New York County Clerk's Index No. 164002/2025

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2026-00384

MICHAEL WILLIAMS, JOSÉ RAMÍREZ-GAROFALO, AIXA TORRES, and MELISSA CARTY,

Petitioners-Appellees,

against

BOARD OF ELECTIONS OF THE STATE OF NEW YORK; KRISTEN ZEBROWSKI STAVISKY, IN HER OFFICIAL CAPACITY AS CO-EXECUTIVE DIRECTOR OF THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; RAYMOND J. RILEY, III, IN HIS OFFICIAL CAPACITY AS CO-EXECUTIVE DIRECTOR OF THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; PETER S. KOSINSKI, IN HIS OFFICIAL CAPACITY AS CO-CHAIR AND COMMISSIONER OF THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; HENRY T. BERGER, IN HIS OFFICIAL CAPACITY AS CO-CHAIR AND COMMISSIONER OF THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; ANTHONY J. CASALE, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; ESSMA BAGNUOLA,

(Caption Continued on the Reverse)

REPLY AFFIRMATION OF BENNET J. MOSKOWITZ IN SUPPORT OF EMERGENCY MOTION FOR INTERIM STAY, STAY, AND LEAVE TO APPEAL AND IN OPPOSITION TO CROSS-MOTION TO VACATE STAY

TROUTMAN PEPPER LOCKE LLP
Attorneys for Intervenors-Respondents-Appellants
875 Third Avenue
New York, New York 10022
212-704-6000
bennet.moskowitz@troutman.com

Date Completed: February 6, 2026

IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; KATHY HOCHUL, IN HER OFFICIAL CAPACITY AS GOVERNOR OF NEW YORK; ANDREA STEWART-COUSINS, IN HER OFFICIAL CAPACITY AS NEW YORK STATE SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE; CARL E. HEASTIE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NEW YORK STATE ASSEMBLY; and LETITIA JAMES, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NEW YORK,

Respondents-Appellants,

and

REPRESENTATIVE NICOLE MALLIOTAKIS, EDWARD L. LAI, JOEL MEDINA, SOLOMON B. REEVES, ANGELA SISTO, and FAITH TOGBA,

Intervenors-Respondents-Appellants.

AFFIRMATION OF BENNET J. MOSKOWITZ IN SUPPORT OF REPLY IN SUPPORT OF EMERGENCY MOTION FOR INTERIM STAY, STAY, AND LEAVE TO APPEAL AND IN OPPOSITION TO CROSS-MOTION TO VACATE STAY

BENNET J. MOSKOWITZ, an attorney duly admitted to practice in the Courts of the State of New York, affirms the following to be true under the penalties of perjury pursuant to CPLR § 2106:

1. I am a Partner at the law firm Troutman Pepper Locke LLP, counsel for Appellants-Intervenor-Respondents Congresswoman Nicole Malliotakis and Individual Voters Edward L. Lai, Joel Medina, Solomon B. Reeves, Angela Sisto, and Faith Togba (together, the "Intervenor-Respondents") in this proceeding.

2. I submit this Affirmation solely to present to the Court information and materials relating to Intervenor-Respondents' Reply in Support of Emergency Motion for Interim Stay, Stay, and Leave to Appeal, which materials are attached hereto as described below. I am fully familiar with the facts and circumstances set forth herein.

3. A true and correct copy of the version of Professors Greenwood and Stephanopoulos' Proposed Appellate Division Amicus Memorandum of Law, submitted to this Court on February 4, 2026, is attached hereto as **Exhibit A**, originally filed as NYSCEF No.33. The Clerk has returned this filing for correction. As of the time of this filing, Professors Greenwood and Stephanopoulos have not re-filed the document.

I affirm this 6th day of February 2026, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Bennet J. Moskowitz, Reg. No.4693842
875 Third Avenue
New York, NY 10022
(212) 704-6000
bennet.moskowitz@troutman.com

Counsel for Congresswoman Nicole Malliotakis and Individual Voters Edward L. Lai, Joel Medina, Solomon B. Reeves, Angela Sisto, and Faith Togba

Exhibit A

Court of Appeals Docket No. 2026-00010
On Appeal from the New York Supreme Court, Index No. 164002/2025
Appellate Division – First Department, Docket No. 26-00384

Court of Appeals

State of New York

MICHAEL WILLIAMS, ET AL.,

Petitioners-Respondents,

against

BOARD OF ELECTIONS OF THE STATE OF NEW YORK, ET AL.,

Respondents,

and

PETER S. KOSINSKI, ANTHONY J. CASALE, AND RAYMOND J. RILEY III,

Respondent-Appellants,

and

REPRESENTATIVE NICOLE MALLIOTAKIS, ET AL.,

Intervenor-Appellants.

PROPOSED BRIEF OF RUTH GREENWOOD AND NICHOLAS STEPHANOPOULOS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

Ruth Merewyn Greenwood
Nicholas O. Stephanopoulos
ELECTION LAW CLINIC AT
HARVARD LAW SCHOOL
6 Everett Street, Suite 4105
Cambridge, MA 02138
(617) 998-1010
rgreenwood@law.harvard.edu

Counsel for Proposed Amici Curiae

Dated February 4, 2026

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases (cont'd) **Page(s)**

Constitutional Provisions

Statutes

Other Authorities

STATEMENT OF INTEREST

Amici curiae are law professors who research, write about, and litigate using federal and state voting rights acts. They have a longstanding interest in the development and application of vote dilution doctrine.

Amicus curiae Nicholas O. Stephanopoulos is the Kirkland & Ellis Professor of Law at Harvard Law School. His works on federal and state voting rights acts include *Race, Place, and Power*, 68 Stan. L. Rev. 1323 (2016), *The Race-Blind Future of Voting Rights*, 130 Yale L.J. 862 (2021) (with Jowei Chen), and *Voting Rights Federalism*, 73 Emory L J. 299 (2023) (with Ruth M. Greenwood).

Amicus curiae Ruth M. Greenwood is an Assistant Clinical Professor of Law at Harvard Law School and the Director of the Election Law Clinic, also at Harvard Law School. Her works on federal and state voting rights acts include *Fair Representation in Local Government*, 5 Ind. J.L. & Soc. Equal. 197 (2017), and *Voting Rights Federalism*, 73 Emory L.J. 299 (2023) (with Nicholas O. Stephanopoulos).

Together, Amici make two points about the Supreme Court's decision in this case. First, the court correctly construed Petitioners' claim as a claim for a coalition crossover district and set forth the proper standard for this kind of allegation. Second, however, the court failed to apply the standard it laid out because it

believed this analysis could be deferred to the remedial stage of the litigation. In fact, before *liability* may be imposed in a vote dilution suit, it must be clear that a reasonable alternative policy exists that would cure the plaintiffs' harm.

INTRODUCTION

The Supreme Court was confronted with a complex and novel case. Petitioners are the first to assert a vote dilution claim under Article III, Section 4(c)(1) of the New York Constitution. Their presentation of this claim was also ambiguous. At times, their filings seemed to seek the creation of a coalition crossover district: a district in which a coalition of minority groups, together comprising less than fifty percent of the district's population, would in fact be able to elect the groups' mutually preferred candidate. At other times, Petitioners' filings appeared to ask for an influence district: a district in which minority voters are able to exert substantial influence over electoral outcomes but *not* to elect their candidate of choice.

In the face of this uncertainty, the Supreme Court correctly construed Petitioners' claim as a coalition crossover claim. *See* NYSCEF Doc. 217 at 14. Not only is this type of claim more consistent with the language of Article III, Section 4(c)(1), most of Petitioners' materials emphasized minority voters' potential opportunity to elect their preferred candidate in a reshaped district. This

opportunity to elect is a hallmark of a coalition crossover district—and its absence is the defining characteristic of an influence district. The Court also set forth the proper standard for a coalition crossover claim. A hypothetical district qualifies as a coalition crossover district only if (1) a coalition of minority groups, amounting to less than fifty percent of the district's population, would usually be able to nominate the groups' mutual candidate of choice in the primary election; and (2) this candidate would usually prevail in the general election. *See id.* at 15.

The Supreme Court went astray, however, when it thought this standard had been satisfied. The court believed that vote dilution liability could be proven *solely* based on racially polarized voting, historical and ongoing discrimination, and a lack of current representation for minority voters—*without* determining whether a coalition crossover district could actually be drawn. In the court's view, this determination should be made at the remedial, not the liability, stage. But this position is at odds with both the concept of, and the case law on, vote dilution. A group's representation can be deemed diluted only if a showing has been made that a reasonable alternative policy would improve the group's representation. As the California Supreme Court recently put it, "what is required to establish 'dilution' . . . is proof that, under some lawful alternative electoral system, the protected class would have the potential . . . to elect its preferred candidate." *Pico Neighborhood Ass'n v. City of Santa Monica*, 534 P.3d 54, 60 (Cal. 2023).

True, district configuration and performance must *also* be evaluated at the remedial stage. The Supreme Court was not wrong about that. But this remedial evaluation cannot substitute for the earlier assessment at the liability stage because they serve different functions. The question at the liability stage is whether a reasonable alternative district exists that could bolster the plaintiffs' representation; only if so can the existing district configuration be dilutive. In contrast, the remedial issue is whether a particular proposed district—like one drawn by the legislature or offered by a party—would in fact cure the identified dilution and be otherwise lawful. Critically, the hypothetical district put forward at the liability stage need not be the same as the remedial district ultimately adopted.

Amici take no position on what result should follow here from the application of the proper standard for coalition crossover claims. Amici's view is simply that Congressional District 11 should not be invalidated unless and until a court concludes that this standard has been met.

ARGUMENT

I. The Supreme Court Correctly Construed Petitioners' Claim and Set Forth the Proper Standard for Coalition Crossover Claims.

A. As flagged above, Petitioners' suit is the first to allege a violation of Article III, Section 4(c)(1) of the New York Constitution. The litigation is novel in other respects as well. Very few vote dilution cases have been brought under state

constitutions (as opposed to state voting rights acts or the federal Voting Rights Act (VRA)). And very few vote dilution cases seeking the creation of crossover districts have been filed since the U.S. Supreme Court held that crossover claims are unavailable under the federal VRA in *Bartlett v. Strickland*, 556 U.S. 1 (2009).

The Supreme Court faced not just a novel suit but also a somewhat confusing one. As amici explained in their brief to that court, Petitioners' filings "freely mix[ed] the concepts of 'opportunity,' 'crossover,' and 'influence,'" sometimes seeming to request a new coalition crossover district, elsewhere appearing to call for a new influence district, and in still other places combining these formulations. NYSCEF Doc. 135 at 7. For example, one paragraph of the petition asserted that liability should arise if a district map "is responsible for the protected class's lack of electoral *influence*." NYSCEF Doc. 1 ¶ 46. The next paragraph switched from the language of "influence" to that of "coalition" and "crossover" claims, stating that "the voters of New York . . . made the choice to go beyond the scope of the federal Voting Rights Act and protect coalition and crossover districts." *Id.* at ¶ 47. Then in their brief, Petitioners typically merged these concepts into a unitary idea, arguing that the current boundaries of Congressional District 11 impair minority voters' ability "to elect candidates of their choice *and* influence elections." NYSCEF Doc. 63 at 8, 10, 15, 19, 21, 26 (emphasis added).

B. By way of background, vote dilution law distinguishes between opportunity districts, influence districts, and all other districts. Minority voters have the ability to elect their candidate of choice in an opportunity district (thanks to the turnout and electoral decisions of minority and non-minority voters alike). In an influence district, minority voters cannot elect their preferred candidate but do have some sway over electoral outcomes (for instance, by blocking the election of their least-preferred candidate). And in all other districts, minority voters can neither elect their candidate of choice nor exert substantial electoral influence.

Opportunity districts, in turn, are divided between majority-minority and crossover districts. Minority voters comprise an outright majority of the population in a majority-minority district. They make up less than fifty percent of the population in a crossover district (and so must rely on some crossover support from white voters to elect their preferred candidate). In both a majority-minority and a crossover district, minority voters can belong to a single racial or ethnic group or to multiple such communities. Where multiple racial or ethnic groups are mutually politically cohesive, and are able to elect their jointly favored candidate, an opportunity district is known as a coalition district. *See, e.g.*, *Bartlett*, 556 U.S. at 13-14 (plurality opinion) (discussing this terminology); NYSCEF Doc. 135 at 8-17 (same).

As noted, crossover claims have been barred under the federal VRA since 2009. The U.S. Supreme Court also does not recognize claims for influence districts under the federal VRA. *See League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 445-46 (2006) (opinion of Kennedy, J.). However, the Court has assumed that coalition claims *may* be brought under the federal VRA, *see, e.g.*, *Growe v. Emison*, 507 U.S. 25, 41 (1993), and most federal courts, including the Second Circuit, agree that these claims are available, *see, e.g.*, *NAACP Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 379 (S.D.N.Y. 2020), *aff'd*, 984 F.3d 213 (2d Cir. 2021).

C. Here, amici argued in their Supreme Court brief that Petitioners' claim is best understood as a coalition crossover claim—an allegation that Congressional District 11 is dilutive because it is not an opportunity district and could be replaced by a coalition crossover district in which minority voters *would* be able to elect their candidate of choice. *See* NYSCEF Doc. 135 at 18-19. The court construed Petitioners' claim the same way, stating that it "sees this as a crossover claim." NYSCEF Doc. 217 at 14; *see also id.* at 12-13 (holding that vote dilution was established with respect to a coalition of Black and Latino voters).

The Supreme Court's interpretation of Petitioners' claim was sensible. While their filings were opaque at times, "the thrust of their complaint [was] clearly that a new minority opportunity district (specifically, a coalition crossover district)

should be drawn." NYSCEF Doc. 135 at 19. The phrasing of Article III, Section 4(c)(1) also more plainly authorizes a coalition crossover claim (a type of claim for an opportunity district) than an influence claim. Unlike the New York Voting Rights Act (NYVRA), *see* N.Y. Elec. Law § 17-206(2)(a), the constitutional provision does not use the term "influence." But it does refer to the "opportunity" of "racial or minority language groups" to "elect representatives of their choice." N.Y. Const. art. III, § 4(c)(1). This sentence explicitly contemplates that a claim for an opportunity district may be brought. A coalition crossover claim, again, is merely one such claim.

D. After correctly construing Petitioners' claim, the Supreme Court set forth the proper standard for a coalition crossover claim. A hypothetical district counts as a crossover district if, first, "minority voters (including from two or more ethnic groups) are able to select their candidates of choice in the primary election." NYSCEF Doc. 217 at 15. "Second, these candidates must usually be victorious in the general election." *Id.* When these conditions are satisfied, minority voters (whether from a single group or a coalition) are genuinely able to elect their preferred candidates despite comprising less than a majority of the district's population.[1]

[1] The court added a third condition that seems unnecessary to Amici: "the reconstituted district should also increase the influence of minority voters, such that they are decisive in the

As Amici pointed out in their earlier brief, this standard is consistent with the opinions of U.S. Supreme Court justices who have addressed crossover districts. In *LULAC*, Justice Souter argued that a crossover district exists where "minority voters . . . constitute a majority of those voting in the primary of the dominant party, that is, the party tending to win in the general election." 548 U.S. at 485-86 (Souter, J., concurring in part and dissenting in part). Justice Souter thereby recognized that minority voters must effectively control a crossover district and that the primary election is often the key to wielding (and ascertaining) control. In *Bartlett*, the plurality cited this passage from Justice Souter's opinion in *LULAC* and confirmed that "some have suggested using minority voters' strength within a particular party as the proper yardstick." 556 U.S. at 22 (plurality opinion). Consideration of both the primary and general elections is also implied by the plurality's understanding of a crossover district as one where the minority population "is large enough" (despite not being a majority) "to elect the candidate of its choice." *Id.* at 13. A minority population is sufficiently large when it can both

---

selection of candidates." NYSCEF Doc. 217 at 15. As long as the challenged district is not an opportunity district and a hypothetical district would be one, the hypothetical district would necessarily "increase the influence of minority voters." *Id.* And minority voters are necessarily "decisive in the selection of candidates" when (as required by the first two conditions) their candidates of choice usually prevail in both the primary and the general election. *Id.*

nominate its preferred candidate in the primary and see this candidate take office after the general election.

In the academy, scholars, including one of us, have evaluated whether districts qualify as crossover districts using very similar approaches. In one article, Jowei Chen and amicus Nicholas Stephanopoulos relied on the following working definition of a minority opportunity district: "one where (1) the minority-preferred candidate wins the general election, and (2) minority voters who support the minority-preferred candidate outnumber white voters backing that candidate, provided that (3) minority voters of different racial groups are aggregated only if each group favors the same candidate." Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 Yale L.J. 862, 899 (2021). Any minority opportunity district must satisfy the first element. The second element is the one that ensures that minority voters in a crossover district effectively control the district—because their votes outnumber white voters' votes for the minority-preferred candidate. *See also, e.g.*, Nicholas O. Stephanopoulos, Eric McGhee & Christopher Warshaw, *Non-Retrogression Without Law*, 2023 U. Chi. Legal. F. 267, 269 (using the same definition).

Because these studies sought to make comparisons across states and lacked data from primary elections, they had to approximate control of the primary by asking if more minority voters than white voters backed the minority-preferred

candidate in the general election. Studies of a single state, however, do not face this limitation and do explicitly analyze both primary and general elections. For example, a team of prominent scholars defined a successful outcome for the voters of a minority group in Texas as "one in which the minority-preferred candidate in the primary prevailed in both" that election and the general election. Amariah Becker, Moon Duchin, Dara Gold & Sam Hirsch, *Computational Redistricting and the Voting Rights Act*, 20 Election L.J. 407, 420 (2021). By "*link*[ing] the primary . . . to the general election," the authors addressed their "main concern here," which was "whether minority-preferred candidates are ultimately elected to office." *Id.* at 416.

A final benefit of this standard is that it eschews racial thresholds for crossover district status. The U.S. Supreme Court is extremely suspicious of such thresholds, viewing them as admissions that race predominated over all other factors. *See, e.g.*, *Cooper v. Harris*, 581 U.S. 285, 299 (2017) (applying strict scrutiny when "the State's mapmakers . . . purposefully established a racial target: African-Americans should make up no less than a majority of the voting-age population"). But this standard does not rely on crude racial quotas. Instead, it asks, as a functional matter, whether minority voters control the primary election because their candidate of choice is usually nominated, and whether they also control the general election because their preferred candidate usually wins that

race, too. Answering these questions requires a sophisticated assessment of voters' likely turnout and electoral decisions. The issues are *not* resolved by simply tabulating a minority group's size.

II. The Supreme Court Erred by Failing to Apply Its Standard for Coalition Crossover Claims.

A. So far, so good. But despite correctly construing Petitioners' claim and setting forth the proper standard for coalition crossover claims, the Supreme Court made a serious mistake in its decision. Fundamentally, the court did not *apply* its own standard. That is, the court did not examine whether the demonstrative district offered by Petitioners was, in fact, a coalition crossover district (and otherwise lawful). This district combines Staten Island with a portion of lower Manhattan rather than southern Brooklyn. *See* NYSCEF Doc. 217 at 13. The court did not consider whether a coalition of minority voters in this district would usually be able to nominate their candidate of choice in the primary election and, if so, whether this candidate would usually prevail in the general election as well.

The Supreme Court did not perform this analysis because it apparently believed that vote dilution liability arises when three elements are present: racially polarized voting, historical and ongoing discrimination highlighted by the totality

of the circumstances, and a lack of current representation for minority voters.[2] *See* NYSCEF Doc. 217 at 8-13 (discussing relevant evidence). These three elements are indeed necessary—but they are insufficient to establish vote dilution liability. What is missing is a showing that minority voters' current underrepresentation could be *ameliorated* by a reasonable alternative policy: here, a new coalition crossover district that complies with all federal and state legal requirements. Without this showing, it might be that no plausible remedy could improve the representation of minority voters in Congressional District 11. In that case, linguistically and legally, one would not say that these voters are the victims of vote dilution since the concept implies the existence of an available undiluted state.

B. Justice Scalia once humorously expressed the idea that vote dilution requires an undiluted baseline at an oral argument. "It seems to me you need a standard for dilution," he told Solicitor General Ken Starr. "You don't know what watered beer is unless you know what beer is, right?" Transcript of Oral Argument at 8, *Chisom v. Roemer*, 501 U.S. 380 (1991) (Nos. 90-757, 90–1032).

[2] The court also focused on minority voters' lack of representation in Congressional District 11 alone. But vote dilution occurs across multiple districts (typically, a geographic region or an entire jurisdiction). The court should thus have asked whether minority voters are underrepresented in part or all of New York State, not solely in Congressional District 11. *See, e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1013-16, 1023-24 (1994) (finding no vote dilution in the Dade County portions of Florida state legislative plans because both Black and Hispanic voters already received close to proportional representation in this area).

In the *Gingles* framework for vote dilution claims under the federal VRA, the first precondition serves the purpose of identifying an undiluted baseline to which the challenged plan is then compared. The first precondition requires a plaintiff to prove that a minority group is "sufficiently large and geographically compact to constitute a majority in [an additional] single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). When a plaintiff makes this showing, "minority voters possess the *potential* to elect [more] representatives" than they do under the "challenged structure or practice." *Id.* n.17. Conversely, if the first precondition is not satisfied, minority voters "cannot claim to have been injured by that structure or practice." *Id.*

The U.S. Supreme Court has confirmed the baseline-identifying function of the first *Gingles* precondition in subsequent cases. In *Growe*, the Court explained that this element is "needed to establish that the minority has the potential to elect a representative of its own choice in [an additional] single-member district." 507 U.S. at 40. "Unless [this] point[] [is] established, there neither has been a wrong nor can be a remedy." *Id.* at 40-41. More recently, in *Allen v. Milligan*, 599 U.S. 1 (2023), the Court observed that "[e]ach *Gingles* precondition serves a different purpose." *Id.* at 18. "The first, focused on geographical compactness and numerosity," does what the Court said in *Growe*: ensure that a hypothetical district map exists that is better in terms of minority representation and still compliant with

traditional line-drawing criteria. *Id.*; *see also, e.g.*, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) ("Because the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured, a § 2 plaintiff must . . . postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice.").

C. While state voting rights acts diverge from the federal VRA in several ways, they share its approach that liability may be imposed only if the existence of a reasonable alternative policy that better represents the plaintiffs is proven. For instance, in the first appellate decision interpreting the NYVRA, the Appellate Division held that, "in order to obtain a remedy under the NYVRA, a plaintiff . . . must show that 'vote dilution' has occurred." *Clarke v. Town of Newburgh*, 237 A.D.3d 14, 39 (2d Dep't 2025). In turn, vote dilution has occurred only if "there is an alternative practice that would allow the minority group to 'have equitable access to fully participate in the electoral process.'" *Id.* (quoting N.Y. Elec. Law § 17-206(5)(a)). "Thus," the court concluded, "the NYVRA does not significantly differ from the FVRA in this respect." *Id.*

Similarly, the California Supreme Court held in *Pico Neighborhood Association* that, to succeed under the California Voting Rights Act (CVRA), a plaintiff must do more than show racially polarized voting and a lack of minority representation. "[W]hat is [also] required to establish 'dilution' . . . is proof that,

under some lawful alternative electoral system, the protected class would have the potential . . . to elect its preferred candidate." *Pico Neighborhood Association*, 534 P.3d at 60. According to the court, this element is necessary because, otherwise, "a party [could] prevail based solely on" racially polarized voting and minority underrepresentation "that could not be remedied or ameliorated by any other electoral system." *Id.* at 65. The reasonable-alternative-policy requirement ensures that there could be "a net gain in the protected class's potential to elect candidates under an alternative system." *Id.* at 69; *see also* Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 Emory L.J. 299, 345-46 (2023) (arguing that state voting rights acts plaintiffs should "identify a benchmark relative to which their underrepresentation would be evaluated").

D. Federal and state vote dilution precedents make clear, then, that the Supreme Court erred by imposing liability without first investigating whether Petitioners' demonstrative district qualifies as a coalition crossover district (and is otherwise lawful). Contrary to the court's decision, *see* NYSCEF Doc. 217 at 13-15, this question is part of the *merits* analysis of this (and any other) vote dilution case. It is not an issue that can be deferred to the remedial stage.

That said, the Supreme Court was right that district configuration and performance must be examined anew at the remedial stage. At this stage, a court knows that a new district *could* be drawn that would improve the plaintiffs'

representation and comport with all federal and state requirements. Again, demonstrating this is the whole point of the reasonable-alternative-policy requirement at the liability stage. Now, however, a court must determine whether a proposed remedial district *would* actually cure the vote dilution by bolstering the plaintiffs' representation. This potential district could be enacted by the legislature, put forward by a party, or crafted by the court itself, possibly with the assistance of a special master. Regardless of the remedial district's provenance, the court must ensure that it would fully cure the violation. *See, e.g.*, N.Y. Elec. Law § 17-206(5)(a) ("Upon a finding of a violation . . . the court shall implement appropriate remedies to ensure that voters of [all racial and ethnic groups] have equitable access to fully participate in the electoral process . . .").

Of course, if the remedial district contemplated by the court is the same as the demonstrative district used earlier to satisfy the reasonable-alternative-policy requirement, the liability and remedial analyses are identical. But "the remedy the court ends up selecting . . . need not[] be the benchmark the plaintiff offered to show the element of dilution." *Pico Neighborhood Ass'n*, 534 P.3d at 69. And when the demonstrative district and the potential remedial district are different, the latter may not cure the violation even if the former, had it been adopted, would have done so.

To illustrate, in the *Milligan* litigation in which the U.S. Supreme Court recently reaffirmed the viability of vote dilution claims, the district court initially held that the plaintiffs satisfied the first *Gingles* precondition by offering several demonstrative maps containing two reasonably-configured Black-majority districts (compared to one in the enacted plan). *See Singleton v. Merrill*, 582 F. Supp. 3d 924, 1004-16 (N.D. Ala. 2022), *aff'd sub nom Allen v. Milligan,* 599 U.S. 1 (2023). After liability was found, however, Alabama declined to accept any of the plaintiffs' demonstrative maps, instead ratifying its own new plan. At the remedial stage, the district court rejected this plan on the ground that it did "not completely remedy the likely [federal VRA] violation" because it included only one rather than the necessary two Black opportunity districts. *Singleton v. Allen*, 690 F. Supp. 3d 1226, 1295 (N.D. Ala. 2023).

Accordingly, the Supreme Court was correct that its standard for coalition crossover claims must be applied at the remedial stage to determine if a potential remedial district *would* fully cure a violation. But the court was wrong to think that this standard need only be applied at the remedial stage. To the contrary, it must first be applied at the liability stage to find out if a hypothetical, reasonable district *could* improve the plaintiffs' representation.

E. Amici take no position on what result should follow here from the application of the proper standard for coalition crossover claims. This application

could be conducted by the Supreme Court upon remittitur. It could be conducted by the Appellate Division, to which Intervenor-Respondents have also appealed. *See, e.g.*, *People v. Brenda WW.*, 2025 N.Y. Slip Op. 03643, at 6 (N.Y. June 17, 2025) ("The Appellate Division has the same factfinding ability as the trial courts, and its factual review is plenary."). Or this Court could apply the proper standard if doing so would involve "a proposition of law which appeared upon the face of the record and which could not have been avoided if brought to the attention of . . . the court below." *Persky v. Bank of Am. Nat'l Ass'n*, 261 N.Y. 212, 218 (1933). Amici's view is simply that Congressional District 11 should not be invalidated unless and until a court concludes that this standard has been met.

CONCLUSION

In this complex and novel case, the Supreme Court correctly construed Petitioners' claim as a claim for a coalition crossover district and set forth the proper standard for this kind of allegation. However, the court failed to apply its own standard before imposing liability, mistakenly believing that this application could be postponed until the remedial stage of the litigation. Congressional District 11 should not be struck down unless and until a court determines that a coalition crossover district compliant with federal and state legal requirements could be drawn in its place.

Dated: February 4, 2026
Cambridge, MA

Respectfully submitted,

ELECTION LAW CLINIC AT
HARVARD LAW SCHOOL

by: /s/

Ruth Merewyn Greenwood
Nicholas O. Stephanopoulos
Attorneys for Proposed Amici Curiae
6 Everett Street, Suite 4105
Cambridge, MA 02138
(617) 998-1010
rgreenwood@law.harvard.edu

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under Rule 500.13(c)(3), is 4,278 words.

This brief was prepared on a computer using Microsoft Word, in Times New Roman, a proportionally spaced typeface, with 14-point font size and 2.0 line spacing.

Dated: February 4, 2026
Cambridge, MA

/s/ Ruth M. Greenwood

Ruth M. Greenwood

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

Case No. 2026-00384

MICHAEL WILLIAMS, JOSÉ RAMÍREZ-GAROFALO, AIXA TORRES, and MELISSA CARTY,

Petitioners-Appellees,

against

BOARD OF ELECTIONS OF THE STATE OF NEW YORK; KRISTEN ZEBROWSKI STAVISKY, IN HER OFFICIAL CAPACITY AS CO-EXECUTIVE DIRECTOR OF THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; RAYMOND J. RILEY, III, IN HIS OFFICIAL CAPACITY AS CO-EXECUTIVE DIRECTOR OF THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; PETER S. KOSINSKI, IN HIS OFFICIAL CAPACITY AS CO-CHAIR AND COMMISSIONER OF THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; HENRY T. BERGER, IN HIS OFFICIAL CAPACITY AS CO-CHAIR AND COMMISSIONER OF THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; ANTHONY J. CASALE, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; ESSMA BAGNUOLA,

(Caption Continued on the Reverse)

REPLY MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION FOR INTERIM STAY, STAY, AND LEAVE TO APPEAL AND RESPONSE IN OPPOSITION TO CROSS-MOTION TO VACATE STAY

TROUTMAN PEPPER LOCKE LLP
Attorneys for Intervenors-Respondents-Appellants
875 Third Avenue
New York, New York 10022
212-704-6000
bennet.moskowitz@troutman.com

Date Completed: February 6, 2026

IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE BOARD OF ELECTIONS OF THE STATE OF NEW YORK; KATHY HOCHUL, IN HER OFFICIAL CAPACITY AS GOVERNOR OF NEW YORK; ANDREA STEWART-COUSINS, IN HER OFFICIAL CAPACITY AS NEW YORK STATE SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE; CARL E. HEASTIE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NEW YORK STATE ASSEMBLY; and LETITIA JAMES, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NEW YORK,

Respondents-Appellants,

and

REPRESENTATIVE NICOLE MALLIOTAKIS, EDWARD L. LAI, JOEL MEDINA, SOLOMON B. REEVES, ANGELA SISTO, and FAITH TOGBA,

Intervenors-Respondents-Appellants.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

PRELIMINARY STATEMENT

It is hard to imagine a case that more clearly calls out for this stay pending appeal. The Supreme Court below adopted a theory that no party briefed or submitted evidence on, in violation of due process and fairness principles. This Court does not need to take Appellants-Intervenor-Respondents' ("Intervenor-Respondents") word for it. The professors who submitted the *amicus* brief from which the Supreme Court derived its test have told this Court that the trial court made a "serious mistake" by not requiring Appellees-Petitioners ("Petitioners") to satisfy the critical elements of that test. Affirmation of B. Moskowitz, Ex.A ("AD.Prof.Am.Br.") at 12. *Amici* from multiple voting groups—who, to the undersigned's knowledge, have never before argued that any court erred in striking down any map based upon a vote dilution theory—make the same point, explaining that the Supreme Court "erred in finding liability without making a determination as to [an] essential element." NYSCEF Doc. No.36, NYCLU et al. Proposed *Amicus* Memorandum of Law ("AD.NYCLU.Am.Br.") at 8. The State Respondents take no position on a stay. *See* NYSCEF Doc. No.34, State Respondents' Memorandum of Law in Response to Motions for Stay ("AD.Gov.Br.") at 12–23. And Petitioners ask this Court to not only ignore what the Supreme Court actually said, but to flout the basics of vote dilution claims by allowing a finding of liability without any showing of vote dilution. That is just the tip of the iceberg of the Supreme Court's fatal errors,

which include inventing a crossover-district test with no support in the New York Constitution's text and ordering a violation of the U.S. Constitution's Equal Protection and Elections Clauses. None of the parties or *amici* that defend the Supreme Court's crossover-district standard—even while most admit that the Supreme Court did not even apply it lawfully—explain how judicially discovering that requirement can be consistent with the serious Equal Protection Clause constitutional problems that the U.S. Supreme Court warned about when it rejected adopting a crossover-district mandate.

The equities calling for a stay are just as clear. Petitioners still have no answer for the point that they waited 18 months after the Legislature enacted the 2024 Congressional Map to bring their lawsuit, which is the only reason these emergency proceedings are happening now. A party that saw so little urgency in bringing its concerns to the courts, and then filed such a fatally flawed theory that the Supreme Court adopted an entirely new theory that requires reversal, cannot then succeed in asking the Court to move election deadlines to accommodate its own delay and poor litigation choices. And, to be clear, Petitioners' position guarantees delay and confusion. Even if this Court lifts the automatic stay, which it clearly should not, there is no chance the Independent Redistricting Commission ("IRC") will be able to reconvene, take in necessary evidence from the public, and engage in careful deliberations in order to carry out the Supreme Court's mandate to racially

gerrymander New York's Eleventh Congressional District ("CD11") before February 24. Accordingly, declining to lift the stay that Intervenor-Respondents seek, while granting Petitioners' cross-motion to dissolve the automatic stay on the IRC, will mean substantial delays in the 2026 Congressional Election for all New Yorkers. And all of this will benefit no one because there is no chance that the Supreme Court's indefensible order will survive appellate review.

In all, this Court should grant Intervenor-Respondents' stay motion, deny Petitioners' cross-motion, and make clear that the 2026 Congressional Election will begin on February 24, under the map that the Legislature adopted. While Intervenor-Respondents strongly believe that this appeal will end with an order requiring dismissal of Petitioners' entirely meritless lawsuit, there is no reason to impose serious harm on Intervenor-Respondents and the public in the meanwhile, especially given Petitioners' egregious, unexplained delay in bringing this lawsuit.

ARGUMENT

I. Intervenor-Respondents Are Certain To Prevail In Their Challenge To The Supreme Court's Order

A. As Even The Professor *Amici* Whose Test The Supreme Court Unconstitutionally Adopted After The Close Of Evidence Admit, The Supreme Court Did Not Apply Its Crossover-District Test But Nevertheless Somehow Ruled In Petitioners' Favor

1. The Supreme Court violated due process rights, basic principles of fairness and the party presentation principle by adjudicating this case under a standard that no party proposed or submitted evidence on, and which the Court announced for the

first time after trial. NYSCEF Doc. No.11, Intervenor-Respondents' Memorandum of Law in Support of Motion to Stay ("AD.Int'r.Resp't.Br.") at 22–28 (citing, *e.g.*, *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020); *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010); *Reich v. Collins*, 513 U.S. 106, 111 (1994); *Wells Fargo Bank, N.A. v. St. Louis*, 229 A.D.3d 116, 122 (2d Dep't 2024)). Petitioners' sole theory was that the NYVRA's standards applied to their Article III, Section 4 vote dilution claim. *Id.* at 24. After the parties developed their evidence in response to that theory and tried the case under the NYVRA's standards, the Supreme Court ruled for Petitioners based upon a wholly different, novel, *amici*-suggested standard. *Id.* at 24–26. Under the Supreme Court's belated standard, a petitioner carries its burden of proving that "redrawing of the congressional lines is a proper remedy" by showing that a proposed district exists where (1) "minority voters (including from two or more ethnic groups) are able to select their candidates of choice in the primary election," (2) these candidates are "usually [ ] victorious" (meaning that they "win more often than not") in the general election, and (3) minority voters "are decisive in the selection of candidates" in primary races. NYSCEF Doc. No.11, Ex.A, Decision and Order of the Supreme Court of the State of New York ("Order") at 13, 15.

Unsurprisingly, no party submitted evidence on multiple elements of the Supreme Court's belatedly adopted test, including whether minority voters are

"decisive" in any party's primary or whether they control candidate selection in a proposed crossover district, AD.Int'r.Resp't.Br.26, as would be necessary to show the existence of a reasonable alternative crossover district for purposes of proving a crossover-district claim, *id.* at 26–27. The Supreme Court in fact *rejected* Petitioners' entire approach to crafting a demonstrative remedial map—which approach relied upon moving White Democratic voters from Lower Manhattan into CD11 while moving out a bipartisan mix of White and Asian voters, *id.* at 7–8, 19—and nonetheless somehow ruled in their favor. The Supreme Court noted that if "minority voters *do not* gain actual influence but *are* grouped with White voters who would elect minority-preferred candidates regardless of whether those minority voters were drawn into a new district or not," the proposed district is not a crossover district and is instead "simply" a means of "bolstering a political party's power and influence." Order at 15. And yet it still concluded that Petitioners won, based on a crossover-district standard that Intervenor-Respondents did not have any reason to brief and on which no party submitted evidence. The Supreme Court's approach to this case offends basic principles of fairness to litigants and requires reversal. AD.Int'r.Resp't.Br.26–28.

2. This Court has now before it four briefs filed on Wednesday—submitted by the Professor *amici*, the NYCLU *amici*, the State Respondents, and Petitioners—that favor the idea of crossover districts, but they offer at least three different

interpretations of the Supreme Court's holding below. That even those who support the Supreme Court's crossover-district approach cannot agree as to what the Supreme Court did in this case underscores how obvious the due process violation is here, where the Supreme Court sprang a new legal standard on the parties after the close of evidence and then applied that standard without any adversarial testing. *See, e.g.*, *Reich*, 513 U.S. at 111; *Wells Fargo*, 229 A.D.3d at 122.

a. *The Professor Proposed Amici*. The Professor *amici* reiterate their own test for a crossover district, which the Supreme Court adopted as the first two prongs of its three-pronged standard: that "minority voters (including from two or more ethnic groups) are able to select their candidates of choice in the primary election," and that "these candidates must usually be victorious in the general election." AD.Prof.Am.Br.8 (quoting Order at 15). As the Professors note, a plaintiff *must* present evidence establishing that minority voters' purported "underrepresentation could be *ameliorated* by a reasonable alternative policy: here, a new coalition crossover district that complies with all federal and state legal requirements." *Id.* at 13. In other words, "before *liability* may be imposed," *id.* at 2, a crossover-district plaintiff must establish an *undiluted* baseline to show that a minority group's representation in the current district is, in fact, diluted, *see Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) ("the very concept of vote dilution" requires "the existence of an 'undiluted' practice against which the fact of dilution may be

measured"). And so, as the Professor *amici* (correctly) explain, "what is required to establish 'dilution' . . . is proof that, under some lawful alternative electoral system, the protected class would have the potential . . . to elect its preferred candidate." AD.Prof.Am.Br.3 (alterations in original) (quoting *Pico Neighborhood Ass'n v. City of Santa Monica*, 534 P.3d 54, 60 (Cal. 2023)). To the extent that a plaintiff is bringing a "crossover" claim, its proposed alternative electoral system must show, at minimum, that minority voters are able to select their candidates of choice in the primary election and that these candidates are usually victorious in the general election, *id.* at 8—which is largely the standard that the Supreme Court announced as its crossover-district test here, *see* Order at 15.

As the Professor *amici* concede, the Supreme Court did not assess whether Petitioners' illustrative CD11 "was, in fact, a coalition crossover district (and otherwise lawful)," and so committed a "**serious mistake**." AD.Prof.Am.Br.12 (emphasis added). **That "serious mistake" alone—which there can be no reasonable dispute occurred here—demonstrates that Intervenor-Respondents are likely to succeed on the merits of *this* appeal**. Petitioners understood that a reasonable alternative map is essential evidence for any vote dilution claim; that is why they prepared and submitted their illustrative CD11. The Supreme Court rejected Petitioners' approach and the theory upon which it was based without holding Petitioners to their burden of establishing an undiluted baseline. Petitioners

presented no evidence at all on the Supreme Court's *post hoc* crossover-district standard, nor did Intervenor-Respondents have any reasonable chance to submit evidence on that standard. That is a clear due process violation. *See, e.g.*, *Sineneng-Smith*, 590 U.S. at 375; *Wells Fargo*, 229 A.D.3d at 122. And even if the Professor *amici* were correct that the Supreme Court could remedy its error by applying the Professors' crossover-district standard to Petitioners' illustrative map on remand (from which there would surely be yet another appeal), Intervenor-Respondents are still likely to succeed on *this* appeal, from an order where the Supreme Court very clearly did not do what the Professor *amici* admit it had to do.

That said, remanding this matter for the Supreme Court to apply the Professors' test—as these *amici* suggest—would only heighten the due process violation here, where no party submitted evidence tailored to this test. Petitioners chose to present their vote dilution claim under the NYVRA's standards and offered no evidence of a reasonable alternative *crossover* district. The only permissible outcome of this case is to reverse and remand with instructions to dismiss Petitioners' lawsuit. *See* AD.Int'r.Resp't.Br.4. If some other party wants to bring a lawsuit under the Professors' theory, it is free to do so. But even if this Court were to order a remand at the end of this appeal, there would still need to be an additional proceeding with new expert reports analyzing whether the illustrative district that Petitioners submitted satisfies the Supreme Court's test. The fundamental point is

that the Supreme Court's decision is legally indefensible, and was instead premised on at least one "serious mistake" (and actually many more). AD.Prof.Am.Br.12. That mistake, standing alone, establishes that Intervenor-Respondents have a strong likelihood of success for purposes of their stay motion.[1]

In addition and also independently sufficient to satisfy Intervenor-Respondents' burden to show likelihood of success on appeal, Petitioners failed entirely to present evidence suggesting that minority voters are underrepresented in part or all of New York State, which evidence the Professor *amici* concede was *also* necessary to establish vote dilution under their theory. *Id.* at 13 n.2 (citing *Johnson v. De Grandy*, 512 U.S. 997, 1013–16, 1023–24 (1994)). As Justice Souter acknowledged in his *Bartlett* dissent that the Supreme Court relied upon, to determine whether particular district lines result in vote dilution, a court "must look to an entire districting plan (normally, statewide)," assessing whether "the challenged plan creates an insufficient number of minority-opportunity districts in

[1] The Professor *amici* also suggest that this Court could perhaps use its own factfinding authority to determine if Petitioners' illustrative map meets the Supreme Court's crossover-district standard. Taking this approach would be inappropriate for multiple reasons, including because the parties would need to submit new expert evidence tailored to the Supreme Court's newly adopted standard. That would mean preparing evidence for this Court's review demonstrating whether minority voters are able to select (and are decisive in the selection of) their preferred candidate in primary elections, and whether these candidates win more often than not in general elections. Order at 15. But even if this Court were to step in and conduct the legal and factual analysis that the Supreme Court failed to perform, that would not change the stay analysis here, where Petitioners do not even argue that their illustrative map meets the Supreme Court's crossover-district criteria.

the territory as a whole." *Bartlett v. Strickland*, 556 U.S. 1, 30 (2009) (Souter, J., dissenting). As the Professors similarly explain (and as Intervenor-Respondents argued below), "vote dilution occurs across multiple districts (typically, a geographic region or an entire jurisdiction)," such that the Supreme Court was required to "ask[ ] whether minority voters are underrepresented in part or all of the New York State, not solely in [CD11]." AD.Prof.Am.Br.13 n.2. The Supreme Court thus erred by "focus[ing] on minority voters' lack of representation in [CD11] alone." *Id.* The evidence in this case on this point is *undisputed*: Black and Latino-preferred candidates (that is, Democrats) win every district wholly within or around New York City other than CD11 and constitute 73% of the New York congressional delegation statewide. AD.Int'r.Resp't.Br.14.

Finally, while the Professor *amici* try to explain why the Supreme Court made its clear error—noting that Petitioners' "presentation of [their] claim was [ ] ambiguous," "confusing," and mixing and merging different election-law concepts, AD.Prof.Am.Br.2, 5—this only further demonstrates the due process violation here. Despite Petitioners' poor presentation of their claim, Intervenor-Respondents made clear throughout the litigation that they were presenting evidence under the NYVRA theory that Petitioners very clearly proposed in their Petition and in their briefing. Intervenor-Respondents explained to the Supreme Court that it would violate due process to apply any different theory, now that the parties had prepared their briefing

and expert reports in accordance with the Article-III-Section-4-equals-NYVRA theory that Petitioners had presented. AD.Int'r.Resp't.Br.10. But then the Supreme Court decided the case on a new theory announced for the first time after trial, without even addressing these due process arguments.

b. *The NYCLU Proposed Amici*. The NYCLU *amici*—whose stated mission is to develop voting rights policy and litigate racial vote dilution claims on behalf of voters of color—similarly admit that the Supreme Court fatally erred in failing to analyze whether Petitioners' illustrative map constitutes a valid crossover district at the liability phase, AD.NYCLU.Am.Br.11, providing even further support for Intervenor-Respondents' argument that the Supreme Court violated the parties' due process rights here, *see, e.g.*, *Sineneng-Smith*, 590 U.S. at 375; *Wells Fargo*, 229 A.D.3d at 122. While the NYCLU *amici* and Professor *amici* disagree to some extent on what the standard for crossover districts should be, *compare* AD.Prof.Am.Br.8 & n.1 (stating that the third element of the Supreme Court's crossover-district test "seems unnecessary to Amici"), *with* AD.NYCLU.Am.Br.12–13 (agreeing with most aspects of the Supreme Court's test),[2] they agree that the

[2] Curiously, both sets of *amici* now appear to walk back on what it means for minority groups to be "decisive" in the selection of candidates, with the Professor *amici* and the NYCLU *amici* now arguing that this element can be met merely by showing that a minority-preferred candidate can usually win in both the primary and the general election. *See* AD.Prof.Am.Br.8 n.1; AD.NYCLU.Am.Br.13. But that is incorrect: if minority voters' preferred candidate would win regardless of minority voters' votes, these voters can hardly be said to be "decisive" in electoral

Supreme Court got the analysis badly wrong. As the NYCLU *amici* note, "[a]uthority from state and federal courts supports the principle that proffering a reasonable alternative practice is part of a vote-dilution plaintiff's liability showing." AD.NYCLU.Am.Br.9. The Supreme Court thus "erred in finding liability without making a determination as to this essential element." *Id.* at 8. Although these *amici* and Intervenor-Respondents may disagree on the appellate remedy for the Supreme Court's error, *compare id.* at 11 (arguing, contrary to Intervenor-Respondents' position, that remand for further proceedings is appropriate), *with supra* p.6 (explaining that dismissal on remand is the only permissible option), they agree that the Court made a critical legal error, such that Intervenor-Respondents are likely to prevail in this appeal.

The NYCLU *amici* also underscore the fundamental due process issues in the Supreme Court's approach. As these *amici* recognize, "*no party* [ ] briefed the position that crossover claims are cognizable under the New York State Constitution." NYSCEF Doc. No.36, Affirmation of Perry M. Grossman, ¶ 8 (emphasis added). The Supreme Court's decision to "seize upon an issue not raised by any party . . . , without providing . . . notice of the issue and an opportunity for all parties to be heard on it" is a due process violation that demands reversal. *See*

---

outcomes. In any event, Petitioners did not present evidence that their illustrative map meets any of the Supreme Court's conditions for crossover districts.

Wells Fargo, 229 A.D.3d at 122; *see also Sineneng-Smith*, 590 U.S. at 375; *Espinosa*, 559 U.S. at 272; *Reich*, 513 U.S. at 111.

c. *The State Respondents*. The State Respondents remarkably insist that the Supreme Court actually assessed Petitioners' proposed illustrative map and determined that the court's new crossover-district "standards [were] satisfied here," AD.Gov.Br.9, but their arguments only support finding a due process violation. The State Respondents explain the Supreme Court's holding that, to demonstrate a crossover district, a plaintiff must show that minority voters "comprise a sufficiently large portion of the population of the district's voting population that they would be able to influence electoral outcomes." *Id.* at 8–9. As the State Respondents note, this is proven under the Supreme Court's test by showing that minority voters in a proposed district are able to select (and are decisive in the selection of) their preferred candidates in primary elections, and these candidates win more often than not in general elections. Order at 15. But not even the *amici* who have championed the Supreme Court's new crossover-district test have taken the implausible position that the Supreme Court secretly determined Petitioners' illustrative district *satisfied* this three-pronged test. *See supra* pp.5–10. Nowhere in its order did the Court perform any analysis of whether Petitioners' illustrative map allows "minority voters (including from two or more ethnic groups) . . . to select their candidates of choice in the primary election." *See* Order at 15. Nor did it address whether these

candidates would "usually be victorious in the general election." *See id.* And the Supreme Court certainly did not discuss whether Petitioners' illustrative district—which, again, was premised largely on moving White Democratic voters into CD11—would "increase the influence of minority voters, such that they are decisive in the selection of candidates" in primary races. *See id.* It would, in fact, have been impossible for the Supreme Court to do so, since Petitioners did not present evidence on any of these mandatory factors under the Supreme Court's own test. But even if the State Respondents were correct that the Supreme Court made this finding without telling anyone, that would only heighten the due process violation here, where Petitioners did not present and Intervenor-Respondents did not have an opportunity to respond to evidence relating to a crossover district. *See Wells Fargo*, 229 A.D.3d at 122; *Reich*, 513 U.S. at 111.

d. *Petitioners*. Petitioners, for their part, find themselves in the unenviable position of attempting to defend the indefensible. They cannot seriously tout the theory on which they actually tried the case—that Article III, Section 4, adopted in 2012, time traveled to incorporate the NYVRA's influence-district framework adopted in 2022. And they likewise cannot defend what the Supreme Court actually did: rejecting that theory and then, after the close of evidence, adopting a new, *amici*-designed crossover-district standard that no party had litigated or introduced evidence to satisfy as to multiple elements. Petitioners thus take out their blue pen

to rewrite both their own prior briefing and the Supreme Court's test, while mischaracterizing Intervenor-Respondents' due process argument and ignoring the fundamental mismatch between their evidence and the standard that the Supreme Court belatedly announced.

Petitioners' response to Intervenor-Respondents' due process argument is an exercise in misdirection. According to Petitioners, the Supreme Court did not violate due process because it based its conclusion that Black and Latino voters' representation in CD11 is diluted solely on the racial polarization and totality-of-the-circumstances evidence that Petitioners submitted during trial. NYSCEF Doc. No.37, Petitioners' Memorandum of Law in Opposition to Motions to Stay and in Support of Cross Motion to Vacate Stay ("AD.Pet.Br.") 15–16. But as Intervenor-Respondents, Respondents, and both sets of *amici* have now explained to this Court, Petitioners' argument misunderstands both the Supreme Court's own test and the nature of vote dilution claims. Regardless of whether Petitioners successfully proved sufficient racially polarized voting and satisfied the relevant totality-of-the-circumstances test (both points Intervenor-Respondents strenuously dispute, *see infra* pp.17–19), the Supreme Court indisputably failed to analyze a key element of Petitioners' vote dilution claim under its own test: whether Petitioners proved that there is an alternative to CD11 that would satisfy the Court's three-part test for a non-dilutive, cross-over district baseline. *See supra* pp.5–10. This showing is

necessary for Petitioners to prevail on the merits, and yet Petitioners submitted no evidence on multiple elements in the Court's belatedly announced test. When the Supreme Court announced a novel three-part crossover-district test after the close of evidence, it deprived the parties of any opportunity to litigate the merits of that test or submit expert evidence on it, in violation of basic Due Process Clause and fairness principles. *See Wells Fargo*, 229 A.D.3d at 122; *Sineneng-Smith*, 590 U.S. at 375; *Reich*, 513 U.S. at 111.

Although Petitioners admit that they "principally argued that the court should have looked to the NYVRA's framework" to analyze their vote dilution claim, they contend that this is a "distinction without a difference," as both federal and state law require evidence of racially polarized voting and the totality of the circumstances to prove vote dilution. AD.Pet.Br.16–17. **But both federal and state law *also* require a plaintiff to show that "there is an alternative practice that would allow the minority group to 'have equitable access to fully participate in the electoral process.'"** *Clarke v. Town of Newburgh*, 237 A.D.3d 14, 39 (2d Dep't 2025) (quoting N.Y. Elec. Law § 17-206(5)(a)), *aff'd on other grounds*, __ N.E.3d ___, 2025 WL 3235042 (N.Y. Nov. 20, 2025); *Reno*, 520 U.S. at 480 ("the very concept of vote dilution" requires the "existence of an 'undiluted' practice against which the fact of dilution may be measured"). The Supreme Court here came up with a standard for evaluating this prong of the vote dilution analysis that no party to the

case advanced, and then did not hold Petitioners to their burden of actually proving it. *See* Order at 13–16. Regardless of whether Petitioners "hitched their wagon to the NYVRA alone as a possible framework," AD.Pet.Br.16–17—which they very clearly did, *see infra* pp.13–14—they indisputably did *not* advocate for the crossover-district standard that the Supreme Court adopted. Nor is that standard "substantially similar" to the framework that Petitioners proposed, *contra* AD.Pet.Br.17, as demonstrated by Petitioners' failure to make any evidentiary showing relevant to this standard.

After admitting that they "principally" argued an NYVRA-based theory, Petitioners cite to a footnote in their opening pre-trial brief where they stated that they would "readily satisfy" "any possible [vote dilution] standard." AD.Pet.Br.16–17. That characterization elides the core problem. It is true that Petitioners used the word "crossover" a handful of times in describing the district they sought. But labels—and especially "confusing" labels used in an "ambiguous" manner, *see* AD.Prof.Am.Br.2, 5—are not legal standards, and the case that Petitioners actually tried was built around an NYVRA influence-district theory. Nothing in Petitioners' presentation below remotely resembled the post-trial crossover-district test that the Supreme Court ultimately adopted. Nor do Petitioners' assurances in a single footnote that they could "readily satisfy" "any possible standard," AD.Pet.Br.17, cure the lack of notice issue here. Petitioners' vague reference to "any possible

standard" did not put the other parties on notice that they would need to defend against any possible standard that the Supreme Court could ultimately adopt. Due process protects the parties' opportunity to shape the record around the actual elements that will decide the case. *See Espinosa*, 559 U.S. at 272; *Sineneng-Smith*, 590 U.S. at 375.

Equally untenable is Petitioners' effort to recast what the Supreme Court's opinion requires. Contrary to Petitioners' interpretation, the Supreme Court did not simply hold that minority voters must "comprise a sufficiently large portion of the population' in the relevant area 'to influence electoral outcomes'" (whatever that means) to make out a crossover-district claim. AD.Pet.Br.18 (citation omitted). Rather, as the State Respondents explain, *see supra* pp.10–11, after rejecting Petitioners' NYVRA-incorporation theory, the Supreme Court held that a proposed crossover district "counts" for purposes of showing a "sufficiently large portion of the population" only if: (1) minority voters (including multiple ethnic groups) are able to select their candidates of choice in the primary; (2) those candidates "usually" prevail in the general election, which the court defined as winning "more often than not"; and (3) minority voters' preferences are "decisive" in the district, such that they are not merely swept along by White voters who would elect the same candidates regardless. Order at 15. The Supreme Court's failure to apply this standard to Petitioners' proposed illustrative district flies in the face of both state and

federal precedent, *see, e.g.*, *Clarke*, 237 A.D.3d at 39; *Reno*, 520 U.S. at 480, as well as the core principles that *amici* espouse and that were set forth in the dissenting opinion that the Supreme Court relied upon to formulate its new crossover-district standard, *see League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399, 485–86 (2006) (Souter, J., concurring in part and dissenting in part).

Petitioners next attempt to portray Intervenor-Respondents as claiming that courts cannot adopt a legal standard that differs from the parties' submissions in any respect. *See* AD.Pet.Br.20–21. That is not Intervenor-Respondents' position. Their core due process objection is more specific. This case was tried under one legal standard—Petitioners' Article-III-Section-4-equals-NYVRA theory—but decided under another. After the parties submitted briefing and expert evidence and tried the case on Petitioners' Article-III-Section-4-equals-NYVRA theory, the Supreme Court announced a materially different and novel standard that required *different* kinds of evidence, without providing the parties with any notice or opportunity to litigate that new standard or introduce evidence tailored to its elements. Neither side was asked to—and neither side did—marshal primary-election data in Petitioners' proposed district or data regarding whether Black and Latino voters would be "decisive" in that district. Only after both sides had rested and the record was closed did the Court reject Petitioners' proposed NYVRA framework and embrace an *amici*-derived model that made primary-election control and "decisiveness" central

elements of a crossover-district claim. It is these facts—litigation under one test, followed by post-trial adoption of another—that violate the party presentation principle and offend due process. *See Wells Fargo*, 229 A.D.3d at 122; *Sineneng-Smith*, 590 U.S. at 375.

None of the authorities that Petitioners cite addresses a situation where the court adopted a new standard after the close of evidence. Cases recognizing courts' inherent duty to interpret statutes and constitutions, *see* AD.Pet.Br.22–23 (citing, *e.g.*, *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006), *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024), and *O'Reilly v. City of New York*, 205 A.D. 888, 892 (2d Dep't 1923)), or their ability to consider unpreserved legal issues, *see id.* (citing, *e.g.*, *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991), and *Am. Timber & Trading Co. v. First Nat'l Bank of Or.*, 690 F.2d 781, 786 (9th Cir. 1982)), do not authorize a court to adopt a fact-intensive, *amici*-designed liability standard after trial is over, and then enter judgment without requiring any evidence satisfying that standard.

The U.S. Supreme Court's decision in *Sineneng-Smith* underscores this point. There, the Court faulted an appellate panel for allowing *amici* to "radical[ly] transform[ ]" the case by injecting new constitutional theories not advanced by the parties. 590 U.S. at 380. Here, the Supreme Court adopted an *amici*-crafted crossover framework into controlling law, post-trial, and never required Petitioners

to prove its elements. That is precisely the kind of non-adversarial doctrinal transformation that the U.S. Supreme Court has warned against. *See id.* at 375, 380.

Nor can Petitioners identify evidence showing that they did, in fact, satisfy the Supreme Court's *post-hoc* crossover-district test. Petitioners do not show that the record contains the primary-election and "decisiveness" data under the Supreme Court's standard. There is no evidence, for example, that in Petitioners' illustrative CD11, Black and Latino voters would control Democratic primaries. The Supreme Court expressly makes primary-election control central to defining a crossover district. Order at 15. Yet, Petitioners' experts did not model or analyze primary-election behavior in their illustrative district, failing to provide any evidence whatsoever regarding primary election data. Nor is there any analysis of whether Black and Latino voters would be "decisive" in that proposed district.

Petitioners are wrong to argue that their illustrative map demonstrated that any alleged vote dilution in CD11 could be lawfully remedied under the Supreme Court's standard. Even assuming that the Supreme Court's decision to import the Professors' standard into Article III, Section 4 was legally permissible, *but see infra* Section I.B, Petitioners presented no evidence suggesting that their illustrative district could meet that standard. Indeed, Petitioners' illustrative map achieves its dramatic increase in minority-preferred success by importing overwhelmingly Democratic White voters from Lower Manhattan. And while Petitioners contend

that their map "would have afforded Staten Island's Black and Hispanic residents an equal opportunity to elect their candidates of choice," AD.Pet.Br.11, that map would have all-but-assured dominance for candidates preferred by those imported White voters from Lower Manhattan, resulting in Democrats winning roughly 90% of the time according to Petitioners' own expert, *see* AD.Int'r.Resp't.Br.44–45. The Supreme Court appeared to recognize that Petitioners' approach was about partisan engineering, not the creation of a coalition in which minority voters are genuinely "decisive." Order at 15. The Supreme Court thus rejected Petitioners' remedial approach, explaining that its understanding of Article III would look instead to "adding Black and Latino voters" where appropriate. *Id.* at 13. Petitioners' Opposition does not confront that rejection, nor do they explain how their proposed illustrative district could possibly be reconciled with the Supreme Court's own insistence that minorities be "decisive" in crossover districts.

Petitioners incorrectly contend that Intervenor-Respondents "never meaningfully disputed the obvious fact that the IRC and Legislature have numerous lawful options for redrawing CD-11 in [a] manner that remedies vote dilution and complies with other ordinary redistricting criteria." AD.Pet.Br.21. To be clear, Intervenor-Respondents believe that any effort to redraw CD11 would be unlawful. But it was Petitioners—and not Intervenor-Respondents—who bore the burden of presenting a reasonable alternative map. *See supra* pp.5–10. Their suggestion that

Intervenor-Respondents had to prove that there is no conceivable reasonable alternative to the current CD11 that met a test that the Court did not announce until after trial is risible.

Discussing briefly the evidence that the parties did dispute at trial—which the Supreme Court lumped into its all-things-considered inquiry—Petitioners cannot defend the Supreme Court's reasoning. On racial polarization and "usually defeated," AD.Pet.Br.30–32, Petitioners' own expert reports and testimony show that Black and Latino voters make up roughly 22.7% of CD11's current voting-age population and elect their preferred candidates in 25% or more of elections that the expert hand-selected, AD.Int'r.Resp't.Br.28. Petitioners do not seriously dispute this proportionality, and the *amici* in this case explicitly agree with Intervenor-Respondents that, to prove vote dilution, Petitioners were required to show that "minority voters are underrepresented in part or all of New York State, not solely in [CD11]." AD.Prof.Am.Br.13 n.2. Polarization in a district where a minority coalition approximates its population share in terms of electoral success—and where the broader jurisdiction is overwhelmingly favorable to that coalition—does not establish that CD11's boundaries dilute Black and Latino voters' representation. The evidence also showed that Black and Latino-preferred candidates (Democrats) routinely win across New York State and in New York City. *See id.* at 14.

The same is true of Petitioners' discussion of the other evidence that the Supreme Court relied upon, *see* AD.Pet.Br.32–40, which Intervenor-Respondents discuss only briefly here given that they focused their stay motion on the clear constitutional errors in the Supreme Court's analysis (to be clear, when this appeal reaches the merits, Intervenor-Respondents will have much more to say on the Supreme Court's many mistakes as to this evidence). For instance, while the Supreme Court credited Dr. Sugrue's narrative of Staten Island's history, Petitioners overstate what that evidence shows about present conditions in CD11. *See id.* at 33–35. Historical redlining, school segregation, and mid-century discrimination are deeply troubling, but the legal question is whether those practices still distort political opportunity today. *See* AD.Int'r.Resp't.Br.27–28. Intervenor-Respondents' expert Mr. Borelli provided contemporary data showing increased integration, and Petitioners' own dissimilarity indices indicate only moderate segregation between White and Latino residents, with higher but improving Black–White measures. *See id.* Likewise, the socioeconomic data that Petitioners cite—gaps in income, education, and homeownership—describe disparities but do not by themselves demonstrate dilution. Petitioners largely rely on generic scholarship suggesting that socioeconomic inequality can reduce electoral participation, and then simply assume such a causal link in CD11. *See* AD.Pet.Br.35–36. But there is no district-specific analysis tying the disparities to turnout patterns in a way that

transforms ordinary socioeconomic inequality into proof that CD11's lines deny minorities equitable access to the political process. *See id.*; AD.Int'r.Resp't.Br.27–28. And Petitioners present no authority suggesting that three instances of allegedly racially tinged appeals over several decades, with the most recent being in 2017, proves that racial appeals are "common." *See* AD.Pet.Br.37. Petitioners' focus on minority officeholding fares no better. *See* AD.Pet.Br.36. Recognizing that CD11's *current* representative is of Cuban descent—Congresswoman Malliotakis—the Supreme Court itself concluded that the "election of minority candidates in CD-11 presents more complexity" and did not clearly weigh this factor in either party's favor. Order at 11.

B. The New York Constitution Does Not Contain The Professor *Amici*'s Test Or Any Crossover-District Mandate And None Of The Parties Or *Amici* Even Explain How Adopting That Test Complies With The Constitutional Concerns The U.S. Supreme Court Articulated In *Bartlett*

1. As Intervenor-Respondents explained, Article III, Section 4 does not incorporate the Professors' crossover theory that the Supreme Court adopted. AD.Int'r.Resp't.Br.29–38. Article III, Section 4 was modeled after, and uses substantially identical language to, Section 2 of the federal VRA, *id.* at 29–33, which the U.S. Supreme Court determined does not require crossover districts, *Bartlett*, 556 U.S. at 21–23 (plurality op.). Well-settled principles of constitutional construction thus compel adopting the U.S. Supreme Court's interpretation of the

same language used in Article III, Section 4. AD.Int'r.Resp't.Br.28–33; *accord In re Colo. Indep. Cong. Redistricting Comm'n*, 497 P.3d 493, 508–12 (Colo. 2021). The Supreme Court defended its contrary conclusion by stating that the 2014 redistricting amendments were meant to "expand on those provided by the federal government" in the VRA. AD.Int'r.Resp't.Br.35–36 (quoting Order at 6). But even assuming that is true in some manner, there is no textual support for writing the Professors' crossover mandate into Article III, Section 4. *Id.* And there are strong constitutional reasons to avoid that reading. As the controlling *Bartlett* concurrence explained when rejecting reading a crossover mandate into Section 2, such a mandate would "unnecessarily infuse race into virtually every redistricting" by ""[i]njecting [a] racial measure" into the redistricting process at every turn, asking how each "factor that enters into districting" affects "crossover voting." *Bartlett*, 556 U.S. at 21–22 (plurality op.); AD.Int'r.Resp't.Br.35. The doctrine of constitutional avoidance thus compels rejecting any interpretation of Article III, Section 4 that incorporates a crossover mandate, AD.Int'r.Resp't.Br.35.

2. None of the arguments raised by Petitioners, AD.Pet.Br.25–29, the State Respondents, AD.Gov.Br.16–19, or *amici*, AD.NYCLU.Am.Br.5–8; AD.Prof.Am.Br.7–9, support the Supreme Court's rewrite of Article III, Section 4.

Attempting to find support for their crossover-district theory in Article III, Section 4's text, these parties and *amici* rely upon a single textual difference between

Article III, Section 4 and Section 2 of the federal VRA: Article III, Section 4 uses "plural language," requiring districts to "'be drawn so that, based on the totality of the circumstances, racial or minority language *groups*' do not have less political opportunity" to elect representatives of their choice. AD.Pet.Br.25–26. Section 2, in contrast, uses slightly different verbiage. This minor textual difference does not even arguably bless injecting a crossover-district mandate into the New York Constitution. That is, even if some difference in meaning existed between Article III, Section 4 and Section 2 due to the use of plural here, the "mousehole[ ]"-sized textual difference between these provisions cannot possibly house the "elephant[ ]"-sized difference that Petitioners and the *amici* Professors seek to insert into it, *Haar v. Nationwide Mut. Fire Ins. Co.*, 34 N.Y.3d 224, 231 (2019)—a crossover-district mandate encompassing the particular crossover-district theory espoused by the *amici* Professors here. At most, this slight difference suggests that the New York Constitution tolerates coalition claims, *see* AD.Pet.Br.25–26—that is, a claim where two or more minority groups come together to create a majority, an issue the U.S. Supreme Court has never addressed with regard to Section 2 of the VRA, *see* AD.Int'r.Resp't.Br.33 n.7. The substantive parallels in language between Article III, Section 4 and Section 2 of the VRA are far more comprehensive than the single, isolated difference in language upon which the Professors and Petitioners seize. *See* AD.Int'r.Resp't.Br.29–33. It is implausible that this State—in the face

of clear U.S. Supreme Court authority that Section 2's language does not permit crossover claims, *Bartlett*, 556 U.S. at 21 (plurality op.)—decided to take a different approach to crossover districts with this minor linguistic difference. If the People wanted to constitutionalize such a stark departure from core Section 2 case law, they would have made that intent clear in the New York Constitution's text.

Contrary to Petitioners' assertions, AD.Pet.Br.25–26, the Sixth Circuit's decision in *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc), does not support their position, as that case dealt with coalition claims, *not* crossover claims like the case here. In *Nixon*, the plaintiffs brought a minority coalition claim under Section 2 of the VRA, alleging that a district had diluted Black and Hispanics' collective voting rights. *Id.* at 1383. *Nixon* held that the plaintiffs could not succeed on this claim because Section 2 does not recognize "coalition suits." *Id.* at 1386. As the Sixth Circuit explained, Section 2 protects "members of *a class*," and "[i]f Congress had intended to sanction coalition suits, the statute would read 'participation by members of *the classes* of citizens.'" *Id.* *Nixon*, therefore, addressed a distinct claim—coalition claims—saying nothing about crossover claims that are at issue here, under the Supreme Court's Order.

Petitioners are also incorrect to suggest that any New York "precedent" supports reading a crossover-district mandate found nowhere in Article III, Section 4. *Contra* AD.Pet.Br.26–27. Petitioners claim that the Steuben County Supreme

Court's decision in *Harkenrider v. Hochul*, 173 N.Y.S.3d 109 (Sup.Ct., Steuben Cnty. 2022), *aff'd as modified*, 167 N.Y.S.3d 659 (4th Dept. 2022), *aff'd as modified*, 38 N.Y.3d 494 (2022), supports their position, but the best Petitioners can do is point to its offhand observation that "experts" believe Article III, Section 4 provides more expansive protections than Section 2 and a statement made by "the special master" in that case reciting Article III, Section 4's command not to "draw districts that would result in the denial or abridgement or racial or language minority voting rights." AD.Pet.Br.26–27 (citations omitted). That stray comment and innocuous recitation of Article III, Section 4 in no way amount to a holding that the New York Constitution contains a crossover-district mandate. Indeed, that question was neither presented nor addressed in *Harkenrider*, *see generally* 173 N.Y.S.3d 109, and Petitioners do not attempt to show otherwise.

Petitioners' reliance on the NYVRA, AD.Pet.Br.27–28, is similarly misplaced. According to Petitioners, Article III, Section 4 should be read as permitting crossover districts because the NYVRA permits such districts, and those provisions should be read "in parallel" rather than "in direct tension with one another." AD.Pet.Br.27. But the Supreme Court *rejected* Petitioners' theory that the NYVRA adopted in 2022 should inform New York courts' interpretation of Article III, Section 4, adopted eight years earlier. Order at 5. And on this score, at least, the Supreme Court got it right: while a statute adopted *contemporaneously*

with a constitutional amendment on the same subject may inform the amendment's meaning because those voting for the amendment reasonably had the statute in mind as informing how the amendment would operate, *see Harkenrider v. Hochul*, 38 N.Y.3d 494, 510–11 (2022), that is not the situation here.

Petitioners next argue that Article III, Section 4 should be interpreted as requiring crossover districts—despite containing materially indistinguishable language from Section 2, which does not permit crossover-district claims—to prevent Article III, Section 4 from becoming "a pointless duplicate to the federal VRA." AD.Pet.Br.25; *see id.* at 29. But reading Article III, Section 4 to mirror Section 2's lack of a crossover district mandate would not render Article III, Section 4 "pointless," *contra id.* at 25, because that constitutional provision differs from the VRA in other ways. For example, the 2014 Amendments prohibit partisan gerrymandering, whereas the VRA does not. *Compare Harkenrider*, 38 N.Y.3d at 518, *with Hunt v. Cromartie*, 526 U.S. 541, 551 (1999). And those amendments also establish redistricting principles beyond those contained in the VRA, including the requirements to maintain "cores of existing districts" and "pre-existing political subdivisions." N.Y. Const. art. III, § 4(c)(5). This further demonstrates that the Legislature knew how to distinguish the 2014 Amendments from the federal VRA when it so desired. The Legislature chose not to differentiate Article III, Section 4's language from Section 2 of the VRA, but that does not make it pointless—it shows

that the People intended for these specific provisions to be coextensive. *See* AD.Int'r.Resp't.Br.29–34. Regardless, States—including New York—often adopt constitutional provisions that are coterminous with federal law. *See Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 404 (1979). Indeed, the Court of Appeals has interpreted the equal protection guarantees, search and seizure provision, and due process protections of the New York Constitution to all be coextensive with the U.S. Constitution's Equal Protection Clause, Fourth Amendment, and Due Process Clause, respectively. *See Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 945 F.3d 83, 110 n.211 (2d. Cir. 2019) (New York and federal "equal protection guarantees" "are coextensive"); *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 304 (1988) (provision against "unlawful searches and seizures contained in NY Constitution . . . conforms with that found in the 4th Amendment"); *Cent. Sav. Bank in N.Y. v. City of New York*, 280 N.Y. 9, 10 (1939) (per curiam).

Finally, Petitioners, the State Respondents, and *amici* fail to grapple with Intervenor-Respondents' constitutional-avoidance argument, based on *Bartlett*, for not reading a crossover mandate into Article III, Section 4. *See* AD.Pet.Br.29; *see generally* AD.Gov.Br.18–19 (not addressing this argument); AD.NYCLU.Am.Br.6–7 (same); AD.Prof.Am.Br.8–9 (same). As Intervenor-Respondents explained, *Bartlett* warned that adopting a crossover-district mandate would "unnecessarily

infuse race into virtually every redistricting" and threaten "balkaniz[ing] us into competing racial factions." 556 U.S. at 21 (plurality op.). That would lead to the "perilous enterprise" of mapdrawers "relying on a combination of race and party to presume an effective majority" and "predictions" that they "would hold together as an effective majority over time" rather than considering only "objective" redistricting criteria. *Id.* at 22–23. Interpreting the law to mandate those evils would raise "serious constitutional concerns under the Equal Protection Clause," counseling in favor of adopting a different "plausible interpretation[ ] of a [ ] text" to avoid such "serious constitutional doubts." *Id.* at 21 (citations omitted).

Petitioners do not meaningfully respond to any of this, *see* AD.Pet.Br.29, and their other supporting parties and *amici* do not respond to these arguments at all. Petitioners just tar Intervenor-Respondents' legitimate, *Bartlett*-based warning as "simply scaremongering," AD.Pet.Br.29, but the concerns are ones the U.S. Supreme Court voiced: mandating the creation of crossover districts would require "courts and legislature . . . to scrutinize *every factor* that enters into districting to gauge its effect on crossover voting," which is "a perilous enterprise," *Bartlett*, 556 U.S. at 22 (plurality op.) (emphasis added). And this case shows why. To satisfy Article III, Section 4's supposed crossover-district mandate, the Supreme Court ordered "adding Black and Latino voters" into the redrawn CD11 "from elsewhere" to increase electoral success based upon racial groups. Order at 13. The Supreme

Court entered this order in the face of Petitioners' own evidence that the 23% of Black and Latino voters in CD11 were already expected to have their candidate of choice win 25% of elections, which for some reason the Supreme Court thought was not enough. That is precisely the kind of unconstitutional racial balkanization of which *Bartlett* warned. 556 U.S. at 21 (plurality op.). Petitioners' only other attempt to avoid *Bartlett*'s warnings is to claim that *Bartlett* "confirmed that states are free" to draw crossover districts. AD.Pet.Br.29. But *Bartlett*'s conclusion that States are "free" to draw crossover districts "where no other prohibition exists," 556 U.S. at 23–24 (pluralirt op.), is not even arguably an endorsement of state authority to *mandate* the drawing of such districts as a matter of state-constitutional law. "[T]here is a difference between being aware of racial considerations and being motivated by them." *Allen v. Milligan*, 599 U.S. 1, 30 (2023) (plurality op.) (citation omitted). *Bartlett* merely acknowledges that a State may happen to draw crossover districts due to its "aware[ness] of racial considerations" or "racial demographics," *Allen*, 599 U.S. at 30; it does not allow a State to mandate the drawing of such districts where "the overriding reason for choosing [them]" is "race for its own sake," *id.* at 31.

C. The Equal Protection Clause Prohibits Judicially Mandating The Racial Redrawing Of CD11

1. As Intervenor-Respondents explained, the Supreme Court ordered the IRC to adopt a racial gerrymander in violation of the Equal Protection Clause of the

Fourteenth Amendment, and it did so without even attempting to address this fundamental point of U.S. constitutional law—despite Intervenor-Respondents repeatedly raising this issue. AD.Int'r.Resp't.Br.38–45. Under U.S. Supreme Court precedent, the Supreme Court's order triggers strict-scrutiny review because it mandates the redrawing of CD11's lines based on racial considerations, requiring the IRC to "add[ ] Black and Latino voters from elsewhere" into CD11 with the sole, express goal of increasing the electoral prospects of voters lumped together by race. *Id.* at 41–43 (quoting Order at 13, and citing, *e.g.*, *Cooper v. Harris*, 581 U.S. 285, 291, 299–301 (2017); *Wis. Legislature w. Wis. Elections Comm'n*, 595 U.S. 398, 402–03 (2022); and *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 192–93 (2017)). Thus, the "predominant"—and, indeed, sole—objective for the new district lines is race-based, clearly triggering strict-scrutiny review. *Id.* at 41–42.

Neither the Supreme Court nor Petitioners attempted to meet Petitioners' burden to show that a race-based reconfiguration of CD11 satisfies strict scrutiny. *Id.* at 43–45. Petitioners did not present, and the Supreme Court did not identify, any evidence that race-based action is "necessary" to remediate "*identified* discrimination," providing instead only "generalized assertion[s] of past discrimination" that are insufficient to satisfy strict scrutiny. *Id.* at 43 (citing *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996) ("*Shaw II*")). As to strict scrutiny's narrow-

tailoring prong, Petitioners failed to establish how redrawing a district where Black and Latino voters already win at least 25% (according to Plaintiffs' expert's election set) of elections while comprising 23% of the district population, with the goal of increasing Black and Latino electoral success, is narrowly tailored to any interest—let alone any compelling interest. *Id.* at 44–45.

2. The equal-protection arguments of Petitioners, AD.Pet.Br.47–54, and of the State Respondents, AD.Gov.Br.19–21, all fail.

The Equal Protection Arguments Are Clearly Ripe Now. Petitioners argue that it is "premature" to consider the Equal Protection Clause here, as the Court "must wait to see what the remedial district actually looks like." AD.Pet.Br.47–48. But the mandated redrawing of CD11 by the Supreme Court violates the Equal Protection Clause no matter how CD11 is ultimately redrawn because the order itself mandates racial gerrymandering without satisfying strict scrutiny. By requiring the IRC to "add[ ] Black and Latino voters from elsewhere" into CD11 in order to increase the electoral prospects of voters lumped together by race, Order at 13, the Supreme Court has ordered the IRC to redraw CD11 with "race furnish[ing] the predominant rationale for that district's redesign," *Cooper*, 581 U.S. at 299. Or, to use the words of Petitioners' own cited authority here, "*any* remedial district" that the IRC draws to comply with the Supreme Court's order would "necessarily" violate the Equal Protection Clause, AD.Pet.Br.47 (quoting *Black Voters Matter*

Capacity Bldg. Inst., Inc. v. Byrd, No. 2022-CA-666, 2023 WL 5695485, at *10–11 (Fla. Cir. Ct. Sept. 02, 2023), *rev'd on other grounds*, 375 So. 3d 335 (Fla. Dist. Ct. App. 2023)), as every possible compliant permutation must "add[ ] Black and Latino voters [into CD11] from elsewhere" in order to increase racial group electoral prospects in CD11, Order at 13.

Strict Scrutiny Applies. Petitioners' and the State Respondents' arguments that the Supreme Court's order does not trigger strict scrutiny under the Equal Protection Clause fare no better.

As an initial matter, Petitioners and the State Respondents admit, AD.Pet.Br.48; AD.Gov.Br.19–20, that strict scrutiny applies when a district is redrawn with race as the predominant rationale for the redesign, *Cooper*, 581 U.S. at 299–301. Yet they attempt to avoid the application of this test here by claiming that the Supreme Court's order mandates "an awareness of race," AD.Pet.Br.49, as "one factor among many that must be considered," AD.Gov.Br.20–21, which does not trigger strict scrutiny. A map triggers strict scrutiny when the mapdrawer has an express race-based purpose for drawing the map at issue, without any further showing required. *Wis. Legislature*, 595 U.S. at 401–04; *Cooper*, 581 U.S. at 291, 295–96. So, in *Wisconsin Legislature*, the U.S. Supreme Court held that "race [was] the predominant factor motivating the placement of voters in or out of a particular district," 595 U.S. at 401—triggering strict scrutiny—where a remedial map added

a "seventh majority-black district," without any additional inquiry, *id.* at 402. And in *Cooper*, the U.S. Supreme Court held that a challenger may establish that race was the predominant consideration in the redrawing of a district with "direct evidence," 581 U.S. at 291, that the mapdrawer "purposefully established a racial target" for the district," without anything more, *id.* at 299–301; *see generally id.* at 291 (discussing other evidentiary pathways). So, where a mapdrawer has such an express race-based purpose in redrawing the district at issue, the mapdrawer is not simply "aware of racial considerations" but rather is "motivated by them," *Milligan*, 599 U.S. at 30 (plurality op.), with no further "holistic analysis" required, *Bethune-Hill*, 580 U.S. at 192; *contra* AD.Pet.Br.48–49; AD.Gov.Br.20–21. Applying this precedent here, the Supreme Court's order requires racial considerations to predominate in the redrawing of CD11, as the *only* way for the IRC to satisfy that order is to pursue the sole and express race-based purpose of "adding Black and Latino voters from elsewhere" into CD11. Order at 13.

Petitioners' discussion of the plurality portion of *Milligan*—which they fail to denote as a plurality—does not change this analysis. AD.Pet.Br.49–50; *see also* AD.Gov.Br.20–21. In that plurality portion of *Milligan*, the Chief Justice articulated the same predominance standard described immediately above, explaining that "race may not be 'the predominant factor in drawing district lines unless there is a compelling reason'" and that race "predominates . . . when 'race-neutral

considerations come into play only after the race-based decision had been made.'" 599 U.S. at 30 (plurality op.) (first quoting *Cooper*, 581 U.S. at 291, and then quoting *Bethune-Hill*, 580 U.S. at 189 (brackets omitted)). The Chief Justice then explained that a mapdrawer's use of an express racial target for a district does not necessarily establish that race has predominated where the mapdrawer gives "several other factors" "*equal weighting*." *Id.* at 31–32 (emphasis added). That is because "use of an express racial target" would be "just one factor among others," *id.* at 32 (citation omitted), that may not necessarily be "the overriding reason for choosing one map over others," *id.* at 31 (citations omitted). That dynamic is not present here, as the sole criterion of whether a map complies with the Supreme Court's order is whether that map "add[s] Black and Latino voters from elsewhere" into CD11, Order at 13, meaning that race is "the criterion that, in the [mapdrawer's] view, could not be compromised," *Bethune-Hill*, 580 U.S. at 189 (citations omitted; brackets omitted), rather than simply being "just one factor among others" with "equal weighting," *Milligan*, 599 U.S. at 31–32 (plurality op.); *Cooper*, 581 U.S. at 291, 295–96; *Wis. Legislature*, 595 U.S. at 401–04.

Relatedly, Petitioners claim that any map that the IRC draws pursuant to the Supreme Cour's order could also avoid strict-scrutiny review by "comply[ing] with traditional redistricting criteria." AD.Pet.Br.48–50; *see* AD.Gov.Br.20–21. U.S. Supreme Court precedent forecloses this argument as well. As just explained, both

in *Wisconsin Legislature* and in *Cooper*, the U.S. Supreme Court held that a mapdrawer's *explicit* intent in drawing a map based on race *necessarily* makes race the predominant rationale, *Wis. Legislature*, 595 U.S. at 401–02; *Cooper*, 581 U.S. at 291, 295–96, with no need to consider whether the resulting map also fails to adhere to traditional redistricting criteria, *see generally Wis. Legislature*, 595 U.S. at 401–04; *Cooper*, 581 U.S. at 299–301. This is why, for example, the U.S. Supreme Court did not even discuss in *Wisconsin Legislature* the Wisconsin Governor's argument that, because the remedial map under review there complied with traditional redistricting criteria, race did not predominate in the drawing of that map. *Compare* Opp'n To Appl. From Resp't Governor Tony Evers at 19, *Wis. Legislature*, No.21A471 (U.S. Mar. 11, 2022),[3] *with Wis. Legislature*, 595 U.S. at 401–04.

Bethune-Hill then makes this point clearly, where the Court held that "showing a deviation from, or conflict with, traditional redistricting principles is *not* a necessary prerequisite to establishing racial predominance" and triggering strict-scrutiny review. 580 U.S. at 191 (emphasis added). Again, "[r]ace may predominate even when a reapportionment plan respects traditional principles . . . if race was the criterion that, in the [mapdrawer's] view, could not be compromised, and race-

[3] Available at https://www.supremecourt.gov/DocketPDF/21/21A471/218427/20220311165107226_21A471%20Wisconsin%20-%20SCOTUS%20Opp%20Final.pdf (last visited Feb. 6, 2026).

neutral considerations came into play only after the race-based decision had been made." *Id.* at 189 (citations omitted).

That is the case here, under the express terms of the Supreme Court's order. The *only* way the IRC may comply with the Supreme Court's order is to redraw CD11 by "adding Black and Latino voters [into CD11] from elsewhere" to increases those races' electoral prospects, Order at 13, regardless of how the IRC's redraw of CD11 otherwise respects "other redistricting criteria," AD.Pet.Br.50. In other words, the IRC can only incorporate "race-neutral considerations" into its redrawing of CD11 "after the race-based decision," *Bethune-Hill*, 580 U.S. at 189 (citation omitted), of "adding Black and Latino voters from elsewhere," Order at 13, "had been made," *Bethune-Hill*, 580 U.S. at 189 (citation omitted). And given that it is not "plausibl[e]" to interpret the Supreme Court's order as anything but a directive to engage in a race-based redesign of CD11 in this way, *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 10 (2024), concluding that the racial-predominance test is met here does reject the "presumption that the legislature acted in good faith," *contra* AD.Pet.Br.50 (quoting *Alexander*, 602 U.S. at 6).

Petitioners next argue that the Supreme Court's order is "no different" than an order to draw "a remedial district created under the federal VRA," which, in Petitioners' view, would not trigger strict scrutiny. AD.Pet.Br.50–51. This badly backfires. The U.S. Supreme Court has long assumed that a State's drawing of a

majority-minority remedial district to comply with the requirements of Section 2 of the federal VRA furthers a compelling interest, satisfying strict-scrutiny review. *See Abbott v. Perez*, 585 U.S. 579, 587 (2018); *Bartlett*, 556 U.S. at 21 (plurality op.).[4] The logic of that assumption is that the U.S. Supreme Court would subject Section 2 of the VRA itself to strict scrutiny, given that it mandates race-based redistricting under some circumstances. Thus, Petitioners comparison of the Supreme Court's order here to an order under Section 2 of the federal VRA, AD.Pet.Br.50–51, concedes that strict scrutiny must apply. Petitioners resist this conclusion by citing a plurality opinion of the U.S. Supreme Court that took the opposite view, AD.Pet.Br.51 (citing *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality op.)), but that plurality opinion was released before *Abbott* and *Bartlett* and, in any event, expressly recognized that a majority of the U.S. Supreme Court had already "reserv[ed] this question" of whether "all cases of intentional creation of majority-minority districts" trigger "[s]trict scrutiny," *Vera*, 517 U.S. at 958 (plurality op.) (citing *Shaw v. Hunt*, 509 U.S. 630, 649 (1996)). Petitioners also cite *Clarke* here, AD.Pet.Br.51, but that case dealt with whether NYVRA's vote dilution provisions

[4] As Intervenor-Respondents explained, AD.Int'r.Resp't.Br.40 n.9, the U.S. Supreme Court appears poised to cut back on this longstanding assumption in *Louisiana v. Callais*, 606 U.S. ____, 2025 WL 1773632 (June 27, 2025), where the U.S. Supreme Court ordered and heard reargument on the question of whether a State's drawing of a majority-minority district under Section 2 of the federal VRA satisfies the Equal Protection Clause.

were facially unconstitutional and turned on the lack of capacity of the municipality-defendants there to raise that facial constitutional challenge, 237 A.D.3d at 16–17.

The Supreme Court's Order Does Not Carry Its Burden Under Strict Scrutiny. Finally, Petitioners alone argue that the Supreme Court's order to redraw CD11 explicitly based on race somehow satisfies strict-scrutiny review. AD.Pet.Br.51–54. Crucially, however, nowhere in Petitioners' brief do they explain how an order to redraw a congressional district to give more electoral influence to certain minority voters could possibly satisfy strict scrutiny where those voters are *already* enjoying proportional electoral success in the district, according to the analysis of Petitioners' own experts. *Compare* AD.Int'r.Resp't.Br.44–45, *with* AD.Pet.Br.51–54. As that is what the Supreme Court's order does here with respect to CD11, Petitioners' failure on this score alone shows that the order cannot survive strict-scrutiny review.

This point aside, Petitioners' sole argument that the Supreme Court's order furthers a compelling interest is that it orders compliance with the *state* constitutional provision at issue here—Article III, Section 4. AD.Pet.Br.51–52. While the U.S. Supreme Court has assumed that compliance with Section 2 of the VRA furthers a compelling state interest, *see* AD.Pet.Br.51–52, the U.S. Supreme Court has never similarly recognized that compliance with any state law could be a compelling interest for purposes of Fourteenth Amendment strict-scrutiny review, *see Cooper*, 581 U.S. at 292. To the exact contrary, such an approach would be contrary to the

point of the Fourteenth Amendment, which is to prohibit the States' race-based actions, meaning that the States are not "free to decide" when race-based "remedies are appropriate." *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 490 (1989) (plurality op). So, while Congress may have the power to use race-based laws that redress "societal discrimination," the States do not likewise enjoy such Fourteenth Amendment authority, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 226 (2023) ("*SFFA*")—and they may not engage in the "odious" task, *id.* at 208, of "pick[ing] winners and losers based on the color of [their citizens'] skin," *id.* at 229. And, more broadly, the U.S. Supreme Court is loath to recognize new compelling interests here, given that only "rare" and "extraordinary case[s]" may justify race-based state action by the State. *Id.* at 208.

2. Finally, Petitioners' narrow-tailoring argument misunderstands their burden here, under strict-scrutiny review. AD.Pet.Br.52–54. For race-based redistricting order to satisfy the Equal Protection Clause, Petitioners must show that it was "*necessary*," *SFFA*, 600 U.S. at 206–07 (emphasis added; citations omitted), to engage in race-based redistricting in order to remedy the specific, identified instances of discrimination in the jurisdiction at issue, *City of Richmond*, 488 U.S. at 510 (plurality op.); AD.Int'r.Resp't.Br.41. Yet, here, Petitioners make no effort at all to show that race-neutral measures could not increase the influence of Black and Latino voters in CD11—even if there were a reason to do that, given that they

already enjoy at least proportional electoral success in CD11, and more than that in New York City and throughout the State. Instead, Petitioners argue only that the Supreme Court's order is narrowly tailored because it remedies a "violat[ion]" of "the New York Constitution's prohibition on minority vote dilution." AD.Pet.Br.52–54. That assertion cannot carry their heavy burden here, even if this Court somehow accepts the erroneous proposition that the entirely lawful CD11 violates the New York Constitution under the Supreme Court's untested, atextual test, which test includes multiple elements for which Petitioners never even submitted evidence.

D. The Court's Order Violates The Elections Clause

1. The Supreme Court's order judicially inserting a crossover-district mandate into Article III, Section 4—a standard that no party briefed and that has no basis in the constitutional text—"transgress[es] the ordinary bounds of judicial review" and so "distorts state law beyond what a fair reading required" "in a federal election case" as to violate the Elections Clause under *Moore v. Harper*, 600 U.S. 1 (2023). AD.Int'r.Resp't.Br.45–49 (citations omitted). The Supreme Court's atextual usurpation of the Legislature's constitutional authority for congressional redistricting is not grounded in any preexisting New York constitutional standard or case law. *Id.* at 48–49. Further, the Court declared its novel new standard in a post-trial opinion without the benefit of any adversarial briefing on that test or evidence

on multiple elements of that test. *Id.* at 49. The Supreme Court's post-hoc amendment of Article III, Section 4 fashioning an unprecedented crossover-district theory and its use of that theory to invalidate a duly enacted congressional plan mid-decade "distorts state law" and "[dis]respect[s] [ ] the constitutionally prescribed role of state *legislatures*" "in a federal election case"—plainly violating the Elections Clause. *Id.* at 47–49 (citations omitted).

2. Petitioners' attempts to reconcile the Supreme Court's order with the Elections Clause, AD.Pet.Br.44–47, fail. According to Petitioners, while Intervenor-Respondents "complain" that the Court "went too far in construing Section 4(c) to permit crossover districts, that hardly amounts to an Elections Clause violation." *Id.* at 47. But that is just what *Moore* said: "state court interpretations of state law" that "transgress the ordinary bounds of judicial review" in federal election cases "stray[ ] beyond the limits derived from the Elections Clause." 600 U.S. at 36. Justice Kavanaugh's explanation is in accord: a state court that "'impermissibly distort[s]' state law" "in a federal election case" "'beyond what a fair reading required'" indeed goes too far and violates the Elections Clause. *Id.* at 38 (Kavanaugh, J., concurring) (citing *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring)). Petitioners attempt to defend the Supreme Court's order by asserting that the Supreme Court has the power to "exercise[ ]" its "review authority" by "apply[ing] state constitutional restraints," AD.Pet.Br.44, but a court

"do[es] not have free rein" to carry out that review authority and it *cannot* adopt an interpretation of a constitutional provision that departs so drastically from prior doctrine on how to interpret the New York Constitution as to "transgress the ordinary bounds of judicial review," *Moore*, 600 U.S. at 34, 36.

Petitioners assert that the Supreme Court's interpretation somehow adhered to "New York's principles of constitutional interpretation," AD.Pet.Br.45, but they do not identify a single such principle that the court complied with or even attempt to ground the court's interpretation in *any* text contained in Article III, Section 4, *see id.* at 45–47. Nor are Petitioners correct that the Supreme Court's atextual reading somehow "furthers the Legislature's own interpretation of Section 4(c)." *Id.* at 45. Instead of identifying any textual basis in Article III, Section 4(c) for their claim, *contra People v. Galindo*, 38 N.Y.3d 199, 203 (2022) ("[T]he plain meaning of statutory text is the best evidence of legislative intent." (citations omitted)), Petitioners point to language in *the NYVRA* and the views of the two state legislators that "are parties to this case" to support "*Petitioners*' view of Section 4(c)," AD.Pet.Br.45. Again, showing that the Supreme Court grounded its interpretation of Article III, Section 4 in language contained in the separate, later-enacted NYVRA would only further demonstrate that its interpretation "'impermissibly distorted' state law." *Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring) (citation omitted); *see supra* Section I.B. And two individual legislators supporting Petitioners'

preferred interpretation of Article III, Section 4 in no way shows that the Legislature intended the Supreme Court to so radically depart from that provision's plain language. *See Galindo*, 38 N.Y.3d at 203 ("[A]s a general rule, unambiguous language of a statute is alone determinative." (citations omitted)). In any event, the Supreme Court expressly *rejected* Petitioners' interpretation of Article III, Section 4(c), opting instead to adopt a novel new legal standard that no party presented or submitted evidence under, *supra* pp.5–10.

Petitioners attempt to defend the Supreme Court's "sua sponte" adoption of that standard by claiming that "nothing about the court's decision to interpret Section 4(c) was of its own accord" because the parties all "asked the court to construe" that provision "in the first instance." AD.Pet.Br.46. As an initial matter, Intervenor-Respondents asked the Supreme Court to *dismiss* the Petition if the Supreme Court rejected Petitioners' *sole* theory that Article III, Section 4 incorporates the later-enacted NYVRA standard for vote dilution claims, *see generally* NYSCEF Doc. No.11, Ex.K, Intervenor-Respondents' Memorandum of Law in Support of Motion to Dismiss, which is what the Court should have done. Intervenor-Respondents did not suggest that the Supreme Court should nevertheless go on to divine a standard "in the first instance" to govern future Article III, Section 4 claims, and certainly did not ask the Supreme Court to do so in a post-trial order after the close of evidence. *Contra* AD.Pet.Br.46. Petitioners' only response is to claim that "all of the elements

of the crossover district" theory that the Supreme Court invented "came from" U.S. Supreme Court precedent. *Id.* Even this crossover-district standard had some tangential basis in U.S. Supreme Court precedent interpreting Section 2 of the VRA—it very obviously does not, *see supra* Section I.B; AD.Int'r.Resp't.Br.29–38—that would do nothing to show that the Supreme Court's interpretation constitutes a "fair reading" of the "state law," *Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring) (citation omitted), at issue here, Article III, Section 4, which provides *no* textual basis for any such crossover-district mandate.

3. Finally, Petitioners' suggestion that the Supreme Court's order complies with the Elections Clause because the court did not "draw new district lines" itself or "simply adopt Petitioners' Illustrative Map," AD.Pet.Br.46, is wrong. What matters for purposes of the Elections Clause is that the Supreme Court adopted an "[un]fair reading" of "state law" and applied that reading "in a federal election case," *Moore*, 600 U.S. at 38 (Kavanaugh, J., concurring) (citation omitted), to invalidate a legislatively-enacted congressional map. That order "transgress[ed] the ordinary bounds of judicial review" and constitutes an attempt by the Supreme Court to "arrogate to [itself] the power vested in state legislatures" to "prescribe[ ]" the "[m]anner" of holding congressional elections in violation of the Elections Clause. *Id.* at 36 (majority op.); *see* AD.Int'r.Resp't.Br.47–49.

II. All Equitable Considerations Call Out For A Stay, Which Is The Only Remedy That Will Stop The Ongoing Chaos For The 2026 Election

A. A stay of the Supreme Court's order pending this appeal is necessary to prevent Intervenor-Respondents and the public from suffering serious irreparable harm. AD.Int'r.Resp't.Br.49–52. The portion of the Supreme Court's order compelling the IRC to reconvene to draw a new map is stayed, but the portion of that order prohibiting the 2024 Congressional Map's use in elections remains in effect, meaning there is no map in place for the upcoming 2026 Congressional Election, set to begin on February 24, 2026. *Id.* at 49–50. Absent a stay pending appeal, election officials, candidates, and voters will all be thrown into chaos. *Id.* at 50. Denying a stay will also impose irreparable harm on Intervenor-Respondents specifically. *Id.* at 51–52. Having spent significant time, effort, and resources cultivating constituent relationships under the district's longstanding configuration, Congresswoman Malliotakis has the right to begin petitioning as scheduled on February 24, 2026 with a clear understanding of CD11's boundaries. *Id.* at 51. The Individual Voters, who have also invested substantial time, energy, and resources campaigning on Congresswoman Malliotakis' behalf within CD11 likewise have the right to know the applicable district lines prior to the start of the election. *Id.* at 51. Casting doubt on those long-stable boundaries on the eve of an election cycle—including to mandate a racially gerrymandered district replacement—would significantly prejudice Intervenor-Respondents and voters at large. *Id.* at 51–52.

Petitioners, in contrast, will not suffer any prejudice if the Court issues a stay of the Supreme Court's order. The only reason the parties—and the courts—are in this predicament is because Petitioners inexplicably waited a year-and-a-half to bring this action after the adoption of the 2024 Congressional Map. Had Petitioners been concerned about any irreparable harm they would have brought this action sooner and with sufficient time to ensure a new congressional map would be in place prior to the 2026 election cycle. Having failed to do so, Petitioners cannot seriously complain of any harm from an order making clear that the 2026 Congression Election will be conducted under the lines that Petitioners did not challenge until the 11th hour.

B. Petitioners' Response Brief remarkably omits any discussion of their egregious, still-unexplained 18-month delay in bringing this action. So, while Petitioners assert that they will suffer harm from having the 2026 Congressional Election run under what they (implausibly, *see supra* Part I) claim are unlawful boundaries in CD11, were they concerned about the 2026 election, they would not have waited a year-and-a half to bring this action. It is well-established that a party whose own delay caused its irreparable harm cannot later complain that it will suffer irreparable harm from the maintenance of the status quo. *See Chambers v. Old Stone Hill Rd. Assocs.*, 1 N.Y.3d 424, 434 (2004) (discounting "alleged hardship" that was "largely self-created" (citation omitted)); *Sync Realty Grp., Inc. v. Rotterdam*

Ventures, Inc., 63 A.D.3d 1429, 1431 (3d Dep't 2009) (concluding that equitable relief was inappropriate given that "plaintiff's alleged harm appears to be in part self-created"); *Mercury Serv. Sys., Inc. v. Schmidt*, 50 A.D.2d 533, 533 (1st Dep't 1975) (per curiam) (denying preliminary injunction due to a "delay of three and one-half months in seeking [any] relief" because one under "a threat of truly irreparable harm" would move "with dispatch").

For this same reason, Petitioners' attempt to analogize this situation to *Harkenrider* badly backfires. There, after the Legislature adopted and the Governor signed an unconstitutional congressional map, the petitioners brought a challenge to the map *that very night*. *Harkenrider*, 38 N.Y.3d at 504–05. The Court of Appeals determined that immediate judicial intervention and a revised election schedule was warranted because failure to seek such a remedy would have allowed the Legislature's delay in adopting the map to force petitioners to suffer an election under an unlawful map despite their prompt challenge, based on no fault of their own. *Id.* at 521–22. Here, in as direct a contrast as could be imagined, Petitioners themselves have caused this situation by waiting 18 months after the adoption of the 2024 Congressional Map to file this lawsuit.

As to Intervenor-Respondents harm, Petitioners claim that Intervenor-Respondents "present weak evidence of irreparable harm" because "[t]heir arguments rely almost entirely on the alleged confusion caused by the Supreme

Court's order," suggesting that the "obvious" solution is to lift the automatic stay. AD.Pet.Br.55–56. But Petitioners misunderstand the serious harm Intervenor-Respondents will face absent a stay. Without a stay pending appeal, Intervenor-Respondents will suffer the harm of not being able to start the election cycle using the lawful map at issue when the election calendar begins on February 24. And Intervenor-Respondents' harm based upon the Supreme Court's order requiring that they be put into a racially gerrymandered district is not "speculative" or "premature." *Contra id.* at 56–57. As explained above, the only remedy that can comply with the Supreme Court's order would be an unconstitutional racial gerrymander. *See supra* Section I.C.

While Petitioners claim that this Court can fix the problem of no map being in place for the 2026 Congressional Elections by lifting the automatic stay on the IRC remedy aspect of the Supreme Court's order, that is wrong. Lifting the automatic stay will only make the current chaos surrounding the 2026 Congressional Election worse. Even the State Respondents—who "take no position" on the stay motion, AD.Gov.Br.2—state that "[t]here is no question" that Petitioners' requested relief "presents challenges . . . to the upcoming 2026 election calendar," *id.* at 12. They explain that, to implement a new congressional map, the IRC will need to "develop[ ] a timeline and schedule, plan[ ] for public hearings . . . , retain[ ] consultants and counsel, and develop[ ] draft remedial maps" *Id.* at 13 n.7. There

is no way that the IRC can reconvene, complete each of those tasks, and finalize its map, before February 24, 2026. That means that absent a stay, the election schedule will need to be judicially amended, causing state officials, candidates, and voters, including Intervenor-Respondents, to be needlessly placed into a state of confusion and uncertainty. And while such confusion from moving election deadlines can be worth the candle in a situation like *Harkenrider*—where the petitioners acted as quickly as possible to challenge a clearly unconstitutional map—it cannot possibly be justified here, where the situation is entirely of Petitioners' own making, and there is no chance that the order declaring the extant map unconstitutional will survive judicial review.

Lastly, the State Respondents suggest that if the Court issues a stay of the order blocking the use of the 2024 Congressional Map for the impending 2026 Congressional Election, this should "not preclude the IRC from taking preparatory steps to comply with the order below" so as to "mitigate" the "challenges" that Petitioners have created "with regard to the upcoming 2026 election calendar." AD.Gov.Br.12–14. Intervenor-Respondents disagree. While a stay of the Supreme Court's order will not impact the IRC's voluntary actions—so, they are free to take whatever voluntary actions they choose, so long as those actions comply with all extant laws and constitutional provisions—there is no reason for the IRC to reconvene to begin a needless, racial gerrymander redraw and cast doubt on the 2026

Congressional Election going forward. Rather, this Court's order should make clear that the election will begin on February 24, 2026, as scheduled, under the map that the Legislature adopted, and that any relief from this proceeding—however unlikely—will have to await a future election in light of the impending election cycle, Petitioners' egregious, unexplained delay in bringing this action, and the legally unsound nature of the Supreme Court's decision.

III. Granting Petitioners' Cross-Motion To Dissolve The Automatic Stay Would Only Further The Chaos That The Supreme Court's Order And Petitioners' Delay Has Generated

A. To be entitled to dissolution of the automatic stay, Petitioners must show: (1) that the appeal is "meritless," CPLR § 5519 cmt. ¶ 6; *see Gur Assocs. LLC v. Convenience on Eight Corp.*, 208 N.Y.S.3d 838, 843–44 (N.Y. Civ. Ct. 2024); (2) that they will suffer "irreparable harm" absent vacatur, *DeLury v. City of New York*, 48 A.D.2d 405, 405 (1st Dep't 1975) (per curiam); and (3) that the stay does not "promot[e] any viable State interest," *Clark v. Cuomo*, 105 A.D.2d 451, 452 (3d. Dep't 1984) (Weiss, J., dissenting). Given that these factors mirror, if not heighten, those of Intervenor-Respondents' stay request, for all the reasons discussed above, Petitioners failed to demonstrate that vacatur of the automatic stay is warranted here. *See supra* Part I. After all, Petitioners obviously cannot demonstrate that this appeal is "meritless," CPLR § 5519 cmt. ¶ 6, given that Intervenor-Respondents are likely to succeed on appeal, *see supra* Part I.

More generally, the automatic stay must remain in place as it is the only way to provide certainty for the 2026 Congressional Election, especially when paired with this Court properly staying the portion of the Supreme Court's order blocking the use of the 2024 Congressional Map. The purpose of CPLR 5519(a)(1)'s automatic stay is "to maintain the status quo pending appeal," *New York v. Town of Haverstraw*, 219 A.D.2d 64, 65 (2d Dep't) (per curiam), and thereby "stabilize the effect of adverse determinations on governmental entities," *Summerville v. City of New York*, 97 N.Y.2d 427, 434 (2002). Such an automatic stay is not "to be vacated" "lightly" as CPLR 5519(a)(1) furthers "a public policy designed to protect a 'political subdivision of the state.'" *DeLury*, 48 A.D.2d at 405. If the Court were to dissolve the stay now, that would undermine CPLR 5519(a)(1)'s objective by causing chaos and destabilizing the 2026 Congressional Election. With that stay vacated, the IRC must begin a multi-step effort to racially gerrymander CD11's boundaries, causing confusion for state officials, candidates, and voters regarding what district they will represent or vote in. Then, given the Supreme Court's order's glaring legal failings, *see supra* Part I, the redraw will accomplish nothing for anyone because the Supreme Court's order is sure to fail on appeal. The congressional lines, at that point, will return to those imposed by the 2024 Congressional Map, further confusing all those involved. This result is precisely

what CPLR 5519(a)(1)'s automatic stay aims to avoid. *Haverstraw*, 219 A.D.2d at 65–66; *Summerville*, 97 N.Y.2d at 433–34.

Petitioners contend that "[t]his case squarely fits the circumstances warranting vacatur" because they "will be irreparably harmed should New York be left without a lawful map in time for the 2026 elections" and "forced to vote under" unlawful maps. AD.Pet.Br.57–58. Petitioners have no one but themselves to blame for having to vote in another election under the lines created in the 2024 Congressional Map that they did not challenge for 18 months. Petitioners then argue that Intervenor-Respondents "will suffer no irreparable harm should the Court vacate the automatic stay" because things can simply "return to the 'status quo'" if Intervenor-Respondents ultimately prevail on appeal. AD.Pet.Br.58. That blinks reality. Intervenor-Respondents and the public will suffer harm if their district lines flip flop. *Contra* AD.Pet.Br.58–59. Again, creating an alternative, racially gerrymandered map that will never survive appeal accomplishes nothing positive for anyone. It will only confuse the voters as to which district they reside in and will lead to distrust and apathy among voters. The candidates will not know which voters to begin courting whenever petitioning actually begins, given the needless confusion that Petitioners and the Supreme Court have created. And the state officials will be unsure of how to run the election, not even knowing whether the election deadlines will remain. Keeping the automatic stay in place—which is the default position—

while pairing that with a stay against the prohibition against using the 2024 Congressional Map starting on February 24, 2026 will "stabilize the effect of" the Supreme Court's order by making clear that these long-delayed proceedings will not impact the impending election. *See Summerville*, 97 N.Y.2d at 433–34.

IV. This Court Should Authorize A Direct Appeal To The Court Of Appeals

This appeal presents issues of statewide significance that the Court of Appeals has not addressed, AD.Int'r.Resp't.Br.52–53; *see supra* Part I, and Intervenor-Respondents sought authorization to appeal because those issues should be resolved by the State's highest court, as an institutional matter. Petitioners' argument that this Court "should not even contemplate certifying an appeal," AD.Pet.Br.60, ignores that it is the role of the Court of Appeals to "authoritatively declare and settle the law uniformly throughout the state" regarding "legal issues of statewide significance," *People v. Hawkins*, 11 N.Y.3d 484, 493 (2008). And this is especially important here because the Supreme Court's order has thrown New York's *federal* elections into chaos, meaning that if the New York appellate courts do not fix the problem, the U.S. Supreme Court will need to do so. If the Court of Appeals concludes that it does not have jurisdiction over Intervenor-Respondents' direct appeal under CPLR 5602, the only way review of these important issues in this case can occur by the State's highest court now—rather than potentially skipping right from this Court to the U.S. Supreme Court—is for this Court to issue an "order"

immediately, and then grant permission to appeal to the Court of Appeals under CPLR 5602(b)(1). *See* CPLR § 5602. Given these considerations, as well as the extraordinary public importance of ensuring stable, lawful rules for electing New York's congressional delegation, and the important issues of "statewide significance," *Hawkins*, 11 N.Y.3d at 493, this Court should authorize an immediate appeal to the Court of Appeals.

CONCLUSION

This Court should grant Intervenor-Respondents' motion for a stay pending resolution of this appeal, as well as granting leave to appeal directly to the Court of Appeals, and deny Petitioners' request to lift the automatic stay.

Dated: New York, New York
February 6, 2026

TROUTMAN PEPPER LOCKE LLP

BENNET J. MOSKOWITZ
875 Third Avenue
New York, New York 10022
(212) 704-6000

MISHA TSEYTLIN
111 S. Wacker Dr., Suite 4100
Chicago, Illinois 60606
(608) 999-1240

Counsel for Congresswoman Nicole Malliotakis and Individual Voters Edward L. Lai, Joel Medina, Solomon B. Reeves, Angela Sisto, and Faith Togba