To be Argued by:
ERIC HECKER
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

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

Petitioners-Respondents,

-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,

(For Continuation of Caption See Inside Cover)

Docket No.: CAE 22-00506

BRIEF FOR RESPONDENT-APPELLANT SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS

CUTI HECKER WANG LLP
Eric Hecker, Esq.
John Cuti, Esq.
Alex Goldenberg, Esq.
Alice Reiter, Esq.
Daniel Mullkoff, Esq.
Attorneys for the Respondent-Appellant Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600
ehecker@chwllp.com
jcuti@chwllp.com
agoldenberg@chwllp.com
areiter@chwllp.com
dmullkoff@chwllp.com

Steuben County Clerk's Index No. E2022-0116CV

SPEAKER OF THE ASSEMBLY CARL HEASTIE, and THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents-Appellants,

and

NEW YORK STATE BOARD OF ELECTIONS,

Respondent.

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QUESTIONS PRESENTED

1. Does the failure by the Independent Redistricting Commission (the "Commission") to submit a final redistricting plan to the Legislature strip the Legislature of its authority to enact reapportionment plans, such that new Senate, Assembly, and congressional districts must be drawn by the courts?

Answer: No.

2. Do Petitioners' computer simulations, which are vulnerable to performance issues, fail to maintain communities of interest, and are not even in the record, prove beyond a reasonable doubt that the enacted congressional plan intentionally disfavors Republicans?

Answer: No.

3. Do Petitioners have standing to challenge districts that are nowhere near where they reside?

Answer: No.

4. Should the Court sow confusion and disrupt the orderly administration of an election that is already underway by ordering that the 2022 election proceed under new district lines?

Answer: No.

PRELIMINARY STATEMENT

Petitioners[1] assert two claims, neither of which proves that the redistricting plans at issue are unconstitutional beyond a reasonable doubt.

Petitioners first contend that because the Commission failed to recommend a final redistricting plan to the Legislature, the Legislature was stripped of its authority to enact redistricting legislation, and only Petitioners' hand-picked judge is allowed to draw new Senate, Assembly, and congressional lines. This claim cannot be squared with the text of the Constitution or binding Court of Appeals precedent. The Trial Court nevertheless went even farther than Petitioners urged, throwing out not just the Senate plan and the congressional plan, but also the Assembly plan that nobody challenged. The Trial Court's purported remedy – ordering the legislative Respondents to negotiate with the minority party and enact new "bipartisanly supported" plans – is itself obviously unconstitutional.

Petitioners' claim that the congressional plan is an unconstitutional partisan gerrymander fares no better. The record contains zero evidence of partisan intent other than, according to Petitioners, their two purported experts. Neither experts' testimony comes close to meeting Petitioners' formidable burden.

[1] We refer to the Petitioners below as "Petitioners" and to the Respondents below as "Respondents."

Petitioners' computer simulations are irredeemably flawed. Their expert is a graduate student who had never served as a simulations expert before this case. His model, which uses a new proposed algorithm from a draft paper that has not been published or peer-reviewed, barely accounted for important required redistricting criteria, and it outright ignored others – including especially the requirement in the New York Constitution that map-drawers consider and maintain communities of interest. Respondents have shown that because Petitioners' simulations start from a "blank page" and fail to heed communities of interest, the simulations look nothing like what an actual map-drawer would draw and, indeed, generate an ensemble of maps that are not even lawful. Respondents also have shown that Petitioners' simulations likely were infected by a fatal redundancy problem, one that their expert attempted to fix when he gave it a second try in another case right after he submitted his reports in this case. Nobody can get to the bottom of these serious performance issues because Petitioners did not put their simulations into the record, a failure of proof that itself should end this case.

Petitioners pretend that striking down a redistricting plan based solely on computer simulations like theirs is routine, but it is anything but. There are a few courts that have relied in part on computer simulations to augment other compelling evidence that a redistricting plan was unconstitutional, but never before has any court struck down a redistricting plan based exclusively on this developing

technology, and certainly not in a case in which state law requires the consideration of communities of interest, which Petitioners concede computer simulations simply cannot model.

This case must be decided based on the record, not based on extra-record hearsay statements by pundits who neither testified nor examined any of the evidence. The record contains abundant evidence that the congressional districts at issue reflect the application and balancing of New York's complex mandatory redistricting criteria. The record contains nowhere close to the quantum of evidence of impermissible partisan intent that would be necessary to sustain the Trial Court's Order.

STATEMENT OF THE CASE

Background

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, *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.

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.

Given that the Legislature itself was the impetus behind the 2014 amendments, it is not surprising that the amendments expressly preserve the Legislature's traditional role, authority, and discretion to enact redistricting plans following each decennial census. The 2014 amendments delegated authority to the Commission to hold hearings and make recommendations, but the 2014 amendments grant the Legislature unfettered discretion to reject any Commission proposal for any reason and to enact any plan it chooses by making "any amendments" it "deems necessary." N.Y. Const., art. III, § 4(b).

The 2014 amendments prescribe a specific schedule. The Commission was required to publish draft redistricting plans and relevant supporting data by September 15, 2021. *Id*. § 4(c). It 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. *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*.

The process of running for legislative office in New York in 2022 commenced on March 1, the day after the last possible deadline for the Commission to submit its final proposed plan to the Legislature. N.Y. Elec. Law § 6-158(1). The 2014 amendments do not contemplate that the Legislature will hold any public hearings before it decides whether to accept or reject the Commission's proposals and, if necessary, amend the final proposal. Instead, the 2014 amendments contemplate that the Legislature will rely on the expansive record that the Commission develops 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").

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, cities, and towns. *Id.* §§ 4(c)(1), (3), (4), (5). The federal 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).

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.

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 does not use 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) prescribes specific rules for legislative votes on redistricting plans and fixes the minimum

percentage of legislators who must vote for the plans under different scenarios. The Constitution says nothing about the political party with which the legislators caucus. Nowhere does the Constitution suggest, much less state, that the Legislature's authority to enact redistricting legislation hinges on obtaining support from the minority political party.

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

In 2020 and 2021, the Legislature attempted to improve the redistricting process that it had enacted through the 2014 amendments by proposing additional amendments to the Constitution, most of which would have changed express constitutional provisions and therefore could be implemented only through constitutional amendment. Although the Trial Court stated that none of these proposed additional amendments were "hot button issues," R13, that *ipse dixit* is baseless. The 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;

changed the Commission's quorum rules; advanced the timetable for the redistricting process by two months to allow more time before the commencement 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 proposed redistricting plans 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.

Meanwhile, in June 2021 – approximately five months before voters declined to approve the proposed 2021 amendments – both houses of the Legislature passed a statute that addresses what happens if the Commission abdicates its duty to submit a 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.

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 regarding communities of interest, minority voting strength, and myriad

other redistricting issues. On January 3, 2022, the Commission submitted its first proposed plans for the Legislature to consider. Because the Commission deadlocked along party lines and was unable to form a bipartisan consensus, it submitted two 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, R12; the deadline was January 25, 2022.)

On January 24, 2022, the day before the deadline, the Commission announced that it remained deadlocked along party lines, and that it would not meet again or present 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 issued a statement blaming the Democrats for the impasse.

In Paragraph 113 of their unverified Amended Petition, R323-24 ¶ 113, 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, R1108-09 ¶ 113, is verified under oath and states unequivocally that:

> [W]hen 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.

In the absence of a Commission proposal to consider, and with the designating petition period fast approaching, the Legislature did what the Constitution, the 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 plans on February 3, 2022. The Governor signed the plans into law on February 3, 2022.

Procedural History

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.

Petitioners filed this case in Steuben County. The unverified Amended Petition alleges that one Petitioner lives in Steuben County, but that Petitioner never submitted an affidavit. *See* R303 ¶ 12 (alleging Petitioner Harkenrider resides in Steuben County). 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 proposed Order to Show Cause that they filed as part of their very first submission,

Petitioners printed "HON. PATRICK F. MCALLISTER, J.S.C." at the top of the document and beneath the signature line even though the case had not yet been assigned to him. R41, R45.

Eleven days after they filed, Petitioners submitted their memorandum of law and reports from their two purported experts, Sean Trende and Claude LaVigna. The only evidence 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 to supplement the 24 hearings already conducted by the Commission. Petitioners also filed a motion for permission to seek discovery.

Respondents 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 the congressional districts about which Petitioners had complained. R817-42. The Senate Majority Leader also submitted an expert affidavit by Dr. Kristopher Tapp and an expert report from Dr. Stephen Ansolabehere. R845-97.

Petitioners filed their reply papers on March 1, 2022, which included additional reports from Mr. LaVigna and Mr. Trende. R1025-50, R1053-65. Petitioners also submitted short affidavits from each Petitioner except Tim

Harkenrider, the only Petitioner who claims to live in Steuben County, attesting to their addresses and that they vote for Republicans. R1067-89.

The Trial Court held a hearing on March 3, 2022. In response to Petitioners' request 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 that "I'm not inclined at this point in time to void the maps simply because the IRC failed to submit a second map." R2509:22-24. The Trial Court also expressly declined to "suspend the election process." R2509:24-25. 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 directed 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." R2509:17-19.

Petitioners then moved this Court to vacate what they believed was an automatic stay of the Trial Court's decision permitting them to engage in discovery, but Justice Lindley held that the Trial Court's decision "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." R2156. Petitioners 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 privileged testimony from legislators or their aides. R1989, R1992-93, R1995. Petitioners never moved to compel but nevertheless moved for sanctions. R1319-20. The Trial Court denied Petitioners' baseless sanctions motion. R3010:22-3011:3.

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 by depriving it of the quorum necessary to present a final plan or plans to the Legislature, R1108-09 ¶ 113, and its detailed counterstatement of facts setting forth objective explanations for and defenses of the congressional districts about which Petitioners had complained, R1119-46 ¶¶ 275-507. The Senate Majority also submitted additional expert affidavits by Dr. Jonathan Katz and Todd Breitbart, and a second affidavit by Dr. Tapp. R1150-1258.

The record contains no evidence supporting Petitioners' partisan gerrymandering claim other than the opinions of their two "experts." The Amended Petition is unverified and therefore does not constitute competent evidence. The affidavit of Senator Ortt merely recites that the Senate did not hold public hearings or consult with Republican Senators before enacting the redistricting plans at issue, R287-89, but it is undisputed that the Legislature relied on the express language in article III, section 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. R290-91, R1067-89.

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.

The trial began 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.

Petitioners first called Sean Trende, who is a graduate student in Ohio State's political science department. R234. Mr. Trende is experienced in a wide range of election law issues, but he is not an accomplished computer scientist or statistician, and this was the first time he had ever presented himself as an "expert" in any case in the highly technical field of redistricting computer simulations. R2565:5-2566:4. Petitioners' other expert was Claude LaVigna, a Republican pollster and political consultant who has never been involved in a redistricting process, much less testified as a redistricting expert. R285-86, R2676:1-2676:20.

Although Respondents had no burden to prove anything at trial, they adduced evidence from multiple highly regarded experts. Respondents called Dr. Stephen Ansolabehere, who is a Professor of Government at Harvard University and a leading expert in elections and redistricting (Dr. Ansolabehere calls races for CBS News on election night). R882-97, R2875:1-2876:24, R2878:5-9. 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. R2889:12-2893:6, R2907:4-15, R2910:13-2912:12. Dr. Ansolabehere further testified that Mr. Trende's analysis was flawed and showed no evidence of partisan bias, R2918:1-11, and that Mr. LaVigna's characterizations of political shifts

across districts were fundamentally wrong, R2905:21-25, R2909:10-2910:12, R2912:16-2913:10.

Respondents called Dr. Kristopher Tapp, Chair of the Mathematics Department at Saint Joseph's University, who identified serious deficiencies in Mr. Trende's methodology that rendered his simulations statistically meaningless. R3028:19-3029:11, R3033:18-3035:5, R3045:7-3046:14, R3048:1-22.

Respondents also called Dr. Jonathan Katz, a Professor of Social Sciences and Statistics at Caltech and one of the leading experts in the mathematics of partisan fairness, who testified that there is 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. R3095:21-25, R1244-52.

Finally, the Senate Respondents called Todd Breitbart, a leading authority on the history of and proper methodology for redistricting the New York Senate. R1151-52 §§ 3-6. Mr. Breitbart 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. R3152:17-23, R3155:24-3158:4.

The trial concluded on March 16, 2022, and the Trial Court heard 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. R2439. Less than two hours later, the Trial Court issued the Order. R7.

STANDARD OF REVIEW

"It is well settled that acts of the Legislature are entitled to a strong presumption of constitutionality." *Cohen v. Cuomo*, 19 N.Y.3d 196, 201 (2012). Especially in the redistricting context, the judiciary may not "upset the balance struck by the Legislature and declare [a redistricting] plan unconstitutional" unless the challengers have proven "beyond reasonable doubt that it conflicts with the fundamental law," and "until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible, the statute will be upheld." *Id*. at 201-02 (quoting *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992) (internal quotation marks omitted); *Matter of Fay*, 291 N.Y. 198, 207 (1943)); *see also Carter v. Rice*, 135 N.Y. 473 (1892); *Bay Ridge Cmty. Council v. Carey*, 115 Misc. 2d 433, 445 (N.Y. Sup. Ct. Kings Cnty. 1982), *aff'd sub nom. Bay Ridge Cmty. Council, Inc. v. Carey*, 103 A.D.2d 280 (2d Dep't 1984), *aff'd*, 66 N.Y.2d 657 (1985).

ARGUMENT

I. THE COMMISSION'S FAILURE TO ACT DID NOT EXTINGUISH THE LEGISLATURE'S AUTHORITY TO ENACT REDISTRICTING PLANS

Petitioners claim, and the Trial Court held, that the 2014 amendments extinguished the Legislature's authority to reapportion legislative districts in the event of a failure by the Commission to submit a final proposed plan, and that any time that happens, only a court can draw new redistricting plans. This strained claim is belied by the text of the Constitution, historical practice, judicial precedent, common sense, and the separation of powers between the Legislature and courts.

The text of the 2014 amendments confirms in four places that the Legislature, and only the Legislature, is authorized to enact redistricting plans. Section 4(b) makes clear that after the Commission presents its first recommendation, the Legislature has unfettered discretion to enact or reject it for any reason; after the Commission presents its second recommendation, the Legislature has unfettered discretion to enact or reject it for any reason; and if the Legislature rejects the second Commission proposal, it may make "any amendments" it "deems necessary" and enact its own plan. Section 5 makes clear that if any court strikes down any aspect of any redistricting plan, the Legislature –

not a court or special master – "shall have a full and reasonable opportunity to correct the law's legal infirmities."

In making clear that the Legislature retains the exclusive authority to decide what legislative districts are enacted, the 2014 amendments respect and reaffirm more than two centuries of history and judicial precedent. *See Matter of Sherill*, 188 N.Y. 185, 202 (1907) (describing the broad "power of apportionment" granted to Legislature in "the first Constitution and the amendment of 1801"); *see also Carter v. Rice*, 135 N.Y. 473, 490-91 (1892) (Legislature possessed exclusive authority to apportion legislative districts); *In re Reynolds*, 202 N.Y. 430, 444 (1911) (affirming "the power vested in and imposed upon the legislature to pass a constitutional apportionment bill"); *Burns v. Flynn*, 268 N.Y. 601, 603 (1935) ("Apportionment is a duty placed by the Constitution on the Legislature, over which the courts have no jurisdiction."); *Matter of Fay*, 291 N.Y. 198, 206-07 (1943) (upholding redistricting plan and affording broad deference to Legislature); *In re Orans*, 15 N.Y.2d 339, 352 (1965) (confirming "[t]here is no doubt that reapportionment is within the legislative power"); *Schneider v. Rockefeller*, 31 N.Y.2d 420, 430 (1972) (upholding plan where "the legislative determination [wa]s reasonable"); *Bay Ridge Cmty. Council, Inc. v. Carey*, 103 A.D.2d 280 (2d Dep't 1984), *aff'd,* 66 N.Y.2d 657 (1985) (rejecting challenge to legislative redistricting plan); *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 77-80 (1992) (holding that

balancing redistricting criteria "is a function entrusted to the Legislature"); *Cohen v. Cuomo*, 19 N.Y.3d 196, 201-02 (2012) (approving Legislature's addition of Senate seat in redistricting because "acts of the Legislature are entitled to a strong presumption of constitutionality"). This retention of legislative power is unsurprising given that the Legislature itself passed the 2014 amendments, twice, before they were submitted to voters.

The Constitution does not address what happens if the Commission abdicates its duty to present a first or second recommendation to the Legislature. The Legislature addressed that silence in June 2021 by passing legislation providing that if the Commission fails to make a recommendation, the Legislature may enact its own plan. L.2021, ch. 633, § 1. This statute complements and does not conflict with the text of the Constitution. If the Commission performs its mandatory duties, then each step enshrined in the Constitution proceeds as described. And if the Commission fails to present a second recommendation to the Legislature, the Legislature has the same discretion to enact its own plan that it has when the Commission presents any second recommendation.

Cohen is controlling precedent. There, the Court of Appeals addressed the Constitution's silence with respect to the Senate size formula. The Constitution did "not provide any specific guidance on how to address" the confusion that had arisen regarding the formula, such that "two different methods" were potentially

valid. 19 N.Y.3d at 200. The petitioners claimed that although it would be permissible to use either method, the Legislature could not "use different methods for different parts of the state in the same adjustment process." *Id*. at 201. The Court rejected this claim, observing that the Legislature has broad discretion to fill a void created by "the Constitution's silence." *Id*. at 202. The Court emphasized that legislative acts "are entitled to a strong presumption of constitutionality," and that a court may not invalidate a statute filling a gap in the Constitution unless it has been "shown beyond reasonable doubt that it conflicts with the fundamental law" and only after "every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Id*. (quoting *Wolpoff,* 80 N.Y.2d at 78; *Fay*, 291 N.Y. at 207).

The Trial Court failed to acknowledge *Cohen*, even though it was the centerpiece of Respondents' briefing below and the most recent decision by the Court of Appeals regarding legislative redistricting. Instead, the Trial Court held that the 2021 statute is unconstitutional and that the Legislature "is not free to ignore the IRC maps and develop their own." R12. Because the Commission failed to submit a final proposal to the Legislature, the Trial Court threw out the Legislature's congressional plan, Senate plan (which the Trial Court otherwise

upheld), and Assembly plan (which no party even challenged). R16. The Trial Court's sweeping determination rests on legal, factual, and logical errors.[2]

First, the Trial Court relied on the words "shall" and "the" in section 4(e) to hold that the legislative redistricting process is entirely contingent on the Commission submitting a second plan or set of plans, but the Constitution says no such thing. It certainly does not state, or even remotely suggest, that if the Commission fails to act then an opportunistic plaintiff may disregard the Legislature and run to court and pick the judge who will draw new districts.

Second, the Trial Court invented out of whole cloth an alleged constitutional requirement that the Legislature enact "bipartisanly supported" redistricting plans that result from "compromise." R10, R24. Notably, even the Petitioners did not argue this below. Article III of the Constitution does not include the words "bipartisan" or "compromise." To the contrary, section 5-b(g) contemplates that the Commission might not reach bipartisan consensus and therefore may submit

[2] The Trial Court cited only one case to support its decision striking down the 2021 law: *City of New York v. New York State Division of Human Rights*, 93 N.Y.2d 768, 774 (1999). That case involved the regulation of civil service lists, and a new statute that defied a prior Court of Appeals decision that prohibited appointing individuals from an expired list. Here, by contrast, no court has ever questioned the Legislature's authority to reapportion legislative districts. To the contrary, *Leib v. Walsh*, 45 Misc. 3d 874, 881 (N.Y. Sup. Ct. Albany Cnty. 2014), held that under the 2014 amendments, "the Commission's plan is little more than a recommendation to the Legislature, which can reject it for unstated reasons and draw its own lines."

two plans. Section 4(b) further 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 voting thresholds in the Legislature but do not tether them to the party affiliation of the legislators casting votes. The Trial Court imposed new legislative voting rules, on its own, at the urging of no party and in obvious violation of article III.

Moreover, the Trial Court's edict that the Legislature's authority to adopt maps is contingent on a new "bipartisanly supported" standard squarely conflicts with article III, section 5, which expressly provides that if a court invalidates a redistricting plan in whole or in part, then "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." Nothing in the Constitution says that where the Legislature has the prescribed number of votes, a reviewing court can limit the Legislature's entitlement to correct any infirmities by requiring the Legislature to obtain affirmative consent for any corrections from an unspecified number of legislators who caucus with the opposition party.

Third, the Trial Court's holding would lead to the absurd result that any four commissioners could block the Legislature from enacting any redistricting plan (because once all ten commissioners are appointed, seven commissioners are required for a quorum, *see* art. III, § 5-b(f)). Thus, as the Trial Court would have it, any time a bloc of four commissioners wishes to deprive the Legislature of its

authority to enact a plan and kick the entire redistricting process to whatever court a litigant might select, those commissioners need only refuse to meet. It would be absurd, and therefore improper, to read the Constitution to vest a minority of four commissioners with the unilateral power to prevent legislative redistricting. *See Anderson v. Regan*, 53 N.Y.2d 356, 362 (1981) (courts must avoid constitutional interpretations that "would lead to an absurd conclusion"); *see also Fay*, 291 N.Y. at 216 (same); *In re Dowling*, 219 N.Y. 44, 56 (1916) (same).

The Trial Court ignored the uncontested record evidence that that is exactly what happened here. Although Petitioners alleged baselessly in their unverified Petition 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," R323-24 ¶ 113, that unsupported allegation is false. The Senate Majority's Answer to the Amended Petition, R1098-1149, is verified and therefore constitutes competent evidence. *See Roxborough Apts. Corp. v. Kalish*, 29 Misc. 3d 41, 42-43 (1st Dep't 2010). Paragraph 113 of the verified Answer states unequivocally that:

> *It was the Republican commissioners who prevented the Commission from submitting a final plan or plans to the Legislature, not the Democratic commissioners*.

R1108-09 ¶ 113 (emphasis added). Petitioners could not, and therefore did not, contest this evidence with proof of their own.

Fourth, the Trial Court erred in stating that the Commission's deadline to present a final plan or plans to the Legislature was February 28, 2022. R12. In fact, the final deadline was January 25, 2022, fifteen days after the Legislature rejected the first Commission plans. *See* N.Y. Const., art. III, § 4(b). The Commission announced that it was deadlocked on January 24, 2022, only one day before that deadline.

In apparent reliance on its misunderstanding of the timeline, the Trial Court mused (again, on its own) that the Legislature should have appointed new commissioners who were willing to submit a second plan or commenced litigation seeking an extraordinary mandamus order compelling the Commission to act. R12. But once again, it was the Republican commissioners who refused to meet and denied the Commission a quorum, and the Senate and Assembly majorities, at most, could have replaced only their own appointees. And the suggestion that the Legislature could have run to court and obtained an order requiring the Commission to act – at all, much less in a day – is untenable. Had the Commission submitted redistricting plans after January 25, those plans would have violated an express constitutional deadline, thereby rendering the Trial Court's proposed solution unlawful.

Fifth, the Trial Court focused repeatedly on the timing of the 2021 legislation, asserting falsely that the Legislature did not pass the statute at issue

until November 2021, three weeks after voters rejected the 2021 amendments. R13. But the Legislature passed the 2021 legislation in June, months before the 2021 election. There is nothing odd or suspicious about that. The Legislature hoped that the statutory language would be constitutionally enshrined alongside additional changes that had to be implemented through constitutional amendment because they would have revised constitutional text. But the Legislature knew that the more expansive 2021 amendments might not be approved, and it recognized the importance of addressing by statute what would happen if the Commission failed to make a final proposal.

Finally, the Trial Court made much of the fact that the Legislature supposedly declined to follow a statutory rule that was adopted in 2012 that states that when amending a Commission-proposed plan, the Legislature's plan may not deviate by more than two percent of the population of any of the districts. R14. Once again, the Trial Court misconstrued the law. The two-percent rule is statutory, not constitutional, and it therefore was within the Legislature's prerogative to amend it through legislation. To the extent the Trial Court suggested that the "People" deemed this rule an important part of the 2014 amendments, that makes no sense; the two-percent rule was not part of the amendments, was not referenced on the ballot, and was never submitted to voters.

For all of these reasons, the Trial Court's decision to invalidate all three redistricting plans (including one that nobody challenged) on the theory that the Legislature was stripped of its power to legislate must be reversed.

II. PETITIONERS FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE CONGRESSIONAL PLAN IS AN UNCONSTITUTIONAL PARTISAN GERRYMANDER

Petitioners' claim that the congressional plan is an unconstitutional partisan gerrymander rests entirely on the opinions of their two "experts," Mr. Trende and Mr. LaVigna.

As demonstrated below, Mr. Trende's analysis is fatally flawed because he used a proposed new algorithm from a draft unpublished paper that is prone to performance issues and used an inadequate sample size; because he failed adequately to apply, and even outright ignored, numerous mandatory redistricting criteria, including especially maintaining communities of interest; and because his simulations likely were infected by a fatal redundancy problem that he failed to investigate. Although some courts in other states have relied on redistricting simulations to some degree in prior cases, the manner in which the Trial Court relied on Mr. Trende's simulations in this case is unprecedented.

In any event, Mr. Trende's results are consistent with Dr. Katz's testimony that the congressional plan is fair and, if anything, slightly benefits Republicans. And Mr. LaVigna's analysis was so obviously incomplete, incompetent, and

incorrect, and he was so thoroughly neutralized on cross-examination, that Petitioners' counsel did not mention him in closing arguments, and the Trial Court did not discuss his submissions or testimony in the Order. This trial record does not come close to proving unconstitutional intent beyond a reasonable doubt.

A. Mr. Trende's Flawed Simulations Prove Nothing, Let Alone Unconstitutional Intent Beyond a Reasonable Doubt

The theory behind redistricting simulations is that if one programs 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 if one ensures that the simulations do not use partisan data, then any statistically significant differences between the simulated results and the enacted map may be evidence of partisan intent. Of course, to enable one to draw that conclusion – at all, much less beyond a reasonable doubt – the simulations must apply and balance all applicable redistricting criteria in a manner that is closely similar to what the actual map-drawers did. Otherwise, one is comparing apples to oranges, and any observed differences between the simulations and the enacted plan cannot form the basis for any inference regarding partisan intent. R3021:11-3022:1, R3024:6-15.

Mr. Trende had not previously testified in any case in which he had run redistricting simulations. R2566:2-4, R2573:6-9. 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, called the "Sequential Monte Carlo" algorithm. R2566:19-2567:20, R2571:4-19. This new algorithm is discussed in a draft paper that Dr. Imai and his co-author have circulated, but that draft has not been peer-reviewed or published in any journal. R3181 (Exhibit S-1), R2568:1-11, R2570:9-23. In the draft paper, 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. R3193-95.

Although Dr. Imai's proposed new algorithm may be mathematically elegant, it is known to have significant performance issues, especially relating to redundancy. R860-61 ¶¶ 55-59, R1205-07 ¶¶ 32-33, R3022:7-3023:8, R3026:6-20, R3036:23-3037:9 (testimony of Respondents' expert Dr. Tapp). Additionally, to generate a distribution of maps that would enable one to draw any reliable inferences about New York, which has over 15,000 precincts and 26 congressional 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. R1205-06 ¶ 32, R3035:16-3036:21. As Mr. Trende admitted, it is more difficult to use redistricting simulations to draw conclusions about large maps rather than small maps. R2574:6-22. Mr. Trende nevertheless initially ran only 5,000 simulations in this case, and he later ran 10,000 simulations, even though the very

same month he submitted his reports in this case – after Respondents' expert Dr. Tapp cogently criticized his sample size – Mr. Trende opted to run 750,000 simulations in the Maryland case.[3]

For numerous reasons, Mr. Trende's simulations in this case prove nothing about the Legislature's intent, much less that the Legislature acted with unconstitutional partisan intent beyond a reasonable doubt.

1. Mr. Trende Barely Applied and Even Completely Ignored Critical Constitutional Criteria

Mr. Trende's simulations did not adequately apply, much less reasonably balance, all of the redistricting criteria that the New York Constitution requires map-drawers to consider, and they therefore tell us little if anything about what an actual map-drawer faithfully applying New York's requirements would have done.

With respect to compactness, there are, in theory, an infinite array of settings that Mr. Trende could have programmed the proposed new Imai algorithm to use,

[3] The Trial Court pointed out that the Assembly's expert, Dr. Michael Barber, generated 50,000 simulated maps in his attempt to replicate Mr. Trende's simulations using the limited information that Mr. Trende provided about his methodology. R18. In an apparent attempt to justify Mr. Trende's inadequate sample size, the Trial Court claimed that Dr. Barber's simulations showed that certain districts were less competitive in a way that favored Democrats. R19. But the record contains no evidence about what Dr. Barber's simulations showed regarding the competitiveness or even the specific partisanship level of any district. All that Dr. Barber described in his report was the number of Democratic-leaning seats in his simulations, which he explained was higher than in the enacted map. R1001-04.

with higher number settings drawing more compact districts, and lower number settings drawing less compact districts. Mr. Trende arbitrarily picked setting "1" for his compactness input. R2582:24-2583:5. He explained during cross-examination that he picked "1" – instead of .25, .5, .75, 2, 5, or any other number – not because he had any basis to think that setting "1" reflected how actual New York map-drawers weigh compactness against other competing redistricting criteria, but rather because the algorithm crashes when any other compactness setting is used. R2583:6-2584:12, R2585:25-2586:3. Instead of balancing compactness against other redistricting criteria the way an actual New York map-drawer is required to do, Mr. Trende's simulations used a blunt and uniform compactness setting because the proposed new algorithm, which is still being developed, tested, and refined, does not work with any other compactness setting.

Similarly, with respect to avoiding county splits, the program Mr. Trende used only permits the simulator to toggle county preservation to "on" or "off." Because there is no easy way to adjust the algorithm's county preservation setting, Mr. Trende simply chose "on." R2594:8-2596:6. This is significant because especially with respect to congressional redistricting, where the federal Constitution allows no population inequality whatsoever, it is impossible to draw a plan that does not split counties. Actual New York map-drawers therefore must *balance* the goal of county preservation with other important considerations (such

as compactness, preserving the cores of prior districts, and maintaining communities of interest). Actual New York map-drawers do not crudely toggle between prioritizing or not prioritizing preserving counties the way Mr. Trende chose to turn the county preservation switch "on" instead of leaving it "off."

With respect to preserving the cores of prior districts, Mr. Trende's reply report states in passing that he supposedly accounted for this important constitutional requirement, but he did not say how. R1043. When asked on cross-examination what core preservation setting he used, he testified that he did not remember. R2588:6-23.

Most importantly, Mr. Trende conceded that he made no effort at all to account for communities of interest. Article III, section 4(c) of the Constitution requires 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. R1043.

Mr. Trende did not deny that identifying and respecting communities of interest is critical when doing so is legally required. The Virginia Supreme Court appointed Mr. Trende and Professor Bernard Grofman to draw Virginia's congressional districts last year, and their report to the Virginia Supreme Court confirms they went to great lengths to identify Virginia's established communities

of interest and to draw lines that respected and maintained those interests. R3213-14 (Exhibit S-2), R2596:19-2598:3, R2599:8-2602:20. Mr. Trende conceded on cross-examination that the Virginia districts "would have come out different" if he and Professor Grofman had not considered and respected communities of interest. R2601:24-2602:8.

Mr. Trende's admitted failure to account for communities of interest in this case is fatal to his methodology. Looking at the upstate region demonstrates why. 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 upstate. They agreed that after eliminating one district from the upstate region as required by the reduction in the State's congressional delegation, 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 third Republican-leaning district along Lake Ontario. Exhibit S-3 shows that the Commission's Plan A and Plan B were substantially identical in how they drew these seven upstate districts, and that the enacted congressional plan hewed closely to the two Commission plans. R3263-66, R2608:1-14, R2609:6-18.

Mr. Trende admitted on cross-examination 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 that these well-established communities of interest (the four upstate urban areas, the Southern Tier, and the North Country) should be maintained. R2603:11-15, R2604:15-2605:1, R2605:18-2606:1. Instead, his simulations started from a "blank page," even upstate. R2606:6-13.

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 were required to approach, and did approach, this redistricting.

Although we cannot look at Mr. Trende's simulations to see if his maps look anything like what a New York map-drawer respecting communities of interest would draw because his simulations are not in the record, we have access to the simulations that Dr. Imai himself ran for New York, using the same algorithm that Mr. Trende used, because Dr. Imai published his simulated maps (which he prepared on his own as an interested academic, not on behalf of any party) on his "ALARM Project" website. Exhibit S-4 shows the three sample simulated maps that Dr. Imai published on his website (the rest can easily be downloaded from his website), and it is clear from these samples that the algorithm drew the upstate

districts in a way that looks nothing like what an actual New York map-drawer would do. R3266. For example, in the first sample 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 would have flipped Representative Elise Stefanik's district from Republican-leaning to Democratic-leaning. *Id.* Mr. Trende admitted on cross-examination that the Imai sample simulated districts reflected in Exhibit S-4 are "not pretty" and even look "crazy." R2614:13-2615:10. He further admitted 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. R2615:11-2616:5.

Petitioners claim that Mr. Trende's simulations show that the Legislature "packed" Republicans into four districts, but this claim stems from the grossly deficient way in which Mr. Trende performed simulations for the upstate region, which the Republican and Democratic commissioners and the Legislature all drew with three heavily Republican districts. Far from "packing" Republicans into upstate districts, the Legislature heeded the strong bipartisan consensus for this region. Implementing this bipartisan consensus about how the seven new upstate districts should be drawn necessarily resulted in placing higher concentrations of Republican and Democratic voters in certain districts than if one started from a

"blank page" as Mr. Trende did. But deferring to a bipartisan consensus regarding established communities of interest is not "packing," even if doing so results in districts that are not particularly competitive. For any court to determine that districts are unconstitutionally "packed," the court must first establish a valid benchmark against which to measure alleged "packing." Mr. Trende's simulations, which entirely ignored the Commission's and the Legislature's identification of upstate communities of interest, come nowhere close to establishing such a benchmark.

The Trial Court acknowledged that "Trende's maps . . . do not include every constitutional consideration." R19. Incredibly, however, the Trial Court *blamed Respondents* for failing to submit simulations of their own that considered communities of interest. R19-20 (observing that "none of Respondents' experts attempted to draw computer generated maps using all the constitutionally required considerations," and "[s]ince no such computer-generated maps were provided to the court the court must use the evidence before it"). It is egregious – and it was outcome-determinative – that the Trial Court improperly reversed the burden of proof in a beyond-a-reasonable-doubt case involving the constitutionality of a statute. Respondents had no burden to do anything in this case, much less to prove Petitioners wrong through computer simulations. The whole point, which the Trial Court clearly did not grasp, is that *it is not possible* to use computer simulations to

divine legislative intent in a state in which map-drawers are required to consider communities of interest. Mr. Trende did not fail to do so because he is lazy. He failed to do so because, as he wrote in his second report and testified at trial, communities of interest are too difficult to code. R1043, R2599:8-14.

Because Mr. Trende could not include communities of interest in his model, and because he admittedly ignored how the Commission drew the upstate districts, the only conclusion that can be drawn from differences between Mr. Trende's simulations and the enacted plan is that Mr. Trende's simulations drew districts in a very different way than the enacted plan, not that there was impermissible partisan intent beyond a reasonable doubt. R1209-10 ¶¶ 41-42, R3033:1-3034:14, R3048:1-22 (analysis by Dr. Tapp of Mr. Trende's failure to account for communities of interest). In fact, Mr. Trende's ensemble is nothing more than an array of unlawful maps.

As discussed below, no court has ever relied on redistricting simulations in a state in which maintaining communities of interest is a constitutional requirement. The fact that no expert was capable of accounting for communities of interest in their simulations here is not a reason why Respondents should lose. It is a principal reason why Petitioners must lose.

2. Mr. Trende's Methodology Is Prone to Serious Redundancy Problems

Dr. Tapp explained in his reports and testimony that Mr. Trende's sample size was far too small to generate reliable results and that Mr. Trende had not performed the necessary validations to ensure that he was generating a representative sample without a high percentage of duplicative maps. R860-61 ¶¶ 55-59, R3035:9-3038:9. Dr. Tapp explained that a primary reason that it is essential to have a sufficiently large sample size and to perform adequate validations is that otherwise, the simulated maps generated by Dr. Imai's proposed new algorithm are likely to be severely duplicative and therefore of no statistically reliable value. R3036:19-3039:19.

In evaluating Mr. Trende's reports, Dr. Tapp was aware from the outset that Dr. Imai's model was prone to redundancy problems, and he immediately observed something very suspicious about the results that Mr. Trende initially reported: the compactness scores of Mr. Trende's simulated Senate maps are not spread across a bell curve as one would expect. Rather, the vast majority of Mr. Trende's 5,000 simulated Senate maps were clustered around one of two compactness scores. R1207-08 ¶¶ 34-36, R3039:21-3043:15. 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 often creates large numbers of simulated maps that are actually

or substantially identical, Mr. Trende's compactness scores indicated that a fatal redundancy problem infected his 5,000 simulations, thus rendering them unreliable. *Id.*

Critically, none of Mr. Trende's simulated maps is in the record, and thus nobody – not Dr. Tapp, not Respondents' counsel, not the Trial Court, and not this Court – can see what Mr. Trende's simulated maps actually look like. Dr. Tapp therefore attempted to replicate Mr. Trende's methodology and to run 5,000 simulations using the same parameters that Mr. Trende used to test his suspicion about the vulnerability of the algorithm to redundancy. In Dr. Tapp's replicated Senate simulations, 3,219 of the 5,000 simulations drew 31 out of 63 Senate districts identically. This level of redundancy rendered the simulated Senate maps statistically meaningless. R1210-14 ¶¶ 44-49, R3043:19-3046:14.

Dr. Tapp's redundancy concerns were by no means limited to Mr. Trende's Senate simulations. Mr. Trende used the same methodology for the congressional plan as he did for the Senate plan, and the underlying flaws with that model – which Dr. Tapp described in both of his affidavits and in his trial testimony – are just as likely to have caused redundancy in the congressional simulations as they did in the Senate simulations. R858-61 (First Tapp Aff. ¶¶ 50-59), R3021:4-3048:22. Indeed, Dr. Tapp replicated both Mr. Trende's Senate and congressional

simulations, and he found significant evidence of redundancy problems in Mr. Trende's congressional ensemble as well. R1210-11 ¶¶ 44-45 and Table 1.[4]

Significantly, immediately after Mr. Trende testified in this case, he testified about computer simulations he ran for the second time in a redistricting case in Maryland. In the Maryland case, Mr. Trende ran 750,000 simulations to simulate an eight-district congressional plan, even though he chose to run only 5,000 or 10,000 simulations to simulate a 26-district congressional plan in New York.

As the Maryland court explained, after Mr. Trende ran his 750,000 simulations (three tranches of 250,000) in that case, he examined all of his simulated maps to weed out redundancies, and he found – just as Dr. Tapp warned would be the case for Mr. Trende's New York simulations – that the majority of his simulated maps in Maryland were fatally redundant. *See Szeliga v. Lamone*, Nos. C-02-CV-21-001773, -001816, slip op. at 63 ¶ 99 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022), R2394 ("In each of Mr. Trende's [three] simulations he used 250,000 maps . . . ; he discarded duplicative maps and arrived at between 30,000 and 90,000 maps to be sampled for each simulation."). Mr. Trende testified in this

[4] The Trial Court held cryptically that it would exclude any portions of Dr. Tapp's second affidavit that did not respond to "new material" in Mr. Trende's reply report, R2976:16-20, but never identified any such portions. In any event, the entirety of Dr. Tapp's discussion of the congressional map in his second affidavit responded to Mr. Trende's reply arguments, and the Court appears to have considered all of Dr. Tapp's testimony in rendering its decision. R18-20, R3017:4-3019:11.

case 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.[5] R2615:11-17.

The Trial Court barely grappled with this issue, and what it wrote makes no sense. Instead of taking Mr. Trende to task for failing to cull duplicate maps out of his New York ensemble the way he did in Maryland, the Trial Court mused that if Mr. Trende had done in New York what he did in Maryland and been forced to throw out three quarters of his maps, then he would have 2,500 maps left out of 10,000, and those 2,500 culled maps supposedly would be "the worst" maps, rendering the enacted congressional map "the worst of the worst." R18. That unsupported, off-the-cuff assertion is not a cogent basis to invalidate a duly enacted statute as unconstitutional because the assumption that any non-duplicative maps would be worse (or better) for the Legislature than other maps is entirely

[5] Mr. Trende's expert report in the Maryland case is dated February 28, 2022, two weeks before he testified in this case. Respondents' counsel was unaware of Mr. Trende's Maryland report, which Petitioners never disclosed, until the Maryland court issued its opinion on March 25, 2022, after the trial in this case ended. But when Mr. Trende testified in this case, *he already knew* that he had run 75 times as many simulations in Maryland as he ran in New York and that he had encountered huge redundancy problems. At trial, counsel for Respondents questioned Mr. Trende about the redundancy issue that Dr. Tapp had raised in both of his affidavits, unaware of what had happened in Maryland. Mr. Trende gave troublingly incomplete answers, choosing not to acknowledge the problems he had encountered in Maryland even though those problems were directly implicated by the questions he was asked. R2586:11-2587:7.

arbitrary and speculative. If a large percentage of Mr. Trende's simulated New York maps were duplicative, those maps could have skewed Mr. Trende's analysis disproportionately in either direction. There is no basis to conclude that the remaining maps would constitute a representative sample from which any reliable conclusions could be drawn, much less that any such potential conclusions would support the Petitioners' partisan gerrymandering claim.

3. Petitioners' Failure to Put Mr. Trende's Simulated Maps Into the Record Is Fatal to Their Claim

The significance of the fact that Mr. Trende's dubious simulated maps are not in the record in this case cannot be overstated. There is a strong basis to believe that many of Mr. Trende's maps are substantially or even entirely duplicative, and there is a strong basis to believe that some, most, or even all of them drew "crazy" districts that no actual map-drawer would have drawn. Yet nobody can look at Mr. Trende's simulated maps to explore either of those serious issues. Mr. Trende admits that even he did not look at them (unlike in Maryland). Respondents' expert, Dr. Ansolabehere, testified that this was highly 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. R2880:25-2881:24.

We respectfully ask: How can any court find a redistricting plan unconstitutional beyond a reasonable doubt based on a comparison of the enacted plan to an ensemble of simulated plans without looking at the simulated plans, especially when the court knows that the simulated plans did not account for all constitutional criteria and are vulnerable to redundancy issues? Why are these simulated maps not in the record, and how does their absence not create reasonable doubt regarding the reliability of Mr. Trende's conclusions? The Trial Court's Order did not even acknowledge this plainly fatal failure of proof.

4. The Trial Court's Reliance on Mr. Trende's Simulations Is Unprecedented

Petitioners pretend that it is "routine" for courts to use computer simulations to strike down redistricting plans, but for at least two reasons, the few other courts that have relied on simulations have done so under very different circumstances. The Trial Court relied on simulations in this case in an unprecedented manner.

First, no court has ever used computer simulations in a state in which maintaining communities of interest is a mandatory redistricting factor. The Maryland constitution requires contiguity, compactness, population equality, and regard for "natural boundaries and the boundaries of political subdivisions," but it says nothing about communities of interest. *See Szeliga*, slip op. at 2 (citing Md. Const. art. III, § 4), R2333. In Ohio, the constitutional redistricting criteria include population equality, contiguity, compactness, avoiding splitting municipalities, and

proportionality, but there is no communities of interest requirement. *See League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, ___ N.E.3d___, 2022 WL 110261, at *2 (Ohio 2022) (citing Ohio Const., art. XIX). And in Pennsylvania, the "essential" criteria are "compactness, contiguity, minimization of the division of political subdivisions, and . . . population equality"; all other factors are "wholly subordinate." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 817 (Pa. 2018).

As Mr. Trende admitted, communities of interest "are a notoriously difficult concept to nail down" and therefore are "difficult to encode." R1043. There is no reason to think the Maryland, Ohio, or Pennsylvania courts would have relied on redistricting simulations if the mandatory redistricting criteria in those states had included communities of interest.

Second, no court has ever relied *exclusively* on simulation evidence to strike down a redistricting plan without additional compelling evidence of unfairness such as partisan symmetry analysis or obvious problems with specific district lines. In Maryland, the court focused primarily on evidence of extreme and inexplicable non-compactness and gratuitous county splits, and used simulation evidence secondarily to confirm that the non-compactness and county splitting was unnecessary. *Szeliga*, slip op. at 59-62, 89-93, R2390-2393, R2420-2424. In Ohio, the court relied primarily on the testimony of so-called "partisan symmetry"

experts who used well-established statistical methodologies that have nothing to do with the novel simulations approach to examine the overall fairness of the Ohio map, and the court referred to simulations only secondarily to confirm its conclusion that the Ohio map was unfair. 2022 WL 110261, at *25-26. And in Pennsylvania, in addition to considering two simulation experts (one of whom conducted *one trillion* simulations), the court relied on extensive expert analysis from political scientists regarding the partisan bias of the enacted plan. 178 A.3d at 775-79.

B. The Record Confirms that the Congressional Plan Is Fair and, If Anything, Has a Slight Republican Lean

Dr. Katz, the esteemed Caltech professor who has testified about partisan fairness in dozens of cases, mostly on behalf of Republicans, explained that in a winner-take-all single-member-district system, the expected outcomes are not proportional to the partisan composition of the electorate. R1228, R3096:15-22. Dr. Katz explained that in a state in which one party had 65% of the vote share, if the population were evenly dispersed throughout the state, that party would be expected to win *every district*. R3096:22-3097:3. Dr. Katz explained that 65% 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 roughly two-thirds of the vote, significantly more than two-thirds of the seats would be expected to be

Democratic-leaning. R3097:4-3098:6. Indeed, it would not be atypical to expect 85% to 90% of seats to be Democratic-leaning (because for each 1% vote share above 50% the majority party attains, the majority party typically sees a 2% increase in seat share; so 69% of the statewide vote share roughly would be expected to lead to an 88% seat share). R1228, R3098:7-3099:11.

Dr. Katz performed a rigorous statistical analysis, analyzing all statewide and legislative elections for the last several election cycles. R1231-1232, R3099:15-3105:16. Using an established forecasting model, Dr. Katz concluded that there was no statistically significant evidence of partisan bias in either the congressional or Senate plans, and that if anything both plans were slightly biased in favor of the Republicans. R1226, R1233-52, R3116:5-3119:11, R3126:4-22, R3127:18-3131:18.

The Trial Court refused to consider Dr. Katz's finding that there is no partisan bias in the congressional plan, purportedly on the basis that his expert report was filed together with Respondents' Answer to the Amended Petition, rather than together with their Answer to the original Petition. R3014:13-16. Ducking Dr. Katz's conclusions about the fairness of the congressional plan was wrong, especially in a case in which the standard is proof beyond a reasonable doubt. It makes no sense that the Trial Court considered Dr. Katz's findings and conclusions with respect to the Senate plan but refused to consider his identical

findings and conclusions with respect to the congressional plan. Dr. Katz used the exact same methodology to evaluate the Senate and congressional plans, he presented his results in the same report, and Petitioners were afforded the same opportunity to cross-examine him about his methodology and conclusions regarding both plans. R1231-52. Given the highly compressed time period in which the special proceeding was conducted, and clear interest in having all relevant evidence available to decide whether a legislative enactment is unconstitutional, the Trial Court should not have ignored Dr. Katz's findings and conclusions about the congressional plan.

In any event, Mr. Trende's simulations confirm Dr. Katz's findings and conclusions, as shown by the "dot plot" graph that is the centerpiece of Mr. Trende's analysis. R245. Mr. Trende "calculate[d]" the "partisanship" (his words), R242, R2624:10-18, of each of the districts in each of his simulated maps using a standard index of results in statewide races, and he reported the partisanship of each simulated district in this illustration. The colored stripes show the range of outcomes for each of Mr. Trende's simulations, ordering them from the most Republican district to the most Democratic district. This graph clearly shows that in substantially all of his simulations, the computer drew no more than four Republican-leaning districts (because the fifth through twenty-sixth districts come out blue, or Democratic-leaning, every time), and in the great majority of his

simulations, the computer drew only three Republican-leaning districts (because the fourth district came out blue, or Democratic-leaning, far more than half the time). R245; *see* R1200 (histogram created by Dr. Tapp from Mr. Trende's results). As Dr. Katz testified, if anything, the congressional plan has a slight Republican lean. R1246-47, R1250-52.[6]

The Trial Court acknowledged that there were more Democratic-leaning districts in Mr. Trende's simulations than in the enacted plan, but apparently concluded that analyzing which party won a majority of a district's past statewide vote share is an improper way to measure a district's partisan lean. R19. But that is precisely the benchmark that Mr. Trende chose to use. R245 (vertical axis labeled "Percent Democratic" and dots colored red and blue based on average of past statewide elections being more or less than 50% Democratic). The record is replete with evidence that Mr. Trende's initial methodology for calculating the partisanship of his simulated districts has been applied in other cases, R2624:14-2625:4, R2867:1-22, R3062:22-3063:6, and Mr. Trende testified that following this standard methodology was necessary "to remove my discretion," R242.

[6] The Trial Court stated that "it strains credulity that a Democrat Assembly, Democrat Senate, and Democrat Governor would knowingly pass maps favoring Republicans." R18. That misses the point. The point is not that the Legislature went out of its way to favor Republicans. The point is that the Legislature drew a fair map that resulted in far more Democratic-leaning districts than Republican-leaning districts because the political demographics of the State make that unavoidable.

But after Respondents observed that the results of the simulations in Mr. Trende's first report were devastating to Petitioners' case, Mr. Trende tried to move the goalposts. He claimed for the first time in his reply report that any district in which past statewide election results showed a Democratic vote share of less than 53% should actually be considered a Republican-leaning district. R1034-35. That is nonsense. The "analysis" Mr. Trende used to reach that transparently self-serving conclusion relied exclusively on the outcomes of past congressional elections. But as the other experts testified, and as Mr. Trende conceded on cross-examination, past congressional election results are uniformly understood to be an unreliable basis to calculate the partisanship of districts because the raw election results do not account for incumbency, scandals, and other district-specific variables. R1203 ¶ 21, R2626:7-14, R2885:10-2886:4. Mr. Trende acknowledged on cross-examination that, for these reasons, the standard practice – indeed, the uniform and only practice – in simulation cases is to calculate the partisanship of the simulated and enacted districts by using an index of past statewide election results, just as Mr. Trende did in his initial report. R2626:21-2628:18.

Attempting to end run around this uniform practice, Mr. Trende's reply report offered a crude regression that attempted to compare past statewide results to past congressional results, R1035, but he failed to account for incumbency. R2639:6-8. Dr. Ansolabehere and Dr. Tapp – esteemed professors with decades of

experience performing such calculations, unlike Mr. Trende – explained that no competent expert would run such a simple regression without controlling for incumbency, R2887:3-10, R3064:7-13, and Mr. Trende admitted on cross-examination that no expert has ever done so in any prior case, R2641:14-17.

The Trial Court's treatment of this issue is profoundly confused. Not only did the Trial Court blindly accept Mr. Trende's demonstrably baseless "53% parity" threshold, it inexplicably rounded it up by an additional two percent to "55%," on its own, in a way that is not even arguably supported by the record and that is contrary to any contention that Petitioners or Mr. Trende ever made in this case. R19 ("[B]oth Trende and Respondents' expert, Jonathan Katz, testified that historically the Republicans win a district up to 52% Democrat and that incumbent Republicans enjoy an additional 3%, which means that the districts would have to be at least 55% Democrats for the Democrats actually to win."). That wildly inaccurate description of the arguments and evidence presented by Petitioners below makes clear that Petitioners' hand-picked judge came nowhere close to getting it right or even understanding the issues. In fact, the Trial Court apparently could not even tell Dr. Tapp and Dr. Katz apart, as each of the Trial Court's mistaken references to "Dr. Katz" in the Order is actually a reference to Dr. Tapp. R19-20. The Trial Court's analysis is that deeply flawed.

C. Mr. LaVigna's Repeated Insistence that There Supposedly Is "No Coherent Explanation" for Certain Congressional Districts Is Belied By the Evidence in the Record

That leaves Petitioners' other "expert," a Republican pollster who has never served as an expert in any other case. R285-86, R2676:1-2676:20. Notably, Petitioners never attempted to qualify Mr. LaVigna as an expert in any specific area, R2679:3-5, and his testimony showed why: he has no experience with redistricting and was unfamiliar even with the constitutional requirements. When tested, Mr. LaVigna's oft-repeated trope that no explanation other than partisanship could explain the enacted plans fell apart at the seams. He was wrong about critical facts and failed to consider – or even understand – the constitutional principles that he falsely insisted had been ignored in the enacted plans.

Mr. LaVigna admitted repeatedly that he lacked the foundation to reach informed judgments about whether specific districts had been drawn for valid reasons. For example, he did not consider racial and language minority voting rights, despite the commands to do so in the federal Voting Rights Act and the 2014 amendments. R2766:4-9. Mr. LaVigna's analysis of the congressional plan never once mentioned population shifts or population equality, even though New York lost a congressional seat and the entire map therefore had to be substantially reconfigured. R2724:15-22. He admitted that he did not even consider either proposed Commission plan and therefore was not aware of the bipartisan

consensus regarding the upstate districts and how closely the enacted plan hewed to that consensus. R2792:16-2793:3.

Beyond these and other glaring global omissions, Mr. LaVigna also made numerous mistakes about specific districts or regions that shattered his credibility and the reliability of his analysis. With respect to Districts 1 and 2 on Long Island, he admitted that the "neighboring towns and villages" he described as having been suspiciously divided across Districts 1 and 2, R1058, in fact do not "neighbor" one another at all but are spread widely across Suffolk County. R2775:1-2776:19. Mr. LaVigna also was wrong about the district in which certain communities, such as East Islip, were located. R2775:6-11.

Mr. LaVigna did not even attempt to rebut the neutral explanations for congressional districts set forth in the counterstatement of facts submitted by the Senate Majority Leader. R817-42 ¶¶ 227-459, R1119-46 ¶¶ 275-507. For example, Mr. LaVigna criticized District 3, which unites communities along the Sound Shore in Long Island, New York City, and Westchester. R2730:3-10. But he ignored that District 3 had to shift west to add necessary additional population, and that it could not have shifted to the south, nor could it have shifted into central Queens, nor could it have shifted substantially into the Bronx, without implicating potentially significant minority voting strength issues. R1126-29 ¶¶ 341-65, R2910:13-2911:23.

Mr. LaVigna's criticisms of the Brooklyn districts rested on the provably false assertion that "in CD10, the Legislature divided an established Asian community by moving half of it into Congressional District 11." R1058-59. In fact, that is the opposite of what happened. As Mr. LaVigna was forced to concede on the stand, the 2012 plan had cracked the Chinese-American community between Districts 10 and 11, and the 2022 plan unites that community of interest by joining Chinese-Americans from former District 11 with the Chinatown neighborhoods in Brooklyn and Manhattan in District 10. R2782:4-2783:4.

Mr. LaVigna falsely claimed that Districts 8-11 "cracked" Russian voters, R1058, but he ignored that vibrant Russian neighborhoods in Brooklyn – including Sheepshead Bay, Brighton Beach, Gravesend, and Manhattan Beach – had been divided under the 2012 plan and are united in new District 8. R1133 ¶ 393.

Mr. LaVigna's criticisms of Districts 16 and 18 in the Hudson Valley ignore the substantial population pressure from multiple directions that required significant changes to these districts, R2890:24-2891:6, R2892:9-12, and the commonalities between towns that the enacted plan united on either side of the Westchester/Putnam border, R1139 ¶¶ 444-48. He asserted baselessly that Orthodox Jewish communities in Districts 17 and 18 were "cracked," ignoring that the Jewish communities in Rockland County remain united in the same district as

under the 2012 plan, and that the enacted plan joins those communities with other growing Jewish communities in Sullivan County. R1140 ¶¶ 451-52.

Mr. LaVigna's analysis of the upstate region was preposterous. He concluded that certain new districts differed from prior districts in ways that he claimed could only be explained by partisanship, but he failed to account for New York's loss of a congressional district and the resulting change in district numbers, such that his analysis 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 conceded on cross-examination that these comparisons in his reports were flatly wrong. R2789:5-20. Mr. LaVigna also ignored that both Commission plans included part of Erie County in District 23 because of population equality concerns and that both plans united Onondaga and Tompkins Counties in District 22 because they share common interests due to being the homes of similar institutions of higher education. R2793:4-17.

Mr. LaVigna's many errors rendered his reports and testimony worthless, and his failure to dispute the neutral explanations for districts contained in the Senate Majority's original Answer and Verified Answer to the Amended Petition leaves that evidence unrebutted.

Like Mr. LaVigna, the Trial Court never acknowledged or accounted for Respondents' sworn counterstatement of facts. Remarkably, in striking down the enacted congressional plan beyond a reasonable doubt, the Trial Court never once even mentioned the 227 paragraphs of sworn testimony submitted by the Senate Majority setting forth neutral, non-partisan explanations for the enacted districts. The Trial Court's failure even to consider Respondents' evidence confirms the essence of its error: instead of evaluating the objective features of the enacted plan and assessing each challenged district, the Trial Court hung its hat entirely on an unreliable comparison of the enacted districts with an ensemble of unlawful simulated districts that is not even available to be reviewed. The Trial Court's deeply flawed approach provided no basis to throw out the enacted congressional plan under any standard, let alone the highest standard known in the law.

III. PETITIONERS LACK STANDING

New York courts have strict standing requirements. "[A] party challenging governmental action must meet the threshold burden of establishing that it has suffered an 'injury in fact' and that the injury it asserts 'fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [government] has acted.'" *Matter of Mental Hygiene Legal Serv. v. Daniels*, 33 N.Y.3d 44, 50 (2019) (citation omitted). The Court of Appeals has expressly endorsed both the constitutional "injury in fact" and the prudential "zone

of interests" rules developed by the federal courts. *See Soc'y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 771-74 (1991).

In the redistricting context, the United States Supreme Court has held that because gerrymandering claims are by definition "district specific," there is no standing unless the allegedly aggrieved voter pleads and proves that he or she lives in the district being challenged. *Gill v. Whitford*, 138 S. Ct. 1916, 1931-34 (2018); *accord Bay Ridge Cmty. Council v. Carey*, 115 Misc. 2d 433, 443 (N.Y. Sup. Ct. Kings Cnty. 1982) (holding that petitioner who did not live in district at issue had no standing to assert gerrymandering claim), *aff'd*, 103 A.D.2d 280 (2d Dep't 1984), *aff'd*, 66 N.Y.2d 657 (1985).

In this case, the Petitioners live in Districts 10, 11, 16, 17, 18, 19, 22, and 23. No Petitioner lives in Districts 1-9, 12-15, 20-21, or 24-26. This Court therefore cannot address Petitioners' challenges to any of those districts, either individually or through an unauthorized attack on the redistricting plan as a whole.

Moreover, Petitioners brought this case in Steuben County even though the record contains no evidence that any Petitioner resides in that County. The unverified Amended Petition alleges that Petitioner Harkenrider resides in Steuben County, but Petitioners never submitted an affidavit or other evidence supporting that unsworn allegation, and the Supreme Court has held that such unproven allegations are insufficient. *Gill*, 138 S. Ct. at 1922. The fact that there is no proof

in the record that any Petitioner lives in Steuben County makes it even more eyebrow-raising that Petitioners opportunistically chose that venue.

Consider, for example, the obvious standing problem in this case relating to any Long Island congressional district. No Petitioner lives anywhere close to Long Island, and Steuben County is well more than halfway (nearly three quarters of the way) across the State. There was no basis for the Steuben County Supreme Court to adjudicate anything about any Long Island congressional districts because no Petitioner is in any way injured by the configuration of any of those districts.

To be sure, article III, section 5 of the Constitution provides that redistricting plans may be challenged "at the suit of any citizen." But even if there is constitutional jurisdiction, *Society of Plastics* makes clear that courts nevertheless must adhere, additionally, to prudential "rules of self-restraint" that emanate from the "general prohibition on one litigant raising the legal rights of another" and the "ban on adjudication of generalized grievances." 77 N.Y.2d at 773. As *Society of Plastics* held, to avoid hearing generalized grievances that are untethered to specific rights and injuries, a court may not adjudicate a claim unless the plaintiff is within the "zone of interests" of the right being asserted, even if there is constitutional standing. *Id*.

That prudential admonition squarely applies here: voters who live nowhere close to Long Island ran to Steuben County complaining about the voting rights of

people living on Long Island. That the Trial Court entertained those claims is the epitome of judicial overreach because no Petitioner was remotely within the "zone of interests" of the right at issue.

IV. THE COURT SHOULD NOT INTERFERE WITH THE 2022 ELECTION

The foregoing analysis confirms that none of the redistricting plans at issue is constitutionally infirm. If the Court finds any infirmities, however, we respectfully submit that any attempt to draw and implement new district lines in time for the 2022 election would create confusion and disrupt the orderly administration of the election, and that the appropriate course would be to use the enacted plans in 2022.

The Supreme Court has repeatedly admonished that courts should not enjoin state election laws in the period close to an election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam). As Justice Kavanaugh explained earlier this year:

> When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others.

Merrill v. Milligan, 142 S. Ct. 879, 880-81 (Feb. 7, 2022) (Kavanaugh, J., concurring).

Although the *Purcell* doctrine is aimed primarily at federal courts, the common-sense principle that courts must not sow confusion by tinkering with

election rules during an election cycle has been widely embraced by state courts as well. *See In re Khanoyan*, 637 S.W.3d 762 (Tex. 2022); *Alliance for Retired Americans v. Secretary of State*, 240 A.3d 45, 53-54 (Me. 2020); *Singh v. Murphy*, Doc. No. A-0323-20T4, 2020 WL 6154223, at *14-15 (N.J. App. Div. Oct. 21, 2020); *League of United Latin American Citizens of Iowa v. Pate*, 950 N.W.2d 204, 215-16 (Iowa 2020); *In re Hotze*, 627 S.W.3d 642, 645-46 (Tex. 2020); *Ohio Democratic Party v. LaRose*, 159 N.E.3d 852, 879 (Ohio 2020); *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 387 (Fl. 2015); *Dean v. Jepsen*, 51 Conn. L. Rptr. 111, 2010 WL 4723433, at *7-8 (Conn. Super. Ct. Nov. 3, 2010); *Chicago Bar Ass'n v. White*, 386 Ill. App. 3d 955, 961 (2008); *Quinn v. Cuomo*, 69 Misc. 3d 171, 177-78 (N.Y. Sup. Ct. Queens Cnty. 2020).

New York courts have made clear in the reapportionment context that even when a plan may be unconstitutional, a fast-approaching election should nevertheless proceed under the plan. *See Honig v. Bd. of Sup'rs of Rensselaer Cnty.*, 31 A.D.2d 989, 989 (3d Dep't 1969)*, aff'd* 24 N.Y.2d 861 (1969); *Duquette v. Bd. of Sup'rs of Franklin Cnty.*, 32 A.D.2d 706 (3d Dep't 1969); *Pokorny v. Bd. of Sup'rs. of Chenango Cnty.*, 59 Misc. 2d 929, 934 (N.Y. Sup. Ct. Chenango Cnty. 1969). Courts have refused to implement the extreme remedy Petitioners seek. *See, e.g., Burns v. Flynn,* 155 Misc. 742, 744 (N.Y. Sup. Ct. Albany Cnty. 1935), *aff'd*, 245 A.D. 799 (3d Dep't 1935), *aff'd*, 268 N.Y. 601 (1935).

These cases strongly counsel against a dramatic disruption of an election process that already is well underway.

CONCLUSION

For the foregoing reasons, the Trial Court's Order should be vacated, and the Amended Petition should be dismissed.

Dated: April 13, 2022
New York, New York

CUTI HECKER WANG LLP

By: _____

Eric Hecker
John R. Cuti
Alexander Goldenberg
Alice G. Reiter
Daniel Mullkoff
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600
ehecker@chwllp.com
jcuti@chwllp.com
agoldenberg@chwllp.com
areiter@chwllp.com
dmullkoff@chwllp.com

Attorneys for Senate Majority Leader Andrea Stewart-Cousins

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Point size:	14
Line spacing:	Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of the pages containing the table of contents, table of citations, proof of service and this Statement is 13,972.

Dated: April 13, 2022
New York, New York

CUTI HECKER WANG LLP

By: _____

Eric Hecker
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600
ehecker@chwllp.com

Attorneys for Senate Majority Leader Andrea Stewart-Cousins