*To be Argued by:*
CRAIG R. BUCKI
*(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, 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.*

**Docket No.: CAE 22-00506**

**BRIEF FOR RESPONDENT-APPELLANT SPEAKER OF THE ASSEMBLY CARL HEASTIE**

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## QUESTIONS PRESENTED, AND ANSWERS OF THE TRIAL COURT

1. Q. Do Petitioners have standing to challenge the constitutionality of all of New York's enacted 2022 Congressional district boundaries, including boundaries of districts where no Petitioner lives?

A. The Trial Court incorrectly answered, "Yes." R. 9.

2. Q. Did the New York State Constitution prevent the Legislature, beyond a reasonable doubt, from enacting a Congressional district map, even though the State would have been left without a valid district map absent legislative action?

A. The Trial Court incorrectly answered, "Yes." R. 16.

3. Q. Did Petitioners prove, beyond a reasonable doubt, that the Legislature drew the enacted 2022 Congressional district map with unconstitutional partisan intent?

A. The Trial Court incorrectly answered, "Yes." R. 20.

4. Q. Did the Trial Court err by invalidating the enacted 2022 Assembly district map (R. 24), which no one challenged and which Petitioners admit received bipartisan support?

A. Yes.

5. Q. Did the Trial Court err by requiring remedial maps to receive bipartisan support (R. 24), even though the State Constitution guarantees the Legislature a "full and reasonable" opportunity to enact remedial maps, and even though the State Constitution establishes voting rules for the enactment of district maps without mentioning party affiliation?

A. Yes.

6. Q. Should implementation of the Legislature's Congressional map be enjoined for the 2022 election cycle — which began over a month ago — until a remedial map, if any, would be finalized?

A. The Trial Court incorrectly answered, "Yes." R. 24.

## PRELIMINARY STATEMENT

In February 2022, the Legislature enacted a redistricting map that established the boundaries of New York's 26 Congressional districts for the next ten years. Petitioners sued, claiming the map is both procedurally and substantively unconstitutional. The Steuben County Supreme Court (Hon. Patrick F. McAllister, A.J.S.C.) agreed and enjoined use of the map for this year's elections. It went a step further and also invalidated the Legislature's Assembly redistricting map, which no one challenged. This misguided, overreaching decision should be reversed for three reasons.

First, the Trial Court erred on the law. An amendment to the State Constitution, ratified in 2014, created an Independent Redistricting Commission (the "Commission"). The amendment required the Commission to submit up to two rounds of proposed district maps for the Legislature's consideration. If the Legislature rejected both rounds of maps, it was free to enact maps of its own. But the Commission failed to agree on proposed maps. Rather than sit on its hands while the 2022 elections drew near, the Legislature averted a Constitutional crisis by doing what it had done for centuries, and what it could have done even if the Commission had fulfilled its mandate: it enacted a Congressional map. Yet the Trial Court held the Legislature lacked authority to do so. That determination is wrong, and should be reversed.

Second, the Trial Court erred on the facts. Petitioners argued the Legislature enacted the Congressional map with an unconstitutional intent to benefit Democrats. They rested their case on the statistical analysis of one person: Sean Trende. But Mr. Trende's analysis was riddled with problems — including his reliance on an unproven methodology, his failure to program redistricting factors required by the State Constitution into his algorithm, and his decision to produce a sample of random maps that was 75 times smaller than the sample he produced for redistricting litigation in another State. What's more, Mr. Trende's results suggest the enacted map produced more Republican-leaning districts than a random map would have produced. Nevertheless, the Trial Court somehow found in Petitioners' favor. This determination should be reversed as well.

These first two errors would have been bad enough in a preponderance-of-the-evidence case. But to strike down a redistricting map, a court must find unconstitutionality beyond a reasonable doubt. Petitioners here came nowhere near carrying this heavy burden.

The Trial Court's third reversible error concerns the remedy it imposed (which should be unnecessary anyway). It required the Legislature to enact "bipartisanly supported" remedial maps, or else an unknown "neutral expert" of the Trial Court's choosing will draw the maps instead. R. 24. The Trial Court also held that New York State cannot use the maps the Legislature enacted in

February for the 2022 election cycle that has already begun. But the unprecedented bipartisanship requirement, which the Trial Court invented on its own, deprives the Legislature of its Constitutional right to enact remedial maps. Slamming the brakes on elections pursuant to the Legislature's enacted redistricting maps will produce chaos and voter confusion. Striking down the entire Congressional map — even though Petitioners live in only a handful of districts, and even though Republicans and Democrats agreed on numerous aspects of the map — was unwarranted. And invalidating the Assembly map — which no one challenged, and which Petitioners admit received bipartisan support — was baseless.

In sum, the Trial Court's decision was wrong on the law, the facts, and the remedy. Should it be allowed to stand, the consequences will be dire — both for this year's elections and for the Legislature's centuries-long right to enact district maps. This Court should reverse.

## STATEMENT OF FACTS

### A. The Legislature enacts, and voters ratify, the 2014 Constitutional amendments

Every ten years, the New York State Legislature enacts legislative-district maps for the Assembly, State Senate, and Congress. This decennial redistricting process is necessary because of population changes recorded by each

Federal census. Redistricting must comply with requirements imposed by the Federal Constitution, the State Constitution, and the Voting Rights Act.

In 2012 and 2013, the State Legislature enacted Constitutional amendments that voters ratified in 2014. The amendments affected the redistricting process in three main ways.

First, they established criteria governing how district lines are drawn. N.Y. CONST. art. III, § 4(c). For instance, the amendments provide redistricting must not abridge rights of racial and language minorities. *Id.* § 4(c)(1). To the extent possible, redistricting must maintain cores of existing districts, unite communities of interest, and avoid splitting counties and municipalities. *Id.* § 4(c)(5). Further, legislative districts must not be drawn "to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." *Id.*

Second, the 2014 amendments created an Independent Redistricting Commission ("Commission"). N.Y. CONST. art. III, § 5-b. The Commission has ten members: four chosen by Republicans, four chosen by Democrats, and two chosen by those eight members. *Id.* § 5-b(a). The Commission's job is to hold public meetings across the State and to propose districts for the Assembly, State Senate, and Congress. N.Y. CONST. art III, §§ 4, 5-b.

Third, the amendments established a process and timeline for enacting legislative-district maps:

- The Commission must hold public meetings, publish draft maps and supporting data, and then submit proposed maps to the Legislature. *Id.* §§ 4(b), (c). The proposed maps are due by January 15 of the relevant year. *Id.* § 4(b).

- The Legislature must vote to accept or reject the Commission's proposed maps, without amendment. *Id.*

- If the Legislature rejects the proposed maps, it must notify the Commission of the rejection, and the Commission must then draft a second set of proposed maps. *Id.* The second set of maps is due within 15 days or on February 28, whichever is earlier. *Id.*

- The Legislature must vote to accept or reject the second set of Commission maps, without amendment. *Id.*

- If the Legislature rejects the second set of Commission maps, the Legislature must draft and enact its own maps, "with any amendments each house of the [L]egislature deems necessary." *Id.*

## B. Republicans deny the Commission a quorum, the Commission fails to fulfill its Constitutional mandate, and the Legislature enacts district maps

The first redistricting subject to the 2014 amendments occurred in response to the 2020 census. Starting in July 2021, after the Commission's members were appointed, the Commission held 24 public meetings throughout the State. R. 1106. But the Commission failed to agree on a single set of proposed maps, so it gave the Legislature two, competing sets of maps on January 3, 2022. R. 1107-08. The Legislature rejected both sets, and notified the Commission on

January 10, 2022. R. 1108. The second set of Commission maps was due by January 25. N.Y. CONST. art. III, § 4(b).

When the January 25 deadline was near, Democratic Commissioners tried convening a meeting of the full Commission to vote on maps. R. 1108. But the four Republican members refused to meet, denying the Commission a quorum. *Id.*; *see also* N.Y. CONST. art. III, § 5-b(f) (providing seven members constitutes a quorum for the Commission, which consists of ten total members). Consequently, the Commission failed to submit a second set of Assembly, State Senate, and Congressional maps, despite its Constitutional obligation to do so.

Months earlier, in June 2021, the Assembly and State Senate had passed Chapter 633 of the Laws of 2021 (the "2021 Statute," which the Governor later approved) that addressed this scenario. The 2021 Statute provided that, if the Commission failed to "vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan," the Legislature could enact its own maps "with any amendments each house deem[ed] necessary." The same provision was included in a proposed constitutional amendment that appeared on

the ballot in the November 2021 general election. That proposed amendment, which contained 11 other provisions, was not ratified.[1,2]

In early February 2022 — about a week after the Commission failed to submit a second set of maps — the Legislature drew and enacted district maps for the Assembly, State Senate, and Congress.

### C. The 2022 election cycle begins, and Petitioners commence this special proceeding to challenge the Congressional and State Senate maps

Once the maps were enacted, New York's county boards of elections began preparing for this year's primary and general statewide elections. R. 2321. According to Thomas Connolly, Director of Operations for the State Board of Elections, the new district boundaries were entered into voter-registration systems "so that New York's 12,982,819 registered voters would be assigned to their correct districts. This is necessary to create poll books for elections, allow voters to receive the correct absentee ballots and to provide data for candidates …." *Id.*

Around the same time — on February 3, 2022 — Petitioners commenced this special proceeding in Steuben County Supreme Court (the "Trial Court"). They first filed an unverified petition seeking to invalidate the

[1] New York State Board of Elections, *2021 Statewide Ballot Proposals: Ballot Proposal 1*, https://www.elections.ny.gov/2021BallotProposals.html (last accessed Apr. 12, 2022).

[2] New York State Board of Elections, *2021 Election Results*, https://www.elections.ny.gov/2021ElectionResults.html (last accessed Apr. 12, 2022).

Congressional map. R. 51-117. Later, they filed an unverified Amended Petition that also challenged the State Senate map, but not the Assembly map. R. 299-381. Both unverified petitions named several Respondents, including Governor Kathy Hochul, Senate Majority Leader Andrea Stewart-Cousins, and Assembly Speaker Carl Heastie. R. 51-117, 299-381. Upon commencing the proceeding, Petitioners pre-printed on their proposed Order to Show Cause the name of Justice Patrick F. McAllister, who indeed would be assigned to hear the case. R. 41.

Petitioners challenged the Congressional and State Senate maps on procedural and substantive grounds. Specifically, they argued: (1) the Legislature lacked authority to enact the maps, because the Commission had failed to submit a second set of maps; and (2) the Legislature drew the maps with unconstitutional partisan intent in violation of New York Constitution Article III, § 4(c)(5).

During the proceeding's first month, the parties engaged in motion practice regarding discovery and other issues. The Trial Court heard oral argument on March 3, 2022. One topic of argument was whether election deadlines should be enjoined pending the special proceeding's resolution. At the conclusion of argument, the Trial Court ruled in Respondents' favor. It announced it would not enjoin election deadlines, and that remedial maps, if needed, would not take effect for the 2022 election cycle (R. 2509-10):

> I do not intend at this time to suspend the election process …. Even if I find the maps violated the Constitution and must be redrawn, it is highly unlikely that a new viable map could be drawn and be in place within a few weeks or even a couple of months. Therefore, striking these maps would more likely than not leave New York State without any duly elected Congressional delegates. I believe the more prudent course would appear to be to permit the current election process to proceed and then, if necessary, to require new elections next year if the new maps need to be drawn.

The first day for aspiring candidates to collect ballot-access signatures was March 1, 2022, two days before the Trial Court's announcement. R. 126-27. Candidates must collect hundreds or thousands of these signatures, then submit them to the relevant board of elections, to qualify for a place on primary ballots. *Id.* Petitions were due for filing from April 4 through 7, 2022, and signatures are valid only if the signatory resides in the district where the candidate will run. *Id.*; N.Y. ELEC. LAW § 6-136(2). Early voting for the primary is scheduled to begin June 18, 2022; early voting for the general election begins October 29. R. 126-27.

### D. The Trial Court invalidates the Congressional map on procedural and substantive grounds, the State Senate map on procedural grounds, and the Assembly map *sua sponte* on procedural grounds

The Trial Court heard testimony from the parties' expert witnesses on March 14, 15, and 16, followed by closing arguments on March 31. Less than two hours after closing arguments, the Trial Court entered an 18-page single-spaced

order (the "Order") invalidating the Assembly, State Senate, and Congressional maps. R. 7-24.

The Trial Court concluded the Congressional map, but not the State Senate map, was drawn with partisan intent and was unconstitutional. R. 20. It also concluded the Legislature lacked authority to enact any maps at all, so the Congressional, Senate, and Assembly maps were "void *ab initio*." R. 16. The Trial Court further determined the 2021 Statute (which allowed the Legislature to enact maps if the Commission failed to fulfill its mandate) was unconstitutional and "shall be stricken from the books." R. 23. The Trial Court rejected Respondents' argument that, for the vast majority of challenged districts, no Petitioner had standing. R. 13.

### E. The Trial Court enjoins use of the 2022 enacted maps, orders the Legislature to enact "bipartisanly supported" remedial maps, and threatens to appoint a "neutral expert" to draw new maps

The Trial Court reversed its March 3 decision, and ordered the Assembly, State Senate, and Congressional maps shall not be used for the 2022 primary and general elections. R. 24. The Trial Court did, however, express "concern[ ] about the relatively brief time in which everything would need to happen to draw new maps." R. 21. It recognized the possibility "New York would not have a Congressional map in place that meets the Constitutional requirements in time for the primaries even with moving the primary date back to August 23,

2022." R. 23. The Trial Court had opined that if primaries were held later than August 23, New York could not possibly hold general elections. R. 22.

Additionally, the Trial Court ordered the Legislature and Governor to "submit bipartisanly supported maps" for the Court's review by April 11, 2022. R. 22. The new maps "must enjoy a reasonable amount of bipartisan support to insure [sic] the constitutional process is protected." *Id.* Otherwise, the Trial Court will "retain a neutral expert at State expense to prepare said maps." R. 24.

**F. Justice Lindley issues a partial stay of the Order**

Respondents filed notices of appeal to this Court within 24 hours after the Order was entered on March 31. R. 1-37. On Sunday, April 3, they moved by proposed order to show cause for a declaration that the Order is not in effect pending appeal, or, alternatively, for a discretionary stay pending appeal. NYSCEF Dkt. Nos. 5, 9. On April 8, Justice Lindley issued a decision recognizing that most provisions of the Order are stayed pending appeal. Dkt. No. 24. As the sole exception to the stay, Justice Lindley determined the Trial Court may "retain[] a 'neutral expert' to 'prepare' a proposed Congressional map, if [the Trial Court] elects to do so pending resolution of the appeal." *Id.* at 2. Significantly, Justice Lindley reaffirmed "the Legislature's constitutional authority to redraw a Congressional map in response to Judge McAllister's ruling" if Petitioners prevail on their substantive challenge to the Legislature's enacted Congressional plan.

Accordingly, any map drawn by the neutral expert "would have no force or effect unless and until the Court of Appeals affirms [the Order]," and the Legislature has been afforded its unambiguous right to enact a remedial map. *Id.* According to Justice Lindley, the Legislature must have at least 30 days from when the Order was entered, *i.e.*, through Saturday, April 30, 2022, to enact remedial maps should they prove necessary.

## ARGUMENT

This Court reviews the Trial Court's findings of fact and conclusions of law. CPLR 5501(c); *accord*, *People v. Bleakley*, 69 N.Y.2d 490, 493-94 (1987) (recognizing the Appellate Division enjoys broad discretion to review findings of fact); *N. Westchester Pro. Park Ass'n v. Town of Bedford*, 60 N.Y.2d 492, 499 (1983) (same).

Last month, the Court of Appeals reaffirmed that a party challenging a statute's constitutionality "face[s] the initial burden of demonstrating … invalidity beyond a reasonable doubt." *White v. Cuomo*, ___ N.Y.3d___, 2022 WL 837573, at *3 (March 22, 2022) (quotation marks and citations omitted). This standard is the law's "highest burden of proof." *Matter of Storar*, 52 N.Y.2d 363, 379 (1981), *superseded by statute on other grounds as stated in Matter of M.B.*, 6 N.Y.3d 437 (2006); *accord*, *Matter of Levy*, 37 N.Y.2d 279, 281 (1975). Further, legislation is entitled to an "exceedingly strong" presumption of constitutionality. *White*, 2022

WL 837573, at *3 (citations omitted). Courts invalidate legislation "only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Id.* (quotation marks and citations omitted).

Naturally, the beyond-reasonable-doubt standard governs challenges to the constitutionality of redistricting legislation. *Cohen v. Cuomo*, 19 N.Y.3d 196, 201-02 (2012) (*per curiam*); *Matter of Fay*, 291 N.Y. 198, 206-07 (1943). For example, in *Matter of Wolpoff v. Cuomo*, the Court of Appeals reiterated "[a] strong presumption of constitutionality attaches to … redistricting plan[s]." 80 N.Y.2d 70, 78 (1992). It added Courts will "declare [a] plan unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Id.* (quotation marks and citation omitted).

Particularly given this demanding standard, the Trial Court should be reversed. Petitioners did not carry their heavy burden to demonstrate the Congressional map is unconstitutional on any ground. Further, the Trial Court erred by finding Petitioners had standing to challenge the entirety of each district map, rather than only districts where they reside. The Trial Court also erred by striking down the Assembly map, which no one challenged. Finally, the Trial

Court erred as to remedies — including by enjoining use of the Legislature's enacted 2022 maps, depriving the Legislature of its Constitutional right to enact remedial maps, and failing to consider whether only part of the Congressional map (rather than the entire map) was the product of unconstitutional partisan intent.

## POINT I

## FOR MOST CHALLENGED DISTRICTS, PARTICULARLY DOWNSTATE, NO PETITIONER HAS STANDING

Standing is an aspect of justiciability. *Soc'y of Plastics Indus., Inc. v. County of Suffolk,* 77 N.Y.2d 761 (1991). The Court of Appeals has articulated the standing requirement as follows:

> The test for determining a litigant's standing is well settled. A plaintiff has standing to maintain an action upon alleging an injury in fact that falls within his or her zone of interest. "The existence of an injury in fact — an actual legal stake in the matter being adjudicated — ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute in a form traditionally capable of judicial resolution."

*Silver v. Pataki,* 96 N.Y.2d 532, 539 (2001) (quoting *Soc'y of Plastics,* 77 N.Y.2d at 772).

Citing the 1975 decision by the Court of Appeals in *Matter of Dairylea Cooperative, Inc. v. Walkley,* 38 N.Y.2d 6 (1975), the Trial Court concluded Petitioners have standing to challenge new electoral districts statewide — despite not residing in many of them — because it found Petitioners "to be in

the zone of interest." R. 9. The Trial Court's Order says nothing about the "injury in fact" facet of standing which unquestionably must be established in challenges to governmental actions. *Matter of Mental Hygiene Legal Serv. v. Daniels*, 33 N.Y.3d 44, 50 (2019) ("[I]f the issue of standing is raised, a party challenging governmental action must meet the threshold burden of establishing that it has suffered an "injury in fact.'"); s*ee Soc'y of Plastics,* 77 N.Y.2d at 772-73 ("That an issue may be one of 'vital public concern' does not entitle a party to standing.").

Contrary to the Trial Court, a squarely-on-point decision rendered in a gerrymander challenge case that post-dates *Dairylea* by ten years holds that to have standing to assert such a claim, the complaining voter must reside in the allegedly gerrymandered district. *See Bay Ridge Cmty. Council v. Carey*, 115 Misc. 2d 433, 443 (Sup. Ct. Kings County 1982), *aff'd,* 103 A.D.2d 280 (2d Dep't 1984), *aff'd,* 66 N.Y.2d 657 (1985).

The *Bay Ridge* criterion for the "injury in fact" needed for standing in a redistricting challenge lies at the heart of the Supreme Court's decision in *Gill v. Whitford*, __ U.S. __, 138 S. Ct. 1916 (2018). *Gill* presented a partisan gerrymander claim identical to the one made by Petitioners here, *viz*., that certain districts "packed and cracked" voters belonging to one political party and diluted that political party's share of the vote statewide. The Supreme Court held the plaintiffs lacked standing to pursue a partisan challenge to the plan as whole. As

the Court explained, "[t]o the extent that the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific," as an individual voter's injury arises from "the boundaries of the district" where the voter resides. *Id.* at 1930.

Drawing on its jurisprudence concerning racial gerrymandering, the Court explained:

> [A] plaintiff who alleges that he is the object of a racial gerrymander — a drawing of district lines on the basis of race — has standing to assert only that his own district has been so gerrymandered. A plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, asserts only a generalized grievance against governmental conduct of which he or she does not approve.

*Id*.

While *Gill* involved a gerrymandering claim under the United States Constitution, in a detailed discussion in *Society of Plastics,* the Court of Appeals explained the standing principles enunciated by Federal Courts are no different in New York. 77 N.Y.2d at 772-73 (noting "[i]njury in fact ... serves to define the proper role of the judiciary"). What Petitioners allege here is the same insufficient "generalized grievance against government conduct" as was alleged in *Gill*. The New York Constitutional provision allowing "any citizen" to challenge a redistricting plan does not alter the outcome. In *Society of Plastics,* the Court of Appeals made clear New York also will not recognize standing to assert

"generalized grievances" as to governmental actions. The Court of Appeals there listed the following "prudential limitations" to standing:

> *a general prohibition on one litigant raising the legal rights of another; a ban on adjudication of generalized grievances more appropriately addressed by the representative branches*; and the requirement that the interest or injury asserted fall within the zone of interests protected by the statute invoked.

*Id.* at 773 (emphasis added) (citation omitted).

In their unverified Amended Petition, Petitioners allege residence in seven new Congressional districts: 10, 11, 16, 17, 18, 19, 22 and 23 only. R. 303-05. Petitioners' affidavits (R. 290-91, 1067-89) recite residence addresses, but not the districts where they reside. No affiant alleges injury in fact in the affiant's own particular district. Even assuming, *arguendo*, that recitals in their affidavits suffice, there is no allegation, much less proof, that any Petitioner lives in Districts 1-9, 12-15, 20-21 or 24-26. Consequently, the constitutionality of those districts individually or via a challenge to the plan in its entirety was not proper for adjudication.

Moreover, using Mr. Trende's "dot plot" analysis, Petitioners complain substantively about a total of fourteen districts — four which they allege are packed, and ten which they allege are uncompetitive. R. 244-51. Nowhere do Petitioners identify the district numbers of the fourteen allegedly faulty districts.

This flaw alone is fatal to Petitioners' burden to prove standing, even as to the seven districts where they reside. And, while precisely which fourteen districts Petitioners target is unknown, insofar as they attack districts on Long Island, no Petitioner resides in any of them, and therefore, standing to challenge any Long Island district plainly is lacking.

Although not reflected in the decretal paragraphs of the Order, in its standing discussion, the Trial Court also found Petitioners to have standing because, if it were to invalidate the maps on procedural grounds, that would "effect [sic] every district," " impacting everyone," and because the invalidity of any one district "impacts neighboring districts" (R. 9).[3] The Trial Court's Order cites no authority for these propositions. The Trial Court erred in that, like the *Gill* plaintiffs, it "fail[ed] to distinguish injury from remedy." 118 S. Ct. at 1930. The notion standing exists because a procedural infirmity (which, in any event, applies only to that limited aspect of the Court's Order, and not its ruling on partisan intent and Congress) would affect the plan as a whole is circular, and presupposes the standing required for the Court to decide the procedural issue in the first place. As to impact on adjacent districts, "remedying the individual voter's harm ... does not

[3] The Trial Court also observed "it would be impractical to require someone from every district to serve as Petitioner" (R. 9). However, standing does not turn on considerations of practicality; it is governed by settled legal standards that require injury in fact.

necessarily require restructuring of all of the state's legislative districts." *Id.* at 1931. Indeed, even Petitioners' experts acknowledge many Democratic districts would remain so, even under their flawed analysis. And for many challenged districts — including all Nassau and Suffolk County districts, upon which Petitioners focused their presentation to the Trial Court — no petitioner lives either in the challenged district *or* in any "neighboring district[ ]."

In sum, the constitutionality of districts in which Petitioners do not reside, and of the redistricting plan as a whole, was not justiciable in this case's posture, because Petitioners lacked standing to assert the gerrymandering claims asserted in the Amended Petition.

## POINT II

## THE TRIAL COURT ERRED BY INVALIDATING THE ASSEMBLY MAP *SUA SPONTE*

The Trial Court held the Legislature lacked authority to enact the Assembly district map, so it invalidated that map. R. 16. In turn, the Trial Court ordered the Legislature to enact a replacement, "bipartisanly supported" Assembly map by April 11, 2022. R. 24. Otherwise, the Trial Court will "retain a neutral expert at State expense" to prepare a replacement Assembly map. *Id.*

For at least two reasons, all aspects of the Order concerning the Assembly map should be reversed. First, Petitioners did not challenge the

Assembly map, so the Trial Court's holdings as to that map are an improper advisory opinion. Second, because the Assembly map received bipartisan support, the remedy ordered by the Trial Court is superfluous.

### A. All aspects of the Order related to the Assembly map are an improper advisory opinion

It is "fundamental" that New York courts may not issue advisory opinions. *N.Y. Pub. Interest Res. Grp. v. Carey*, 42 N.Y.2d 527, 529 (1977); *accord, Prashker v. U.S. Guar. Co.*, 1 N.Y.2d 584, 592 (1956). "'The giving of such opinions is not the exercise of the judicial function.' This is not merely a question of judicial prudence or restraint; it is a constitutional command defining the proper role of the courts under a common-law system." *Carey*, 42 N.Y.2d at 529-30 (quoting *Self-Insurer's Ass'n v. State Indus. Comm'n*, 224 N.Y. 13, 16 (1918) (Cardozo, J.)).

In violation of this well-established principle, the Trial Court issued an advisory opinion by striking down the Assembly map. The initial Petition challenged the Congressional district map only, and the Amended Petition added a challenge to the State Senate map but not the Assembly map. R. 115-16, 317. Thus, even after reconsidering their initial Petition, Petitioners still chose not to challenge the Assembly map. Indeed, in a submission to this Court, Petitioners acknowledge they never challenged the Assembly map. Dkt. No. 18, ¶ 15. Simply

put, there was no controversy between the parties as to the Assembly map. The Trial Court's *sua sponte* decision to invalidate that map should be reversed.

**B. Petitioners concede the Assembly map received bipartisan support**

In its Order, the Trial Court faulted the Legislature for enacting maps that did not receive bipartisan support. R. 10-12. In fact, parts of the Order read as a civics lesson on the value of compromise (even though, as the Trial Court acknowledged, the word "compromise" appears nowhere in the relevant Constitutional provisions). *Id.* To remedy this supposed lack of bipartisanship, the Trial Court ordered the Legislature to enact "bipartisanly supported" remedial maps, including for the Assembly districts. R. 24.

But as Petitioners concede in a submission to this Court, "the Legislature negotiated and agreed on a bipartisan basis" with respect to the Assembly map. Dkt. No. 18, ¶ 15. Therefore, the remedy the Trial Court ordered as to that map serves no purpose. This mismatch between remedy and reality underscores a danger of advisory opinions: absent a live controversy between the parties, Courts lose the benefit of an adversary process and may misapprehend the facts, law, or both, as the Trial Court did here.

## POINT III

## THE LEGISLATURE DID NOT ENACT THE MAPS IN AN UNCONSTITUTIONAL MANNER BEYOND A REASONABLE DOUBT

The Trial Court held the Legislature's reapportionment of Congressional and State Senate districts was procedurally defective *ab initio* because it read the 2014 amendments to the New York Constitution as ousting the Legislature of its redistricting power when the Commission declines to present final proposed redistricting plans for Legislative consideration. R. 14-16. Moreover, despite the absence of any challenge to the Assembly districts, the Trial Court *sua sponte* also voided *ab initio* the Legislature's reapportionment of those districts. R. 16.

The Trial court's myopic, doctrinaire determinations: (1) ignored established law governing challenges to the constitutionality of legislative enactments; and (2) misapprehended the Constitutional scheme for reapportionment legislation following a decennial census.

### A. The Legislature acted consistently with the Constitution in enacting redistricting legislation when the Commission failed to submit a proposed plan

"It is well settled that legislative enactments are entitled to a strong presumption of constitutionality, and courts strike them down only as a last unavoidable result after every reasonable mode of reconciliation of the statute with

the Constitution has been resorted to, and reconciliation has been found impossible. *See, e.g.*, *Cohen*, 19 N.Y.3d at 201; *Wiggins v. Town of Somers*, 4 N.Y.2d 215, 219 (1958).

"As the party challenging a duly enacted statute, plaintiffs face the initial burden of demonstrating [the challenged legislation's] invalidity beyond a reasonable doubt." *White*, 2022 WL 837573 at *3. "[U]nconstitutionality must be demonstrated beyond a reasonable doubt and only as a last resort should courts strike down legislation on the ground of unconstitutionality." *Lighthouse Shores, Inc. v. Town of Islip*, 41 N.Y.2d 7, 11 (1976). *Accord, Harvey v. Finnick*, 88 A.D.2d 40, 43 (4th Dep't), *aff'd sub nom. Kelley v. McGee*, 57 N.Y.2d 522 (1982).

The presumption of constitutionality applies with particular force to Constitutional challenges to redistricting legislation. As the Court of Appeals explained in the last redistricting cycle:

> [W]e will upset the balance struck by the Legislature and declare the redistricting plan unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that *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*.

*Cohen*, 19 N.Y.3d at 201-02 (emphasis added).

The Trial Court's Order briefly paid lip service to the presumption of constitutionality, but then made no effort whatsoever to reconcile the Legislature's

redistricting legislation with the Constitution, let alone resort to "every reasonable mode of reconciliation," as it needed to do. *Id.*

In fact, the Legislature's enactment of the redistricting plans was consistent with the Constitution and centuries of precedent vesting the redistricting prerogative in the Legislature. *See, e.g.*:

- *Matter of Wolpoff*, 80 N.Y.2d at 77-80 ("Balancing the myriad requirements imposed by both the State and the Federal Constitution is a function entrusted to the Legislature. It is not the role of this, or indeed any, court to second-guess the determinations of the Legislature.");

- In re *Orans*, 15 N.Y.2d 339, 352 (1965) ("There is no doubt that reapportionment is within the legislative power");

- *Burns v. Flynn*, 268 N.Y. 601, 603 (1935) ("Apportionment is a duty placed by the Constitution on the Legislature");

- In re *Reynolds*, 202 N.Y. 430, 444 (1911) ("[T]he power [is] vested in and imposed upon the legislature to pass a constitutional apportionment bill");

- *Carter v. Rice*, 135 N.Y. 473, 490-91 (1892) (holding the Legislature possesses exclusive authority to apportion legislative districts).

The 2014 Amendment to the Constitution continues to repose the power to determine redistricting lines exclusively in the Legislature. To be sure, the Constitution contemplates that: (1) the Commission will propose an initial set

of maps, which the Legislature may reject for any reason; and (2) if the Legislature rejects the Commission's first proposal, the Commission will submit a second set of district maps, which the Constitution again grants the Legislature unfettered discretion to reject. The 2014 Amendment clearly states, however, that if the Legislature rejects both sets of proposals the Commission proffers, the Legislature "shall introduce such implementing legislation with any amendments each house of the legislature deems necessary." N.Y. CONST. art. III, § 4(b). Thus, rather than effectuating any forfeiture of the Legislature's longstanding exclusive prerogative over redistricting, the 2014 Amendment embraces that prerogative.

Article III, § 4(b), does not expressly address the situation when the Commission would fail to submit a redistricting proposal to the Legislature. Even so, (1) any proposal submitted by the Commission was advisory only, since the Legislature could reject any Commission proposal; and, (2) at all times, the Legislature had complete and unrestricted power and authority to fashion its own redistricting plan, since it was free to reject both the Commission's first and second proposals and "introduce such implementing legislation with any amendments each house of the legislature deems necessary." *See Leib v. Walsh*, 45 Misc. 3d 874, 881 (Sup. Ct. Albany County 2014) (noting "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."). That power and authority is not impaired by the Commission's failure to submit a second proposal.

Here, the Commission never submitted even an approved first proposal, since no proposal garnered the minimum seven votes required for Commission approval.[4] Instead, the Commission submitted two proposals, each of which had garnered only five votes. After the Legislature rejected both five-vote proposals, the Commission did not send *any* new proposal — let alone one approved by seven members — by the January 25 Constitutional deadline.

In view of the Commission's failure to submit a second proposal, the Legislature was fully justified in proceeding to propose and enact its own redistricting legislation. Since the Legislature was entitled to adopt its own apportionment plan even when it received redistricting proposals approved by at least seven Commission members simply by rejecting those proposals, then *a fortiori,* it was entitled to adopt its own apportionment plan when the Commission failed to submit any such proposal.

The Trial Court's contrary conclusion would mean that by simply refusing to meet so there is no quorum, four Commission members could

[4] N.Y. CONST. art. III, §§ 4(f)(1)-(2) mandate "approval of a redistricting plan and implementing legislation by the commission for submission to the legislature shall require the vote in support of its approval by at least seven members."

extinguish the Legislature's redistricting power and upset the separation of powers by diverting the redistricting prerogative to the judicial branch.[5] Such a preposterous outcome flies in the face of Court of Appeals authority admonishing against Constitutional constructions that produce absurd results. *See, e.g., Matter of Fay*, 291 N.Y. at 216 ("In the construction of a statutory or constitutional provision a meaning should not be given to words that are the subject of construction that will defeat the purpose and intent of the statutory provision or that will make such provision absurd."); In re *Dowling*, 219 N.Y. 44, 56 (1916) (same); *see also Anderson v. Regan*, 53 N.Y.2d 356, 362 (1981) (emphasizing Courts must avoid constitutional interpretation that "would lead to an absurd conclusion").

In holding the apportionment legislation was unconstitutional *ab initio* because the Commission did not submit a second plan, the Trial Court essentially said the Legislature was constitutionally required to do what, in fact, it could not do and what it would have been futile to try — namely, to compel the Commission to agree to a redistricting plan. (R. 12, stating the Legislature should have brought an action to compel the Commission to continue working or replace

[5] New York Constitution Article III, § 4(f), provides "a minimum of seven members shall constitute a quorum …, and no exercise of any power of the independent redistricting commission shall occur without the affirmative vote of at least a majority of the members." Accordingly, four of the ten Commission members could prevent the Commission from holding a meeting.

Commissioners, without any reason to believe impasse would thereby be resolved). "The law does not require a useless formality." *Mahnk v. Blanchard*, 233 A.D. 555, 561 (4th Dep't 1931); *see also Strasbourger v. Leerburger*, 233 N.Y. 55, 60 (1922) ("The law requires no one to do a vain thing.").[6]

*Cohen*, 19 N.Y.3d 196, is dispositive. There, the Court of Appeals considered the Constitution's ambiguity regarding the methodology for computing the number of State Senate seats. The Constitution did "not provide any specific guidance" and "two different methods" of making that calculation were potentially valid. *Id.* at 200.

The Court upheld the Legislature's broad discretion to fill the hole in the Constitution by using different methods in different parts of the State, over the petitioners' objection that the same adjustment method was required to be used throughout. *Id.* at 201-02. The Court emphasized a statute filling a gap in the Constitution may be invalidated "only when it can be shown beyond reasonable

[6] Ironically, the Trial Court's remedy underscores the flaw in its analysis. Although it held the Commission's failure to submit second proposed redistricting maps foreclosed the Legislature from exercising redistricting power, the Trial Court's remedy was to direct the Legislature "to submit bipartisanly supported maps to this court for review" (R. 24). The Trial Court was compelled to invent this extra-Constitutional remedy because Article III, section 5, provides the Legislature shall have a "full and reasonable opportunity" to remedy legislative districts "found to violate the provisions of this article." Had the Trial Court properly reconciled the procedural provisions of Article III and upheld the Legislature's action given the Commission impasse, the Court would not have been in the position of having to concoct a paradoxical remedy that allows the Legislature to craft a plan in the second place in the face of a holding that it was powerless to do that in the first instance.

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, and *Fay*, 291 N.Y. at 207).

The deference afforded to the Legislature in *Cohen* reflects that, "except as restrained by the constitution, the legislative power is untrammeled and supreme." *Silver*, 96 N.Y.2d at 537 (quotation marks and ellipses omitted). Article III grants the Legislature "broad power and functional responsibility to consider and vote on legislation," *id*., and "the separation of powers requires that the Legislature make the critical policy decisions." *Saratoga County Chamber of Com., Inc. v. Pataki*, 100 N.Y.2d 801, 821-22 (2003) (quotation marks omitted). Courts may not expand the text of the Constitution to diminish the Legislature's authority. *People v. Davis*, 13 N.Y.3d 17, 24-25 (2009) (Courts may not infer a limitation when the Constitution "does not speak" to the Legislature's power to supplement an existing procedure described therein).

*Cohen* instructs a statute may be stricken as unconstitutional only when it amounted to "a gross and deliberate violation of the plain intent of the Constitution and a disregard of its spirit and the purpose for which express limitations are included therein" *Id.* at 202 (quoting In re *Sherrill*, 188 N.Y. 185, 198 (1907)). Here, there plainly is no conflict between the statute and the

Constitution and certainly no "gross and deliberate violation of the plain intent of the Constitution." When the Commission performs the duties the Constitution requires, the process set forth in the Constitution ensues. But if the Commission abandons its responsibility to present proposed plans to the Legislature, the Legislature has the same ability to craft its own plan that it undoubtedly possesses after rejecting the Commission's second proposal. Since the procedure the Legislature employed here is both consonant and readily reconcilable with the Constitution, *Cohen* controls.

Article III, § 4(b), of the New York Constitution makes clear that, notwithstanding any redistricting proposal the Commission might suggest, the Legislature has unfettered power and authority, in the final analysis, to enact a redistricting plan it formulates. That power and authority is not impaired by the Commission's failure to submit a second proposal.[7] Accordingly, the Legislature's enactment of redistricting legislation was not procedurally defective or void *ab initio*.

[7] The Trial Court treated as a constitutional mandate the notion that any legislative changes to Commission-proposed districts may not contain population deviations of more than 2%. The Constitution does not say this. Rather, the 2% deviation limitation was imposed by legislative enactment in 2012, and was subject to legislative override in connection with the 2022 redistricting.

## B. The law expressly addressing the situation when the Commission fails to submit a redistricting proposal was not unconstitutional

In June 2021, the Legislature passed a statute that made express what, as explained *supra*, was always implicit in Article III, § 4, of the State Constitution. The 2021 Statute provided that, "if the commission does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan," then the Legislature "shall introduce such implementing legislation with any amendments each house deems necessary." L.2021, c. 633, § 1. The Trial Court erroneously held that law to be unconstitutional.

Facial challenges to a statute have always been disfavored. As the Court of Appeals recently reiterated, "the party mounting a facial challenge bear[s] the substantial burden of demonstrating that in any degree and in any conceivable application, the law suffers wholesale constitutional impairment." *White,* 2022 WL 837573 at *3; *see also Amazon.com, LLC v. N.Y. State Dep't of Tax'n & Fin.*, 81 A.D.3d 183, 194 (1st Dep't 2010), *aff'd sub nom. Overstock.com, Inc. v. N.Y. State Dep't of Tax'n & Fin.*, 20 N.Y.3d 586 (2013) ("A plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid."); *Cohen v. State*, 94 N.Y.2d 1, 8 (1999) ("In seeking facial nullification, plaintiffs bear the burden to demonstrate that in any degree and in every conceivable application, the law suffers wholesale unconstitutional

impairment."). "Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional." *LaValle v. Hayden*, 98 N.Y.2d 155, 161 (2002).

The Trial Court's construction violates these mandates. As previously explained, the Constitution's scheme under Article III, § 4, for enacting redistricting legislation makes clear that Commission proposals are only advisory suggestions, and the Legislature always has final say in fashioning and enacting any redistricting scheme. A reasonable reading of the Constitutional provision compels the conclusion that if the Legislature is free to reject any and all proposals submitted by the Commission and fashion its own redistricting scheme, then it is similarly free to fashion its own redistricting scheme when the Commission submits no proposal. Hence, the 2021 Statute did not change the Constitution's redistricting scheme as set forth in Article III, § 4. It merely made express that which was already implicit.

Petitioners asserted as "proof" of the 2021 Statute's alleged unconstitutionality the supposed "fact" that it was enacted after the voters had rejected a proposed Constitutional amendment with the same language. Petitioners' assertion is meritless.

First, the 2021 Statute was passed in June 2021 — five months before voters declined to approve the proposed 2021 amendments to the Constitution.

Second, the proposed amendment to Article III, § 4, was only one of a package of proposed Constitutional amendments that were voted on collectively. Those proposed amendments included, *inter alia*:

- fixing the number of Senate seats at 63;
- requiring that incarcerated persons be counted at their place of last residence, instead of where they were incarcerated;
- changing the Commission's quorum rules; and
- changing the timetable for the redistricting process.

No evidence was presented concerning which of the proposed amendments caused the entire package to be voted down. Accordingly, there is no basis to conclude that by rejecting the amendments, the voters expressed some conviction that, if the Commission were to fail to submit a redistricting proposal, the Legislature could not adopt redistricting legislation and the Courts would need to adopt a redistricting plan instead.

Accordingly, the Legislature's enactment of the 2021 Statute was not improper, and the law is not invalid.

## POINT IV

## PETITIONERS FAILED TO DEMONSTRATE, BEYOND A REASONABLE DOUBT, THAT THE LEGISLATURE ENACTED THE CONGRESSIONAL MAP WITH UNCONSTITUTIONAL PARTISAN INTENT

The State Constitution establishes several criteria the Legislature must observe when drawing district maps. N.Y. CONST. art. III, § 4(c). Among them is a prohibition on drawing maps "to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." *Id.* § 4(c)(5). Petitioners contend the Congressional map was drawn in violation of this prohibition, but they are incorrect, and have failed to satisfy their burden to prove this allegation beyond a reasonable doubt.

Petitioners relied on the opinion testimony of Claude A. LaVigna and Sean P. Trende. Both submitted two reports to the Trial Court, and both offered testimony during the March trial. In rebuttal, Respondents offered reports and testimony from five experts: Dr. Michael Barber, Ph.D.; Dr. Stephen Ansolabehere, Ph.D.; Dr. Kristopher R. Tapp, Ph.D.; Todd A. Breitbart; and Dr. Jonathan N. Katz, Ph.D.

Although Petitioners proffered two opinion witnesses, their improper-motive claim depends on one: Mr. Trende. That's because Mr. LaVigna — a former staffer for State Senate Republicans, and now a self-described "campaign

strategist" and "national pollster" who has attained no graduate degree — was thoroughly discredited at trial. The record demonstrates Mr. LaVigna relied upon no "methods, data, or processes that would be consistent with analysis in political science" to generate his opinions (R. 995), and he was exposed for numerous inaccurate assertions in his written reports to the Court. *See* R. 265-86. For example:

- Mr. LaVigna claimed the Legislature "entirely rearranged" Congressional Districts 1 and 2 on Long Island (R. 267), when in reality, each such district in the Legislature's 2022 enacted map contains more than three quarters of the territory it incorporated in New York's 2012 Congressional map (R. 2506).

- Mr. LaVigna alleged the Long Island community of East Islip was located in District 1 in New York's 2012 Congressional map (R. 1055), when in fact it was located in District 2, as it is in the 2022 enacted Congressional map (R. 2775).

- Mr. LaVigna purported Districts 1 and 2 in New York's 2012 Congressional map were "strong" or "sure" Republican districts (R. 1057), when in reality, the average vote for Democratic candidates in statewide elections in those Districts exceeded 50% from 2016 through 2020 (R. 2888-89).

- Mr. LaVigna claimed the enacted 2022 Congressional map "[broke] up concentrated Orthodox Jewish and Russian communities" that he alleged to lean Republican in Brooklyn. R. 1056. Yet Mr. LaVigna offered no data about how Jews vote, failed to account for differences in language and religious practices among different Jewish neighborhoods, and declined to recognize the 2012 Congressional map likewise did not unite all of Brooklyn's Jewish neighborhoods in a single district. He also ignored that the 2022 Congressional map united some Jewish neighborhoods (such as Midwood, and the Five Towns with Far Rockaway in Queens) that had been split across district lines in the past. R. 2762-64, 2776-81.

- Mr. LaVigna alleged the enacted 2022 Congressional map split an Asian community in Brooklyn (R. 268), when in reality, it unified multiple Asian communities across Manhattan and Brooklyn pursuant to a recommendation made by the Organization for Chinese Americans-New York (R. 2785-86).

- Mr. LaVigna complained the enacted 2022 Congressional map "cracked" and "packed" Republicans in Districts 16 through 18. R. 269. Yet, under that map and the 2012 map, average vote share for Democrats in statewide elections would exceed 70% in District 16 and 60% in District 17, and would differ by approximately one percentage point in District 18. R. 875.

- Finally, Mr. LaVigna opined the enacted 2022 Congressional map's District 22, joining metropolitan Syracuse with Tompkins County, "has no coherent explanation except for seeking partisan and incumbent protection advantage[.]" R. 270. This allegation is absurd, however, because Democrats and Republicans alike on the Commission had proposed unifying metropolitan Syracuse and Tompkins County (including the City of Ithaca and the Cornell University campus) in the same district. R. 2793.

Perhaps because of these numerous inaccuracies, Petitioners' counsel did not even mention Mr. LaVigna during closing argument, and the Trial Court did not discuss his reports or testimony in its Order. So Petitioners' allegations of improper partisan intent in the creation of the enacted 2022 Congressional map rise and fall with Mr. Trende.

Mr. Trende has no doctoral degree, and has never published a peer-reviewed paper on any subject. R. 855. His conclusions were based on his analysis of randomized, computer-generated legislative-district maps. R. 237. For his initial report, he programmed an algorithm to generate 5,000 random district maps for New York's Congressional delegation. R. 241, 249. Then, using a

metric he called the "gerrymandering index," he compared the 5,000 computer-generated maps with the two maps enacted by the Legislature. R. 242. In response to criticism from one of Respondents' experts, Mr. Trende repeated the exercise for Congress with 10,000 maps rather than 5,000. R. 1048-49. According to Mr. Trende, all these simulations indicated the Congressional map was drawn with partisan intent. R. 1031.

The purported gerrymandering index does demonstrate how closely a political party's vote share across several past elections in a district in the maps enacted by the Legislature would approximate that party's vote share across those elections in the ensemble of maps created by a computer simulation. R. 852. Critically, however, it "does *not* provide any information about *which party* is favored by the enacted map relative to the ensemble, or even whether there is a favored party," and also "does *not* provide any information about whether the enacted map discourages competitive districts relative to the ensemble." *Id.* (emphasis added). Rather, Mr. Trende's gerrymandering index for a district can be high for any of a number of reasons — such as, for example, because the simulated ensemble of maps features convoluted districts or district alignments that no mapmaker in the real world would ever draw — that bear no relationship to partisan considerations. R. 853.

Relying on Mr. Trende's analysis, the Trial Court held the Legislature acted with unconstitutional partisan intent when it drew the enacted 2022 Congressional map. R. 20. The Court was mistaken. For several reasons, Petitioners failed to demonstrate, beyond a reasonable doubt, that the Legislature drew the Congressional map with improper motive.

First, both Mr. Trende and the Trial Court flipped the burden of proof. Petitioners bore responsibility to demonstrate, beyond a reasonable doubt, that the maps enacted in 2022 were unconstitutional. *Wolpoff*, 80 N.Y.2d at 78. Yet Mr. Trende and the Trial Court blamed Respondents for not generating their own maps to counter Mr. Trende's. R. 19-20, 1038. This error would have been bad enough in a preponderance-of-the-evidence case; it is particularly grave when Petitioners must prove their case beyond a reasonable doubt. To prevail, Respondents needed only to identify sufficient flaws in Mr. Trende's methodology and testimony to create reasonable doubt. They did not need to provide any evidence of their own (although they did provide their own evidence, including the opinions of five expert witnesses). *See* CJI.2d (NY) GA 81 ("The burden of proof never shifts … to the defendant.").

In fact, Respondents exposed numerous, serious flaws in Mr. Trende's analysis. At a minimum, those flaws individually and collectively create

reasonable doubt as to whether the Legislature drew the Congressional map with unconstitutional partisan intent, which it did not.

### A. Mr. Trende's algorithm ignores criteria that, under the State Constitution, the Legislature must consider, thereby rendering his simulated maps a useless, unrepresentative sample

The concept underlying Mr. Trende's analysis is straightforward: His computer program generated 10,000 random Congressional maps. The map enacted by the Legislature differs from them: a statistical outlier, according to the alleged gerrymandering index. When generating the ensemble of random maps, Mr. Trende's computer program did not consider residents' political affiliations, *i.e.*, it made no effort to join or separate people into districts based on political party. Therefore, Mr. Trende concludes, partisanship must be the reason for the difference between the random maps and the enacted map.

But this conclusion assumes incorrectly that Mr. Trende's simulated maps bear similarity to real maps that a partisanship-blind Legislature would have drawn. "[A] major factor in the validity of [his] simulated maps is whether or not they constitute a representative sample of the trillions of legally valid possible maps that could be drawn." *See* R. 996; *accord*, R. 848.

As Mr. Trende admits, however, his algorithm ignored factors that the State Constitution required the Legislature to consider. R. 856, 2587-91, 2629-30, 2705-31. Consequently, the difference in the gerrymandering index between his

random maps and the enacted map could have arisen (and likely did arise) not from partisan concerns, but rather from the Legislature's efforts to consider and draw districts that accounted for and balanced mandatory Constitutional factors, which Mr. Trende's algorithm did not.

Critically, for example, the Legislature was required to consider maintaining "communities of interest." N.Y. CONST. art. III, §§ 4(b), (c)(5). And it obviously did so. The Legislature created Congressional districts for the metropolitan regions around Buffalo, Rochester, Albany, and Syracuse/Ithaca (which are home to two major research universities, Syracuse University and Cornell University). R. 868, 2793. The Legislature also kept the Southern Tier together in one district and most of the North Country region (including Potsdam, Lake Placid, and Plattsburgh) together in another. R. 2787-91, 2904-07. Downstate, the enacted maps unite communities of interest that include Asian-American populations across Manhattan and Brooklyn, as well as the municipalities that comprise the western Long Island Sound watershed. R. 873, 2914-17.

Mr. Trende's algorithm, in contrast, made no attempt to keep communities of interest (including metropolitan areas) together. R. 1000. This is so, he admits, because "[c]ommunities of interest are a notoriously difficult concept to nail down … and difficult to encode" in generating simulated maps at

random. R. 1043. Of his 10,000 random maps, thousands likely chop up and separate communities of interest like Buffalo, Rochester, and the Southern Tier — which would be irrational. Indeed, Mr. Trende cannot prove otherwise, because he admits he never studied the ensemble of maps created by his simulations, and none of those maps appears in the record. R. 2615-16. Alleged differences between unrealistic maps generated by a simulation and the Legislature's enacted Congressional map are hardly proof of improper political motive. At a minimum, the Legislature's fulfillment of its charge to keep communities of interest together to the extent practicable explains those differences.

The Legislature was also required to consider "the maintenance of cores of existing districts." N.Y. CONST. art. III, § 4(c)(5). It did that: all but one of the enacted map's Congressional districts retain over 50% of the population of a district under the 2012 Congressional map, and 75% of areas in the enacted districts are the same as prior districts from the 2012 map. R. 871, 1005. The one exception is the 2022 enacted map's District 19, which incorporates territory from a 2012 district that was eliminated due to New York's loss of a Congressional seat. R. 1005. Yet Mr. Trende's original simulation that generated 5,000 random Congressional district maps made no attempt to maintain the cores of existing districts; rather, it drew district lines on a blank canvas. R. 999-1005, 2606. Concerning a second simulation that yielded another 10,000 Congressional district

maps, Mr. Trende claimed to have "program[med] in a constraint … to pay attention to cores," but had "no idea" how precisely he did this, because he "[didn't] remember the exact line in the code." R. 2588. Once again, absent any credible explanation from Mr. Trende as to how his simulations considered retaining cores of existing Congressional districts — as the State Constitution compelled real mapmakers in the Legislature to do — differences between Trende's random maps and the Legislature's enacted Congressional map are unsurprising.

Exacerbating these fatal flaws, Mr. Trende himself has never even studied the maps generated by his computer program. R. 2615. No one has, and no one can see them, because they are absent from the record. R. 2615-16. All we know is he generated maps without considering factors the Constitution mandated the Legislature to evaluate. Seeing Trende's simulated maps, therefore, would likely underscore how dissimilar they are from maps that a rational New York Legislature would draw.

The Trial Court itself recognized partisanship is not the only explanation for a gerrymandering index disparity (R. 20), but it nonetheless assumed that must be the explanation here, even though it recognized Mr. Trende's maps "do not include every constitutional consideration" (R. 19). As Dr. Barber testified, because Mr. Trende's simulations failed to account for every criterion the

Constitution required actual Legislators to consider in redistricting, they cannot support Petitioners' claimed inferences that the Legislature drew the districts enacted earlier this year with any intent to promote partisan interests or limit competition among candidates. R. 2861.[8] The Trial Court's flawed assumption turned the burden of proof on its head.

Simply put, Mr. Trende's analysis does not explain beyond a reasonable doubt why the Legislature's enacted Congressional map differs from the simulated maps created by Trende's algorithm. And as explained *supra*, the reason is likely that the Legislature had to consider numerous factors required by the State Constitution, but ignored by Trende's computer.

### B. Mr. Trende did not generate a sufficient number of random maps, and the record suggests he failed to eliminate duplicates

For his initial analysis, Mr. Trende programmed his computer to produce 5,000 random Congressional maps. R. 241. Dr. Kristopher Tapp, a

[8] On cross-examination, Petitioners' counsel asked Dr. Barber numerous questions about whether, according to data produced from Mr. Trende's simulations, certain Congressional districts in the Legislature's enacted map were more or less competitive than any district in the ensemble of maps Mr. Trende created. R. 2853-56. Dr. Barber specified he based his answers upon his reading of the simulation data on a "dot-plot" graph Mr. Trende had prepared. R. 2869. He did not offer his own opinion, however, as to whether a particular Congressional district in the Legislature's 2022 enacted map was competitive (or not) as an objective matter, because "[t]he measure of competitiveness [of a district] is entirely based on the data," *viz.*, the value of Mr. Trende's graph "is limited by the data that was used" to create it. R. 2870-71. Such value is compromised by Mr. Trende's failure to use an algorithm that even attempted to account for all the redistricting criteria the State Constitution required, especially "the maintenance … of communities of interest." N.Y. CONST. art. III, § 4(c)(5).

mathematics professor at St. Joseph's University in Philadelphia, Pennsylvania, opined that a sample size of 5,000 was too small (R. 861), so Mr. Trende performed a second analysis with 10,000 random maps (R. 1048-49). But this number of maps, too, was insufficient to produce reliable results.

In choosing how many random maps to generate, Mr. Trende relied on a paper co-written by Dr. Kosuke Imai, Ph.D., a Professor of Government and Statistics at Harvard University. R. 2564. In that paper, Dr. Imai produced 10,000 maps to analyze a hypothetical jurisdiction with 50 precincts from which three legislative districts would be created. R. 2575, 3035. New York, in contrast, has many more precincts and Congressional districts: 15,000 and 26, respectively. R. 861. And Dr. Tapp explained that "[t]he larger the number of precincts and districts, the larger the ensemble needed." *Id.* Nevertheless, Mr. Trende decided to generate the same number of random maps as Dr. Imai. Indeed, before conducting a do-over in response to criticism from Dr. Tapp, Mr. Trende generated only half as many random maps as Dr. Imai.

Mr. Trende's analysis as an expert in *Szeliga v. Lamone* (Case No. C-02-CV-21-001816) (R. 2332-2425), another redistricting challenge decided this year in a Maryland State Court, demonstrates the inadequacy of the sample size of simulated maps upon which he relied in New York. In *Szeliga*, Mr. Trende calculated gerrymandering indices for Maryland's eight enacted Congressional

districts — and did so by generating 750,000 simulated, random maps. R. 2394. That is 75 times as many maps as produced in his larger run of simulations here. And New York, which will contain 26 Congressional districts as of January 1, 2023, will have 3 ½ times Maryland's eight districts. So if anything, Mr. Trende should have generated more maps for New York than for Maryland. But he did the opposite, creating serious doubt about the adequacy of his New York analysis.[9]

In his Maryland analysis, Mr. Trende also studied and discarded numerous "duplicate" maps before he made any comparison to Maryland's enacted Congressional map. R. 2394. For every 250,000 random maps, he found as many as 220,000 duplicates. *Id.* By contrast, in this proceeding, Mr. Trende did not discard, or even search for, any duplicates in the New York sample, because he admits he did not even look at the simulated maps his algorithm produced. R. 2615.

Given Mr. Trende's experience in Maryland, common sense would counsel his ensemble of New York Congressional district maps contained some measure of duplication of districts also. As per Dr. Tapp, "[a]n ensemble with a

[9] Mr. Trende also evaluated the compactness of proposed Congressional districts in Maryland pursuant to four different metrics. R. 2392. By contrast, even though the New York Constitution required the Legislature to develop districts "as compact in form as practicable" (N.Y. CONST. art. III, § 4(c)(4)), Mr. Trende used only a single compactness measure, the "Polsby-Popper score," to create the ensemble of maps against which he compared the Legislature's enacted 2022 Congressional district map. R. 2592.

high level of redundancy" among certain simulated districts "cannot be said to provide a representative sample of its target distribution" (R. 1205-06), and therefore is "statistically useless" (R. 1210-11). Hence, Mr. Trende's decision to evaluate his simulated Maryland Congressional maps for redundancy (and to discard duplicates), but not to do likewise for his New York ensemble, casts further doubt on the reliability of his conclusions here.

### C. Mr. Trende employed an experimental methodology whose results undermine his conclusions

As explained by Dr. Tapp, the "McCartan-Imai algorithm" employed by Mr. Trende to generate his simulations of alternative New York Congressional district maps continues to undergo peer review. R. 860. In fact, Professors McCartan and Imai recently received a "referee report" requiring them to make significant changes to their proposed paper introducing the algorithm. R. 859. For this reason, Dr. Tapp characterized the McCartan-Imai algorithm as "a work in progress." R. 860. Simply put, Mr. Trende's reliance on a simulation methodology that is a work in progress, without more, fails to prove Petitioners' allegations beyond any reasonable doubt.

Further, even assuming that methodology's validity, Mr. Trende's results arguably support Respondents, not Petitioners. Had Mr. Trende acknowledged the conclusion that necessarily flowed from his first report and the

established "Partisan Index," rather than purported to rely on his novel and little-tested gerrymandering index to compare the Legislature's 2022 enacted Congressional map to his ensemble of simulated maps, he would have concluded that the enacted Congressional map actually benefits Republicans. R. 879, 1004. So concluded Dr. Barber upon trying to replicate the results of Mr. Trende's simulations as best he could, given the limited information Mr. Trende disclosed about his work. R. 997-1001, 1004.

The Partisan Index uses the vote totals from past statewide elections to determine which major political party (Republicans or Democrats) would be expected to receive more votes in a given district. R. 1001-02. Dr. Barber and Dr. Ansolabehere agreed, as does Dr. Imai, that the correct way to evaluate a given district's partisan lean is to calculate the district's Partisan Index, and then to classify the district as leaning Republican or Democratic based upon the average vote received by each party in recent statewide elections. R. 874-76, 1001-02, 2868. This evaluation would demonstrate that the plurality of Mr. Trende's randomly simulated maps — about 40% — would contain 23 Democratic-leaning Congressional districts and three Republican-leaning districts. R. 1002-04. Yet Dr. Barber concluded, and Dr. Tapp and Dr. Ansolabehere agreed, the Legislature's enacted 2022 Congressional map is more favorable to Republicans,

in that it contains 22 Democratic-leaning districts, and four Republican-leaning districts. *Id.*

The Trial Court dismissed the Partisan Index analysis because, in its view, "it strains credulity that a Democrat Assembly, Democrat Senate, and Democrat Governor would knowingly pass maps favoring Republicans." R. 18. This reasoning is circular: Democrats must have tried to disadvantage Republicans, so evidence suggesting the contrary must be false. And if the Trial Court disbelieved the conclusions required by applying the Partisanship Index to Mr. Trende's data, it should have faulted Mr. Trende's data, found reasonable doubt, and upheld New York's enacted Congressional map.

Finally, the Trial Court expressed concern that New York's 2012 Congressional map yielded eight Republican representatives in the most recent election cycle, while the 2022 enacted Congressional map could potentially yield only four Republican representatives. R. 19. But Republicans' possible loss of four seats — in a state that lost a Congressional seat due to the 2020 census results, and in which population shifted significantly toward areas of the State that favor Democrats — does not mean the Legislature stacked the deck against them. Much can happen in ten years. People can vote differently, change their party affiliation, or both. The political landscape can shift on account of current events, such as rising gasoline prices or the American response to the war in Ukraine.

Republicans can move out of State, Democrats can move into the State, and they can move within the State, causing material shifts in population like those New York has seen over the past decade. R. 869.

Simply put, there is no guarantee that a particular political party will win the same number of seats forever — even if redistricting occurs without consideration of politics — nor is there any guarantee either major party will win a particular number of Congressional seats this year. This is so, because computers do not vote or draw district maps; people do. Mr. Trende assumes certain Congressional districts will vote for a particular party representative, when recent counterexamples (for instance, the success of Republican Representatives John Katko and Lee Zeldin winning election to Congress from districts whose Partisan Indices leaned Democratic under the 2012 Congressional plan, and lean Democratic again in the enacted 2022 plan) demonstrate otherwise.

To conclude, Mr. Trende's analysis is riddled with problems. The Trial Court ignored them, apparently relying on its knee-jerk belief that "[o]ne does not reach the worst of 2,500, 5,000, 10,000, or 50,000 maps by chance." R. 20. But this cursory, one-sentence assertion misses the point. Mr. Trende's maps are not a representative sample of maps that could be drawn under the State Constitution, or of maps that a rational New York Legislature would draw. The sample size is too small. The methodology is unproven. It fails to account for the

Legislature's mandate to consider, among other things, maintaining communities of interest in a district to the extent possible. Mr. Trende cannot warrant his simulated maps lack redundancy, moreover, because he never studied them and they appear nowhere in the record. And even accepting Mr. Trende's data at face value, the Partisan Index suggests New York's enacted 2022 Congressional map is, at the very least, fair to Republicans. Petitioners did not prove their case beyond a reasonable doubt, and the Trial Court should be reversed.

## POINT V

## THE TRIAL COURT'S REMEDY VIOLATES THE STATE CONSTITUTION AND EQUITABLE PRINCIPLES

### A. The State Constitution does not allow courts to impose a bipartisanship requirement on remedial maps

The Order requires the Legislature to draw replacement district maps for the Assembly, State Senate, and Congress. R. 24. If the replacement maps fail to receive some unspecified amount of bipartisan support, the Trial Court claims it "will retain a neutral expert at State expense to prepare said maps." *Id.* This bipartisanship requirement is unconstitutional.

In particular, the New York Constitution guarantees the Legislature a "full and reasonable opportunity" to correct any redistricting-plan defects found by a court. N.Y. CONST. art. III, § 5. This guarantee is consistent with the well-established principle that "legislative reapportionment is primarily a matter for

legislative consideration and determination." *Orans*, 15 N.Y.2d at 352 (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)).

A "full and reasonable opportunity" to enact replacement maps cannot include an undefined and unprecedented bipartisanship requirement. The Trial Court invented the requirement out of whole cloth, and Petitioners never asked for such relief. Perhaps more importantly, the State Constitution establishes required vote thresholds governing "[a]ll votes by the senate or assembly on any redistricting plan," and these thresholds make no mention of legislators' party affiliations. N.Y. CONST. art. III, § 4(b). Additionally, on a practical level, the bipartisanship requirement almost certainly means the Legislature cannot draw replacement maps at all. Members of the Legislature's Republican minority can simply refuse to negotiate in good faith, deny the Democratic majority an opportunity to enact "bipartisan" maps, and ensure that Petitioners' hand-picked judge in Steuben County can draw the maps instead.

### B. The Trial Court erred by failing to evaluate the Congressional map district-by-district

"Relief in redistricting cases is 'fashioned in the light of well-known principles of equity.'" *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (*per curiam*) (quoting *Reynolds*, 377 U.S. at 585). Accordingly, Courts "must undertake an equitable weighing process to select a fitting remedy for the legal

violations it has identified, taking account of what is necessary, what is fair, and what is workable." *Id.* (quotation marks and citations omitted). These principles prohibit what the Trial Court did here: striking down the entire Congressional map for improper legislative motive, without considering whether motive was unconstitutional as to some districts but not others.

Illustrative is *Upham v. Seamon*, which arose under the Voting Rights Act. 456 U.S. 37 (1982) (*per curiam*). There, Texas submitted its Congressional redistricting plan to the United States Attorney General for "preclearance" under the Act, and the Attorney General objected to only two districts. *Id.* at 38. Meanwhile, plaintiffs sued in federal court to invalidate the redistricting plan under a different section of the Act. *Id.* In that lawsuit, the court modified the boundaries of districts in Dallas County — even though the Attorney General had not objected to those districts, and even though the Court did not find those districts illegal or unconstitutional. *Id.* at 38, 43. The United States Supreme Court reversed, reasoning that judicial modifications to a redistricting plan must be "limited to those necessary to cure any constitutional or statutory defect." *Id.* at 43-44. Courts reached analogous outcomes in *Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971), and *Johnson v. Miller*, 929 F. Supp. 1529, 1566–67 (S.D. Ga. 1996).

Like the District Court in *Upham*, the Trial Court here should have ordered a remedy only with respect to any Congressional districts it found to reflect unconstitutional partisan intent. Instead, it made a blanket finding that the entire Congressional map was substantively unconstitutional, without considering whether some of the districts satisfied Constitutional requirements. For instance, the Congressional districts north of metropolitan New York City are similar to districts drawn by both Republican and Democratic members of the Commission: Democratic-leaning districts centered around Buffalo, Rochester, Ithaca/Syracuse, and Albany; Republican-leaning districts for the Southern Tier and the North Country; and a Republican-leaning district along Lake Ontario around Rochester. R. 3263-65. And many of the downstate Congressional districts, including most New York City districts, in the Legislature's 2022 enacted map were not challenged at all by any voters who reside there. *See* Point I, *supra*.[10]

[10] Also on account of *Upham*, if this Court were to hold the Legislature's 2022 Assembly map were enacted in an unconstitutional manner (which it was not; *see* Point III, *supra*), this Court should hold that map retains full force and effect regardless, because it contains no substantive deficiency.

## POINT VI

## REMEDIAL MAPS, IF ANY, SHOULD NOT TAKE EFFECT UNTIL AFTER THE ONGOING 2022 ELECTIONS

### A. Interfering with the 2022 election would generate chaos

As Justice Kavanaugh recognized in February, "[r]unning elections state-wide is extraordinarily complicated and difficult .... Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Mem.) (Kavanaugh, J., concurring).

New York's elections are no exception. In a 37-day period, aspiring candidates must collect hundreds of designating-petition signatures to qualify for primary elections. R. 126-27. Then, signatures are subject to challenge,[11] and those challenges require about a month to resolve. R. 2319. Next, primary ballots are certified, printed, and mailed to absentee voters and to military members at least 45 days before the primaries;[12] early in-person voting is held for nine days; in-person voting occurs on Primary Day; and votes are counted. R. 126-27. This process of certification, printing, mailing, and voting repeats for the general

[11] N.Y. ELEC. LAW § 6-154.

[12] N.Y. ELEC. LAW § 10-108(1)(a); 52 U.S.C. § 20302(a)(8)(A).

election, which is scheduled for November 8, 2022. Not even the first of these many steps can be taken until district maps are finalized.

Given these complexities, any attempt to jam remedial maps into 2022 would generate chaos. Officials have been preparing the State's election infrastructure since February. R. 2321-22. The Trial Court's Order eviscerates that work and requires the officials to start from scratch. The result will be a frantic sprint to hold elections on a condensed calendar under district maps that do not yet exist. As stated by Thomas Connolly, Director of Operations for the New York State Board of Elections, the Order will cause "substantial disruption to candidates, political parties and boards of elections" as well as "financial, logistical and administrative burdens." R. 2318, 2325.

Further, aspiring candidates began collecting ballot-access signatures — which requires substantial investments of time and money — on March 1, 2022. R. 126-27. The deadline to submit those signatures to boards of elections was April 7. *Id.* Candidates must gather signatures from voters who reside in the relevant district, N.Y. ELEC. LAW § 6-136(2), so this process would likely need to start over if district boundaries change. Indeed, until the boundaries are set, potential candidates may not even know whether they will run for office.

The Trial Court's Order would cause voter confusion, as well. A change in district lines will necessarily change voting dates and polling places, and

voters may become unsure of which candidates are vying to represent them. Some voters already contributed time and money to support particular candidates, only to have their chosen candidate potentially pushed out of their district.

The Trial Court itself recognized some of the grave risks created by its Order. It expressed "concern[ ] about the relatively brief time in which everything would need to happen to draw new maps" and noted that, as a result of its Order, New York might not have maps in time for the 2022 elections. R. 21, 23. This possibility — which would amount to a Constitutional crisis — is ample reason to leave the existing district lines in place for this year's elections.

### B. This Court should adhere to the *Purcell* principle, which warns against judicial interference in impending elections

It is well settled that Courts should not "enjoin a state's election laws in the period close to an election." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (*per curiam*)). The so-called *Purcell* principle "reflects a bedrock tenet of election law: 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." *Merill*, 142 S. Ct. at 880–81 (Kavanaugh, J., concurring).

In *Merrill*, for instance, a Federal District Court determined that Alabama's redistricting maps likely violated Federal law. *Caster v. Merrill*, 2022 WL 264819, at *2 (N.D. Ala. Jan. 24, 2022). That Court therefore enjoined the State from holding Congressional elections under the likely illegal maps, even though primary elections were scheduled to begin five months later. *Id.* at *1-2. The United States Supreme Court granted a stay of that injunction, which allowed the election to proceed under the challenged maps. *Merrill*, 142 S. Ct. at 879. That decision was no outlier — the United States Supreme Court has often rejected attempts to disrupt impending elections. *E.g.*, *Moore v. Harper*, 142 S. Ct. 1089 (2022) (Mem); *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020) (Mem); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (*per curiam*); *Veasey v. Perry*, 574 U.S. 951 (2014) (Mem); *Frank v. Walker*, 574 U.S. 929 (2014) (Mem).

The *Purcell* principle is based on common sense, and this Court should adopt it. Although the principle was developed by Federal Courts, the key reasons animating it apply everywhere. Thus, it is no surprise that the highest Courts of several States have recently adopted *Purcell*. *E.g.*, *Fay v. Merrill*, 256 A.3d 622, 638 n.21 (Conn. 2021); *Jones v. Sec'y of State*, 239 A.3d 628, 630-31 (Me. 2020); In re *Hotze*, 627 S.W.3d 642, 645 & n.18 (Tex. 2020); *League of*

*United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 206-07 (Iowa 2020) (*per curiam*).

For example, in *Alliance for Retired Americans v. Secretary of State*, the plaintiffs claimed that certain Maine laws regarding absentee voting were unconstitutional. 240 A.3d 45, 48 (Me. 2020). The plaintiffs moved to enjoin enforcement of the laws, the Trial Court denied the motion, and the Supreme Judicial Court of Maine affirmed. *Id.* The Court found "instructive" a recent United States Supreme Court decision that "emphasized the wisdom of the *Purcell* principle, which seeks to avoid judicially created confusion." *Id.* at 52 (cleaned up). This Court, too, should employ the "wisdom" of *Purcell* and decline to disrupt the 2022 elections at this late stage.

### C. The New York Court of Appeals and the United States Supreme Court have held that imminent elections should proceed even under illegal or unconstitutional district maps

The New York Court of Appeals has already held that imminent elections should proceed under illegal district maps. For instance, in *Badillo v. Katz*, the Court declined to enjoin New York City local elections, even though the municipal district maps violated State law. 32 N.Y.2d 825, 827 (1973). Similarly, in *Honig v. Board of Supervisors of Rensselaer County*, the Court affirmed the Appellate Division's decision not to disturb upcoming elections, despite invalidating the subject redistricting plan. 31 A.D.2d 989 (3d Dep't), *aff'd*, 24

N.Y.2d 861 (1969). Other New York State Courts have reached similar conclusions. *E.g.*, *Duquette v. Bd. of Supervisors of Franklin County*, 32 A.D.2d 706 (3d Dep't 1969); *English v. Lefever*, 110 Misc. 2d 220, 230 (Sup. Ct. Rockland County 1981); *Pokorny v. Bd. of Supervisors of Chenango County*, 59 Misc. 2d 929, 934 (Sup. Ct. Chenango County 1969).

Similarly, the United States Supreme Court has recognized that "if a [redistricting] plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Accordingly, the Court has allowed impending elections to proceed under unconstitutional maps for practical reasons. *E.g.*, *Bullock v. Weiser*, 404 U.S. 1065 (1972) (Mem); *Ely v. Klahr*, 403 U.S. 108, 114-15 (1971); *Whitcomb v. Chavis*, 396 U.S. 1055 (1970); *Wells v. Rockefeller*, 394 U.S. 542, 547 (1969); *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967) (*per curiam*).

Particularly instructive here is *Wells*, in which a Federal District Court held in 1967 that a New York redistricting plan was unconstitutional. 394 U.S. at 547. But because the 1968 primary elections were only three months away, the Court approved the plan for those elections, notwithstanding the unconstitutionality. *Id.* The United States Supreme Court affirmed that decision, holding that new maps should take effect for the 1970 elections, not the 1968 elections. *Id.*

The Trial Court acknowledged but failed to apply *Wells*, apparently accepting Petitioners' invitation to read into the State Constitution a requirement that any remedy take effect in the current election cycle. R. 21. Such reading is unsupported. True, the State Constitution required the Trial Court to issue its decision within 60 days of the lawsuit's commencement. N.Y. CONST. art. III, § 5. But the Constitution does not require replacement maps to become effective at any particular time. Nor does it make the Trial Court the court of last resort or place a time constraint on appellate review of the Order.

This Court should adhere to binding precedent from the Court of Appeals, and voluminous persuasive authority from the United States Supreme Court, holding that imminent elections should proceed even under legally flawed maps.

### D. Interference with the 2022 Congressional elections would likely violate a Federal Court Order

In 2012, District Judge Gary Sharpe entered a permanent injunction setting New York's Federal primary to occur on the fourth Tuesday in June to permit timely mailing of ballots to overseas military personnel as required by law. *United States v. New York*, 2012 WL 254263, at *2 (N.D.N.Y. Jan. 27, 2012). Judge Sharpe's Order — in which he expressly rejected a request to set an August primary date — states any change to the June primary date is subject to his

approval. *Id.* at *3. Thus, any attempt to alter the primary date — which would be necessary to comply with the Trial Court's Order — would risk violating Federal law and, at a minimum, would require Judge Sharpe's approval.

## CONCLUSION

The Trial Court misinterpreted the law, misjudged the facts, and ordered a remedy that, if allowed to take effect, would do great violence to New York's elections and Constitution. This Court should reverse the Order in all respects, except that the Order should be affirmed to the extent it upholds the State Senate district map.

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