To be Argued by:
ALICE G. REITER
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

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

Petitioners-Respondents,

-against-

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS,

(For Continuation of Caption See Inside Cover)

Docket No.: CAE 22-00506

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

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

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

Respondents-Appellants,

and

NEW YORK STATE BOARD OF ELECTIONS,

Respondent.

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PRELIMINARY STATEMENT

Petitioners, and now the League of Women Voters of New York ("LWV"), insist that the Constitution says what it simply does not say. Article III does not contemplate or address a failure by the Commission to perform its mandatory duties, and it certainly does not state unequivocally that any time that happens, legislative redistricting becomes the exclusive province of the courts. Petitioners and the LWV rely on textual and policy arguments that disregard the words in the Constitution and the reality of what led to this dispute.

Petitioners' partisan gerrymandering claim fares no better. Petitioners rely on an untested and deeply flawed simulation methodology, analyses of specific districts that have been thoroughly discredited, and simplistic and misleading new arguments about partisan shifts that they make for the first time on appeal. The record comes nowhere close to satisfying Petitioners' heavy burden.

ARGUMENT

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

Petitioners and the LWV are wrong for the simple reason that the Constitution does not say what they want it to say, even though it easily could. If the Constitution were as clear as they claim, it would say something like, "If the Commission fails to present a second set of plans, then X happens." The

Constitution contains no such language. A failure by the Commission to present a second plan is not anticipated by or addressed in article III, and nobody on either side reasonably can claim otherwise.

Under *Cohen v. Cuomo*, the fact that the Constitution does not address what happens if the Commission fails to act is dispositive unless the Court conducts a searching inquiry and finds it "impossible" to accept the Legislature's reading even after "every reasonable mode of reconciliation of the statute with the Constitution has been resorted to." 19 N.Y.3d 196, 202 (2012) (citations omitted).

Here, the manner in which the Legislature filled the constitutional silence is easily reconcilable with the text. There is nothing implausible about affording the Legislature the same discretion to enact a plan if the Commission presents no second recommendation that it has whenever the Commission presents a second recommendation. But even if the Court were to conclude that Petitioners' view of the text is also plausible – or even if the Court were to prefer Petitioners' reading – the enacted plans must stand unless the meaning of the Constitution is so unmistakably clear and contrary to the Legislature's interpretation that the Court can say so beyond a reasonable doubt.

Petitioners' textual argument hinges on the words "the process" in section 4(e). Everyone agrees that "the process" includes the requirements that the Commission present two rounds of recommendations and that the Legislature vote

up or down on each Commission proposal without amendment before exercising its authority to make any amendments that it deems necessary. It is undisputed that the process was not followed here, and the record shows that the reason why is that the Republican commissioners denied the Commission a quorum, thereby causing it to fail to act. The question presented is who, if anyone, now has the authority to reapportion the 2012 districts?

Petitioners engage in a lengthy syntactic exegesis about the meanings of "shall" and "the," Pet. Br. 16-17, but nobody suggests that "the process" is optional. This case is not about defining "the process" or lamenting that it was not followed. The sole question is whether the Constitution states unambiguously that any breakdown in the process necessarily vests the judiciary with exclusive jurisdiction to reapportion districts from whole cloth. It plainly does not.

Petitioners and the LWV argue that because section 4(e) states that the process shall be followed "except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law," it necessarily follows, unambiguously and inescapably, that *any* time the process breaks down in *any* way, the Legislature's power to act is *extinguished*. But they conveniently ignore the words "and section five" in section 4(e). Section 4(e) does not merely say that "[t]he process . . . established by this section . . . shall govern." It says that "the process . . . established by this section and *sections five* and five-b

of this article shall govern" (emphasis added). Section 5 states that the Legislature "shall have a full and reasonable opportunity to correct" any infirmities in any law. Given that section 4(e) expressly incorporates by reference all of section 5, including the legislative correction provision, one cannot read section 4(e) to say unambiguously that any process failure necessarily extinguishes all legislative authority.

The LWV contends that the judicial process referenced in section 4(e) is entirely separate from the process described in section 5, and that the two provisions supposedly contemplate "two possible scenarios" depending on whether the Legislature should be allowed a chance to cure. LWV Br. 5-6. This argument is both unsupported by the text and circular. Section 5 expressly states that the Legislature shall be afforded a "full and reasonable opportunity to correct" any legal infirmity "in *any law*" found in "*any judicial proceeding* relating to redistricting" under article III (emphasis added). Given that section 5 twice uses the word "any," the LWV's conclusory assertion that comparing the words that are used in sections 4(e) and 5 "makes clear" when the Legislature does and does not have the right to cure, LWV Br. 12, is manifestly incorrect. Its argument is untethered to any standard, and devolves into the tautology that the Legislature has the right to cure only when it has the right to cure.

This fatal flaw is driven home by the Trial Court's plainly unconstitutional remedy, which Petitioners disavow. Pet. Br. 54-55. After holding that the Legislature lacked the power to redistrict in the first place, the Trial Court struggled with the predicament that its decision prevented it from heeding the legislative correction provision in section 5 because if the Legislature did not have the authority to act the first time, then it lacked the authority to correct anything the second time. The Trial Court therefore tried to get creative by conjuring the process that it thinks should have happened at the Commission, resulting in "bipartisanly supported" plans. But the Constitution plainly says nothing about that, and the Trial Court's remedy, which effectively rewrites the Constitution's text, is itself plainly unconstitutional, as Petitioners tacitly concede.

Unable to defend the Trial Court's Order, Petitioners contend that the 2014 amendments "reject[ed] the Legislature's former prerogative and resign[ed] the Legislature to a rather begrudging backstop." Pet. Br. 22. But the 2014 amendments are clear that the Commission's authority is limited to making recommendations to the Legislature, and that at every stage of redistricting, only the Legislature has the authority to decide what district lines become law. To be sure, the Commission plays an important role in conducting public hearings, considering the record, and making recommendations. But only the Legislature may decide whether the Commission's first recommendation becomes law; only

the Legislature may decide whether the Commission's second recommendation becomes law; only the Legislature may decide what amendments it "deems necessary" if no Commission plan is enacted; and only the Legislature may cure any infirmities identified by a reviewing court. N.Y. Const., art. III, §§ 4(b), 5. As recognized by the only other court to opine on the 2014 amendments, "the Commission's plan is little more than a recommendation to the Legislature, which can reject it for unstated reasons and draw its own lines." *Leib v. Walsh*, 45 Misc. 3d 874, 881 (N.Y. Sup. Ct. Albany Cnty. 2014).[1]

Petitioners refer repeatedly to "the People," pretending that the 2014 amendments were adopted through a populist referendum to supplant the Legislature's power. But the Legislature itself enacted the 2014 amendments, twice, before the voters weighed in, which is critical to the deference that this Court must afford to the Legislature's interpretation. *See 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

[1] The LWV points to language in the 2014 ballot proposal that suggested that the Legislature may act only if the Commission's plans are rejected twice. LWV Br. 4, 19. That language, like the amendments themselves, did not anticipate or address what happens if the Commission fails to act. Moreover, other language that accompanied the 2014 ballot proposal stated expressly that a "deadlock on the commission empowers the legislature to create its own plan." *See* https://ballotpedia.org/New_York_Redistricting_Commission_Amendment,_Proposal_1_(2014).

itself."). Had the Legislature intended to renounce more than 200 years of precedent establishing its primary role in the area of redistricting, surely it would have said so.

Petitioners assert that any reading of the 2014 amendments other than theirs would render the amendments "meaningless" because the Legislature could purposefully appoint Commissioners who would thwart the process, and that ruling in their favor would encourage future legislative leaders to appoint commissioners who will honor their obligations and reach bipartisan compromise. Pet. Br. 18-19. That brings us back to the inconvenient truth that it was the Republicans on the Commission, not the Democrats, who refused to vote on a second set of plans, R1108-09 ¶ 113, which causes Petitioners' policy argument to fall apart at the seams.[2] The legislative majorities' appointees tried to perform their constitutional duty, but they could not achieve a quorum without Republican participation.

[2] Petitioners attempt to paper over the absence of any record evidence that the Democratic commissioners stymied the process by pointing to a public statement by Jack Martins, the Republican Vice Chair of the Commission, accusing the Democrats of refusing to negotiate in good faith. Pet. Br. 24. But this statement was made on January 3, 2022, *three weeks before* the Republican commissioners refused to meet on the eve of the final deadline, and it therefore sheds no light on what happened at the end of the Commission process. Petitioners also contend that they were deprived of the chance to adduce evidence to refute Respondents' claim that the Republican commissioners denied the Commission a quorum because they were unable to depose the Democratic commissioners. *Id.* That is nonsense. Surely the Republican commissioners would have been available to provide affidavits if they had been able to state truthfully, under oath, that the Democrats stymied the Commission process.

The LWV accuses Respondents of being "alarmist" by observing that if Petitioners prevail, four commissioners appointed by the minority party always will have the ability to extinguish the Legislature's authority and vest whatever court an opportunistic plaintiff chooses with the exclusive power to redistrict. But that is exactly what happened here. Indeed, it is notable that Petitioners commenced this proceeding within hours of the enactment of the redistricting plans, already armed with a lengthy, carefully developed argument that the Commission's failure to act stripped the Legislature of its authority to redistrict. R53-54, R58-65, R67-74. The record strongly suggests that Petitioners and their Republican allies were lying in wait, ready to pounce in Steuben County.

Petitioners continue to mischaracterize the circumstances of the 2021 legislation, which the Legislature passed in June. That statute sought to fill the gap created by the silence in the 2014 amendments about what happens if the Commission fails to fulfill its duties. Petitioners contend falsely that the Legislature "understood" that an amendment was necessary, and that the statute was an attempt to end-run around the Constitution. Pet. Br. 19-20. Most of the November 2021 amendment, however, proposed changes that could be implemented only through a constitutional amendment. A.10839/S.8833 of 2020; A.1916/S.515 of 2021. The same is not true of the 2021 statute, which did not alter or amend any constitutional text. The mere fact that the gap-filling language

in the statute did not become part of the Constitution did not prohibit the Legislature from sending to the Governor the law that it had passed five months earlier.

The LWV (but not Petitioners) urges that the Legislature should have commenced a mandamus proceeding to obtain an extraordinary judicial order compelling the Commission to meet and vote on a final set of plans in order to uphold "the process." It is hard to see how such an emergency order could have been obtained by the constitutionally mandated deadline the following day, or why any such order would not have been automatically stayed by CPLR 5519(a)(1) if the Commission appealed. But to the extent that there is any merit to this suggestion, it suffices to observe that nothing prevented the LWV and its able counsel from pursuing such relief.

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

A. Petitioners' False Comparison of a "19-8" Map to a "22-4" Map Is a Meritless Sleight of Hand

Petitioners never argued below that the supposed migration from a "19-8" 2012 map to a "22-4" 2022 map proves that the enacted congressional plan resulted from impermissible partisan intent. Nevertheless, the Trial Court offered its own observation that the enacted congressional plan likely will "lead to the Republicans winning four Congressional seats" even though "[t]he Republicans

currently hold 8 of the 27 congressional seats" under the 2012 plan. R19. Now, for the first time, Petitioners claim that this superficial comparison proves their case so overwhelmingly that it is a "case-ending point." Pet. Br. 29. It is anything but.

The reason why the Constitution requires decennial redistricting is that things change during the course of a decade. Here, everyone (including the Republican commissioners) agrees that the upstate region is likely to lose two Republican incumbents. One Republican seat under the 2012 plan, former District 22, had to be eliminated altogether due to substantial population shifts in favor of the downstate region and New York's loss of a district. R869-70, R2788:9-24, R2904:1-R2905:10. And due to evolving demographics, a second seat that currently is held by a Republican, current District 22 (former District 24), which was Democratic-leaning even under the 2012 plan, became more Democratic-leaning in 2022 under both Commission plans and the enacted plan. R876 ¶¶ 60-61, R3263 (Exhibit S-3). Additionally, the popular Republican incumbent who managed to hold that already-Democratic-leaning district, John Katko, is retiring.

There is nothing suspicious about the fact that under the outdated 2012 plan, the upstate congressional delegation has five Republican incumbents out of eight seats, whereas under the 2022 plan, four out of seven seats will be Democratic-leaning. That simply reflects the strong bipartisan consensus regarding the

population, demographic, and political changes that occurred between 2012 and 2022. Thus, before one even considers downstate, two Republican seats necessarily are lost, which accounts for half of the alleged statewide shift.

With respect to the downstate region, District 1 was Democratic-leaning even under the 2012 plan, though a Republican, Lee Zeldin, has managed to win that seat since 2014 (Congressman Zeldin is not running for re-election this year). R874 ¶ 49. And it is undisputed that the Legislature's decision to reunite in new District 10 the fast-growing Chinese-American communities that had been cracked between Districts 10 and 11 under the outdated 2012 plan – a laudable improvement for which Petitioners' own expert advocated, R2781:5-R2786:8, R2913:11-R2914:8 – necessitated moving District 11 to the north, as it had been configured during the 1972 and 1982 redistricting cycles, R1136-37 ¶¶ 422-24, thereby changing the political demographics of that district, R2917:7-25.

The simulations that Mr. Trende proffered in his reply report show that there is nothing unlawful – or even statistically surprising – about any of these changes. Virtually every one of Mr. Trende's Long Island simulations draws *all* of Long Island as Democratic-leaning, including not only District 1 but also District 2. R1044. The enacted plan nevertheless draws District 2 as a Republican-leaning district that unites communities along the South Shore of Long Island. R1125 ¶ 329, R2912:23-R2913:1. And literally every one of Mr. Trende's simulations of

Districts 10-12 draws all three of those districts – *including District 11* – as Democratic-leaning. R1044.

The record thus shows that things are very different in 2022 than they were in 2012. The fact that the current delegation happens to have eight Republican incumbents under an outdated, ten-year-old plan says nothing about what an appropriate new plan should look like. Superficially comparing the outgoing delegation to the incoming plan is not probative of anything, much less is it a "case-ending point."

B. Petitioners' "Process" Argument Proves Nothing, Let Alone Unconstitutional Intent Beyond a Reasonable Doubt

Petitioners next contend that they must win because the Legislature enacted the congressional plan "hurriedly" after the Commission deadlocked, without holding hearings or seeking bipartisan consensus. Pet. Br. 27. This "process" argument fails for several reasons.

First, there was nothing improper about the Legislature's decision to enact redistricting plans "hurriedly." The Commission's unexpected failure to submit a second proposal occurred just one day before the final deadline. By then, there was only a little more than a month before the petitioning period was to begin. Candidates needed to know how new districts would be drawn to plan their campaigns, and for some candidates, even to decide whether to run. Voters needed

to know how the districts would be drawn to evaluate which candidates to support. There was no time to waste.

Nor was there any reason for the Legislature to hold still more public hearings. The 2014 amendments do not require or even contemplate that the Legislature will hold public hearings. The Commission already had held 24 public hearings and provided the Legislature with recordings of each and voluminous written submissions from the public.

Nor was there any reason for the Democratic super-majorities in both houses of the Legislature to seek "input or involvement" from the Republican minorities. Pet. Br. 27. Far from imposing any rule that redistricting plans be "bipartisanly supported," article III, § 4(b) of the Constitution prescribes the number of votes that are required to enact redistricting legislation, and those in favor of the enacted plans had the votes to enact them. Here, moreover, there was a substantial basis to fear that the Republicans would cry foul baselessly, just as they are doing in this case, about the unavoidable loss of Republican seats. That Senator Ortt feels marginalized or even slighted by the decision to deny him and his colleagues the opportunity to engage in time-wasting political theater hardly proves unconstitutional intent to injure the Republicans beyond a reasonable doubt.[3]

[3] The cases cited on pages 26-27 of Petitioners' brief are so far afield that they are irrelevant. *See, e.g., League of Women Voters of Fl. v. Detzner*, 172 So. 3d 363, 390-93 (Fla. 2015) (legislature destroyed material evidence and misled the

C. Mr. Trende's Flawed Simulations Are of No Statistical Value

Petitioners ask this Court to defer to the Trial Court's reliance on Mr. Trende's analysis, but appellate courts only afford such deference when the ability of the original factfinder to view the witness is central to determining credibility. *See State v. Jesus H.*, 176 A.D.3d 646, 648 (1st Dep't 2019) (trial court "owed no deference" in its decision not to credit expert); *Green v. William Penn Life Ins. Co. of New York*, 74 A.D.3d 570, 574 (1st Dep't 2010) (plurality opinion) (no deference due where credibility determination below not based on demeanor). The record makes clear that Mr. Trende's methodology and conclusions are not credible, and that the Trial Court was not focused on his demeanor as a witness.

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public through sham hearings while secretly conspiring with national Republican consultants); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1099-1100 (S.D. Ohio 2019) (legislature sought to mislead the public through purported open hearings, while working secretly with national Republican consultants who directed the line-drawing process), *vacated and remanded*, 140 S. Ct. 101 (2019); *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 870 (M.D.N.C. 2018) (map-drawers admitted they "'drew this map in a way to help foster' the election of Republican candidates"), *vacated and remanded*, 139 S. Ct. 2484 (2019); *Whitford v. Gill*, 218 F. Supp. 3d 837, 895 (W.D. Wis. 2016) (map-makers "designed a measure of partisanship and confirmed the accuracy of this measure with [an outside expert]," "used this measure to evaluate . . . maps that they drew," "labeled their maps by reference to their partisanship scores" and "[w]hen they completed a statewide map, they submitted it to [the expert] to assess the fortitude of the partisan design in the wake of various electoral outcomes"), *vacated and remanded,* 138 S. Ct. 1916 (2018).

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

Petitioners do not meaningfully respond to Respondents' criticisms of the manner in which Mr. Trende crudely attempted to simulate the actual map-drawers' balancing of the requirements of compactness, maintaining political subdivisions, and preserving the cores of prior districts. Rather than balancing these criteria as the Constitution requires, Mr. Trende set his compactness setting to "1" because no other setting worked, turned the county preservation toggle "on," and used a core preservation setting that he picked arbitrarily and does not even remember. R1043, R2582:18-R2584:12, R2585:25-R2586:3, R2588:6-23, R2594:4-R2596:6. Petitioners do not dispute these facts, nor do they attempt to explain how Mr. Trende's simulation settings could be expected to mimic what the actual map-drawers did given the arbitrariness and crudeness of his inputs.

More importantly, Petitioners offer no serious defense of Mr. Trende's failure to account for communities of interest. They concede, as they must, that "[n]o one can build that consideration into simulations." Pet. Br. 42. All they have to say is that Mr. Trende supposedly controlled for "municipal splits," which they assert without any support is a factor that is "closely related" to communities of interest. *Id.* But controlling for municipal splits – assuming for the sake of argument that Mr. Trende even did that adequately – is a far cry from heeding the strong bipartisan consensus among Republican and Democratic commissioners

regarding how to draw the upstate region, and it hardly explains how Mr. Trende's simulations prove anything given Petitioners' concession that he completely ignored that bipartisan consensus and instead started his simulations from a "blank page." R2603:11-R2605:1, R2605:18-R2606:1, R2606:6-13.

Petitioners then assert, again without support, that "there is no reason to think that considering communities of interest one way or another" would make Mr. Trende's simulations come out differently. Pet. Br. 42. But Petitioners fail even to acknowledge Exhibits S-3 or S-4, which plainly show that using the Imai algorithm that Mr. Trende used, and starting from a "blank page" as he did, results in districts that look "crazy" and nothing like what an actual New York map-drawer reasonably would be expected to draw. R2614:13-R2616:5, R3263-66.

Petitioners boast about Mr. Trende's appointment to draw Virginia's congressional districts together with Dr. Grofman, Pet. Br. 10, 47-48, but they fail to acknowledge that Mr. Trende and Dr. Grofman went to great lengths to identify and heed established Virginia communities of interest, R3208 (Exhibit S-2), R2596:19-R2598:3, R2599:8-R2601:23, and that Mr. Trende conceded on cross-examination that the Virginia districts "would have looked different" if they had not considered and respected those communities, R2601:24-R2602:8.

As Respondents noted in their opening brief, no court has ever relied on computer simulations in a state in which considering the maintenance of

communities of interest is a mandatory redistricting factor. Sen. Br. 45-46. Petitioners respond by attempting to obfuscate, citing an unverified website that is not part of the record in support of their assertion that maintaining communities of interest supposedly is required in North Carolina. Pet. Br. 43. That is not true. *See Harper v. Hall*, 868 S.E.2d 499, 512 (N.C. 2022); *Common Cause v. Lewis*, 2019 WL 4569584, at *36 (N.C. Super. Ct. 2019).[4] None of the cases cited by Petitioners that have relied in part on redistricting simulations involved a requirement that map-drawers consider the maintenance of communities of interest – not North Carolina, not Ohio, not Maryland, and not Pennsylvania.

Respondents also noted in their opening brief that no court has ever relied *exclusively* on simulation evidence to strike down a redistricting plan without additional compelling evidence, as the Trial Court did here. Sen. Br. 46. Petitioners do not contest that point. Far from the "dominant approach" in redistricting cases, Pet. Br. 47, what Petitioners are asking this Court to do is unprecedented.

[4] Petitioners repeatedly cite Justice Kagan's dissent in *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019). Pet. Br. 43-44, 47. Leaving aside that Justice Kagan's dissent was a dissent – the Supreme Court has never endorsed redistricting simulations in any case – *Rucho* arose out of North Carolina, which does not require the consideration of maintaining communities of interest.

2. Mr. Trende's Sample Size Was Too Small, and His Methodology Is Prone to Serious Redundancy Problems

Respondents have explained in detail why Mr. Trende's sample size was too small to draw statistically reliable conclusions, citing copious evidence in the record to support that conclusion. Sen. Br. 31. Petitioners' primary response, once again, is to obfuscate. They pretend throughout their brief that Mr. Trende supposedly did "35,000" full simulations – the original 5,000, plus "three runs of 10,000" more – but that is misleading. In Mr. Trende's reply report, he ran batches of 10,000 partial simulations that "froze" most of the enacted districts in place to show how isolated regions turned out. R1040-45.

Even if Mr. Trende had performed 35,000 full simulations, Dr. Tapp explained why that would be of little statistical value without proper sample size validation studies, which are standard procedure for redistricting simulations but which Mr. Trende did not do in this case. R860-861 ¶¶ 55-59, R3035:9-R3038:9. Petitioners offer no explanation for or defense of Mr. Trende's conceded failure to perform any validation studies confirming the adequacy of his sample size.

Then there is the glaring redundancy problem, which Petitioners have not come close to addressing adequately. Petitioners baselessly assert that Dr. Tapp "presented no evidence whatsoever of duplicates in Mr. Trende's *congressional* simulations," Pet. Br. 44 (emphasis in original), but they ignore that Dr. Tapp replicated *both* Mr. Trende's Senate *and* congressional simulations, and that he

found significant evidence of redundancy problems in Mr. Trende's congressional ensemble above and beyond the bimodal distribution in the compactness scores of the Senate plan. R1210-11 (¶¶ 44-45 and Table 1).[5]

Nor have Petitioners offered an adequate explanation for Mr. Trende's decision to run 750,000 simulations in the Maryland case, where he found massive redundancy in his three ensembles. Petitioners claim that Respondents somehow "waived" this issue by failing to "do sufficient diligence before cross-examination of Mr. Trende," Pet. Br. 45, but that is meritless. No party even suggested engaging in expert discovery in this case before the unusually expedited trial began because there was no time. Mr. Trende knew when his reply report was served on March 1, 2022 that he already had served his 750,000-simulation report in the Maryland case, but he failed to disclose his Maryland simulations either in his reply report or during his trial testimony in this case. Moreover, it was Petitioners who submitted the Maryland court's decision to the Trial Court shortly before summations, specifically to buttress their arguments regarding Mr. Trende. R2330.

[5] Petitioners insist that the Trial Court supposedly "struck the congressional portions" of Dr. Tapp's reply report, Pet. Br. 13, but that is false. The Trial Court's ruling had nothing to do with whether Dr. Tapp was addressing the congressional plan. Rather, the Trial Court only limited Dr. Tapp's reply report to responding to "any new material in Trende's reply report," R2976:16-19, and the Trial Court never specified what if any portions of the reply report would be stricken, nor did it strike any portion of Dr. Tapp's extensive trial testimony about redundancy. R3036:19-R3048:22.

Petitioners cannot credibly contend that they were allowed to make new arguments about Mr. Trende arising from the Maryland case, but that Respondents were precluded from citing the same decision to identify fatal inconsistencies between what Mr. Trende did in each state.

On the merits, Petitioners claim that the only reason Mr. Trende ran 75 times as many simulations in Maryland as he did in New York is because of Voting Rights Act issues that allegedly are unique to Maryland. They assert that a sample size of 5,000 maps in Maryland would have resulted in only 600 valid maps. Pet. Br. 46. But the court's opinion in *Szeliga* said nothing about that, nor did Mr. Trende say anything about that in his Maryland report (which is not in the record, but is attached to a document on this Court's docket, *see* Dkt. No. 19 Ex. H). Petitioners cite to paragraphs 86-87 and Appendix I to Mr. Trende's Maryland report, but Mr. Trende does not say there or anywhere else that the Voting Rights Act constraints Petitioners cite are unique to Maryland (New York, for example, has nine majority-minority districts compared to Maryland's two). In any event, Mr. Trende's acknowledgement that running 5,000 simulations in Maryland would have yielded only 600 non-duplicative, usable maps only highlights the massive redundancy problem that likely infected his New York simulations, which he admittedly failed even to examine.

Petitioners' attempt to summon Dr. Barber to their rescue fails. Petitioners note that Dr. Barber ran 50,000 simulations of his own "with no mention at all of redundancies." Pet. Br. 45. But Dr. Barber was never asked to examine the redundancy issue and never endorsed Mr. Trende's flawed methodology. R2860:18-R2861:19. Rather, the Assembly called upon Dr. Barber only to confirm what Mr. Trende already had showed with his dot-plot chart: that if anything, the enacted congressional plan has a slight Republican lean. R997, R1003. Petitioners had ample opportunity to ask Dr. Barber on cross-examination whether he examined his simulations for redundancy, but they did not do so.[6]

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

A crucial issue in this case is that Petitioners did not offer Mr. Trende's dubious simulated maps into the trial record, and therefore nobody can see whether his simulated maps draw "crazy" districts that no actual map-drawer would draw and/or suffer from a significant redundancy problem. Like the Trial Court, Petitioners respond by improperly reversing the burden of proof, criticizing Respondents for failing to obtain Mr. Trende's maps through discovery. Pet. Br.

[6] Petitioners also suggest falsely that Dr. Barber's simulations support Mr. Trende's claims about the competitiveness of specific districts. Pet. Br. 44, 45. Respondents noted in their opening brief that the record contains no evidence about what Dr. Barber's simulations showed regarding the competeiveness or partisanship level of any district. Sen. Br. 32 n.3. Petitioners cite nothing to the contrary.

46-47. But there was no expert discovery, and Respondents had no burden to adduce evidence or prove anything. At a bare minimum, the absence of Mr. Trende's simulations from the record creates reasonable doubt, especially in light of his concession that he never examined his maps himself.[7]

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

If one takes the results of Mr. Trende's simulations at face value, they show that the enacted congressional plan has, if anything, a slight Republican lean because it draws four Republican-leaning districts whereas the great majority of Mr. Trende's simulations draw only three. The blue and red stripes on page 15 of Mr. Trende's first report, R245, show this clearly, as numerous defense experts confirmed. R872-73, R1004, R1200, R3049:25-R3054:8.

Petitioners attack Respondents for using the 50%-50% partisanship cutoff to differentiate between Democratic-leaning and Republican-leaning districts. Pet. Br. 39-40. But that hardly is a "bizarre" place to draw the line with respect to how

[7] Petitioners' reliance on what Mr. Trende calls the "gerrymandering index" further shows the flaws in his analysis. Mr. Trende conceded that no simulations expert had ever used the "gerrymandering index" in any other case. R2638:10-13. Contrary to its misleading name, the "gerrymandering index" provides no information about whether the enacted map favors one party or the other, or encourages or discourages competition. It only measures how much the enacted map differs from the simulated maps. R852-53 ¶¶ 25-26, R3048:23-R3049:24. In this case, it would be more apt to call it the "failure to account for communities of interest index."

the partisanship of a district leans. In fact, that is precisely how Mr. Trende drew that line in his initial report. R245, R2625:11-20.[8] Nor are Respondents treating a 70% Democratic-leaning district "the same" as a 50.01% Democratic-leaning district. Respondents are merely making the point that, although Republican candidates may win more or fewer than four congressional seats in November, there is nothing surprising or unfair about the fact that the enacted plan contains 22 Democratic-leaning districts, one fewer than in nearly all of Mr. Trende's simulations. Petitioners' assertion that the congressional plan has "extreme Democratic partisan effects," Pet. Br. 34, is not just unsupported. It is belied by the record, including the analysis of their own expert.[9]

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[8] Petitioners do not even attempt to defend the "53%" figure that Mr. Trende conveniently invented in his reply report, R1034-35, and that the Trial Court attempted to rely upon but baselessly took the liberty of bumping up to "55%," R19.

[9] Petitioners press their claim that Dr. Katz's analysis of the congressional plan was "flagrantly improper" because his report supposedly was submitted "two weeks late." Pet. Br. 48. That is false. Dr. Katz's report was submitted on the day that Respondents' Answer to the Amended Petition was due. That was two weeks later than Respondents' Answer to the initial Petition was due because Petitioners amended, thereby triggering a new response date. Neither Petitioners nor the Trial Court ever disputed that Dr. Katz's report was timely submitted with respect to the Senate plan; Dr. Katz used the exact same methodology, and drew the same conclusions, with respect to both the congressional and Senate plans, and Petitioners had a full and fair opportunity to cross-examine him about his methodology and conclusions at trial. It defies logic that the Trial Court chose to ignore Dr. Katz's conclusions about the fairness of the congressional plan. Respondents have appealed "from each and every part of the Judgment," R26, including the Trial Court's refusal to consider Dr. Katz's testimony regarding the

E. Petitioners' Arguments About Specific Districts Do Not Carry Their Burden

Petitioners' cursory discussion of specific districts, Pet. Br. 35-39, comes nowhere close to carrying their burden. Petitioners do not even mention by name the expert who is the source of the "evidence" they rely on because he was discredited so thoroughly on cross-examination.

With respect to the Long Island districts, Petitioners mischaracterize Dr. Ansolabehere's testimony and suggest falsely that he agreed that those districts shifted in favor of Democrats. Using the CPVI data that Petitioners cite, Dr. Ansolabehere testified that there is no net partisan change to the Long Island districts. R2913:7-10 ("The net effect is nothing. One district goes from R to swing; one district goes from swing to R; the other district remains swing, so it's kind of a net zero change in terms of partisanship.").

In New York City, Petitioners recycle debunked "evidence" from Mr. LaVigna's report alleging that various communities were cracked. Pet. Br. 36-37. Petitioners ignore both the contrary evidence in the record, R1119-46 ¶¶ 275-507, and Mr. LaVigna's concessions that many of his core allegations were completely wrong, R2776:20-R2787:21. District 11 experienced a significant partisan shift because it reverted to a prior configuration that united the fast-growing Chinese-

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congressional plan, a ruling that is all the more indefensible given the beyond a reasonable doubt standard that applies here.

American communities that had been cracked under the 2012 plan. Far from the Legislature "cracking" other communities of interest in the process, the Brooklyn communities discussed in Mr. LaVigna's report are more united now than in 2012. R1130-37 ¶¶ 366-427.

In the Hudson Valley region, Petitioners mischaracterize the population and political lean of different areas and ignore the neutral features of each district set forth in the Verified Counterstatement of Facts submitted by Respondents below. The allegation that Putnam Valley, Carmel, Yorktown, and Somers are all "heavily Republican towns," as Mr. LaVigna initially claimed without any supporting data, R269, is incorrect, R875 ¶ 58. In response to Dr. Ansolabehere's rebuttal of this mischaracterization, Mr. LaVigna restated his assertion on reply, again without any data. R1061-62. Moreover, even using the CPVI numbers from Mr. LaVigna's rebuttal report that Petitioners cite in their brief, the enacted Hudson Valley districts reflect an overall increase in competitiveness relative to the 2012 districts. R2910:9-12. And the critique that District 16 features a "long tail" that connects parts of the district ignores the shape of Westchester County, a reality that leads to similar configurations in both Commission plans. R2908:2-25, R3263-65; *see Schneider v. Rockefeller*, 31 N.Y.2d 420, 430 ("[I]t is manifest that our State, with its irregular boundaries, its islands, rivers, lakes and other geographical features is not susceptible of division into circular planes or squares.").

With respect to upstate, Petitioners again ignore the strong bipartisan consensus in both Commission plans about how to draw the upstate districts. R3263-3265 (Exhibit S-3). They fail even to mention that New York lost a congressional seat, which together with population increases downstate, R870 ¶ 23, necessitated a significant reconfiguration of the region, R2904:9-R2905:10. They claim that the Legislature "packed" Republicans into three districts, but those districts are also heavily Republican in both Commission plans for reasons that have nothing to do with seeking partisan advantage. *See* Sen. Br. 37-38.

III. PETITIONERS LACK STANDING

Petitioners' argument that they have standing rests primarily on Justice Kagan's concurrence in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). That reliance is misplaced for two reasons.

First, Justice Kagan's concurrence is not the law. The *Gill* majority expressly rejected the argument that a partisan gerrymandering plaintiff can have standing to assert a claim that is "statewide in nature," holding that the harm in a partisan gerrymandering claim is necessarily "district specific." *Id*. at 1930. Because a "plaintiff who complains of gerrymandering, but who does not live in a gerrymandered district, assert[s] only a generalized grievance against governmental conduct of which he or she does not approve," a partisan

gerrymandering plaintiff only may seek the "revision of the boundaries of the individual's own district." *Id*. (internal quotation omitted). That is the law.

Second, even to the extent Justice Kagan mused in her concurrence about the possibility that partisan gerrymandering plaintiffs might complain about "an infringement of their First Amendment right of association," she concurred in the decision to reject the *Gill* plaintiffs' claims because they "did not advance [that theory] with sufficient clarity or concreteness to make it a real part of the case." *Id*. at 1934 (Kagan, J., concurring). Petitioners never advanced any right of association theory here either. Their only claim is precisely the kind of "packing" and "cracking" theory that the Court in *Gill* plainly held must be pleaded and proved on a "district specific" basis.

Notably, although Petitioners insist repeatedly that Mr. Trende's simulations "showed that Respondents packed and cracked Republicans throughout the State," Pet. Br. 3, 11, 30-34, never once did Mr. Trende identify any specific districts that supposedly were packed and cracked. Indeed, his simulations are *inherently incapable* of identifying specific districts that allegedly are problematic. In his congressional dot-plot chart, R245, the colored bars in the first four ordered districts starting from the left are *not* the four most Republican-leaning districts in the *enacted* plan; those colored bars show the *constellation* of the first, second, third, and fourth most Republican-leaning districts in each of his simulations, and

his simulations (in theory, if there is no redundancy) come out differently every time. So when Petitioners point to colored bars in the dot-plot chart and say they show that the four most Republican-leaning districts are too Republican-leaning, those colored bars are not saying anything about any specific districts. Under *Gill*, this kind of generalized analysis, without more, does not confer standing.

Petitioners also rely on the broad language in article III, section 5 of the Constitution allowing "any citizen" to challenge a redistricting plan. But that language was not added to the Constitution in 2014. It has been there since 1894. No New York court has ever allowed a citizen to seek to remedy a district located halfway across the state from her residence or to pursue a "statewide" partisan gerrymandering claim. Such a far-away plaintiff would neither be injured in fact nor within the zone of interests necessary to establish standing.[10]

IV. THE ELECTION SHOULD PROCEED ON SCHEDULE USING THE 2022 MAPS

Petitioners are wrong that the *Purcell* principle does not apply in state courts. The common-sense underpinning of *Purcell* – that courts should not tinker

[10] Petitioners' reliance on *Humane Society of U.S. v. Empire State Development Corporation*, is misplaced because in that SEQRA case, the only plaintiff who was found to have standing "live[d] adjacent to the site of the proposed project," had a "drinking water supply" that would "be affected by the project," and would "be impacted by increased noise and truck traffic." 53 A.D.3d 1013, 1017 (3d Dep't 2008).

with election laws and deadlines close to an election to avoid chaos, confusion, and unfair consequences for candidates and voters – applies equally to state courts even if election changes are not barred by federalism concerns. State courts have routinely refused to disrupt imminent or ongoing elections, invoking *Purcell*. *See* Sen. Br. 60-61 (collecting cases).

Moreover, Petitioners fail to reckon with the well-established rule in New York that even plans that are struck down as unconstitutional should be kept in place for the duration of an imminent election. *See* Sen. Br. 61 (collecting cases). The actions of courts in Maryland, Pennsylvania, and North Carolina are inapposite because those courts were not bound by this New York authority, and because in those cases only the state's highest court moved election deadlines.

CONCLUSION

For the foregoing reasons, and for those set forth in Respondents' opening brief, the Trial Court's Order should be vacated, and the Amended Petition should be dismissed.

Dated: April 18, 2022
New York, New York

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