SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT
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TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, AND MARIANNE VIOLANTE,

Petitioners,

-against-

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

Respondents.

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Steuben County Index No. E2022-0116CV

A.D. No. _____

AFFIRMATION OF ALEXANDER GOLDENBERG IN SUPPORT OF APPELLANTS' MOTION BY ORDER TO SHOW CAUSE TO CLARIFY THAT THE TRIAL COURT'S ORDER IS NOT IN EFFECT OR, IN THE ALTERNATIVE, FOR A STAY PENDING APPEAL

ALEXANDER GOLDENBERG, ESQ., hereby affirms under penalty of perjury that the following is true and correct:

1. I am an attorney duly licensed to practice law in New York State. I am a partner at Cuti Hecker Wang LLP, counsel for the Senate Majority Leader. I submit this Affirmation in support of the motion of the Senate Majority Leader and the Speaker of the Assembly, by order to show cause, to clarify that the trial court's Decision and Order dated and entered on March 31, 2022 (the "Order") is not in effect or, in the alternative, for a stay pending appeal.

2. The purpose of this Affirmation is to set forth the relevant factual background and procedural history relating to this motion.

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3. The New York Constitution may be amended in either of two ways: the People may amend the Constitution themselves, with no participation by the Legislature, through a constitutional convention, a process that requires three separate statewide elections (one to call a convention, a second to elect convention delegates, and a third to ratify any proposed amendments that are adopted at the convention), *see* N.Y. Const. art. XIX, § 2; or the Legislature may amend the Constitution, which requires two successive Legislatures to enact the identical proposed amendments, which are then submitted to voters for approval, *see id.* § 1.

4. The 2014 amendments at issue in this special proceeding were twice considered and twice enacted by the Legislature – once in 2012, A.9526/S.6698, and then a second time in 2013, A.2086/S.2107. The voters approved the Legislature's proposed amendments in 2014.

5. Given that the Legislature itself was the impetus behind the 2014 amendments, it is not surprising that the 2014 amendments expressly preserve the Legislature's traditional role, authority, and discretion in enacting redistricting plans following each decennial census. The 2014 amendments delegated authority to the Independent Redistricting Commission (the "Commission") to hold hearings and make redistricting plan recommendations, but the 2014 amendments provide unambiguously that the Legislature has unfettered discretion to reject any Commission proposal for any reason, and that if the Legislature rejects a Commission proposal, the Legislature may enact any plan it chooses by making "any amendments" it "deems necessary." *See* N.Y. Const., art. III, § 4(b) (attached hereto as Exhibit 1).

6. The 2014 amendments expressly prescribe a specific schedule. The Commission was required to publish draft redistricting plans and relevant supporting data by September 15, 2021. *Id*. § 4(c)(6). The Commission was then required to hold at least one public hearing in each of twelve locations throughout the State to enable the "public to review, analyze, and comment upon such plans

and to develop alternative redistricting plans for presentation to the commission at the public hearings." *Id*. The Commission was then required to submit a proposed redistricting plan to the Legislature between January 1 and January 15, 2022, which the Legislature had unfettered discretion to adopt or reject for any reason. *Id*. § 4(b). If the Legislature declined to adopt the first Commission proposal, the Commission was then required to submit a second proposed plan to the Legislature within fifteen days of the Legislature's rejection of the first proposed plan, and in no event later than February 28, 2022. *Id*.

7. The process of running for legislative office in New York in 2022 officially started on March 1, the day after the last possible deadline for the Commission to submit its final proposed plan to the Legislature. To get on the ballot for legislative office for the June 2022 primary in New York, a candidate must submit designating petitions to the Board of Elections containing the required number of signatures from voters residing in the district in which the candidate is seeking to run. Candidates were allowed to begin collecting signatures on March 1, 2022; they may submit designating petitions with all required signatures as soon as tomorrow, April 4, 2022; and the final deadline for submitting designating petitions is April 7, 2022. N.Y. Election Law § 6-158(1). Each voter may sign only one petition, and any signatures collected outside of this 37-day window are void. *Id*. § 6-134(3)-(4). Because signatures count only if the voter signing the

petition resides in the district in which the candidate is seeking to run, *id*. § 6-136(2), it is impracticable for candidates to collect signatures if the district lines have not yet been established or if there is uncertainty about where the district boundaries are.

8. Given that the 2014 amendments allow for the possibility that the Commission will submit its final proposed redistricting plan to the Legislature as late as February 28, 2022, the day before the designating petition signature collection process begins, and after the Commission has already completed an extensive public hearing and comment process, the 2014 amendments do not contemplate that the Legislature itself will hold any public hearings before it decides whether to accept or reject the Commission's final proposal and, if necessary, amend the final proposal. Instead, the 2014 amendments contemplate that the Legislature will rely on the expansive record that the Commission is required to develop during the required public hearings. *See* N.Y. Const. art. III, § 4(c) (the Commission "shall report the findings of all such hearings to the legislature upon submission of a redistricting plan").

9. The 2014 amendments impose important constraints on the redistricting process. The amendments require that legislative districts (a) avoid the denial or abridgement of racial or language minority voting rights, (b) ensure that racial and minority language groups do not have less opportunity to participate

in the political process than other members of the electorate and to elect representatives of their choice, (c) consist of contiguous territory, (d) be as compact as practicable, (e) refrain from drawing districts to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties, (f) maintain the cores of existing districts, (g) unite communities of interest, and (h) consider pre-existing political subdivisions, including counties, cites, and towns. *Id.* §§ 4(c)(1), (3), (4), (5). The United States Constitution further requires that congressional districts vary in population by no more than one person and that Senate and Assembly districts be of substantially equal population. *See Karcher v. Daggett*, 462 U.S. 725 (1983); *Brown v. Thomson*, 462 U.S. 835 (1983); *see also* N.Y. Const. art. III, § 4(c)(2).

10. Although there is no doubt that constraining partisanship and creating a role for the Commission to develop redistricting plans were important aspects of the 2014 amendments, amended article III, section 4(b) provides that the Legislature continues to have the final word with respect to approving or disapproving the Commission's proposals, and that the Legislature may make "any" changes to any Commission plan that it "deems necessary" for any reason.

11. The 2014 amendments certainly permit bipartisan cooperation, but there is no requirement that any Commission proposal, or any legislative enactment, have bipartisan support or reflect political compromise. Article III of

the Constitution never uses the words "bipartisan" or "compromise." Section 5-b(g) expressly contemplates that the Commission might not reach a bipartisan consensus and that it might submit two five-vote plans to the Legislature. Section 4(b) provides that "all votes by the senate or assembly on any redistricting plan legislation pursuant to this article shall be conducted in accordance" with specific rules, and sections 4(b)(1)-(3) prescribe specific numerical thresholds for votes in the Legislature. The 2014 amendments do not distinguish between legislators' votes based on party affiliation.

12. The 2014 amendments assume that the Commission will faithfully discharge each of the mandatory duties that the Constitution expressly and unambiguously imposes on it. The 2014 amendments do not address what happens if the Commission abdicates its mandatory duty to submit a final proposed redistricting plan or plans for the Legislature to consider. The Constitution is silent on that question.

13. In 2020 and 2021, the Legislature attempted to improve the new redistricting process that it had enacted through the 2014 amendments by proposing additional amendments to the Constitution. Although the trial court stated that none of these proposed additional amendments were "hot button issues," Order at 7, that statement was baseless. The additional constitutional amendments that the Legislature proposed would have, among other things: fixed

the number of Senate seats at 63; required that district lines be based on total population of all residents, including non-citizens; required that incarcerated individuals be counted at their place of last residence, instead of at their place of incarceration; changed the Commission's quorum rules; advanced the timetable for the redistricting process by two months to allow more time for it to be completed before the beginning of the designating petition period in light of a federal court injunction moving New York's primary from September to June; and clarified that if the Commission fails to present a final proposed redistricting plan to the Legislature, the Legislature has the same discretion to enact its own plan that it has when the Commission presents a final recommendation. The Legislature enacted these proposed amendments twice, A.10839/S.8833 of 2020; A.1916/S.515 of 2021, but voters did not approve them in the 2021 election.

14. Meanwhile, in June 2021 – approximately five months *before* voters declined to approve the proposed 2021 amendments – the Legislature enacted a statute that addresses what happens if the Commission abdicates its duty to submit a final proposed redistricting plan. The 2021 statute provides that "if the commission does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan," then the Legislature "shall introduce such implementing legislation with any amendments each house deems necessary." L.2021, c. 633, § 1. The trial court stated erroneously that the Legislature did not

enact the 2021 statute until three weeks after the voters rejected the additional constitutional amendments in November 2021, Order at 7, 8, but that is wrong. The Legislature enacted the 2021 statute in June 2021, months before the proposed additional constitutional amendments were presented to the voters.

15. Between July 20 and December 5, 2021, the Commission held 24 public hearings comprised of dozens of hours of testimony from officials and members of the public about communities of interest, minority voting strength, and myriad other redistricting issues. On January 3, 2022, the Commission submitted its first proposed plans to the Legislature for consideration. Because the Commission deadlocked along party lines and was unable to form a bipartisan consensus, it submitted two partisan proposed plans in accordance with section 5-b(g), one urged by the Democrats ("Plan A") and one urged by the Republicans ("Plan B"). The Legislature rejected both plans on January 10, 2022. The Commission then had fifteen days, until January 25, 2022, to present its final proposal or proposals for the Legislature to consider. N.Y. Const. art. III, § 4(b). (The trial court stated incorrectly that the deadline for the Commission to submit its final proposal or proposals was February 28, 2022, Order at 6, but that plainly is wrong; the deadline was January 25, 2022.)

16. On January 24, 2022, the day before the deadline, the Commission announced that it remained hopelessly deadlocked along party lines, and that it

would not be meeting again or presenting any final proposal to the Legislature. The Democratic Commissioners issued a statement asserting that the Republican Commissioners had sabotaged the process by refusing to meet to vote on a final proposed plan or plans, and the Republican Commissioners likewise issued a statement blaming the Democrats for the impasse.

17. In Paragraph 113 of their unverified Amended Petition (NYSCEF Dkt. No. 18), Petitioners alleged, upon information and belief, that the Democratic Commissioners refused to submit a final plan to the Legislature by the final deadline "after receiving encouragement to undermine the constitutional process from Democratic Party politicians and officials." That unsworn, unsupported allegation is false . Paragraph 113 of the Senate Majority's Answer to the Amended Petition (NYSCEF Dkt. No. 148) is verified under oath – and therefore constitutes competent evidence – and states unequivocally that:

> the Senate Democrats did not at any time discourage the Commission from submitting a final congressional or state legislative plan or plans to the Legislature by the deadline prescribed in the Constitution. Nor did the Democratic commissioners refuse to meet to vote on a final plan or plans to submit to the Legislature. To the contrary, when the deadline for submitting a final plan or plans to the Legislature was looming, the Democratic commissioners sought to convene a meeting of the full Commission to vote on a final plan or plans, but the Republican commissioners refused to meet to vote on a final plan or plans. ***It was the Republican commissioners who prevented the Commission from submitting a final plan or plans to the Legislature, not the Democratic commissioners.***

Id. (emphasis added). Petitioners had the opportunity to contest this evidence with evidence of their own, but they were unable to do so. The record thus contains uncontradicted evidence that it was the Republican Commissioners, not the Democrats, who purposefully stymied the Commission process by depriving it of the quorum necessary for the Commission to present a final plan or plans to the Legislature.

18. In the absence of a Commission proposal to consider, and with the designating petition period fast approaching, the Legislature did what the Constitution, the June 2021 statute, and two centuries of precedent plainly allowed it to do: it enacted new congressional, Senate, and Assembly redistricting plans. In doing so, the Legislature balanced a complex array of often competing considerations, including the need to comply with the population equality requirement – which, with respect to the congressional plan, required drawing a very different map because the State's congressional delegation was reduced from 27 to 26 seats, and because the State's significant population growth during the last decade was unevenly distributed between the downstate and upstate regions – the need to avoid diluting minority voting strength, and the need to join communities of interest, among other factors. The Legislature enacted the congressional plan on February 2, 2022 and the Assembly and Senate plan on February 3, 2022. The Governor signed the plans into law on February 3, 2022.

19. Petitioners commenced this special proceeding on February 3, 2022, initially challenging only the congressional plan. Petitioners filed an unverified Petition, containing only unsworn allegations, which does not constitute evidence. Five days later, Petitioners filed a motion for leave to file an Amended Petition that would include a challenge to the Senate plan. At no time did Petitioners ever challenge the Assembly plan.

20. Petitioners commenced this special proceeding in Supreme Court, Steuben County, the county of residence of one Petitioner. Unlike many of New York's 62 counties, which have multiple Supreme Court justices and a neutral process for judicial assignments, Petitioners knew when they filed in Steuben County exactly which judge would hear their claims. Lest there be any uncertainty on this point, in the very first document they filed on the NYSCEF docket, their first proposed Order to Show Cause, Petitioners printed "HON. PATRICK F. MCALLISTER, J.S.C." at the top of the document even though the case had not been assigned to him yet.

21. On February 14, 2022, eleven days after they commenced this special proceeding, Petitioners filed their memorandum of law and the reports of their two purported experts, Sean Trende and Claude Lavigna. The only evidence that Petitioners submitted was an affidavit by one Petitioner, Lawrence Garvey, attempting to address his alleged standing to sue, and an affidavit by Senate

Minority Leader Robert Ortt, who observed unremarkably that the Legislature did not hold emergency public hearings (because the Legislature relied on the extensive public record developed by the Commission and enacted a redistricting plan quickly after the Commission's unexpected abdication of its duty to submit a final proposed plan). Petitioners also filed a motion for permission to seek discovery.

22. Pursuant to the trial court's scheduling order, Appellants filed their Answers and supporting papers on February 24, 2022. The Senate Majority's Answer included a detailed counterstatement of facts setting forth objective explanations for and defenses of all of the congressional districts about which Petitioners had complained. The Senate Majority Leader also submitted an expert affidavit by Dr. Kristopher Tapp and an expert report from Dr. Stephen Ansolabehere, and the Speaker of the Assembly submitted an expert affidavit from Dr. Michael Barber.

23. Pursuant to the trial court's scheduling order, Petitioners filed their reply papers on March 1, 2022, which included additional reports from Mr. Lavigna and Mr. Trende. Petitioners also submitted short affidavits from each Petitioner stating their addresses.

24. The trial court held a hearing on March 3, 2022. In response to Petitioners' request that that the trial court enjoin the designating petitioning period

and other election deadlines, the trial court expressly declined to do so. With respect to Petitioners' claim that the Commission's failure to present a final plan stripped the Legislature of its authority to enact redistricting plans, the trial court stated on the record that "I'm not inclined at this point in time to void the maps simply because the IRC failed to submit a second map." 3/3/22 Tr. 69:22-25 (attached hereto as Exhibit 2). The trial court also expressly declined to "suspend the election process," explaining on the record that:

> Petitioners have an extremely high level of proof to be able to prove that the Respondents acted in an unconstitutional way in creating the Congressional and Senate maps. That proof is beyond a reasonable doubt with the Respondents enjoying a presumption of constitutionality. Two; even if I find the maps violated the Constitution and must be redrawn, it is highly unlikely that a new viable map could be drawn and be in place within a few weeks or even a couple of months….

Tr. 3/3/22 70:1-9. The trial court granted Petitioners leave to file the Amended Petition, expanding the case to include the Senate plan – but not the Assembly plan – and directing Respondents to file Answers and supporting papers by March 10, 2022. The trial court also granted Petitioners leave to engage in discovery, setting a discovery deadline of March 12, 2022. Finally, the trial court set the case down for trial for March 14, 2022 "to determine where the truth lies between the Petitioners' experts and the Respondents' experts." 3/3/22 Tr. at 69:17-19.

25. Petitioners then moved this Court by order to show cause to vacate what they believed was an automatic stay of the trial court's decision permitting them to engage in discovery. Justice Lindley declined to sign Petitioners' proposed order to show cause, observing that the document issued by the trial court was a decision, not an order, and that even if it were an order, it "did not compel discovery or direct any of the respondents to do anything, such as sit for depositions or turn over emails or disclose other communications regarding redistricting." 3/9/22 Decision by Justice Lindley (attached hereto as Exhibit 3). Petitioners then served discovery requests, subpoenas for depositions, and eventually deposition notices. Respondents timely produced documents (and preserved objections to objectionable document requests), but Respondents objected to Petitioners' attempts to obtain testimony from legislators or their aides. Petitioners never moved to compel but nevertheless moved for sanctions. The trial court denied Petitioners' baseless sanctions motion.

26. Meanwhile, on March 10, 2022, Respondents filed their Answers to the Amended Petition. The Senate Majority verified its Answer to the Amended Petition, including by swearing to the truth of its statement that it was the Republican Commissioners, not the Democrats, who purposefully stymied the Commission process by depriving it of the quorum necessary for the Commission to present a final plan or plan to the Legislature, NYSCEF Dkt. No. 148 ¶ 113, and

its detailed counterstatement of facts setting forth objective explanations for and defenses of all of the congressional districts about which Petitioners had complained, *id*. ¶¶ 275-507. The Senate Majority also submitted additional expert affidavits by Dr. Jonathan Katz and Todd Breitbart, and a second affidavit by Dr. Tapp.

27. The record in this case contains no evidence supporting Petitioners' partisan gerrymandering claims other than, arguably, the reports and testimony of their two "experts." The Amended Petition is unverified and therefore does not constitute competent evidence. The affidavit of Senator Ortt (NYSCEF Dkt. No. 28) merely recites that the Senate did not hold public hearings or consult with Republican Senators before enacting the redistricting plans at issue, but it is undisputed that the Legislature relied on the express language in article III, § 4(c) of the Constitution requiring the Commission to hold extensive public hearings and to "report the findings of all such hearings to the legislature," and that the Legislature determined in its discretion that the exigencies of the election calendar made it more prudent to act than to hold additional redundant hearings that realistically were not likely to result quickly in bipartisan consensus. The affidavits from the Petitioners themselves merely recite their addresses and confirm that they vote for Republicans.

28. Thus, in terms of actual evidence that the Legislature acted with unconstitutional partisan intent, Petitioners rested their entire case exclusively on their two experts. There is nothing else.

29. The case proceeded to trial on March 14, 2022. Over the course of three days, Petitioners called their two experts, and Respondents cross-examined them; and Respondents called their five experts, and Petitioners cross-examined them. The record is shockingly bad for Petitioners.

30. Petitioners first called Sean Trende, who is a graduate student in Ohio State's political science department. Mr. Trende is experienced in a wide range of election law issues, but he is not an accomplished computer scientist or statistician. This undisputedly is the first time he had ever presented himself as an "expert" in any case in the highly technical field of redistricting computer simulations.

31. The theory behind redistricting simulations is that if you can program a computer to do exactly what the real-life redistricting map-drawers were required to do – applying the same redistricting criteria, and balancing them the same way – and ensure that the simulations do not use partisan data, then any statistically significant differences between the simulated results and the actual districts may be evidence of partisan intent. Of course, to enable one to draw that conclusion fairly – at all, much less conclusively and beyond a reasonable doubt – the simulations have to apply and balance all of the applicable redistricting criteria in a manner

that is very closely similar to what the actual map-drawers did. Otherwise, one is comparing apples to oranges.

32. For numerous reasons, Mr. Trende's computer simulations proved nothing about the Legislature's intent, much less that the Legislature unquestionably acted with unconstitutional partisan intent beyond a reasonable doubt.

33. First, instead of relying on the more established "Markov Chain Monte Carlo" simulation algorithm, Mr. Trende decided to use a "proposed" and "new" algorithm posited by Dr. Kosuke Imai, an esteemed Harvard professor and undisputed leader in the field, called the "Sequential Monte Carlo" algorithm. Mr. Trende relied upon a draft paper that Dr. Imai and his co-author have circulated announcing and explaining their proposed new Sequential Monte Carlo algorithm. This draft paper has not been peer-reviewed and has not been published in any journal. In the draft paper, which is in the trial record, Dr. Imai and his co-author explain that they tested this proposed new algorithm by performing 10,000 simulations on a hypothetical three-district map containing 50 precincts.

34. As Respondents' expert, Dr. Tapp, testified, although Dr. Imai's proposed new algorithm is mathematically elegant, it is known to have significant performance issues – especially, as discussed below, relating to redundancy. Additionally, to generate a distribution of maps that would enable one to draw any

fair inferences about New York, which has over 15,000 precincts, 26 congressional districts, and 63 Senate districts, one would need to run far more simulations than Dr. Imai ran in his draft paper to simulate a hypothetical three-district map containing only 50 precincts. Mr. Trende nevertheless initially ran only 5,000 simulations in this case (he later ran 10,000 simulations).

35. As Dr. Tapp observed, there is something very suspicious about the results that Mr. Trende reported. The compactness scores of Mr. Trende's simulated Senate maps are not spread across a bell curve as one would expect. Rather, Mr. Trende reported that the vast majority of his 5,000 simulated Senate maps were clustered around one of two compactness scores. Dr. Tapp testified that because it is extremely unlikely that this so-called "bimodal distribution" could occur naturally, and because the proposed new algorithm that Mr. Trende borrowed from Dr. Imai's draft paper is known to have redundancy issues – in other words, it often creates large numbers of simulated maps that are actually or substantially identical – Dr. Tapp opined that the bi-modal distribution in Mr. Trende's compactness scores indicated that a fatal redundancy problem infected his 5,000 simulations, thus rendering them unreliable.

36. Critically, none of Mr. Trende's simulated maps are in the record in this case, and thus nobody – not Dr. Tapp, not Respondents' counsel, not the trial court, and not this Court – can look at Mr. Trende's simulated maps and see what

they actually look like (more on that below). Dr. Tapp therefore attempted to replicate Mr. Trende's methodology and to run 5,000 simulations using the same parameters that Mr. Trende used, and in Dr. Tapp's replicated simulations, 3,219 of the 5,000 simulations drew 31 out of 63 Senate districts identically. Dr. Tapp therefore testified that it is very likely that Mr. Trende's simulated maps suffer from a fatal redundancy problem and are of no statistical value.

37. Immediately after Mr. Trende testified in this case, he testified about computer simulations in another redistricting case, in Maryland. In the Maryland case, Mr. Trende ran 750,000 simulations. Nobody has explained why Mr. Trende ran 750,000 simulations in Maryland to simulate an 8-district congressional plan but chose to run only 5,000 or 10,000 simulations to simulate a 26-district congressional plan and 63-district Senate plan in New York.

38. Moreover, as the Maryland trial court explained in its opinion in that case, Mr. Trende testified that after he ran his 750,000 simulations, he examined all of them to weed out redundancies, and he found – just as Dr. Tapp warned in this case – that the great majority of his simulated maps in Maryland were fatally redundant. As the Maryland trial court explained, in each of the three tranches of 250,000 simulations that Mr. Trende ran, upon examining them, he had to throw out most of the simulated maps because they were simply duplicates. He culled the simulated maps down to between 30,000 to 90,000 non-duplicative maps in

each of his three tranches of 250,000 simulations. During cross-examination in this case, Mr. Trende testified that he did not bother to look at his 5,000 or 10,000 simulated New York maps to see whether there were, as in Maryland, huge numbers of duplicate maps.

39. Leaving aside the massive redundancy problem that Mr. Trende thoroughly explored and addressed in Maryland but never explored in this case, it is undisputed that Mr. Trende's simulations did not even apply, much less reasonably balance, all of the redistricting criteria that are required by the New York Constitution to be considered by actual map-drawers. With respect to compactness, there are a wide range of settings that one could program the algorithm to use, with higher number settings drawing more compact districts, and lower number settings drawing less compact districts. Mr. Trende testified that he picked setting "1" for his compactness input – not because he had any basis to think that setting reflected how the actual map-drawers weighed compactness against other competing redistricting criteria, but rather because Dr. Imai and his co-author have reported that the algorithm does not work well at any other compactness setting. With respect to prioritizing avoiding county splits, the algorithm only allows the simulator to toggle county preservation "on" or "off" with no way to adjust the setting, and Mr. Trende simply chose "on." With respect to the preservation of the cores of prior districts, Mr. Trende said in his reply report

that he accounted for this principle, but he did not say how, and when he was asked on cross-examination what core preservation setting he used, he testified that he did not remember.

40. Perhaps most importantly, Mr. Trende admitted that he made no effort to account for communities of interest. Article III, § 4(c) of the Constitution states that a map-drawer "shall consider" the maintenance of communities of interest. It is unconstitutional not to do so. Mr. Trende nevertheless did not account for communities of interest in his New York simulations because, as he acknowledged, it was not possible to do so.

41. Respondents established at trial that Mr. Trende's failure to account for communities of interest is fatal to his methodology, and looking at the upstate region shows why. The Republicans and Democrats on the Commission disagreed about how to draw congressional districts in certain regions of the state, but they reached a consensus about the upstate region. The Republicans and Democrats on the Commission agreed that there should be four Democratic-leaning districts encompassing the four upstate urban areas (Albany, Syracuse, Rochester, and Buffalo), a Republican-leaning district uniting the Southern Tier, a Republican-leaning district uniting the North Country, and a remaining Republican-leaning district along Lake Ontario. Respondents introduced into the record Exhibit S-3 (attached hereto as Exhibit 4), which showed that the Commission's Plan A and

Plan B were substantially identical in how they drew these seven upstate districts, and that the actual enacted plan hewed closely to the two Commission plans. Mr. Trende admitted at trial that he did not know any of that, and that he did not instruct his computer simulations to account for the strong consensus among Republicans and Democrats alike that these well-established communities of interest (the four upstate urban areas, the Southern Tier, and the North Country) should be maintained. Instead, his simulations started from a "blank page," even upstate.

42. It therefore is no wonder that Mr. Trende reported statistically significant differences between his simulated maps and the enacted congressional plan. Of course his simulations came out differently. It was impossible for them not to because they drew districts in a way that was completely different from the way the actual map-drawers approached the redistricting.

43. Once again, Petitioners did not put Mr. Trende's simulated maps into the record, so nobody can look to see whether all, most, some, or none of Mr. Trende's simulations look anything like what an actual New York map-drawer reasonably might do. Respondents' expert, Dr. Ansolabehere, testified that this was unusual, and that in each prior case in which he served as an expert that involved computer simulations, the expert who ran the simulations had made the

simulated maps available, so that the parties, their experts, and the court could evaluate them.

44. Despite this crucial omission by Petitioners, we do have access to the 5,000 simulations that Dr. Imai himself ran for New York, because Dr. Imai published his simulated maps (which he prepared on his own as an interested academic, not because he was retained by any party in this case) on his "ALARM Project" website. Trial exhibit S-4, which is attached hereto as Exhibit 5, shows the three simulated maps that Dr. Imai published pictorially on his website (the rest can easily be downloaded), and it is clear that the algorithm drew upstate districts in a crazy way that looks nothing like what an actual New York map-drawer reasonably might do. For example, in the first Imai simulation, Schuyler County is joined in the same congressional district as Franklin County more than 250 miles to the northeast, in a way that flipped Representative Elise Stefanik's district from Republican-leaning to Democratic-leaning. Mr. Trende admitted on cross-examination that he did not bother to look at any of his simulated maps to see if they similarly drew districts in a way that did not match what an actual New York map-drawer reasonably would do, and that nobody else can do so because nobody else has seen or can see his simulated maps.

45. Mr. Trende also ignored the unequivocal constitutional requirement that a Senate plan may not split towns, and he ignored the Constitution's so-called

"block-on-border" and "town-on-border" rules. Indeed, he admitted on cross-examination that he did not know what those rules were.

46. Petitioners' other "expert" is Claude Lavigna, a Republican pollster who has never been involved in a redistricting process, much less testified as a redistricting expert. Mr. Lavigna asserted that there supposedly was "no coherent explanation" for various congressional and Senate districts other than partisanship, but his analysis was so incomplete and incompetent, and his opinions were so thoroughly debunked on cross-examination that Petitioners' counsel did not even mention him in closing arguments, and the trial court did not rely on his testimony in its Order.

47. To take just two examples, Mr. Lavigna testified that it supposedly was clear that Congressional District 11 was drawn with impermissible partisan intent because the Legislature "divided an established Asian community in District 10 by moving half of it to District 11." But Mr. Lavigna admitted at trial that his report was simply wrong about that, and that District 10 actually united the Asian community by joining the Chinese-American area in Bath Beach, Brooklyn with the Brooklyn and Manhattan Chinatown communities in District 10, consistent with testimony before the Commission calling for that change (the Bath Beach Chinese-American community had previously been cracked and split into District 11, the opposite of what Mr. Lavigna first thought).

48. Mr. Lavigna's analysis of the upstate region – in which he complained that certain new congressional districts were different from the old districts in ways that supposedly were clearly partisan – was truly absurd because he failed to understand that because New York lost a congressional district, the district numbers changed, and he actually compared the wrong districts. For example, Mr. Lavigna complained about changes between old District 22 and new District 22, but old District 22 was eliminated, and new District 22 (which encompasses the Syracuse area) is most comparable to old District 24. Mr. Lavigna's analysis was deeply flawed.

49. As discussed above, Respondents called Dr. Tapp, the Chair of the Mathematics Department at Saint Joseph's University, whose research focuses on the mathematics of redistricting simulations and who is an expert on the strengths and weaknesses of the available redistricting simulation algorithms, including Dr. Imai's proposed new algorithm discussed in his unpublished draft paper that Mr. Trende used in this case. Dr. Tapp testified extensively about the problematic lack of transparency regarding Mr. Trende's methodology (Mr. Trende tells us certain things but not others about how he instructed the Imai algorithm to draw simulated maps), about why Mr. Trende's simulations likely suffer from a fatal redundancy problem, about why Mr. Trende's simulations prove nothing because he did not

account for various constitutional requirements, and that it is highly problematic that Mr. Trende did not make his simulated maps available to be scrutinized.

50. Respondents called Dr. Michael Barber, who is an Associate Professor of Political Science at Brigham Young University and an expert in the fields of redistricting and statistics. Dr. Barber reviewed Mr. Lavigna's expert report and testified that Mr. Lavigna had not used any data or evidence to substantiate his claims. Dr. Barber also reviewed Mr. Trende's report and attempted to replicate Mr. Trende's ensemble using the limited information about the methodological choices that Mr. Trende set forth in his report. Using Mr. Trende's methodology and the same method of calculating partisanship that Mr. Trende used in his report, Dr. Barber found that the enacted congressional plan contained fewer Democratic-leaning districts than the simulated plans. Dr. Barber made clear that he did not endorse the methodology Mr. Trende used, including because Mr. Trende failed to account for several of New York's mandatory redistricting criteria. Dr. Barber testified that if Mr. Trende's model had taken into account communities of interest and the other mandatory redistricting criteria, it would have changed Mr. Trende's results, including the level of competitiveness in the simulated districts. Dr. Barber testified that due to the flaws in Mr. Trende's methodology, Mr. Trende's simulations cannot be used to infer partisan intent or intent to discourage competition.

51. Respondents called Dr. Stephen Ansolabehere, who is the Frank G. Thompson Professor of Government at Harvard University and a leading expert in elections and redistricting (among other things, Dr. Ansolabehere consults for CBS News and calls races on election night). Dr. Ansolabehere explained the complexity of drawing a constitutionally compliant congressional redistricting plan given significant population shifts across New York, the loss of a congressional seat, and New York's physical geography. He concluded that the enacted congressional plan is "quite a stable map" that preserved the cores of prior districts by an average of 77% as measured by population, and 75% as measured by geographic area. Dr. Ansolabehere testified further about flaws in Mr. Trende's analysis, explained why Mr. Lavigna's characterizations of political shifts across districts were fundamentally wrong, and that in his expert opinion Mr. Trende's simulations analysis offered no evidence of partisan bias in the enacted congressional plan.

52. Respondents also called Dr. Jonathan Katz, the Kay Sugahara Professor of Social Sciences and Statistics at Caltech and one of the leading experts in the mathematics of partisan fairness. Dr. Katz has testified about partisan fairness in dozens of cases, mostly on behalf of Republicans. Dr. Katz explained that in a winner-take-all single-member-district system like the ones at issue in this case, the expected outcomes are not proportional to the partisan

composition of the electorate. Dr. Katz explained that in a hypothetical ten-seat state in which one party had 60% of the vote share, if the population were evenly dispersed throughout the state, one would expect the party with 60% of the statewide vote to win all ten districts. Dr. Katz explained that 60% of the vote share typically does not translate into 100% of the seats because Democrats and Republicans tend to be somewhat clustered geographically, but that in a state like New York in which Democrats typically receive around two thirds of the vote, it would not be atypical to expect the Democrats to win 85% to 90% of the seats. Dr. Katz performed a very rigorous statistical analysis, analyzing all statewide and legislative elections for the last several election cycles, and using a forecasting model that is widely used and established in the social sciences to calculate the average predicted vote share for future Democratic and Republican candidates in each new Senate district, the variability of that predicted vote share, and the probability that a Democrat or Republican wins the seat. Dr. Katz performed that analysis twice, once without assuming any incumbents will run in the new districts and once assuming which districts would have incumbents running. Dr. Katz concluded that there was no statistically significant evidence of partisan bias in either the congressional or Senate plans, and that if anything the plans were slightly biased in favor of the Republicans. Dr. Katz also calculated the efficiency gap – another widely used measure of partisan fairness that measures how

efficiently each party converts its votes into seats – and found it to be small and slightly favoring Republicans.[1]

53. Finally, Respondents called Todd Breitbart, who is among the foremost authorities on the history of and proper methodology for redistricting the New York Senate. Mr. Breitbart thoroughly explained how the Senate plan complies with all constitutional criteria and is a dramatic improvement over the Senate plan enacted in 2012 with respect to regional and partisan fairness.

54. The trial concluded on March 16, 2022, and the trial court called the parties back for oral summations on March 31, 2022. The parties' extensive summations began shortly before 10:00 a.m. and, following a lunch break, concluded at approximately 2:30 p.m. At 4:20 p.m., less than two hours later, the trial court issued the Order at issue (attached hereto as Exhibit 6).

55. Even though the trial court stated on the record on March 3, 2022 that it was "not inclined at this point in time to void the maps simply because the IRC failed to submit a second map," and even though there was no further briefing on

[1] Dr. Katz's conclusion that there was no partisan lean is consistent with Mr. Trende's own simulations. Petitioners allege that the Legislature allegedly packed Republicans into Congressional District 2 in order to make District 1 more Democratic, but in the Long Island region, every single simulation drew District 1 as Democratic-leaning, and almost all of the simulations drew District 2 as Democrat-leaning as well. Petitioners allege that the Legislature purposefully made District 11 in Staten Island/Brooklyn more Democratic-leaning than it should have been, but every single one of Mr. Trende's simulations drew District 11 as Democratic-leaning. Overall, Mr. Trende's simulations show that (assuming his methodology is valid, even though it is not) one would expect there to be at least 23 and perhaps 24 Democratic-leaning congressional districts, whereas the enacted plan draws only 22 Democratic-leaning districts.

and no witness testified about that claim after March 3, the trial court nevertheless did exactly that. And even though Petitioners did not challenge the Assembly plan, the trial court nevertheless struck down the Assembly plan *sua sponte*. And even though the trial court stated on the record on March 3, 2022 that it would not suspend the 2022 election process because doing so might leave New York without elected representatives, the trial court nevertheless did exactly that. And even though the law requires that in any court challenge to these redistricting plans "the determination of the court shall be embodied in a tentative order which shall become final thirty days after service of copies thereof upon the parties," L. 2022, ch. 13, § 3(i); *see also* L. 2022, ch. 14, § 2, the trial court's Order purportedly gives the Legislature only eleven days to submit new "bipartisanly supported" redistricting plans.

56. Among other things, the trial court: (1) granted Petitioners "a permanent injunction refraining and enjoining the Respondents, their agents, officers, and employees or others from using, applying, administering, enforcing or implementing any of the recently enacted 2022 maps for this or any other election in New York, included [sic] but not limited to the 2022 primary and general election for Congress, State Senate and State Assembly"; (2) ordered that "the Legislature shall have until April 11, 2022 to submit bipartisanly supported maps to this court for review of the Congressional District Maps, Senate District Maps,

and Assembly District Maps that meet Constitutional requirements"; and (3) ordered that "in the event the Legislature fails to submit maps that receive sufficient bipartisan support by April 11, 2022 the court will retain a neutral expert at State expense to prepare said maps."

57. The legislative Respondents filed notices of appeal on March 31, 2022, the same day the trial court issued the Order. The executive Respondents filed a notice of appeal the next day, April 1, 2022.

58. Later on April 1, 2022, the New York State Board of Elections, which is a separately represented Respondent in this case, issued the following public statement via Twitter:

> The March 31, 2022 order of the State Supreme Court Order (Harkenrider v Hochul, Sup. Ct. Steuben County Index No. E2022-0116cv Doc# 243) which declared the 2022 Congressional, Senate and Assembly lines unconstitutional has been STAYED pending appeal.

Shortly thereafter, the Board of Elections issued this follow-up statement specifically directing candidates that they "must" file their designating petitions during the April 4 to April 7 statutory period:

> The means that the filing period for designating petitions will remain April 4 to April 7 and all other deadlines provided for by law are still in effect pending further court determinations. All designating petitions must be filed during that time period.

59. Several hours later, Petitioners' counsel wrote a letter to counsel to the Board of Elections arguing that no automatic stay is in effect and demanding that the Board of Elections immediately publish a corrective statement. A copy of that letter is attached hereto as Exhibit 7.

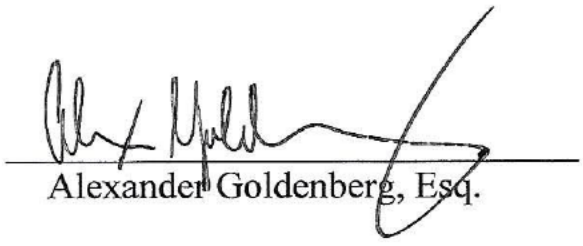
60. Attached hereto as Exhibit 8 is the Affidavit of Thomas Connolly, dated March 21, 2022.

61. Attached hereto as Exhibit 9 is the Affidavit of Thomas Connolly, dated April 2, 2022.

62. Attached hereto as Exhibit 10 is a copy of New York's political calendar.

63. I affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated: April 3, 2022
New York, New York



Alexander Goldenberg, Esq.