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

Petitioners,

-against-

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

Respondents.
_____x

A.D. No. _____

Steuben County Index No. E2022-0116CV

MEMORANDUM OF LAW OF THE SENATE MAJORITY LEADER AND THE SPEAKER OF THE ASSEMBLY IN SUPPORT OF APPELLANTS' MOTION TO CLARIFY THAT THE TRIAL COURT'S ORDER IS NOT IN EFFECT OR, IN THE ALTERNATIVE, FOR A STAY PENDING APPEAL

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Senate Majority Leader Andrea Stewart-Cousins and Speaker of the Assembly Carl Heastie, by and through their attorneys, Cuti Hecker Wang LLP, and Graubard Miller and Phillips Lytle LLP, respectfully submit this memorandum of law in support of their motion by order to cause as to why this Court should not enter an order that the trial court's order is not in effect and/or is stayed pending appeal.

PRELIMINARY STATEMENT

On Thursday, March 31, 2022, the Steuben County Supreme Court (the "trial court") struck down the legislative-district maps governing the Assembly, the Senate, and New York's congressional delegation. It ordered the Legislature to drop everything and enact new, "bipartisanly [sic] supported" maps by April 11, 2022, without defining this bipartisanship requirement that it invented out of whole cloth. And if the Legislature's Republican minority simply decides not to participate in this contrived process, the Steuben County Supreme Court has ordered it will redraw the maps itself with the assistance of an unspecified "neutral expert."

Implementation of this unprecedented Order would upend the 2022 election cycle midstream. Hundreds of candidates began campaigning, and collecting thousands of ballot-access signatures, more than a month ago; the statutory window to submit those signatures to the Board of Elections opens tomorrow,

April 4, and closes on April 7, 2022. Election officials have been working for months behind the scenes to prepare for June's primary elections. In the midst of this complex process, the trial court's Order would erase the very district lines upon which the entire election infrastructure is built.

By statute, and contrary to Petitioners' contentions and the provisions of the Order itself, the Order cannot go into effect until 30 days have passed. Even if the Order were effective immediately, however, it has been automatically stayed by this appeal under CPLR 5519(a)(1). This Court should confirm as much to provide clarity and prevent the chaos and confusion that would otherwise result. Candidates and election officials need to know, immediately, that the April 4 to April 7 window remains in place to file the petition signatures they have collected in reliance upon the district lines duly enacted by the Legislature in February 2022.

Finally, even if the Order is effective and not automatically stayed, this Court should grant a discretionary stay. The alternative is a full-fledged constitutional crisis. Without any opportunity for appellate review, Steuben County Supreme Court would re-draw the district maps for the entire State's Assembly, Senate, and congressional elections, usurping the Legislature's centuries-long authority over that process. The ongoing election cycle will have to somehow restart from scratch under new district lines – which is likely impossible.

The trial court itself recognized, apparently unfazed, that its Order may result in no primary elections in 2022.

It bears emphasis that the trial court's Order, aside from its dire consequences, is deeply flawed on the merits. In the course of delivering a civics lecture on the value of compromise, the trial court ignored the New York State Constitution, statutory law, and controlling case law. It even struck down, *sua sponte*, an Assembly district map that no one challenged. This Court should confirm that the Order is not in effect, maintain the status quo, and allow appellate review to correct one of the gravest errors in the history of this State's judiciary.

STATEMENT OF THE CASE

The relevant facts are set forth in the accompanying Affirmation of Alexander Goldenberg, Esq. and are incorporated by reference herein.

ARGUMENT

I. THIS COURT SHOULD CLARIFY THAT THE ORDER IS NOT IN EFFECT

By statute, the Order invalidating the congressional, Senate, and Assembly maps is not in effect. Those maps were created pursuant to L. 2022, ch. 13 and L. 2022, ch. 14, and the language of those statutes is clear that no order invalidating them can go into effect before the Legislature has been afforded 30 days advance notice:

> It is hereby determined and declared that no order of the court invalidating this act or part thereof shall be entered in a manner which will deprive the legislature of an opportunity to discharge its constitutional mandate. In any proceeding for judicial review of the provisions of this act, the determination of the court shall be embodied in a tentative order which shall become final 30 days after service of copies thereof upon the parties unless the court shall, in the interval, on application of any party, resettle its order.

See L. 2022, ch.13, § 3(i); *see also* L. 2022, ch. 14, § 2 (identical provision applies to an order invalidating any part of the statute enacting the Senate and Assembly redistricting plans). By expressly providing that a judicial order invalidating a redistricting plan enacted by the Legislature must be "tentative" and not final until 30 days after it was served on the parties, the statute automatically delays the effectiveness of the tentative order in order to safeguard the Legislature's opportunity "to discharge its constitutional mandate." *Id*.

The statute makes obvious sense. It contemplates precisely the kind of deeply troubling and urgent circumstances in which we find ourselves: a constitutional crisis in which the trial court's Order invalidates all operative electoral maps in the State of New York, seeks to halt an election that is already underway, strikes down an Assembly plan that no party even challenged, directs the Legislature to enact new "bipartisanly supported" legislation within 11 days, and otherwise confirms the intent to re-draw the plans itself if "sufficient bipartisan support" is not achieved, all in plain violation of the Constitution. Because the Order declares invalid the redistricting plans enacted pursuant to the statutes

referenced above, none of the decretal paragraphs purporting to grant Petitioners "a permanent injunction refraining and enjoining the Respondents, their agents, officers, and employees or others from using, applying, administering, enforcing or implementing any of the recently enacted 2022 maps for this or any other election in New York, included [sic] but not limited to the 2022 primary and general election for Congress, State Senate and State Assembly"; ordering that "the Legislature shall have until April 11, 2022 to submit bipartisanly [sic] supported maps to this court for review of the Congressional District Maps, Senate District Maps, and Assembly District Maps that meet Constitutional requirements"; or ordering that "in the event the Legislature fails to submit maps that receive sufficient bipartisan support by April 11, 2022 the court will retain a neutral expert at State expense to prepare said maps," Order at 18, is in effect.[1]

The plain language of the statutes cited above, which require such orders to be tentative for 30 days, is dispositive. But even assuming *arguendo* that the Order somehow was effective when issued, enforcement of the Order's directives would be automatically stayed under CPLR § 5519(a)(1). *See LaRossa, Axenfeld & Mitchell v. Abrams*, 62 N.Y.2d 583, 586 (1984) (stating that Attorney General had "obtained an automatic stay" of a preliminary injunction enjoining it from

[1] If the court relies in part on this provision, it should further clarify or order that a stay shall remain in effect for the duration of this appeal, either by virtue of the automatic stay in CPLR § 5519(a)(1) or through a discretionary stay.

enforcing subpoenas pending hearing on other motions). An automatic stay is triggered upon service on the adverse party of a notice of appeal where the Appellant is "a political subdivision of the state or any officer or agency of state or of any political subdivision of the state." CPLR § 5519(a)(1). Maintenance of the status quo pending appeal is the foundational objective of the automatic stay. *See State v. Town of Haverstraw*, 219 A.D.2d 64, 65 (2d Dep't 1996) ("The objective of the automatic stay provided by CPLR 5519(a)(1) is to maintain the status quo pending the appeal."); *see* Siegel, *New York Practice*, § 535. By commanding numerous affirmative actions by Respondents and thousands of others that would dramatically disturb the status quo and which could not be undone should they prevail on appeal, the Order triggers the automatic stay.

By way of example, the Order directs elections officials and others responsible for administering the election that is already underway to violate the statutes that govern such election administration. *See, e.g.*, N.Y. Election Law § 4-110 ("The state board of elections, not later than fifty-five days before a primary election, *shall* certify to each county board of elections" information concerning candidates and offices for which they are running) (emphasis added); *id.* § 4-118 ("Each county board of elections *shall* publish" notice of the primary election date and time and the offices for which it will be held) (emphasis added); *id*. § 4-134 ("The board of elections *shall* deliver" the official and sample ballots, ledgers and

other necessary documents to town and city clerks) (emphasis added). The Order commands violation of scores of statutes on the books by thousands of state, county, and local elections officials and volunteers.

Separately – and stunningly – the Order directs the Legislature to enact and submit "bipartisanly supported" redistricting legislation within 11 days of entry of the Order, thereby commanding the entire Legislature to undertake myriad actions not otherwise required by the CPLR. In boldly directing "the performance of . . . [acts] in the future" and "requir[ing] voluntary or compelled compliance to cause them to be executed," the Order invokes 5519(a)(1). *Matter of Pokoik v. Dep't of Health Servs. of Cnty. of Suffolk*, 220 A.D.2d 13, 14-16 (2d Dep't 1996).

Two days ago, the New York State Board of Elections, which is a separately represented Respondent in this case, issued the following public statement via Twitter:

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

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

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

Several hours later, Petitioners' counsel wrote a letter to counsel to the Board of Elections arguing that no automatic stay is in effect and demanding that the Board of Elections immediately publish a corrective statement.

We respectfully urge the Court to clarify that the Order is not currently in effect. If the Court declines to do so, the crisis caused by Petitioners' insistence that the Board of Elections is wrong about whether the Order is stayed, and the widespread confusion that already has been sown, will only worsen.

II. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT A STAY OF THE ORDER PENDING APPEAL

Assuming *arguendo* that the Order was effective upon issuance and not subject to an automatic stay, the Court should exercise its discretion to grant a stay of the Order pending appeal because failing to do so would "threaten[] to defeat or impair its exercise of jurisdiction." *Matter of Schneider v. Aulisi*, 307 N.Y. 376, 384 (1954) (affirming issuance of stay pursuant to court's inherent power because underlying pending motion would have been "valueless without a stay"); *see also* CPLR § 5519(c). Even if the CPLR did not expressly authorize stays (of course, it does), it is well-established that this Court has the inherent authority to issue a stay in order to preserve the status quo and prevent irreparable harm to Respondents

and countless others throughout the State, including the voters. *See Schneider*, 307 N.Y. at 383-84; *Matter of National Fuel Gas Supply Corp. v. Gurov*, 179 A.D.3d 1453, 1454 (4th Dep't 2020) (exercising discretion to issue stay pending appeal of order authorizing petitioner to acquire easement over his property); *Tax Equity Now NY LLC v. City of New York*, 173 A.D.3d 464, 465 (1st Dep't 2019); *Matter of Santiago v. Bristol*, 273 A.D.2d 813, 813 (4th Dep't 2000) (staying enforcement of order that declared Civil Rights Law § 52 unconstitutional and permitted audiovisual recording of a criminal trial); *Schwartz v New York City Hous. Auth.*, 219 A.D.2d 47, 48 (2d Dep't 1996) (recognizing "this Court's inherent power to grant a stay of acts or proceedings, which, although not commanded or forbidden by the order appealed from, will disturb the status quo and tend to defeat or impair our appellate jurisdiction").

The standard for issuing a stay on appeal is the same standard that is applied in granting a preliminary injunction. *Matter of Riccelli Enters., Inc. v. Worker's Comp. Bd.*, 117 A.D.3d 1438, 1439 (4th Dep't 2014). The movant is entitled to a stay when it demonstrates "(1) a likelihood of success on the merits, (2) irreparable injury in the absence of injunctive relief, and (3) a balance of the equities in its favor." *Eastview Mall, LLC v. Grace Holmes, Inc.*, 182 A.D.3d 1057, 1058 (4th Dep't 2020) (internal quotation marks omitted). The Order threatens to prevent the legislative and executive branches of government from fulfilling their obligations

to conduct orderly, fair elections, and to violate the separation of powers by usurping the constitutionally prescribed redistricting process and giving the trial court complete power to enact new maps. It is hard to imagine a stronger basis to grant a stay, particularly because the Order is riddled with errors, unsupported by the record, and very likely to be vacated on appeal. In the meantime, the Order is actively causing irreparable harm to the Respondents. For the reasons set forth below, the Court should issue a stay.

A. Appellants Are Likely to Succeed on the Merits

1. The Trial Court Erred in Holding that the Commission's Failure to Act Stripped the Legislature of Its Authority to Enact Congressional, Senate, and Assembly Plans.

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

We begin with what is not in dispute. The Constitution unambiguously required the Commission to recommend a proposed plan or plans to the Legislature between January 1 and January 15 and unambiguously afforded the Commission

no discretion not to do so. The Constitution then unambiguously vested the Legislature with unfettered discretion to accept or reject the Commission's initial recommendation for any reason. If the Legislature declined to enact the initial Commission recommendation, the Constitution unambiguously required the Commission to submit a second recommendation within fifteen days. Once again, the Commission had no discretion not to submit a second recommendation by that deadline, and once again, the Legislature had unfettered discretion to accept or reject the Commission's second recommendation for any reason. Critically, if the Legislature chose in its discretion to reject the Commission's second recommendation, the Constitution unambiguously afforded the Legislature broad discretion to enact its own plan by making "any amendments" it "deems necessary."[2]

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[2] By continuing to afford the Legislature broad discretion to enact any redistricting plan it deems necessary, the 2014 amendments uphold more than two centuries of history, tradition, and judicial precedent. *See Matter of Sherill*, 188 N.Y. 185, 202 (1907) (describing broad "power of apportionment" granted to Legislature in "the first Constitution and the amendment of 1801"); *see also Carter v. Rice*, 135 N.Y. 473, 490-91 (1892) (holding that Legislature possessed exclusive authority to apportion legislative districts); *In re Reynolds*, 202 N.Y. 430, 444 (1911) (affirming "the power vested in and imposed upon the legislature to pass a constitutional apportionment bill"); *Burns v. Flynn*, 268 N.Y. 601, 603 (1935) ("Apportionment is a duty placed by the Constitution on the Legislature, over which the courts have no jurisdiction."); *In re Fay*, 291 N.Y. 198, 206-07 (1943) (upholding constitutionality of redistricting plan and affording broad deference to Legislature); *In re Orans*, 15 N.Y.2d 339, 352 (1965) (confirming "[t]here is no doubt that reapportionment is within the legislative power"); *Schneider v. Rockefeller*, 31 N.Y.2d 420, 430 (1972) (upholding plan where "the legislative

The Constitution does not address what happens if the Commission abdicates its duty to present a first or second recommendation to the Legislature. The Legislature addressed that silence in June 2021 by passing legislation that reasonably provides that if the Commission fails to make a recommendation, the Legislature may enact its own plan – just as the Legislature unquestionably may do if it chooses for any reason not to enact a Commission recommendation. L.2021, c. 633, § 1. This statute complements, and does not conflict with, the text of the Constitution.

Cohen v. Cuomo, 19 N.Y.3d 196 (2012), is controlling precedent. In that case, the Court of Appeals addressed the Constitution's silence with respect to the formula for calculating the size of the Senate. The Constitution did "not provide any specific guidance on how to address" the confusion that had arisen with respect to the Senate size formula, such that "two different methods" were potentially valid. *Id*. at 200. The petitioners claimed that although it would be

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determination [wa]s reasonable"); *Bay Ridge Cmty. Council, Inc. v. Carey*, 103 A.D.2d 280 (2d Dep't 1984), *aff'd,* 66 N.Y.2d 657 (1985) (rejecting challenge to legislative redistricting plan); *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 77-80 (1992) (acknowledging limitations on judiciary's role in redistricting, and confirming that "[b]alancing the myriad requirements imposed by both the State and the Federal Constitution is a function entrusted to the Legislature"); *Cohen v. Cuomo*, 19 N.Y.3d 196, 201-02 (2012) (approving Legislature's addition of Senate seat in redistricting because "acts of the Legislature are entitled to a strong presumption of constitutionality"). These decisions remain controlling precedent, unless and until the Court of Appeals says otherwise.

permissible to use either method, the Legislature could not "use different methods for different parts of the state in the same adjustment process." *Id*. at 201. The Court rejected this claim, observing that the Legislature has broad discretion to fill a void created by "the Constitution's silence." *Id*. at 202. The Court emphasized that legislative acts "are entitled to a strong presumption of constitutionality," and that a court may strike down a statute filling a gap in the Constitution "only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law" and only after "every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *Id*. (quoting *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992); *In re Fay*, 291 N.Y. 198, 207 (1943)). Under *Cohen*, the only question for a court is whether a legislative enactment 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 *Matter of Sherrill*, 188 N.Y. 185, 198 (1907)).

Here, there plainly is no conflict between the statute and the Constitution. If the Commission performs its mandatory duties, then each step enshrined in the Constitution proceeds as described. And if the Commission abdicates its duty to present a second recommendation to the Legislature, then the Legislature has the same discretion to enact its own plan that it has when the Commission presents any

second recommendation. That conclusion comes nowhere close to the "impossible" "conflict[] with fundamental law" and "gross and deliberate violation" of the plain intent of the Constitution that *Cohen* made clear a challenger must show before a court may reject the Legislature's resolution of a constitutional ambiguity. 19 N.Y.3d at 202.

The trial court failed even to acknowledge *Cohen*, even though it was the centerpiece of Respondents' briefing below and the Court of Appeals' most recent decision regarding legislative redistricting.[3] Instead, the trial court held that the 2021 statute is unconstitutional and that the Legislature "is not free to ignore the IRC maps and develop their own." Order at 6, 8-10. Because the Commission failed to submit a final proposal to the Legislature, the trial court threw out the Legislature's duly enacted congressional plan, Senate plan (which the trial court otherwise upheld on the merits), and Assembly plan (which no party even

[3] The trial court cited only one case to support its decision striking down three statutes on the ground of alleged legislative overreach: *City of New York v. New York State Division of Human Rights*, 93 N.Y.2d 768, 774 (1999). That case involved the regulation of civil service lists, and a legislative enactment that specifically defied a prior Court of Appeals decision that forbid appointing individuals from an expired list. Here, by contrast, no court has ever questioned the Legislature's authority to reapportion legislative districts. To the contrary, *Leib v. Walsh*, 45 Misc. 3d 874, 881 (N.Y. Sup. Ct. Albany Cnty. 2014), the only prior case to address the 2014 amendments, held that "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."

challenged). *Id.* The trial court's sweeping determination rests on numerous obvious legal, factual, and logical errors.

First, the trial court's holding would lead to the absurd result that any four Commissioners could unilaterally block the Legislature from enacting any redistricting plan (because seven Commissioners are required for a quorum, *see* art. III, § 5-b(f)). Thus, as the trial court would have it, any time a bloc of four Commissioners wished to deprive the Legislature of its authority to enact a plan and kick the entire redistricting process to whatever court an opportunistic litigant might select, those Commissioners could simply refuse to meet. It would be absurd, and therefore improper, to read the Constitution to vest a minority of four Commissioners with the unilateral power to stymie the legislative redistricting process. *See In re Dowling*, 219 N.Y. 44, 56 (1916) (upholding Legislature's decision concerning Senate size and holding that "[i]n 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 Fay*, 291 N.Y. 198, 216 (1943) (same); *see also Anderson v. Regan*, 53 N.Y.2d 356, 362 (1981) (court must avoid constitutional interpretation that "would lead to an absurd conclusion").

In fact, the trial court willfully ignored the uncontested evidence in the record that that is exactly what happened in this case. Although Petitioners alleged baselessly in their unverified Petition that the Democratic Commissioners refused to submit a final plan to the Legislature by the final deadline "after receiving encouragement to undermine the constitutional process from Democratic Party politicians and officials," that unsworn, unsupported allegation is false. Paragraph 113 of the Senate Majority's Answer to the Amended Petition (NYSCEF Dkt. No. 148) is verified under oath – and therefore constitutes competent evidence – and states unequivocally that:

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

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

the quorum necessary for the Commission to present a final plan or plans to the Legislature.

It is outrageous that the trial court threw out three duly enacted redistricting plans, and purportedly has now usurped the entire redistricting process, without acknowledging the uncontradicted record showing that it was the Republicans, not the Democrats, who thwarted the Commission process. There is no basis in the record for the trial court's entirely unsupported "finding" that by enacting the 2021 legislation, the Legislature "made it substantially less likely that the IRC would ever submit a bipartisan plan when the senate, assembly, and governorship are all controlled by the same political party." Order at 9. The record in this case confirms that the Republican commissioners were to blame.

The trial court also invented out of whole cloth an alleged constitutional requirement that the Legislature enact "bipartisan" redistricting plans that are the result of "compromise." Notably, even the Petitioners did not make this argument in any of their briefs, and article III of the Constitution uses neither of those words. Section 5-b(g) expressly contemplates that the Commission might not reach a bipartisan consensus and that it could submit two five-vote plans to the Legislature in the event that no Commission plan obtained seven votes. Section 4(b) provides that "all votes by the senate or assembly on any redistricting plan legislation pursuant to this article shall be conducted in accordance" with specific rules, and

sections 4(b)(1)-(3) prescribe specific numerical thresholds for votes in the Legislature. The 2014 amendments plainly do not require bipartisan consensus or compromise, or distinguish between legislators' votes based on party affiliation. The trial court made all of that up, on its own, at the urging of no party.

The trial court's strange order that the Legislature must now go back and enact and submit new congressional, Senate, and Assembly redistricting plans that are "bipartisanly supported," Order at 18 – which, once again, Petitioners never asked for – squarely conflicts with article III, § 5 of the Constitution, which expressly provides that if a court invalidates a redistricting plan in whole or in part, then "*the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities*" (emphasis added). Nothing in the Constitution says that a court can limit the "full and reasonable opportunity" to correct any infirmities to which the Legislature is entitled by imposing unprecedented requirements regarding the partisan identity of legislators. And even if there were a shred of validity to this rule – which there plainly is not – the trial court did not provide any guidance regarding how many Republicans in the Senate and Assembly would have to vote for each plan for it to be deemed to be sufficiently "bipartisanly supported."

The court also erred in stating that the Commission's deadline for submitting a final plan or plans to the Legislature was February 28, 2022. Order at 6.

Petitioners never said that, and it is just wrong. There is no dispute among the parties that the final deadline was January 25, 2022, fifteen days after the Legislature rejected the first Commission plans, not February 28, 2022. *See* N.Y. Const., art. III, § 4(b) ("Within fifteen days of such notification" of rejection of the first redistricting plan, the Commission "shall prepare and submit to the legislature a second redistricting plan"). It is undisputed that the Commission announced that it was deadlocked on January 24, 2022, only one day before the final deadline.

In apparent reliance on this misunderstanding of the timeline, the trial court mused (again, on its own; Petitioners never said anything like this) that the Legislature should have appointed new commissioners who would submit a second plan, or sought judicial intervention to compel the Commission to act via mandamus. Order at 6. But once again, it was the Republican commissioners who had refused to meet and denied the Commission a quorum, and the Senate and Assembly majorities, at most, could have replaced their own appointees. The suggestion that the Senate and Assembly Majorities could have run to court and obtained an extraordinary mandamus order compelling the Commission to act within one day is obviously untenable. It is therefore remarkable that the procedure suggested by the trial court, without prompting, would inevitably violate the Constitution, because any plan submitted after judicial review and further Commission action would contravene the constitutional deadline.

The trial court rests its decision in part on what it believes "the people" must have intended when they approved the 2014 amendments. Order at 4-5. The trial court's populist invocation of "the people" ignores that the Legislature itself enacted the 2014 amendments, twice, before they were submitted to voters. A.9526/S.6698 of 2012; second passage A.2086/S.2107 of 2013. It strains credulity to suggest that the Legislature itself subjected its exclusive constitutional authority to apportion legislative districts to the whims of a minority of Commission members. To the contrary, the fact that the Legislature enacted L.2021, c. 633, section 1 in the first redistricting cycle after the amendments signifies that it understood from the outset that it would be responsible for enacting maps even if the Commission failed to perform its duties. *See New York Public Interest Research Group, Inc. v. Steingut*, 40 N.Y.2d 250, 258 (1976) (court may look to actions of Legislature for guidance on what amendment means); *Easley v. New York State Thruway Auth.*, 1 N.Y.2d 374, 379 (1956) ("Legislatures are presumed to know. . . what is intended by constitutional amendments approved by the Legislature itself.").

The trial court also made much of the fact that the Legislature declined to follow a statutory rule that was adopted in 2012 that states that when amending a final Commission-proposed plan, the Legislature's plan may not deviate by more 2% of the population of any of the districts in the Commission's final proposed

plan. Once again, the trial court is misguided. The 2% rule is a statutory rule, not a constitutional rule, and it therefore unquestionably was within the Legislature's prerogative to amend it through legislation.

The trial court also repeatedly focuses on the timing of the 2021 legislation, asserting falsely multiple times that the Legislature did not enact the statute at issue until November 2021, three weeks after the voters rejected the 2021 amendments. Order at 7, 8. To the extent it matters, once again, the trial court is simply wrong. The Legislature enacted the 2021 legislation in June, months before the 2021 amendments went before the voters. Nor is there anything odd or suspicious about that. The Legislature was hoping the statutory language would be constitutionally enshrined, but it knew the 2021 amendments might not be approved, and it recognized the importance of addressing by statute, in case the more expansive 2021 amendments were not approved, what would happen if the Commission failed to make a final proposal.

In sum, the trial court rejected the Legislature's reasonable effort to ensure that New York would be able to implement reapportioned districts even if the Commission failed to perform its duties, and proposed two alternatives to legislative action under article III: a mandamus proceeding and/or appointing new commissioners to prod Commission action or legislative enactment through a novel, extra-constitutional process that requires some undefined amount of

"bipartisan support" in both the Senate and Assembly. It is astonishing that the trial court struck down three duly enacted statutes, which are plainly constitutional under the standard and rule articulated in *Cohen*, 19 N.Y.3d at 202, (which the trial court failed even to acknowledge), while suggesting or ordering purported solutions that unquestionably conflict with the plain text of the Constitution.

For all of these reasons, the trial court's decision peremptorily to invalidate all three redistricting plans – including one that nobody challenged – on the theory that the Legislature was stripped of its power to legislate is unsupported, untenable, and must be reversed.

2. The Trial Court Erred in Holding that the Congressional Plan Is an Unconstitutional Gerrymander

Petitioners' claim that the congressional plan is an unconstitutional partisan gerrymander rests entirely on the testimony of their two "experts," Mr. Trende and Mr. Lavigna. As discussed in Paragraphs 46-48 of the accompanying Goldenberg Affirmation, Mr. Lavigna's analysis was so obviously incomplete, incompetent, and incorrect, and he was so thoroughly neutralized on cross-examination, that Petitioners' counsel did not mention him in their closing arguments, and the trial court did not discuss his submissions or testimony in the Order. The entirety of the partisan gerrymandering claim thus boils down to whether Mr. Trende's computer simulations do or do not prove beyond a reasonable doubt that the congressional plan is fatally tainted by unconstitutional partisan intent. Mr. Trende's computer

simulations come nowhere close to satisfying that extremely high burden for numerous independent reasons.

First, Mr. Trende's simulations were based on a proposed new algorithm from a draft paper that has not been peer-reviewed or published, and although Dr. Imai is well-respected and the consensus is that his proposed new algorithm has a lot of potential, it is well known to be vulnerable to performance issues, including significant redundancy problems. The validation study that Dr. Imai performed on the proposed new algorithm in his draft paper used 10,000 simulations to model 50 hypothetical precincts over three districts. There is no basis to believe that 10,000 simulations would be anywhere near sufficient to model New York's more than 15,000 precincts (not 50) over 26 congressional districts and 63 Senate districts (not three). We learned last week that Mr. Trende actually used 750,000 simulations in Maryland, to analyze an eight-district congressional plan, and chose to throw out the vast majority of them because he looked at them and saw they were duplicative. Mr. Trende never looked at any of his simulations in this case to see whether there was a similar redundancy problem, despite persuasive, and unrebutted, evidence-based testimony by Dr. Tapp that such redundancy likely occurred. And Mr. Trende's simulated maps are not in the record in this case, so neither Respondents nor the trial court were able to look at them to see just how redundant they are.

In its Order, the lower court barely grappled with this issue, and what it wrote is nonsensical. Instead of taking Mr. Trende to task for failing to cull duplicate maps out of his New York ensemble the way he did in Maryland, the lower court mused that if Mr. Trende had done so in New York, and if he had been forced to throw out three quarters of his maps as he had to do in Maryland, then he would have 2,500 maps left out of 10,000, and those 2,500 culled maps supposedly would be "the worst," rendering the enacted congressional map "the worst of the worst."[4] Order at 12. That off-the-cuff, unsupported assertion is a far cry from a cogent basis to find a duly enacted statute unconstitutional beyond a reasonable doubt.

The whole point of statistical evidence is that one needs a sufficiently large sample size to draw valid conclusions. In his draft paper announcing the proposed new algorithm that Mr. Trende used in this case, Dr. Imai used 10,000 maps to validate the simulation of three districts with a total of 50 precincts. One obviously cannot use 2,500 maps generated by that proposed new algorithm to validly simulate 26 districts containing more than 15,000 precincts. Dr. Tapp and Dr.

[4] The assumption that any remaining non-duplicative maps would be worse for the Legislature than other maps is entirely arbitrary and speculative. If a large percentage of maps were duplicative, those maps could have skewed Mr. Trende's analysis disproportionately in either direction. Without knowing the content of the maps, it is impossible to know whether de-duplication would have strengthened Petitioners' or Respondents' position.

Barber both made this point repeatedly, Mr. Trende never rebutted it, and the trial court simply ignored it, relying instead on its nonsensical statement, based on nothing, that the enacted congressional plan supposedly is "the worst of the worst."

Second, Mr. Trende's computer simulations cannot reliably be compared to the enacted congressional plan because they did not adequately account for some of New York's constitutionally mandated redistricting criteria and they completely ignored others. As discussed in Paragraph 39 of the accompanying Goldenberg Affirmation, it is undisputed that Mr. Trende arbitrarily selected compactness setting "1" for the simple reason that no other setting worked properly, that he simply turned the county preservation switch "on" without making any effort to balance county preservation over competing criteria in any kind of realistic way, and that he could not even remember how he handled preserving the cores of prior districts in his simulations. The Constitution requires a balancing of all three considerations.

Moreover, it is undisputed that Mr. Trende completely ignored several other constitutional requirements, including the maintenance of communities of interest, and that he did not know about, and made no effort to account for, the clear consensus among Republicans and Democrats on the Commission that the upstate region should consist of four Democratic-leaning urban districts in and around Albany, Syracuse, Rochester, and Buffalo, a Republican-leaning district along the

Southern Tier, a Republican-leaning district encompassing the North Country, and a final Republican-leaning district stretching along Lake Ontario. Critically, Mr. Trende conceded on cross-examination that the sample New York simulations that Dr. Imai posted on his ALARM Project website looked nothing like anything that a real New York map-drawer would reasonably do; he conceded that he never looked at any of his simulated maps to see how many of them, if any, looked like anything that a real New York map-drawer would reasonably do; and he conceded that his simulations and resulting tables would have come out differently if he had heeded the bipartisan consensus regarding upstate communities of interest rather than starting his simulations from a "blank page."

The trial court expressly acknowledged that "Trende's maps . . . do not include every constitutional consideration." Order at 13. Incredibly, however, the trial court *blamed Respondents* for failing to submit simulations of their own that included consideration of communities of interest. Order at 13-14 (observing that "none of Respondents' experts attempted to draw computer generated maps using all the constitutionally required considerations," and "[s]ince no such computer-generated maps were provided to the court the court must use the evidence before it"). These statements reversed the burden of proof in a deeply problematic way.

It is bad enough for a court to misapply the burden of proof in a preponderance case, but it is shocking – and it was outcome-determinative – that

the court improperly reversed the burden of proof in a beyond a reasonable doubt case involving the constitutionality of a statute. Respondents had no burden to do anything in this case, much less to prove Petitioners wrong through computer simulations. And the whole point, which the lower court clearly did not grasp, is that *it is not possible* to reliably use computer simulations to divine legislative intent in a state in which map-drawers are required to consider communities of interest. Mr. Trende did not fail to do so because he is lazy. He failed to do so because he wrote in his second report and testified at trial that communities of interest are too hard to code.

Dr. Tapp agreed that there is no easy way to code communities of interest into a simulation model in New York. But Dr. Tapp explained that because Mr. Trende could not include communities of interest in his model, the only conclusion that can be drawn from differences between the enacted map and Mr. Trende's simulations is that the enacted map was drawn differently than Mr. Trende's model for undiscernible reasons, not that there was any impermissible partisan intent. The fact that no expert was capable of accounting for communities of interest in their simulations is not a reason why Respondents should lose. It is one of the principal reasons why Petitioners must lose, because the simulations were the only evidence on which Petitioners ultimately relied.

The trial court also stated that Mr. Trende's simulations supposedly showed that the enacted congressional plan was "the most favorable to Democrats of any of the [simulated] maps." Order at 12. That is simply false. To the contrary, Mr. Trende's simulations plainly show, using the statewide index that Mr. Trende used to calculate the partisanship of the enacted plan and of each simulated plan, that the vast majority of the simulated plans drew 23 or even 24 Democratic-leaning districts, and that the enacted plan drew only 22 Democratic-leaning districts. The trial court justified failing to acknowledge this evidence with its "finding" that "it strains credulity that a Democrat Assembly, Democrat Senate, and Democrat Governor would knowingly pass maps favoring Republicans." Order at 12. The point is not that the Legislature intentionally enacted a plan that sharply benefited Republicans and sharply hurt Democrats. The point is that the Legislature drew a fair map that resulted in far more Democratic-leaning districts than Republican-leaning districts because the political demographics of the State make that unavoidable, but that the statistical evidence in the record confirms that the Legislature did not go even farther than where the natural demographics lead and unfairly put its thumbs on the proverbial scale. The trial court's baseless assumption that the Legislature must have had it out for the Republicans is not a proper basis for judicial decision-making in any case, much less in a case in which

the burden of proof requires a finding of unconstitutional intent beyond a reasonable doubt.

Finally, but perhaps most critically, we repeat that Mr. Trende's dubious simulated maps are not in the record in this case. There is a substantial basis to believe that the vast majority of Mr. Trende's maps are duplicative, and there is a substantial basis to believe that some, most, or even all of them drew crazy districts that no actual map-drawer would have drawn. Yet nobody can look at them to explore either of those serious issues; Mr. Trende admitted that he did not even look at them. We respectfully ask: how can any court find a redistricting plan unconstitutional beyond a reasonable doubt based exclusively on a comparison of the enacted plan to an ensemble of simulated plans without looking at the simulated plans? Why are these simulated maps not in the record and how can their absence not create considerable doubt regarding the reliability of Mr. Trende's conclusions? We made this argument to the trial court repeatedly, but the Order fails even to acknowledge it.

The redistricting process is extraordinarily complex. Even a modest change to a district necessarily affects adjacent districts, and because of the limits on the extent to which some districts can be changed, any alteration of one district has the potential to cascade across regions.

The Court of Appeals has long recognized this, making clear that the Legislature is entitled to very wide discretion in balancing the complex array of often competing principles that guide the redistricting process. It has cautioned that courts "cannot focus solely on the challenged districts and ignore the fact that a redistricting plan must form an integrated whole." *Wolpoff*, 80 N.Y.2d at 79. The Court of Appeals has further explained that:

> 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, the elective representatives of the people, in this regard. We are hesitant to substitute our own determination for that of the Legislature even if we would have struck a slightly different balance on our own.

Id.; *see also Cohen v. Cuomo*, 19 N.Y.3d 196, 202 (2012) ("It is not our task to address the wisdom of the methods employed by the Legislature in accomplishing its constitutional mandate.").

Crucially, the question in this case is not whether the Legislature could have enacted a congressional plan that would have been more to Petitioners' or even a court's liking. *See Schneider*, 31 N.Y.2d at 427 ("[I]t is not our function to determine whether a plan can be worked out that is superior to that set up[.]"); *Matter of Orans*, 17A N.Y.2d 7, 10 (1966) ("It must be conceded that no reapportionment plan can be perfect in every detail, and none can be drawn that will be satisfactory to everyone."); *Bay Ridge Cmty. Council*, 115 Misc. 2d 433,

445 (N.Y. Sup. Ct. Kings. Cnty. 1982) ("[A] judicial review of a New York reapportionment statute is not a contest to select the 'best' reapportionment that can be submitted by any citizen of the State, but is limited to the sole question as to whether the statute before the Court passes constitutional muster."). The question is whether "the methods chosen [by the Legislature] amount to 'a gross and deliberate violation of the plain intent of the Constitution.'" *Cohen*, 19 N.Y.3d at 202 (citing *Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 198 (1907)). Under this exacting standard, the trial court's conclusion that the enacted congressional plan is unconstitutional cannot stand.

3. The Trial Court Erred in Ordering the Legislature to Submit "Bipartisanly Supported" Congressional, Senate, and Assembly Maps by April 11, 2022

The Order recognizes that the Legislature must be afforded the first opportunity to correct any infirmities in a redistricting plan, but it conditioned the Legislature's authority to draw lines on an unlawful process and an unlawful deadline. To begin, the Legislature should not be compelled to take any steps to enact replacement maps before appellate review of the Order invalidating the enacted maps is complete. Even if the trial court were empowered to order a remedy pending appeal from the Order, it failed to meet its obligations to afford the Legislature reasonable time in which to do so and to adhere to the specific and clear constitutional rules for legislative votes on redistricting plans.

As a threshold matter, the trial court should have stayed its own decision pending appellate review. The trial court dramatically rebalanced the separation of powers between the judicial and legislative branches by holding, for the first time in New York State history, that the Legislature's authority to enact a redistricting plan is contingent on whether a non-legislative commission performs its constitutional duty. The effects are immediate and monumental: even though two of the three legislative plans enacted by the Legislature were unchallenged or upheld by the trial court, 239 duly reapportioned legislative districts – including 213 districts in which no infirmity has been found – were discarded summarily by the trial court, supposedly leaving New York with no legislative districts weeks into the election process. In no other state has an ongoing election been halted in such a destructive and dangerous manner without input from the state's appellate courts.

More importantly, the trial court's remedial decretal is unlawful on its face for at least four reasons. First, the Constitution requires that "the legislature shall have a *full and reasonable* opportunity to correct the law's legal infirmities." Giving the Legislature only 11 days to submit redistricting plans containing 239 new legislative districts – during the most intensive period of the legislative session, when the legislative leadership is working around the clock to make

decisions regarding some $200 billion in budgetary spending – plainly is not "reasonable."

Second, pursuant to article III § 5 of the Constitution, which permits the Legislature to prescribe "reasonable regulations" for suits challenging redistricting plans, the redistricting statutes being challenged provide that "the determination of the court [invalidating any part of a plan] shall be embodied in a tentative order which shall become final thirty days after service of copies thereof upon the parties." *See* L.2022, c. 13, § 3(i); L.2022, c. 14, § 2. Under the plain language of these statutes, the trial court's order is not in effect. Because the Order is not in effect and cannot go into effect until April 30, 2022, the trial court could not compel the Legislature to adopt new maps before April 11, 2022.

Third, the Order flagrantly violates the Constitution by ordering that the Legislature to submit "bipartisanly supported maps" and by suggesting that the initial legislative vote was defective because it was insufficiently bipartisan. The trial court failed to define what "bipartisan" even means, beyond the cryptic guidance that any plan "must enjoy a reasonable amount of bipartisan support." Order at 16. The trial court retained exclusive authority to determine in its sole discretion whether any new plans received "bipartisan support" sufficient to meet the trial court's undefined threshold. If the plans fail to meet that undefined

standard, the trial court will supplant the Legislature and draw its own redistricting plans.

This ruling is patently unconstitutional. Article III, section 4(b) of the Constitution states unequivocally that "***all votes*** by the senate or assembly on any redistricting plan legislation pursuant to this article shall be conducted in accordance with the following rules" (emphasis added). Sections 4(b)(1)-(3) then prescribe specific numerical thresholds for votes in the Legislature under different circumstances. The constitutional text plainly does not require bipartisan consensus or distinguish between legislators' votes based on party affiliation.

The trial court simply ignored these constitutionally prescribed rules. In supposed deference to "Constitutional requirements," Order at 17, which the trial court plucked from thin air, the trial court neglected even to mention the actual binding constitutional requirements that apply to "all votes by the senate and assembly" on any redistricting plan. The question for the trial court, and this Court, is not whether the 2014 amendments should have adopted different rules or imposed bipartisanship requirements. That is a policy question, not a legal question. As to the law, the Constitution is clear: each vote in the Legislature was and is entitled to equal weight, regardless of the party symbol at the end of the legislator's name. The trial court lacked authority to re-write the Constitution.

Canteline v. McClellan, 282 N.Y. 166, 171 (1940) ("The duty of the courts is to construe, not to adopt, a Constitution").

The trial court's wholly invented "bipartisanship" requirement is also entirely unrealistic. Like the Republican former State legislators on the Commission who denied a quorum to vote on a second plan or set of plans, the Republicans in the Legislature are sophisticated political actors. If the trial court's order were effective, they would face two choices: compromise with the Democratic majorities in both chambers, or do nothing, thereby supposedly empowering Petitioners' hand-picked judge to re-draw every congressional, Assembly, and Senate district. There is no reason to expect that any Republican legislators – much less a sufficient number of Republican legislators in both the Senate and the Assembly to satisfy the trial court's undefined "bipartisanly" standard – would choose to work constructively with the Democrats rather than force the entire redistricting process into Justice McAllister's exclusive control.

Fourth, the trial court's threatened remedy – nullification of all three of the Legislature's duly enacted plans – also violates United State Supreme Court precedent, which holds that a court may re-draw legislative districts only to the extent necessary to cure a specific constitutional violation in the lines themselves. *Upham v. Seamon*, 456 U.S. 37, 39-43 (1982). Here, Petitioners never challenged the Assembly plan and the trial court upheld the Senate

plan. Under those circumstances, the trial court lacks the authority to substitute its own judgment for that of the Legislature and to draw district lines from a blank page.

B. Appellants and the Public Will Be Irreparably Harmed If the Order Is Not Stayed and the Balance of Hardships Favors Staying the Order Pending Appeal

"Irreparable harm … mean[s] any injury for which money damages are insufficient." *Eastview Mall, LLC v. Grace Homes, Inc.*, 182 A.D.3d 1057, 1058 (4th Dep't 2020) (citing *DiFabio v. Omnipoint Communications, Inc.*, 66 A.D. 635, 636–37 (2d Dep't 2009)); *accord, Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp.*, 69 A.D.3d 212, 223 (4th Dep't 2009). To warrant a stay, "[t]he prospect of irreparable harm must be 'imminent, not remote or speculative.'" *White v. F.F. Thompson Health Sys., Inc.*, 75 A.D.3d 1075, 1076–77 (4th Dep't 2010) (quoting, in part, *Golden v. Steam Heat, Inc.*, 216 A.D.2d 440, 442 (2d Dep't 1995)).

Here, the imminence of irreparable harm is an understatement. The trial court's order leaves New York without district maps for this year's Assembly, State Senate, and Congressional elections – and the electoral process is already underway. Moreover, the trial court itself acknowledged that under its Order, New York might not have maps in place even for a postponed primary election. Order at 17. Simply put, compliance with the Order would throw the ongoing 2022

elections into chaos, and irreparably harm New York's electoral apparatus, voters, the Legislature, and candidates (including New York's incumbent members of Congress, who have developed influence through seniority, yet now face confusion concerning the precise boundaries of the districts in which they will seek re-election).

1. Absent a Stay, Appellants Will Lose Their Right to Appellate Review, and the Legislature Will Lose Its Right to Enact Legislative-District Maps

In its Order, the trial court requires the Legislature to draw replacement district maps for the Assembly, the State Senate, and Congress by April 11, 2022. Order at 18. If those maps do not 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.* Unless this Court issues a stay, the trial court will soon supplant the maps enacted in February 2022 with new lines of its own, and will deprive the Legislature of a full and fair opportunity to defend those enacted maps or obtain appellate review.

This forced replacement of the Legislature's original maps would be particularly egregious in view of the primacy the State Constitution grants the Legislature with respect to redistricting. Even if the district maps are unconstitutional (which they are not), the Legislature is entitled to a "full and reasonable" opportunity to draw new maps. N.Y. Const., art III, § 5. As the Court

of Appeals has long recognized, "legislative reapportionment is primarily a matter for legislative consideration and determination." *In re Orans*, 15 N.Y.2d 339, 352 (1965) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). The trial court's imposition of an 11-day deadline to draft "bipartisan" maps (all while legislators are scrambling to agree on an already-late State budget) effectively rewrites the State Constitution by depriving the Legislature of its remedial opportunity.

On a practical level, the trial court's Order almost certainly means the Legislature will not draw replacement maps. Members of the Legislature's Republican minority can simply refuse to negotiate. Their refusal will deny the Democratic majority an opportunity to enact "bipartisan" maps, so some unknown person of the trial court's unilateral choosing will draw maps to govern this State's elections for the next decade.

To summarize, without a stay, this appeal will soon become moot. The Order would stand as the last word on an issue of great public importance, and a "neutral expert" would prepare new maps for the trial court to impose statewide. A stay is necessary, therefore, to preserve meaningful appellate review of the Order.

2. The Trial Court's Order Creates Unprecedented Burdens for State Elections Officials

If this Court does not stay the Order, Appellants and the Legislature will not be the only ones to suffer irreparable harm. State election officials – indeed, the State's elections themselves – will suffer as well.

An election is not just a day when citizens vote. It involves a complex array of interdependent administrative responsibilities. In fact, as Justice Kavanaugh recognized recently, "[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) (Kavanaugh, J., concurring). New York State's elections are no exception.

New York's 2022 political calendar – at least as it existed before the trial court upended it – proves the point. In a 37-day period, aspiring candidates must collect hundreds of designating-petition signatures to qualify for primary elections. Then, signatures are subject to challenge,[5] and those challenges require about a month to resolve. March 21 Connolly Aff. ¶ 9. Next, primary ballots are certified, printed, and mailed to absentee voters and to military members at least 45 days before the primaries;[6] early in-person voting is held for nine days; in-person voting occurs on Primary Day; and votes are counted. This process of certification, printing, mailing, voting, and counting repeats for the general elections, which are

[5] N.Y. Elec. Law § 6-154.

[6] N.Y. Elec. Law § 10-108(1)(a); 52 U.S.C. § 20302(a)(8)(A).

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

This process began months ago. For instance, elections officials have been preparing the State's election infrastructure since February. March 21 Connolly Aff. ¶¶ 16-17. The trial court's order eviscerates that work and requires the officials to start again from scratch at an unknown date in the future. 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 trial court's order will cause "substantial disruption to candidates, political parties and boards of elections" as well as "financial, logistical and administrative burdens." *Id.* ¶¶ 7, 27.

Finally, compliance with the trial court's order will likely conflict with 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). Any attempt to alter the June primary – which would be necessary to comply with the trial court's Order – would risk violating Federal law and, at a minimum, would require approval by Judge Sharpe before the change could take effect. U.S. Const., art. VI, cl. 2.

In sum, the trial court's order is already causing irreparable harm to election officials, and that harm will multiply if this Court does not grant a stay.

3. The Order Will Prejudice Aspiring Candidates, Who Have Already Invested Resources into the Elections

Aside from the deadlines detailed *supra*, elections obviously also entail fundraising and campaigning. Candidates need time to introduce themselves to voters and potential donors, who likewise need time to consider the various candidates vying for their support. This process cannot begin until final district maps are in place. Before then, candidates do not know whom to court, and voters and donors do not know which candidates to consider. Candidates also cannot know which local issues to emphasize until they know their districts' boundaries.

More fundamentally, until district maps are set, potential candidates may not even know whether to run for office. After all, the location of district lines could mean the difference between running against a powerful incumbent or running to fill an empty seat. It could also mean the difference between running in a district where supporters live versus running in a district of strangers.

Candidates for the Assembly, the State Senate, and Congress have already invested substantial resources into the 2022 elections. The period to collect designating-petition signatures began on March 1. Political Calendar at 1. Two days later, the trial court announced it would not interfere with the 2022 elections,

and that announcement was widely reported by the media.[7] In reliance on that announcement, candidates continued collecting thousands of voter signatures over the next month. Designating petitions must be filed, with the required number of signatures, to the New York State or county Boards of Elections from April 4 through 7, 2022. *Id.*

The trial court's Order puts these hundreds of aspiring candidates in an impossible position. On one hand, they can submit their petitions by the April 7 deadline. But new district lines could render many of the signatures invalid, leaving the candidates off the ballot. (Under N.Y. Election Law § 6-136(2), signatures must be collected from voters who reside in the relevant district.) On the other hand, candidates can decide not to submit their petitions by the deadline, risking disqualification for the untimeliness. It is thus no surprise that Mr. Connolly, the Board of Elections Director of Operations, stated that "[t]he initial confusion created by the [trial court's Order] has been significant." April 2 Connolly Aff. ¶ 11.

For these reasons, the trial court's Order will cause candidates to suffer immediate, irreparable harm absent a stay.

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[7] *E.g.*, Bill Mahoney, *Judge in redistricting case declines to halt New York's elections, but floats statewide specials in 2023*, POLITICO (Mar. 3, 2022, 8:48 PM EST), https://www.politico.com/news/2022/03/03/redistricting-case-declines-halt-new-york-elections-00013801 (last visited Apr. 2, 2022).

4. If Not Stayed, the Trial Court's Order Will Prejudice Voters Statewide

Voters, too, will suffer irreparable harm absent a stay. The Order threatens to change district lines, which will necessarily change voting dates and polling places. Voters may become confused about which candidates are vying to represent them as well. Some voters already contributed time and money to support particular candidates, only to have their chosen candidate potentially pushed out of their district if district lines change.

In fact, the trial court casually observes that its Order may result in no elections at all: "it is possible that New York would not have a Congressional map [or, presumably, Assembly and State Senate maps] in place that meet[ ] the Constitutional requirements in time for the primaries even with moving the primary date back to August 23, 2022." Order at 17. What then? Perhaps, as the trial court itself forecasted on March 3, "striking these maps [for the 2022 election cycle] would … leave New York State without any duly elected Congressional delegates." Tr. of March 3 Oral Arg. at 70:7-12. It is hard to imagine a more profound harm to voters.

C. The Balance of Equities Tips Sharply in Favor of a Stay

The balance of equities is intertwined with irreparable harm. Appellants must demonstrate that "the irreparable injury to be sustained is more burdensome to [Appellants] than the harm caused to [Petitioners]." *Felix v. Brand Service Grp.*

LLC, 101 A.D.3d 1724, 1726 (4th Dep't 2012) (ellipses and brackets omitted) (quoting *Destiny USA Holdings, LLC*, 69 A.D.3d at 223). In balancing the equities, this Court must "weigh the interests of the general public as well as the interests of the parties to the litigation." *Destiny USA Holdings*, 69 A.D.3d at 223 (citation omitted).

Here, for the reasons described *supra*, a failure to stay the trial court's unprecedented Order would cause severe, irreparable harm to Appellants, the Legislature, elections officials, candidates, and voters. On the other side of the scale, Petitioners may claim a right to an immediate remedy for the supposedly unconstitutional maps. Of course, Appellants contend that the maps and the process that led to their enactment comply with the State Constitution. In any event, courts have already weighed these equities and ruled in favor of Appellants' position: that leaving challenged or unconstitutional maps in place for one election cycle is preferable to upending imminent elections. This Court should reach the same conclusion.

1. This Court Should Adhere to the *Purcell* Principle, Which Warns Against Interference in Imminent Elections

It is well settled that Courts should not "enjoin a state's election law 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." *Merrill*, 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, on May 24, 2022. *Id.* 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. Justice Kavanaugh noted that the District Court's injunction was "a prescription for chaos." *Id.* at 880. As will be true here absent a stay, candidates and voters "now do not know who will be running against whom . . . . Filing deadlines need to be met, but candidates cannot be sure what district they need to file for . . . . [S]ome potential candidates do not even know which district they live in." *Id.*

The *Merrill* decision, which was issued in February of this year, is 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 the Federal Courts, the key reasons animating it apply everywhere. No matter the Court, interference in an impending election creates chaos and must be avoided. Consequently, the highest Courts of several States have recently adopted the *Purcell* principle without hesitation. *E.g.*, *Fay v. Merrill*, 256 A.3d 622, 638 n.21 (Conn. 2021) (noting that a court's decision to change the rules of an imminent election "presumably would implicate the factors identified by the United States Supreme Court in *Purcell*"); *Jones v. Sec'y of State*, 239 A.3d 628, 630-31 (Me. 2020) ("[T]here is a strong public interest in not changing the rules for voting at this late time.") (citing *Purcell*); *In re Hotze*, 627 S.W.3d 642, 645 & n.18 (Tex. 2020) (citing *Purcell*, noting that the United States Supreme Court had warned against interference in imminent elections, and denying a request to vacate an executive order related to the 2020 election).

For example, in *League of United Latin American Citizens of Iowa v. Pate*, the plaintiffs challenged an Iowa law related to voter-identification requirements. 950 N.W.2d 204, 206-07 (Iowa 2020) (*per curiam*). The trial court denied the

plaintiffs' request for a temporary injunction blocking the law, and the Iowa Supreme Court affirmed. *Id.* at 208. The Court found that the plaintiffs were unlikely to succeed on the merits – and, quoting *Purcell*, that invalidating an election law "on the eve of [the] election" would be imprudent. *Id.* at 215-16.

Similarly, 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 (internal citation, ellipsis, and quotation marks omitted). So, too, in view of the *Purcell* principle, this Court should award a stay pending appeal to alleviate the chaos created statewide by the Order.

2. 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 balanced the equities in Appellants' favor. For instance, in *Badillo v. Katz*, the Court allowed New York City local elections to proceed, even though the 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 (N.Y. Sup. Ct. Rockland Cnty. 1981); *Pokorny v. Bd. of Supervisors of Chenango County*, 59 Misc. 2d 929 (N.Y. Sup. Ct. Chenango Cnty. 1969); *see also Abate v. Mundt*, 33 A.D.2d 660, 663 (2d Dep't), *aff'd* 25 N.Y.2d 309 (1969), *aff'd* 403 U.S. 182 (1971).

Likewise, 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.* Likewise here, early voting for primary elections begins on June 18 – less than three months from now, Political Calendar at 1 – so any necessary remedy should wait until 2024.

The trial court acknowledged *Wells* and its "similar time deadline," and further expressed "concern[ ] … about the relatively brief time in which everything would need to happen to draw new maps." Order at 15. Nonetheless, it failed to apply *Wells*' holding, and apparently accepted Petitioners' invitation to read into the State Constitution a requirement that any remedy take effect in the current election cycle. *Id*. 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. *See, e.g.*, *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78 (1992) (reversing orders from two separate trial courts finding redistricting plans unconstitutional).

Below, Petitioners emphasized that three States are attempting to resolve redistricting challenges before the 2022 elections: Maryland, Pennsylvania, and

North Carolina. But Courts in at least four other States have taken the wiser path, leaving challenged maps in effect for 2022.[8] And given the controlling New York State authorities discussed *supra* – including binding precedent from the Court of Appeals – decisions from other States simply have no weight here. In fact, other States' experiences demonstrate why New York's 2022 elections should continue as scheduled under the original maps. When Courts have compressed the election calendars and rushed the re-drawing of district maps, chaos and confusion have ensued.[9] This Court should spare New York a similar fate, stay the Order, and

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[8] *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (enjoining the redrawing of Alabama's congressional maps); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 2022 WL 633312 (N.D. Ga. Feb. 28, 2022) (holding that Georgia's 2022 elections should proceed under the enacted maps to preserve the electoral process); Riley Snyder, *Judge blocks GOP-Backed redistricting lawsuit for 2022 election*, The Nevada Independent (Mar. 9, 2022), https://thenevadaindependent.com/article/judge-blocks-gop-backed-redistricting-lawsuit-for-2022-election (court kept challenged maps in place for the 2022 elections to prevent electoral chaos); Joe Sonka, *Judge denies motion to halt Kentucky redistricting. Here's what it means for the election*, Courier Journal (Feb. 18, 2022), 2022 WLNR 5151751 (court allowed the 2022 elections to go forward under challenged maps, citing harm to candidates and electoral process); *see also* Susan Tebben, *ACLU unhappily files Ohio congressional map challenge aiming for 2024, instead of 2022*, WKYC Studios (Mar. 26, 2022), https://www.wkyc.com/article/news/local/ohio/aclu-ohio-congressional-map-challenge-2024-instead-of-2022/95-ac5fc604-d44d-49cc-ba82-56c4836c64f8.

[9] *See, e.g.*, Jeff Barker, *"I say the serenity prayer": Maryland redistricting court cases keep candidates, election officials in limbo*, THE BALTIMORE SUN, Mar. 20, 2022, 2022 WLNR 8848073; Tim Henderson, *Redistricting Delays Scramble State Elections*, THE PEW CHARITABLE TRUSTS (STATELINE), Mar. 10, 2022, 2022 WL 8066659.

allow the 2022 elections to proceed under the challenged maps. If those maps are held unconstitutional after all appeals are exhausted, new maps should take effect for 2024, not 2022.

CONCLUSION

For the foregoing reasons, Appellants respectfully submit that the Court should enter an order clarifying that the trial court's order is not in effect and/or is stayed pending appeal.

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