaders of the Legislature. N.Y. Const. art. III, §§ 4 and 5-b. Under the amendments, beginning with the 2020 redistricting cycle, the IRC has preliminary responsibility for drawing new proposed

electoral maps, while the Legislature retains its long-held ultimate authority over redistricting.

Specifically, the amendments direct the IRC to prepare and submit a redistricting plan for senate, assembly, and congressional districts, along with the necessary implementing legislation, to the Legislature by January 15 of the second year following the census. *Id.* § 4(b). If the speaker of the assembly and temporary president of the senate are members of the same party (as was the case here), seven votes are required to approve a redistricting plan and implementing legislation. *Id.* § 5-b(f). If the IRC cannot obtain seven votes for a plan, it is directed to submit the plan or plans which receive the most votes. *Id.* The Legislature must then vote on the plans and implementing legislation without amendment. *Id.* § 4(b). The Constitution also spells out the vote margins necessary for the Legislature to approve a redistricting plan, depending on whether the speaker of the assembly and temporary president of the senate are of the same or different parties, and the number of IRC votes that the submitted plan or plans received. *Id.*; Legis. Law § 93(1).

If the Legislature fails to adopt the first set of plans and implementing legislation submitted by the IRC, or if the Governor vetoes them, the IRC is directed to submit a second set of plans and implementing legislation to the Legislature, subject to the requirements outlined above, either (1) within 15 days of being notified of the first rejection, or (2) by February 28, whichever date is earlier. N.Y. Const. art. III, § 4(b). The Legislature must then vote on the second set of proposed plans and implementing legislation without amendment. *Id.*

If the Legislature fails to adopt the IRC's second set of plans and implementing legislation, or the Governor vetoes them, the Legislature can create its own maps and implementing legislation, making "any amendments" it "deems necessary." *Id.*

In accordance with the 2014 amendments, on September 15, 2021, the IRC submitted two sets of redistricting plans to the Legislature, because the IRC was split 5-5 along party lines as to which map to put forth. (Record on Appeal [R] 1106.) On January 10, 2022, the Legislature voted down both plans. (R1108.) The process then reverted to the IRC to prepare a second plan. The IRC reached an impasse, however, and was unable to agree to submit any further revised plans. On January 24,

2022, the IRC announced that it would *not* submit another set of congressional and state legislative maps to the Legislature. (R1108.) On January 25, 2022, the 15-day window for the IRC to submit revised maps to the Legislature closed without the IRC submitting new maps.

The 2014 amendments were silent on how to proceed with redistricting in the event that the IRC fails to submit a first or second set of maps. In anticipation of this possibility, in June 2021, both houses of the Legislature approved a bill to specify what should occur in this circumstance.[1] In November 2021, before the bill was signed into law by the Governor, the provision addressing an IRC impasse was incorporated into a more substantial and overarching proposal to amend multiple provisions in the State Constitution. That proposal included freezing the number of state senators at 63, amending the process for counting the state's population, and deleting certain provisions that violate the United States Constitution.[2] (R914-921.) The proposal appeared on the ballot and failed to pass. After the failure of that broader proposal, the Governor

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[1] *See* https://www.nysenate.gov/legislation/bills/2021/S7150, Actions.

[2] *See* https://www.elections.ny.gov/2021BallotProposals.html, Ballot Proposal 1.

signed the bill addressing an IRC impasse into law.[3] L. 2021, c. 633, § 1 ("2021 legislation"). (R912-913.)

In relevant part, the 2021 legislation provides that "[i]f the commission does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan, the commission shall submit to the legislature all plans in its possession, both completed and in draft form, and the data upon which such plans are based." *Id.* (R912-913.) Under such circumstance, the Legislature retains authority to create and pass its own redistricting plan and implementing legislation to be sent to the Governor for signature. *Id.*

As noted above, on January 24, 2022—one day before the deadline—the IRC declared that it had reached an impasse and would not be submitting any further plans to the Legislature. (R1108.) In response, the Legislature, on January 30 and 31, 2022, released its own draft Congressional maps, as well as maps for the Assembly and Senate districts. (R1109.) The Senate and Assembly voted to approve the maps on February 2 and 3, 2022. (R1112.)

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[3] *See* https://www.nysenate.gov/legislation/bills/2021/S7150, Actions.

On February 3, 2022, Governor Hochul signed the maps into law. The Governor's Approval Memoranda provide, in relevant part:

> These bills are necessary to reapportion districts and to provide certainty and clarity regarding such districts in a timely manner, allowing for efficient administration of the electoral process. . . .
>
> Signing these bills will allow the boards of elections to begin the process of administering elections with these new district maps, and ensure that New Yorkers and candidates for elected office have the information they need with as much notice as possible to exercise their right to vote and participate in our democracy.
>
> This bill is approved.

(R929-932.)

B. Supreme Court Proceedings

On February 3, 2022, petitioners, voters in various districts, filed a petition in Supreme Court, Steuben County, challenging the 2022 redistricting plans, as well as the 2021 legislation, as unconstitutional. (R51-117.) On February 8, 2022 petitioners filed an amended petition, which is the operative petition in this proceeding. (R299-381.) Executive respondents moved to dismiss (R898-929);[4] Supreme Court denied the

[4]Although also named as respondents, the New York State Board of Elections ("SBOE") took no position on the outcome of the special

(*continued on the next page*)

motion and set the matter down for trial. A trial took place over four days: March 14, 15, 16, and 31, 2022. (R2513-3171.) Seven expert witnesses testified.

On March 31, 2022, Supreme Court (McAllister, J.) issued a judgment (denominated "decision and order"). (R7-24.) The court struck down the 2021 legislation because, in the court's view, it "substantially altered" the 2014 amendments setting out the IRC process by permitting the Legislature to create its own redistricting plans in the event the IRC fails to submit plans. (R16.) Because Supreme Court determined that the Legislature had not acted consistent with constitutional procedures when it followed the redistricting process provided for by the 2021 legislation, it declared void *ab initio* the Senate and Assembly maps, as well as the congressional map. (R16.) And Supreme Court further held that the congressional map was unconstitutional for the additional reason that it constituted a partisan gerrymander in violation of the 2014 amendments. (R20.)

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proceeding before the trial court, and the New York State Legislative Task Force on Demographic Research and Reapportionment has not entered an appearance in the litigation.

By way of relief, Supreme Court declared the 2022 maps to be "void and not usable" and issued a permanent injunction restraining respondents and their agents from administering current and future elections for Congress and state legislative offices using the 2022 maps. (R23-24.) Supreme Court also declared the prior 2012 maps to be void and not usable, and gave the Legislature until April 11, 2022, to submit "bipartisanly supported" maps to the court for review. (R23-24.) Regarding this requirement, the court stated that the "maps do not have to be unanimously approved, but they must enjoy a reasonable amount of bipartisan support to insure the constitutional process is protected. This they will need to do quickly." (R22.) The court further ordered that if the Legislature failed to submit maps by that deadline, the court would appoint a "neutral expert" at State expense to draw maps. (R24.)

Supreme Court recognized that its decision would require executive and legislative action to amend the election calendar and other election procedures. Striking the 2022 maps, the court stated, "of course will require revision of the election schedule since candidates would not even know what district he/she would run in before most of the current deadlines would have expired." (R21.) The court, however, would "leave

it to the legislature and governor to develop new time frames for gathering signatures, how many signatures will be required to be on the ballot, whether signatures already gathered can be counted toward meeting the quota to appear o[n] the ballot, etc." (R21.)

Executive respondents filed their notice of appeal on April 1, 2022. (R1-2.) Legislative respondents also appealed. (R25-37.)

C. Stay Proceedings Before this Court

On Sunday, April 3, 2022, executive and legislative respondents each moved to confirm that Supreme Court's judgment was automatically stayed by their service of notices of appeal, and in the alternative sought a discretionary stay. (NYSCEF Docs. 5, 6, 7, 8, 9, 10, 11.) On April 4, the Hon. Stephen K. Lindley issued an order temporarily staying Supreme Court's judgment pending determination of these motions. (NYSCEF Doc. 3.) On April 5, petitioners moved for a declaration that no automatic stay exists or, in the alternative, to vacate the stay. (NYSCEF Docs. 17, 18, 19.) On April 6, executive and legislative respondents each filed replies. (NYSCEF Docs. 21, 22.)

On April 8, 2022, Justice Lindley issued a decision, to be incorporated into an order, staying most portions of Supreme Court's

judgment pending a final decision by this Court on the underlying appeals. (NYSCEF Doc. 23.) Justice Lindley nonetheless allowed Supreme Court to retain an expert to draft a proposed congressional district map, provided, however, that no such map take effect until a final decision by the Court of Appeals.

ARGUMENT

POINT I

EXECUTIVE RESPONDENTS ARE NOT PROPER PARTIES TO THIS LITIGATION

Supreme Court erred when it declined to dismiss executive respondents from this litigation on the ground that they are not proper parties to the proceeding.

As an initial matter, the Lieutenant Governor is not a proper party to this proceeding because petitioners made no factual allegations against him either in their petition or at trial. *See Greenfield v. Harris*, 109 A.D.2d 869, 869 (2d Dep't 1985) ("[P]laintiffs failed to state a cause of action as against defendant . . . by failing to allege any wrongdoing on its part."). Nor does the Lieutenant Governor have a constitutional role in approving redistricting plans.

Petitioners did not demonstrate at trial that the Governor was involved in the acts that gave rise to their claims. To the contrary, it was undisputed that the Legislature, and not the Governor, drew the electoral maps challenged by petitioners. The only allegation purportedly implicating the Governor in the map-drawing process concerns a published excerpt from an "edited and condensed" August 2021 interview in the New York Times (R925-928), in which the Governor, asked whether she "plan[ned] to use [her] influence to help Democrats expand the House majority through the redistricting process," responded "yes" and then elaborated. Specifically, the Governor explained that she is "going to be doing whatever I can to let people know that the values of the Democratic Party today are part of who I am, fighting for people that just had a tough blow dealt to them in life. The Democratic Party has to regain its position that it once had when I was growing up. My grandparents were F.D.R. Democrats. My parents were J.F.K. Democrats. Today, I'm a Biden Democrat." (R927.) This generic statement of intent to promote the values and policies of the political party of which she is a member, made six months prior to the drawing of

the maps at issue in this litigation, is insufficient to support her involvement as a respondent in this litigation.

To the extent that petitioners name the Governor solely because she signed the 2022 electoral maps into law, she is entitled to legislative immunity from suit.

The State Constitution's Speech and Debate Clause mirrors the one found in the United States Constitution and, accompanied by well-established common law, provides broad legislative immunity to New York lawmakers—which extends to the executive—for legislative acts that are an integral part of the legislative process. *See* N.Y. Const. art. III, § 11; *People v. Ohrenstein*, 77 N.Y.2d 38, 53–54 (1990) (New York speech and debate clause "was intended to provide at least as much protection as the immunity granted by the comparable provision of the Federal Constitution"). Because the language in the United States Constitution and the New York Constitution mirror one another, we can look to both state and federal caselaw to analyze legislative immunity.

Here, the Governor is immune from suit for her act of signing the redistricting bill into law. *See Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (holding that an executive's acts in "signing into law an ordinance"

are "formally legislative" and "entitled to legislative immunity"); *Warden v. Pataki*, 35 F. Supp. 2d 354, 358 (S.D.N.Y. 1999) ("The well-settled doctrine of absolute legislative immunity . . . bars actions against legislators or governors . . . on the basis of their roles in enacting or signing legislation."), *aff'd sub nom. Chan v. Pataki*, 201 F.3d 430 (2d Cir. 1999). Such immunity bars actions for declaratory and injunctive relief. *See Bogan*, 523 U.S. at 46 (1998) (absolute immunity); *Supreme Court of Va. v. Consumer Union*, 446 U.S. 719, 731-34 (1980); *New York State Motor Truck Ass'n v. Pataki*, 2004 WL 2937803, at *11 (S.D.N.Y. 2004) (where the Governor was entitled to legislative immunity, "he is immune from suit even though the remedy sought here is only injunctive and declaratory relief").

Supreme Court therefore erred when it declined to dismiss the Governor from the case. Unlike other named respondents, the Governor did not design the electoral maps at issue here, nor is she responsible for implementing them. And although petitioners argued below that joinder of the Governor was necessary to obtain relief against the SBOE, that is plainly mistaken. It is not necessary to name the Governor to obtain relief in a redistricting challenge, any more than in any other Election Law

challenge. *See, e.g., United States v. State of New York*, 2012 WL 254263, at *1 (N.D.N.Y. Jan. 27, 2012) (lawsuit brought by United States contesting the date for federal non-presidential primary elections, and naming the State of New York and SBOE, but not the Governor, as defendants).

POINT II

THE 2021 LEGISLATION IS CONSTITUTIONAL.

Supreme Court also erred when it determined that the 2021 legislation is unconstitutional.

As the Court of Appeals reaffirmed in its most recent decision considering the constitutionality of redistricting litigation, "acts of the Legislature are entitled to a strong presumption of constitutionality." *Cohen v. Cuomo*, 19 N.Y.3d 196, 201 (2012). Courts may "upset the balance struck by the Legislature" in a redistricting enactment "only when it can be shown beyond a reasonable doubt that it conflicts with the fundamental law." *Id.* at 201-02. Only once "every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible," will such legislation be declared unconstitutional. *Id.*

The 2021 legislation at issue here can be readily reconciled with the 2014 amendments: it fills a gap left in the constitutional procedures by addressing what occurs when the IRC fails to fulfill its duty to submit two rounds of plans to the Legislature. This omission represents a critical gap because, in the event of an IRC impasse, *some* entity must retain authority to enact electoral maps, given that prior maps will often suffer from malapportionment as determined by the most recent decennial census. "[G]iven the Constitution's silence on this issue," the law filling that gap is constitutional unless it amounts to "a gross and deliberate violation of the plain intent of the Constitution." *Cohen*, 19 N.Y.3d at 202.

Far from a gross and deliberate violation of constitutional intent, the 2021 legislation is perfectly consistent with the Constitution. The legislation focuses exclusively on what should happen if the IRC fails to perform its duty to submit maps, about which occurrence the Constitution is silent. The 2021 legislation thus did not "substantially alter[]" the 2014 amendments, as Supreme Court incorrectly determined (R16), but rather legislated in the gap left by them. *See In re Cooper*, 22 N.Y. 67 (1860) ("but the Constitution of 1822 was silent upon the subject, thus leaving the matter in the direction and control of the Legislature").

Executive respondents' reading of constitutional procedures reconciles the 2021 legislation with the 2014 amendments, and comports with the Court of Appeals' admonition that legislative enactments are "entitled to a strong presumption of constitutionality." *Cohen*, 19 N.Y.3d at 201. This reading also acknowledges the longstanding, central role that the Legislature has played in redistricting, dating back to New York State's earliest days. *See Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 202 (1907) (tracing historical role of Legislature in apportionment, back to 1801); *Matter of Reynolds*, 202 N.Y. 430, 444 (1911) (Legislature's role to pass an apportionment bill).

Nor do the 2014 amendments evince any intent to displace the Legislature from its longstanding role in redistricting. Just the opposite—the amendments preserve the Legislature's key involvement. Under the amendments, the Legislature is free to reject the maps proposed by the IRC and enact its own maps, and any redistricting plans must be passed by the Legislature before they become law. And the 2014 amendments do not alter the preexisting constitutional provision that, if any electoral map is declared invalid upon a court challenge, the

Legislature must be given a "full and reasonable opportunity" to correct the infirmity. N.Y. Const. art. III, § 5.

By contrast, Supreme Court manufactured a false conflict between the 2021 legislation and the Constitution. The court interpreted the 2014 amendments to dictate, unambiguously, that once the IRC fails to submit redistricting plans, the Legislature is thereafter without authority to enact maps for the entire 10-year redistricting cycle. (R16.) Although the court did not elaborate the consequences of its view, presumably at that point the State is trapped in limbo without electoral maps until a court acts to impose its own, upon a judicial challenge. Supreme Court's reading is simply not plausible. There is no evidence that the Legislature—which twice passed the 2014 amendments before they were put to voters—intended such a dramatic diminution in its traditional authority over redistricting in favor of the courts. For instance, under Supreme Court's interpretation, a four-member coalition within the ten-member IRC could transfer redistricting authority to the judiciary, simply by refusing to meet and thereby depriving the IRC of a seven-member quorum. *See* N.Y. Const., art. III, § 5-b(f). Had the constitutional drafters intended such a result, they would have made it explicit.

It is a fundamental canon of construction that, whenever possible, courts should reject interpretations that produce absurd and unintended outcomes. *See Matter of Fay*, 291 N.Y. 198, 216 (1943) (constitutional provisions and laws should not be read in a manner "that will defeat the purpose and intent of the statutory provision or that will make such provision absurd"). That principle applies here, and is another reason why Supreme Court erred in finding an irreconcilable conflict between the 2014 amendments and the 2021 legislation.

Nor does the failure of the 2021 ballot proposal to pass muster with voters at the polls render the 2021 legislation unconstitutional, as Supreme Court mistakenly concluded. As explained above, the Constitution is silent on the process put forth in the 2021 legislation, and therefore the Legislature could fill the silence without a constitutional amendment. When the 2021 ballot proposal was put to voters, it was part of a much broader package that would have included a number of other changes that *did* require constitutional amendment, such as fixing the size of the Senate at 63 districts. *See supra* at p. 7. Accordingly, Supreme Court was wrong when it stated that no other issues of import were addressed by the ballot question. (R13.) Further, the court was also

incorrect when it repeatedly stated that the Legislature passed the 2021 legislation three weeks after the November 2021 election; rather the Legislature passed the 2021 legislation in June, months before the election.[5]

Finally, Supreme Court erred by suggesting that the Legislature could have retained its authority over redistricting despite the IRC's impasse by taking certain remedial steps, specifically (1) bringing a mandamus proceeding compelling the IRC to finish its work, or (2) removing recalcitrant IRC members. (R12.) As a threshold matter, whatever success such steps may have met with, the Constitution does not contain the type of "exhaustion of remedies" requirement that Supreme Court grafted onto it. And the court's entire line of reasoning rests on the mistaken premise that the IRC failed to use an extended remaining period to attempt to produce a new set of maps, giving up before February 28. (R12.) But February 28 was not the IRC's "drop dead date for submitting a plan"—that was January 25, which was 15 days after its first plans were rejected. *See* N.Y. Const. art. III, § 4(b) (second

[5] *See* https://www.nysenate.gov/legislation/bills/2021/S7150, Actions.

plan or plans due within 15 days of being notified of the first rejection, or by February 28, whichever date is earlier). Thus, when the IRC reported a deadlock on January 24, 2022, there was only one day left before the deadline to resubmit maps.

In short, the constitutional procedures simply do not build sufficient time into the redistricting process for the remedial steps that Supreme Court proposed, especially when, as happened here, the IRC first declares an impasse toward or at the end of the 15-day period for resubmission.

For these reasons, the 2021 legislation is fully constitutional and consistent with the 2014 amendments.

POINT III

THE 2022 CONGRESSIONAL MAP IS NOT AN UNCONSTITUTIONAL PARTISAN GERRYMANDER

Supreme Court further erred when it found that the 2022 congressional map is an unconstitutional partisan gerrymander. (R20.) On this point, the executive respondents join the compelling arguments made by legislative respondents in their brief to this Court that petitioners failed to meet their heavy burden of proving an improper

partisan purpose beyond a reasonable doubt. As set forth in Point II above, a "strong presumption of constitutionality attaches to the redistricting plan and we will upset the balance struck by the Legislature and declare the plan unconstitutional 'only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law'" and "'every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible.'" *Matter of Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79 (1992) (quoting *Matter of Fay*, 291 N.Y. at 207).

POINT IV

EVEN IF THIS COURT AFFIRMS IN PART, IT SHOULD VACATE SUPREME COURT'S REMEDY

This Court should reverse the judgment of Supreme Court in full and enter judgment in favor of respondents. However, if the Court agrees with any of the conclusions reached by the lower court, and affirms in part, the Court should nevertheless modify the judgment by vacating Supreme Court's remedy, and defer the implementation of any remedial electoral maps until the next election cycle.

A. Supreme Court Failed to Give the Legislature a Full and Reasonable Opportunity to Cure.

The substantive relief ordered by Supreme Court conflicts with the clear command of the Constitution that, in the event a court finds a violation in a redistricting plan, "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." N.Y. Const. art. III, § 5. The judgment purported to give the Legislature a deadline—April 11 before it was stayed—beyond which the Legislature would forfeit its opportunity to draw remedial maps, and Supreme Court would act in its place. (R24.) These aspects of the judgment deny the Legislature a full and reasonable opportunity to cure infirmities in the maps as required by the Constitution. Nor may the remedy imposed by Supreme Court be upheld on the alternative ground that, as petitioners argued below, the Legislature lost its opportunity to cure because the IRC failed to submit maps, for the reasons set forth in Point II.

Supreme Court's remedy failed to give the Legislature a "full and reasonable" opportunity to correct infirmities in two ways.

First, the reasonable opportunity to cure infirmities includes the opportunity to seek appellate review of a trial court's finding of infirmity before having to enact new maps. The unreasonably truncated deadline

of 11 days for the Legislature to enact and submit new maps for court review deprived the Legislature of this opportunity, forcing respondents to seek a stay of the judgment. Eleven days is simply insufficient time for respondents to exhaust their appellate options even under the highly expedited schedule on which election cases are heard. In this respect, the court's deadline also conflicted with the 30-day time period contained in the legislation implementing the 2022 maps. That legislation provides that "[i]n any proceeding for judicial review of the provisions of this act, the determination of the court shall be embodied in a tentative order which shall become final 30 days after service of copies thereof upon the parties unless the court shall in the interval, on application of any party, resettle its order." L. 2022, ch. 13, § 3(i) (congressional plans); L. 2022, ch. 14, § 2 (Senate and Assembly plans). By staying the effect of any order striking an electoral map for 30 days, this provision gives the Legislature an opportunity to obtain expedited appellate review of an adverse decision before it is required to correct any infirmities identified by a trial court.

Second, the court also required that any new maps submitted by the Legislature enjoy some unspecified level of "bipartisan support."

(R24.) That requirement conflicts with constitutional procedures. Certainly, the drafters of the 2014 amendments wanted to prohibit electoral maps designed to favor incumbents or political parties. And by creating a bipartisan IRC, they doubtless desired that members of the IRC from both parties would work together to devise maps. But they did not require that electoral maps receive bipartisan support. Rather, the Constitution explicitly contemplates the possibility that no single map will command a majority of votes in the IRC, and that in such cases the IRC must submit to the Legislature the two or more competing maps tied for the most votes. *See* N.Y. Const. art. III, § 5-b(g) (the commission shall submit "all plans" that tied for the most votes). And the Constitution specifically sets forth the necessary vote margins for enacting redistricting plans—which margins make no reference to the party affiliation of the voting legislators. *See id.* § 4(b).

Thus, even if this Court were to affirm the judgment in part, it should (1) vacate that portion of the judgment giving the Legislature only 11 days to enact maps and requiring those maps to receive an unspecified level of bipartisan support; and (2) give the Legislature a full and

reasonable opportunity to cure any infirmities found to exist in the current electoral maps.

B. Any Remedy Should Be Deferred Until the Next Election Cycle.

Even if this Court were to affirm on the merits, it should permit the already-underway 2022 election to proceed on the 2022 maps. As executive respondents outlined at length below and in their stay application, switching to new maps in the middle of an election would confuse voters, candidates, and local officials tasked with administering elections, thereby jeopardizing the electoral process. (*See* NYSCEF Docs. 10, 11, 21.) That is precisely why, under the *Purcell* principle, the United States Supreme Court has repeatedly cautioned courts against changes to election rules in the run-up to an election. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

In explaining the concerns animating the *Purcell* principle, Justice Kavanaugh, concurring in the Court's denial of a request to vacate a stay of an election law ruling, recently noted that "judicial restraint" is necessary in the run-up to an election, because "[e]ven seemingly innocuous late-in-the-day judicial alterations" to election laws "can

interfere with administration of an election and cause unanticipated consequences," including voter confusion, election administrator confusion, and damage to the State's interest in running an orderly and efficient election. *Democratic Nat'l Comm. v. Wisconsin State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). As Justice Kavanaugh explained, "[i]f a court alters election laws near an election, election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes." *Id.*

Those concerns are fully present here, and favor the deferral of any remedy until the next election cycle. Thomas Connolly, Director of Operations for the SBOE, opined that if new district lines were imposed at this point, "it is simply not clear how compliance would be possible without significant risk to the integrity of the electoral process." (R2324.) As he explained, the election is already well underway: designating petitions (by which political party candidates get on the ballot) have been circulated and filed. (R2316-2318.) With an order for new maps to be drawn at an unknown future date, candidates for the state offices at issue

in this litigation would not know whether signatures they had already gathered were from voters properly within their district. And voters would not know whether the designating petition they had already signed was in fact valid, or even whether that candidate would still be running in their district. (R2323-2325.)

Moreover, Supreme Court's decision contemplates that the elections for offices not at issue in this litigation would proceed at the June 2022 primary, while the primary elections for offices at issue in this litigation would occur in August 2022, and a redistricting would occur in between those two primary elections. As Mr. Connolly explained, holding two primaries within the span of two months—for which there has been no planning—while conducting a redistricting in between, would be an unprecedented event in New York electoral history, and would bring with it massive confusion for voters and election officials, rife with the potential for error and disenfranchisement. (R2318-2322, 2324-2325.)

Supreme Court's decision also throws into question the ability of local boards of elections to ensure that their voter registration rolls are properly updated to reflect the new maps. (R2321-2322, 2324.) When the current maps became law on February 3, 2022, the county boards of

elections devoted their full attention to updating their voter registration systems so that the new district boundaries would be properly reflected in the rolls. This time-intensive work was necessary to ensure that New York's approximately twelve million active voters would be assigned to the proper election districts sufficiently in advance of the primary. (R2321-2322.) County boards of elections worked nearly exclusively on these updates for a month, and it is not clear how local officials would be able to accurately update these files while also undertaking the task of preparing for the upcoming primary elections for the offices that are not affected by the court's judgment. The timeframe increases the possibility that inaccurate information could exist on Election Day, causing confusion for voters and poll workers. (R2321-2325.)

In support of respondents' stay application, Mr. Connolly expressed the concern that the wholesale revision of the electoral calendar that would be required to accommodate new electoral maps in this election cycle could not be handled by local boards of election without harm to the integrity of the election, and petitioners had no meaningful response.

As a further cause of confusion, new voters and voters who were transferred to a new district under the 2022 maps have received and are

currently receiving informational notifications required by law, informing them of their updated district designations and polling locations. (R2324-2325.) If new maps are implemented at some unknown date this spring, this information will have been inaccurate for some voters, and some voters will thus receive multiple mailings and may have difficulty understanding which instructions to follow. This again risks disenfranchisement and depressed voter participation. (R2325.)

For these reasons, the election cycle should not be interfered with. *See Merrill v. Milligan*, 142 S. Ct. 879 (2022) (order staying district court's injunction requiring State to apply new congressional district lines in upcoming election); *Moore v. Harper*, 142 S. Ct. 1089 (2022) (order declining to require State to implement new congressional district lines). Thus, even if this Court affirms the judgment in part, it should defer the implementation of any remedial maps until the following election cycle.

CONCLUSION

For the foregoing reasons, this Court should vacate Supreme Court's judgment, and issue a decision and order finding in favor of respondents on all counts and dismissing the petition.

Dated: Albany, New York
April 13, 2022

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

Typeface: Century Schoolbook
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is **6,124**.