

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

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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,

Index No. E2022-0116CV

Petitioners,

-against-

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

Respondents.

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**PETITIONERS' RESPONSE MEMORANDUM TO LEGISLATIVE
RESPONDENTS' PROPOSED SENATE MAP**

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PRELIMINARY STATEMENT

For their proposed remedial state Senate Map, Legislative Respondents have submitted *the exact same* gerrymandered 2022 state Senate Map that they purported to enact earlier this year. At the merits phase of this case, this Court concluded that Petitioners had presented “credible evidence” that the 2022 state Senate Map “was gerrymandered,” NYSCEF No.243 at 14, in contravention of the New York Constitution’s plain requirements, N.Y. Const. art. III, § 4(c)(5). Now, at the remedial stage, Petitioners have presented, if anything, more powerful evidence establishing that this map is an impermissible partisan gerrymander. In particular, Mr. Sean P. Trende’s Remedial Senate Map Rebuttal Expert Report (“Trende Senate Reb. Rep.”) compares Legislative Respondents’ proposed remedial state Senate Map to *25,000 simulated maps*, concluding that it “remains an outlier on the gerrymandering index and continues to depress the number of Republican and competitive districts in the State,” which “does not comply with the requirements of the New York Constitution.” Trende Senate Reb. Rep.1, 4. Given Petitioners’ success on the substantive-gerrymandering merits in this case with the congressional maps, the law-of-the-case doctrine requires this Court to follow the methodology of Mr. Trende to ensure that any remedial map that it selects—including remedial state Senate maps—are constitutional.

The Special Master and this Court should reject Legislative Respondents’ proposed remedial state Senate map and adopt Petitioners’ Proposed Remedial Senate Map.

ARGUMENT

I. The Remedial Map That This Court Adopts Here Should Be Consistent With Mr. Trende’s Methodology To Ensure That It Is Constitutional

As Petitioners explained in their Response Memorandum To Legislative Respondents’ Proposed Congressional Map, NYSCEF No.403, the Court of Appeals endorsed both this Court’s and the Appellate Division’s determination that the enacted 2022 congressional map was an

unconstitutional partisan gerrymander, based in large part on “the expert testimony proffered by petitioners,” *Harkenrider v. Hochul*, ___ N.Y.3d ___, 2022 WL 1236822, at *10–11 (Apr. 27, 2022) (“*Harkenrider IP*”). In particular, Petitioners’ “record support” establishing “that the 2022 congressional map was [unconstitutionally] drawn to discourage competition,” *id.* at *11, consisted of the analysis of Mr. Trende—most prominently, his dotplot and gerrymandering index methodologies concluding that the enacted congressional map had “the effect of rendering . . . districts less competitive in favor of democrats,” violating the New York Constitution, *Harkenrider v. Hochul*, ___ A.D.3d ___, 2022 WL 1193180, at *3–5 (4th Dep’t Apr. 21, 2022) (“*Harkenrider P*”) (quoting N.Y. Const. art. III, § 4(c)(5)). Under the law-of-the-case doctrine, this Court’s analysis of the proposed remedial maps, including proposed remedial state Senate maps, must reflect the prior reliance of this Court, the Appellate Division, and the Court of Appeals on Petitioners’ successful proof of impermissible partisan intent—especially Mr. Trende’s methodology—to ensure that the map that it adopts is constitutional. *See Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975). And, notably, the courts in this case did *not* measure partisan fairness through a district-by-district discussion of communities of interest or compactness scores, precisely because “[n]ew redistricting software” can make gerrymanders “more extreme and durable,” “captur[ing] every last bit of partisan advantage, while still meeting traditional districting requirements (compactness, contiguity, and the like).” *Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring).

Further, this Court must rely upon Mr. Trende’s metrics when evaluating whether a proposed remedial state Senate map is an impermissible partisan gerrymander, although the Court concluded during the merits phase that Mr. Trende’s analysis did not “show that the enacted 2022 senate map was drawn with political bias *beyond a reasonable doubt*.” NYSCEF No.243 at 14

(emphasis added). At the merits phase—as Petitioners previously explained—they had to show that the enacted 2022 state Senate map was an unconstitutional partisan gerrymander under the highest burden in New York Law, the beyond-reasonable-doubt standard, in order to prevail on their claims. NYSCEF No.403. While this Court found that Petitioners had “presented credible evidence that this map [] was gerrymandered,” the Court ultimately concluded that Petitioners had not met their heavy burden because Respondents presented “sufficiently credible” contrary evidence. NYSCEF No.243 at 14. Now that this Court is at the *remedial* stage, however, it cannot adopt a proposed remedial state Senate map in the face of a powerful showing that the map is a partisan gerrymander—even if that showing may not clear the beyond-a-reasonable-doubt standard needed to invalidate that map. This is because the “[r]elief in redistricting cases is fashioned in the light of well-known principles of equity,” so as to “select a fitting remedy,” *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam) (citations omitted), and it is not fitting for this Court to adopt a remedial map that it believes—based on powerful evidence—was drawn with impermissible partisan intent, *see* N.Y. Const. art. III, § 4(c)(5).

Finally, Mr. Trende’s analysis of Legislative Respondents’ proposed remedial state Senate map—which, again, is identical to the 2022 state Senate Map—in his Remedial Senate Map Rebuttal Expert Report is *even more powerful* than his analysis in his original expert report in this case. Specifically, Mr. Trende’s Remedial Senate Map Report analyzed Legislative Respondents’ proposed remedial state Senate map against an ensemble of 25,000 computer-generated maps, Trende Senate Reb. Rep.1–2, compared to the 5,000-map ensemble in his original expert report, NYSCEF No.26. Mr. Trende generating this large number of computer-simulated maps “easily adresse[s]” any possible claim that his 5,000-map ensemble produced a “bimodal distribution” of “only two basic maps being drawn,” Trende Senate Reb. Rep.1–2—an argument that Legislative

Respondents had raised at trial, Trial Transcript, Day 3 at 94–102 (Mar. 16, 2022); Transcript of Closing Arguments at 49–54, 66–68, 91, 101 (Mar. 31, 2022), but which Mr. Trende could not respond to earlier in a supplemental rebuttal report given the schedule of this case. And “[u]nsurprisingly, the [Legislative Respondents’] Proposed Map continues to present as a partisan gerrymander” when compared to these 25,000 simulations. Trende Senate Reb. Rep.1–2. Thus, Mr. Trende’s Remedial Senate Map Rebuttal Expert Report provides even stronger “credible evidence” now that Legislative Respondents’ proposed remedial state Senate map is a gerrymander than at the merits phase, NYSCEF No.243 at 14, as explained immediately below, *infra* Part II.

II. Legislative Respondents’ State Senate Map Egregiously Violates These Principles

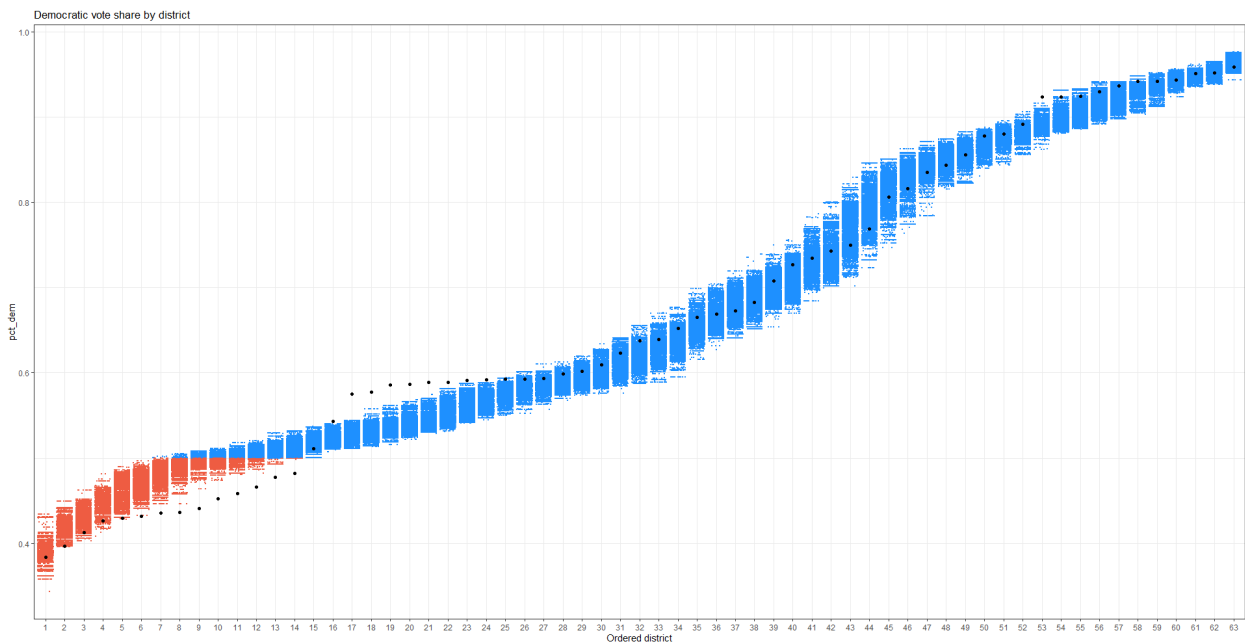
Legislative Respondents’ proposed remedial state Senate map violates these principles, as they have yet again offered an impermissibly partisan-gerrymandered map for this Court’s and the Special Master’s consideration.

A. Overall Partisan Effect/Packing And Cracking

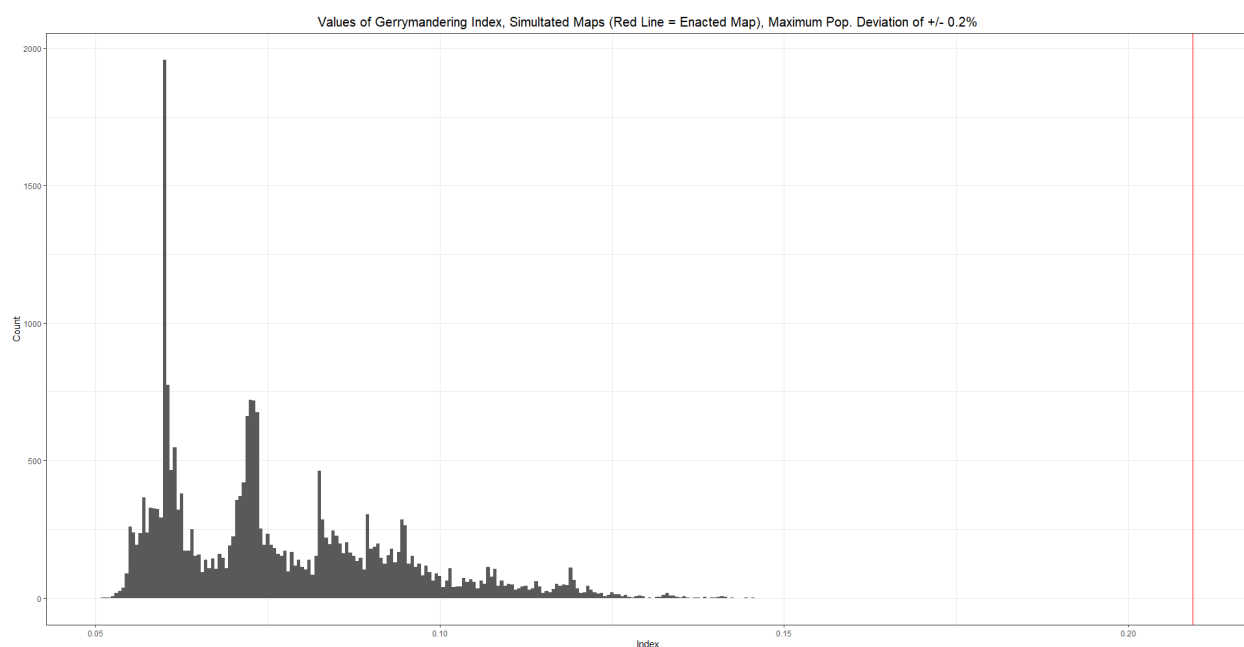
As the Remedial Senate Map Rebuttal Expert Report of Mr. Trende shows, Legislative Respondents have submitted for their remedial map “*the exact same map*” as the 2022 state Senate Map, leading to the obvious result that their proposed “remedial” map has the exact same partisan-gerrymandering flaws as the prior invalidated map. Trende Senate Reb. Rep.1 (emphasis added). That is, “nothing has changed that would render this map more acceptable than it was in the winter”; “[i]t remains an outlier on the gerrymandering index and continues to depress the number of Republican and competitive districts in the State,” which “does not comply with the requirements of the New York Constitution.” Trende Senate Reb. Rep.1, 4.

Mr. Trende’s Remedial Senate Map Rebuttal Expert Report reaches this straightforward conclusion by comparing Legislative Respondents’ proposed remedial state Senate map with 25,000 simulations, according to the same methodology he used throughout this case. Trende

Senate Reb. Rep.2. “Unsurprisingly,” this comparison “continues” to show that the Legislative Respondents’ proposed remedial state Senate map “present[s] as a partisan gerrymander.” Trende Senate Reb. Rep.1–2. In particular, Mr. Trende’s dotplot shows that Districts 1 through 14 of the map “are substantially more Republican than we would expect from a map drawn without reference to politics,” which is clear evidence of packing. Trende Senate Reb. Rep.2–3 (dotplot produced below). Then, District 15 in Legislative Respondents’ proposed map creates an “inflection point” where the districts “fall well outside the expected partisanship of the districts” and produce districts that are less Republican-competitive than would be expected—which is a clear sign of cracking. Trende Senate Reb. Rep.2–3 (explaining that this trend begins most clearly in District 17 and ends at District 24). Finally, after District 25, “the districts move outside of competitive territory” and “begin to fall squarely within the districts of the ensemble distribution,” which is expected in these heavily Democratic areas where no meaningful partisan gains could be had. Trende Senate Reb. Rep.2–3. In all, the dotplot shows an obvious, deliberate partisan gerrymander to benefit Democrats:



Mr. Trende’s Remedial Senate Map Rebuttal Expert Report also calculates a Gerrymandering Index based on this 25,000-map ensemble, and it too—“[u]nsurprisingly”—reveals “a massive” partisan gerrymander. Trende Senate Reb. Rep.3–4 (Gerrymandering Index produced below). The “mean gerrymandering index of the simulation ensemble” was 0.077, while the gerrymandering index of Legislative Respondents’ proposed map was 0.209—an incredible “7.9 standard deviations above the mean,” which cannot happen by accident. Trende Senate Reb. Rep.3–4.



Finally, Mr. Trende’s Remedial Senate Map Rebuttal Expert Report decidedly refutes two spurious arguments that Legislative Respondents have repeatedly flung at Mr. Trende’s original report. First, Legislative Respondents claimed throughout this case that Mr. Trende’s original 5,000-map ensemble was “insufficient for utilizing” his methodology. Trende Senate Reb. Rep.1. While that claim was always wrong, Mr. Trende’s use of 25,000 maps in this most recent report demonstrates just how meritless Legislative Respondents’ argument was, since Mr. Trende’s 25,000-map ensemble led to the exact same results as his 5,000-map ensemble. Trende Senate

Reb. Rep.1–2. Second, Legislative Respondents claimed that Mr. Trende’s original 5,000-map ensemble created “a bimodal distribution,” which, they argued, meant that this ensemble really generated “only two basic maps.” Trende Senate Reb. Rep.1–2. Again, while that argument was always incorrect, Mr. Trende’s Remedial Senate Map Rebuttal Expert Report refutes it beyond any doubt, as “there is no evidence of bimodality” in his 25,000-map ensemble, since the Gerrymandering Index shows that “the simulations produce a variety of unique maps from the distribution.” Trende Senate Reb. Rep.3.

B. The Legislative Respondents’ Proposed Senate Map Is Identical To Their Invalidated Map, Keeping All Of Their Gerrymandering Choices

In addition to the plain fact that Legislative Respondents’ submission fails the social science and data metrics for gerrymandering, as demonstrated by Mr. Trende’s rebuttal report, *see supra* Part II.A, Legislative Respondents admit that their proposed “remedial” map is identical to their unconstitutional map, NYSCEF No.376 at 1, meaning that the districts in their submission mirror and perpetuate the gerrymander of their prior invalidated map.

Long Island

Respondents’ proposed remedial state Senate map makes several clearly partisan choices on Long Island. For example, their proposed SD1 is less compact than the 2012 district, sacrificing constitutional criteria for partisan advantage. The proposed SD1 has an arm that reaches through Brookline up to the Smithtown line of the entire North Shore, connecting in a way that has no logical nexus. Similarly sacrificing compactness for partisan gain, proposed SD2 includes Smithtown on the North Shore rather than Brookhaven and picks up areas along the South Shore—despite historically distinct and separate communities of interest on the north and south shores of Long Island. Like SD2, SD4 is similarly packed, encompassing the Town of Islip and Babylon, while reaching into Nassau County. By packing additional Republicans into SDs 2 and 4,

Legislative Respondents join unrelated communities with distinct needs and interests in order to increase Democrat advantage in the surrounding districts. Proposed SD3 is also less compact and more favorable to Democratic candidates, seeking out Hispanic communities while failing to preserve the core of the district on the shore of Suffolk County and failing to combine communities that have historically been connected in a compact manner. Despite SD5 keeping the Town of Huntington whole, it sends the Republican-rich Five Towns into the southern part of Queens, all the while failing to keep connected the two north shore communities. And again, that is significant because the north and south shore have different interests, culturally, environmentally and economically. Further west, Legislative Respondents' proposed SD6 is bizarrely drawn, including the northern part of Oyster Bay, which has historically been in SD5, into the town of Hempstead, with part of Garden City, and then running along the North Shore to pick up Glen Cove. Historically a compact, central Nassau County district, proposed SD6 ignores the constitutional criteria to increase partisanship. Also, Legislative Respondents' representation that SD6 protects "the minority plurality's ability to elect the candidate of its choice," is false. NYSCEF No.376 at 7. According to the LATFOR website, the current 2022 Senate District 6 has 52.13% non-Hispanic White people who are eligible to vote (age 18+).^{*} SD8 includes an oddly shaped hook that moves Republican voters from Massapequa into Nassau County, thereby packing the district with Republicans. Further ignoring the Constitution's mandate, the Legislature removed the Five Towns community from SD9, joining it with dissimilar communities in SD10 in Queens with which it has largely nothing in common—solely for partisan gain. By moving the Five Towns, a heavily Orthodox Jewish community that has historically been a part of Long Island in SD9, Legislative Respondents cracked SD9, diluting conservative votes.

^{*} Available at <https://latfor.state.ny.us/maps/2022senate/sen006.pdf>.

New York City

In New York City, Legislative Respondents' proposed map cracks historically connected conservative communities to dilute Republican votes. Proposed SD22 joins Orthodox Jewish and Russian communities with dissimilar communities by reaching up into Park Slope. On Staten Island, proposed SDs 24 and 25 similarly sacrifice compactness for partisan gain. And in proposed SD26 (formerly SD17), Legislative Respondents break up another historically connected Orthodox Jewish community, diluting conservative votes.

Hudson Valley

Legislative Respondents' proposed map reflects similarly unconstitutional choices in the Hudson Valley region. Stretching across Dutchess, Putnam, and Westchester Counties, proposed SD40 extends far to the south into the City of White Plains. Combining the Democratic communities of White Plains and southern Westchester County with rural farming communities to the north, proposed SD40 is noncompact and inconsistent with public testimony, *see, e.g.*, Public Testimony of Sergio Esposito 1:28:40–1:30:55, Virtual Public Meeting of the NYSIRC, Aug. 2, 2021[†]—reflecting the Legislature's overriding partisan choices. Proposed SD41 (formerly SD39) is a four-county district that similarly sacrifices compactness for partisan advantage. Proposed SD41 includes northern Orange County, then hops across the river to encompass the towns of Beacon and Fishkill in Dutchess County, Philipstown in Putnam County, and two towns in Rockland County.

Upstate New York

In upstate New York, Legislative Respondents' proposed districts reflect the same unconstitutional gerrymandering choices in the 2022 enacted state Senate map, all for partisan

[†] Available at <https://www.youtube.com/watch?v=7HgDIwfiMmw>.

gain. For example, proposed SD43 (formerly SD41) unnecessarily cuts across county and municipal boundaries, runs up the NY-CT border and includes Columbia, Dutchess, and Rensselaer Counties. Proposed SD48 (formerly SD44) is similarly noncompact, stretching across Ulster County and parts of Dutchess, Columbia, and Greene Counties to the western portion of Albany County—a total of five counties. SD53 combines Thompsons and Broome Counties, demonstrating a clear partisan gerrymandered design to create a Democratic seat. Thompsons County is historically a finger lakes county, while Broome County is not. SD63 combines large portions of the City of Buffalo and the City of Lackawanna with Amherst, a northern suburban town, despite Amherst having very little in common with the cities of Lackawanna and Buffalo.

* * *

Legislative Respondents’ “remedial” state Senate map is nothing more than a blatant attempt to perpetuate the gerrymander in their previous unconstitutional map, despite this Court’s finding of “credible evidence” of that gerrymander. NYSCEF No.243 at 14. Accordingly, this Court should reject Legislative Respondents’ bad-faith submission.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Special Master and this Court adopt Petitioners’ Proposed Remedial Senate Map.

Dated: New York, New York

May 6, 2022

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CERTIFICATION

I hereby certify that the foregoing memorandum complies with the bookmarking requirement and word count limitations set forth in Rule 202.8-b of the Uniform Rules of Supreme and County Courts. *See* 22 NYCRR § 202.8-b. This memorandum contains 2,624 words, excluding parts of the document exempted by Rule 202.8-b(b).

Dated: New York, New York
May 6, 2022

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