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VIA EMAIL

Hon. John P. Asiello
Chief Clerk & Legal Counsel to the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207
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Re: *Harkenrider v. Hochul*, APL-2022-00042 – Petitioners' Supplemental Letter Response Brief To Court Of Appeals

Dear Clerk Asiello:

The parties' letter briefs make clear that the only "question[ ] of law," N.Y. Const. art. VI, § 3(a), that is properly before this Court—other than Respondents' meritless standing objection—is whether the failure of the exclusive, constitutional IRC-focused process means that the Legislature can enact redistricting legislation as if the People had never adopted the 2014 Anti-Gerrymandering Amendments. Petitioners respectfully submit that their analysis of the Constitution's text is compelling, and that Respondents still have no meaningful answer to the critique that Respondents' approach would render the IRC process a meaningless formality. As to the issue that Respondents cover at greatest length in their letter briefs—whether the Legislature acted with partisan intent in enacting the 2022 congressional map—Respondents have confused the roles of the Appellate Division and this Court. The Appellate Division has the exclusive responsibility to "determine whether a particular factual question was correctly resolved by the trier of facts," *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 498 (1978), and the Appellate Division, Fourth Department has now upheld the Supreme Court's factual finding that the Legislature enacted the map with the intent "to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties," N.Y. Const. art. III, § 4(c)(5), beyond a reasonable doubt. Under N.Y. Const. art. VI, § 3(a) and this Court's caselaw, this is the end of the analysis.

If this Court nevertheless usurps the role of the Supreme Court and the Appellate Division by overturning the factual finding that the Legislature acted with partisan intent, beyond a reasonable doubt, the message will be clear: the State of New York will not enforce an express constitutional prohibition on partisan gerrymandering, the only barrier to this practice after *Rucho*

v. Common Cause, 139 S. Ct. 2484 (2019). That this would occur in the case of this particular, nationally embarrassing gerrymander would make that message unmistakably clear to the People, who adopted the 2014 Anti-Gerrymandering Amendments precisely to end the Legislature's gerrymandering. At the very most, Respondents have put forward experts to criticize one of Petitioner's experts in various respects that the Supreme Court and the Appellate Division—the courts authorized to make and then review factual findings—did not find convincing. There will always be expert disagreement, in every partisan-gerrymandering case—*see, e.g.*, *League of Women Voters of Ohio*, ___ N.E.3d___, 2022 WL 110261, *26–27 (Ohio 2022); *Szeliga v. Lamone*, Nos. C-02-CV-21—001773, -00186 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022), slip op. at 80, 84; *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1058–62 (S.D. Ohio 2019), *vacated and remanded sub nom. Chabot v. Ohio A. Philip Randolph Inst.*, 140 S. Ct. 102 (2019); *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 642–50 (M.D.N.C. 2018), *vacated and remanded*, 138 S. Ct. 2679 (2018); *Whitford v. Gill*, 218 F. Supp. 3d 837, 856, 857–62 (W.D. Wis. 2016), *vacated and remanded* 138 S. Ct. 1916 (2018); *League of Women Voters v. Pennsylvania*, 178 A.3d 737, 770–81 (Pa. 2018). So, if Respondents' approach here carries the day, the 2014 Amendments' substantive prohibition on partisan gerrymandering would become a dead letter, just as the Appellate Division's legal conclusion on the IRC process renders that constitutional process a dead letter. That would leave New Yorkers with no protections at all against partisan gerrymandering, just as before 2014.

This Court should hold that the Legislature violated the exclusive, constitutional process for redistricting, that Petitioners have standing, and that this Court has no authority to review the Supreme Court's now-affirmed factual finding that the Legislature enacted the congressional map with the intent "to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties," N.Y. Const. art. III, § 4(c)(5), beyond a reasonable doubt. It should also make clear, just as the Supreme Court and Appellate Division concluded, that the remedy must be for constitutional maps to govern the 2022 election.

I. Respondents Are Wrong To Defend The Legislature's Violation Of The Exclusive Constitutional Process Under The 2014 Anti-Gerrymandering Amendments

As Petitioners, the Supreme Court, Justice Curran, and the League of Women Voters correctly explained, under the 2014 Anti-Gerrymandering Amendments, the IRC process is *the* exclusive, constitutionally mandated process for redistricting, and the Legislature cannot enact maps under the pre-2014 process, which had led to constant gerrymandering. Petitioners' Letter Brief ("Pets.' Letter Br.") 3–5. The *only* exception to the 2014 Amendments' exclusive, IRC-driven process is that the courts must draw a remedial map if there is a failure in the process. N.Y. Const. art. III, § 4(e); Pets.' Letter Br.3; *see* Brief Of *Amicus Curiae* The League of Women Voters Of New York ("League.Br.") at 10–11, 13, App. Div. NYSCEF No.47 ("The Amendment thus makes clear beyond cavil both that the process it ordains is the exclusive process for effectuating redistricting and that the Judiciary is empowered to remedy redistricting plans that violate the law."). Any contrary conclusion, allowing the Legislature to redistrict after a failure of the

exclusive IRC process, would render the constitutional IRC process meaningless. Pets.' Letter Br.4; League.Br.15.

Respondents, quoting the Appellate Division, argue that the Constitution "is silent" as to the remedy for a violation of the exclusive IRC process, meaning that the Legislature may "'fill the gap'" and enact a redistricting plan itself when the IRC process fails. Governor Letter Brief ("Gov. Letter Br.") at 3 (quoting Appellate Division Decision, slip op. at 3); Senate Letter Brief ("Senate Letter Br.") at 3. But Article III, Section 4 is *explicit* that the Legislature never obtains the authority to draw its own maps *unless and until it considers two rounds of IRC submitted maps*. Brief For Petitioners-Respondents ("Pets.' Resp. Br.") 24–25, App. Div. NYSCEF No.43. The Constitution is "silent" on alternatives precisely because its exclusive redistricting process does not allow alternative processes, other than the court-drawn-map failsafe. That is also why Respondents' citation of pre-2014 case law from this Court does not help their cause. Senate Letter Br.3 & n.2. "[T]wo separate legislatures [ ] voted with bipartisan support to propose the 2014 amendments" to the Constitution to cabin to a large extent the Legislature's previously unfettered authority over redistricting, precisely because the People were tired of the Legislature's constant gerrymandering. Appellate Division Decision, slip op. at 14 (Curran, J., dissenting in part); Pets.' Resp. Br.4–5. And while Respondents argue that "prescrib[ing] a judicial remedy" for violations of the exclusive IRC procedure "would give a four-member bloc of the IRC the power to divert redistricting to the courts," Gov. Letter Br.4, that ignores the multiple tools that the Legislature may use to avoid that result. Pets.' Resp. Br.22–23; League.Br.18.

While Respondents criticize Justice Curran's dissenting opinion and his reliance on Article III, Section 4(e), their criticism misses the mark. Gov. Letter Br.4; Senate Letter Br.4. As Justice Curran explained, Appellate Division Decision, slip op. at 12–14, Article III, Section 4(e) broadly allows the courts to order new maps, or even draw them themselves, for "violations of law," which includes exactly the type of procedural infirmities that occurred here, different and in addition to a court's authority to remedy "legal infirmities," such as the unlawful partisanship that also infected the 2022 congressional map. Of course, when the Constitution uses "different terms" like these in various related provisions, "it is reasonable to assume that a distinction between them is intended." *In the Matter of Orens v. Novello*, 99 N.Y.2d 180, 187 (2002); *Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 207 (1907).

Respondents also have no meaningful response to Justice Curran's explanation that giving the Legislature the power to conduct redistricting after a violation of the exclusive IRC process "renders the IRC a useless formality." Appellate Division Decision, slip op. at 14; Senate Letter Br.4. While Respondents gesture to the fact that the Commission held hearings in this redistricting cycle, Senate Letter Br.4, they do not explain why future Commissions would even bother, as those Commissions would be stacked with agents of the Legislature who would know that the Legislature would get to draw district lines as if the IRC process was not in the Constitution, so long as the Commission simply sits on its hands. That is why the League of Women Voters was exactly correct that allowing the Legislature to "exploit" the IRC's failure and conduct redistricting itself "would be to *nullify* the process at the heart of the anti-gerrymandering protection and express

limitation on the power of the Legislature that the People understood they adopted and imposed in 2014." League.Br.20 (emphasis added).

II. As Every Justice Below Concluded, Petitioners Have Standing To Bring This Lawsuit, Including Challenging Both the Congressional And State Senate Map

Petitioners have standing to assert their claims against the 2022 maps for three independently sufficient reasons. Pets.' Resp. Br.55–61. First, as the Appellate Division, with no Justice dissenting, explained, Article III, Section 5 confers standing on Petitioners for both their procedural and substantive claims, providing that a lawsuit may be brought by "any citizen" challenging the constitutionality of a statewide apportionment plan. N.Y. Const. art. III, § 5; Appellate Division Decision at 3; Pets.' Resp. Br.58. Indeed, *Society of Plastics Industries, Inc. v. County of Suffolk*, 77 N.Y.2d 761 (1991), explicitly held that the Legislature may grant standing by statute to "any person" or "any citizen" and thereby allow "every person or every citizen [to] have the right to sue," and the text of "the statute at issue" alone can "answer[ ]" the "question of standing." *Id.* at 769–70. The same must be true for express provisions of the Constitution. In any event, Section 4221 of the Unconsolidated Laws mirrors the text of Article III, Section 5's provision authorizing the "suit of any citizen" to challenge redistricting. Second, Petitioners have standing for both their procedural and substantive claims under Justice Kagan's statewide-standing theory articulated in *Gill*, 138 S. Ct. at 1939 (Kagan., J., concurring), because the Legislature's violation of the exclusive IRC process and the 2022 maps' statewide partisan gerrymander caused Petitioners "associational injur[ies]"—specifically by diminishing their "political action efforts" and "campaign activit[ies]" throughout the State, Pets.' Resp. Br.58–59 (citing R.290–91, 1067–89). Finally, Petitioners also have standing for both their procedural and substantive claims because the unlawful 2022 maps dilute their votes by packing or cracking Petitioners into districts on the basis of political views. Pets.' Resp. Br.59–60 (citing R.242–44; R.290–91, 1067–89); *Gill*, 138 S. Ct. at 1935–36 (Kagan, J., concurring).

Respondents admit that Petitioners have standing to challenge every district in which an individual Petitioner lives and any districts bordering their home districts, Senate Letter Br.11, only contending that Petitioners lack standing in districts for which they have no residence or neighboring residence, Assembly Letter Brief ("Assembly Letter Br.") at 4–5; Senate Letter Br.10–11. But Respondents' repetition of their standing arguments below is unpersuasive.

Respondents again argue that Petitioners lack standing to challenge districts which they do not reside in, or which are not adjacent to their districts of residence, relying on *Gill v. Whitford*, 138 S. Ct. 1916 (2018). Senate Letter Br.11; Assembly Letter Br.4–5. As a threshold matter, there was no constitutional provision or statute granting standing to those plaintiffs in *Gill*, so that alone defeats Respondents' reliance on *Gill* here. Further, and independently, as the *Gill* majority explained, none of the plaintiffs there raised any harm beyond "a burden on those plaintiffs' own votes," which harm "arises through a voter's placement in a 'cracked' or 'packed' district," so the Court "le[ft] for another day consideration" of the standing theories Justice Kagan presented in her concurrence. 138 S. Ct. at 1931. But here, Petitioners submitted sworn affidavits attesting to

harms that track Justice Kagan's statewide-harm theory, explaining that the Legislature's gerrymandered congressional map diminishes all of their "political action efforts" and "campaign activit[ies]" *across the State*, *see* Pets.' Resp. Br.58–59 (quoting R.290–91, 1067–89), providing just the kind of "associational injury" that Justice Kagan described, *Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring), and that the *Gill* majority had no occasion to address there, *id.* at 1932 (maj. op.). And even if *Gill* applied directly and there was neither a constitutional provision nor statute explicitly granting Petitioners standing to sue, *but see supra* p.4, at most this would require a remand to the Supreme Court to allow Petitioners to add additional Petitioners in any standing-deficient districts, just as the U.S. Supreme Court did in *Gill*, 138 S. Ct. at 1923, 1933–34. Indeed, Respondents only claim that Petitioners lack standing in a few of the congressional districts that were "packed" and "cracked," *Compare* Assembly Letter Br.5, *with* Pets.' Letter Br.9–10, so Petitioners can add new petitioners in those districts if needed for complete relief.

Respondents' continued reliance on the trial court decision in *Bay Ridge Community Council v. Carey*, 454 N.Y.S.2d 186 (Kings Cnty. Sup. Ct. 1982), *aff'd on other grounds* 103 A.D.2d 280 (2d Dep't 1984), *aff'd* 66 N.Y.2d 657 (1985), is no better. As Petitioners explained before the Appellate Division, Pets.' Resp. Br.60–61, the *Carey* trial-court decision has no relevance here. And while Respondents criticize the Appellate Division's reliance on *Wright v. County of Cattaraugus*, 41 A.D.3d 1303, 1304 (4th Dep't 2007), *Wright* is on point, holding that a "plaintiff ha[d] standing" to challenge an entire county's redistricting plan because the plaintiff was "a qualified voter in the [County]," *id.* (brackets in original); Appellate Division Decision, slip op. at 3.

III. This Court Lacks Jurisdiction To Resolve The *Only* Challenge That Respondents Articulate In Their Letter Briefs on Petitioners' Substantive Gerrymandering Claim: Whether This Court Should Overturn The Supreme Court's Now-Affirmed *Factual Finding* That The Legislature Enacted The Congressional Map "To Discourage Competition Or For The Purpose Of Favoring Or Disfavoring Incumbents Or Other Particular Candidates Or Political Parties," Beyond A Reasonable Doubt

A. As Petitioners explained in their letter brief, Pets.' Letter Br.1, 7–8, this Court's review of Petitioners' substantive gerrymandering claim against the 2022 congressional map is jurisdictionally limited as compared to the Appellate Division's review. The Appellate Division may "determine whether a particular factual question was correctly resolved by the trier of facts," Pets.' Letter Br.8 (quoting *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 498 (1978)), but this Court's "review is confined solely to the legal issues raised by the parties," with no authority to second-guess facts "supported by evidence in the record," Pets.' Letter Br.7 (quoting *Matter of Hofbauer*, 47 N.Y.2d 648, 654 (1979) (citations omitted); *see also Congel v. Malifitano*, 31 N.Y.3d 272, 294 (2018); *Humphrey v. New York*, 60 N.Y.2d 742, 743 (1983)). And because the Appellate Division affirmed the Supreme Court's factual finding that the Legislature enacted the congressional map with the intent of "discourag[ing] competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties," N.Y. Const. art. III, § 4(c)(5), beyond a reasonable doubt, this Court cannot reconsider that factual finding under N.Y. Const.

art. VI, § 3(a), and may only address the very narrow question of whether there is "evidence in the record" to support that conclusion, *see Matter of Hofbauer*, 47 N.Y.2d at 654.

Ignoring the fundamental difference between the roles of the Appellate Division and this Court in reviewing disputed factual findings of the Supreme Court, Respondents simply re-argue the same position that they presented to the Appellate Division: that because of the claimed deficiencies in Mr. Trende's simulations that their experts testified about, this Court should overturn the Supreme Court's factual finding that the Legislature enacted the congressional map "to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties," N.Y. Const. art. III, § 4(c)(5), beyond a reasonable doubt. But whether this Court would have weighed the admitted factual evidence before the Supreme Court differently is not a "question[ ] of law" under N.Y. Const. art. VI, § 3(a) and this Court's caselaw interpreting that provision., *see Matter of Hofbauer*, 47 N.Y.2d at 654; *Congel*, 31 N.Y.3d at 294; *Humphrey*, 60 N.Y.2d at 743. Rather, the *only* challenge open to Respondents as to the Supreme Court's now-affirmed factual finding is an exceedingly narrow one—whether there is any "evidence in the record" that could support that finding, *Matter of Hofbauer*, 47 N.Y.2d at 654, notwithstanding how this Court would have viewed that evidence if it was sitting as the Supreme Court or Appellate Division.

Given that Respondents fail even to argue that they prevail under that much more difficult standard for them to meet—because, of course, they could not possibly prevail given the very significant amount of evidence in the record to support the Supreme Court's finding, Pets.' Letter Br.7—they have now waived this issue, meaning that this Court should uphold the Appellate Division's affirmance on Petitioners' substantive claim, based upon the Supreme Court's factual finding. *See Jin Ming Chen v. Ins. Co. of State*, 36 N.Y.3d 133, 139 n.2 (2020) (limiting decision to "the issue presented in th[at] appeal" and "argued" by the parties); *see also 241 East 22nd Street Corp. v. City Rent Agency*, 33 N.Y.2d 134, 143 n.2 (N.Y. 1973) (noting that the Court "may consider" an issue only because it was properly "briefed and argued").

B. If this Court were to conclude that it has authority to "determine whether a particular factual question was correctly resolved by the trier of facts," *Cohen*, 45 N.Y.2d at 498, and review *de novo* the Supreme Court's factual finding that the Legislature acted "to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties," N.Y. Const. art. III, § 4(c)(5), beyond a reasonable doubt, this Court should reach the same conclusion as did the Appellate Division.

As Petitioners explained, Pets.' Letter Br.6–7, they presented overwhelming evidence of the Legislature's partisan intent. Very briefly summarizing this extensive evidence, the unrebutted affidavit of Senate Minority Leader Robert G. Ortt, explains that Democrats "unilaterally, secretly, and without any public input, drafted new maps," depriving Republicans of any "input or involvement in the drafting or creating of the congressional . . . map[ ] that the Legislature adopted." Pets.' Letter Br.6. Further, the undisputed evidence before the Supreme Court established that New York's current congressional delegation, under a neutral, court-drawn map

is 19-8 in favor of Democrats, while the delegation under the new map will be 22-4 pro-Democrat in a typical year. Pets.' Letter Br.6. And the Cook Partisan Voting Index ("CPVI") supports that conclusion, as it shows that every competitive district in the State under the 2022 congressional map is now *more* pro-Democrat than under the 2012 map, which is what created the 19-8 to 22-4 shift. Pets.' Letter Br.6. Finally, Petitioners submitted the expert report of Mr. Sean Trende, including his dotplot model based on his analysis of 35,000 simulation maps—an analysis confirmed by Respondents' own expert Dr. Barber, through an additional 50,000 simulations—showing how the Legislature pressed Republican voters "into a few [r]epublican-leaning districts, while spreading [d]emocratic voters as efficiently as possible." Appellate Division Decision, slip op. at 6 (brackets in original); *see also* R.19.

Respondents' spaghetti-against-the-wall approach to this overwhelming evidence of the Legislature's partisan intent fails.

First, Respondents criticize the Appellate Division for concluding that the map-drawing process was wholly partisan. Assembly Letter Br.5–6; Senate Letter Br.6–7. As Minority Leader Ortt explained in an unrebutted affidavit that Respondents stipulated to in their closing argument, SR.37, 39—legislative Democrats controlled the entire map-drawing process and *excluded* Republicans from providing any input. Pets.' Resp. Br.10, 27 (citing R.288–89). Thus, Republicans had no "*input or involvement in the drafting or creating of the congressional . . . map[ ] that the Legislature adopted*." R.289 (emphasis added). Respondents conceded this point below, explaining to the Appellate Division that there was no "reason for the Democratic super-majorities in both houses of the Legislature to seek input or involvement from the Republican minorities." Reply Brief of Respondent-Appellant Senate Majority Leader And President Pro Tempore of the Senate Andrea Stewart Cousins 13, App. Div. NYSCEF No.51 (citations omitted).

Second, Respondents claim that the comparison of the 2022 congressional map (which is 22-4 in a typical year, as all experts in this case agree) to the 2012 congressional map (which was 19-8 under a neutral, court-drawn map) is somehow wrong. Assembly Letter Br.6–7; Senate Letter Br.7. Respondents do not dispute that the enacted map is a 22-4 map in a typical year—nor could they, as experts on both sides agreed on this point below. Pets.' Resp. Br.28 (collecting expert-report citations). And their assertion that the court-adopted map is 23-4 rather than 19-8 is downright bizarre, Senate Letter Br.7; Assembly Letter Br.6–7, *given that New York's congressional delegation under the 2012 map is actually 19 Democrats to 8 Republicans*, Pets.' Letter Br.6 (citing R.1027–38, 1045; R.267–71, 1056–66), with the average delegation split being 19.6-7.4 over the decennial period, *see* State of New York, Biographical Directory of the United States Congress, *available at* https://bit.ly/3vaRWCp.

Third, Respondents continue to press their mendacious claim that the 2022 congressional map has a *Republican* lean based upon a partisan-symmetry methodology that they never timely submitted. Senate Letter Br.5–6 & n.3; *see also* Assembly Letter Br.6. Respondents point only to the testimony of Dr. Katz, Senate Letter Br.5 n.3, yet the Supreme Court *excluded* Dr. Katz's expert report to the extent that it addressed the 2022 congressional map, given that this report was

flagrantly untimely, Pets.' Resp. Br.13, 48, and Petitioners have not even attempted to meet the high bar for overturning that discretionary decision on appeal. In any event, Dr. Katz based this conclusion on a partisan-symmetry methodology that has nothing to do with partisan intent, *see* Pets.' Resp. Br.48–49—which is the relevant factual question here, N.Y. Const. art. III, § 4(c)(5)—and his conclusion is entirely contradicted by the most respected public partisan-symmetry calculations from FiveThirtyEight, which scores the 2022 congressional map as an egregious Democrat +8.6 efficiency gap gerrymander. *See* Pets.' Resp. Br.48 (citing *Compare What Redistricting Looks Like In Every State*, FiveThirtyEight, https://53eig.ht/3M6gJ08).

Fourth, Respondents attack the credentials and experience of Petitioner's expert, Mr. Trende, but these criticisms all fail. Senate Letter Br.6, 8; Assembly Letter Br.9. Mr. Trende's credentials as an expert here are above reproach, as he is a widely renowned expert on redistricting. Pets.' Resp. Br.10–11. The Supreme Court of Virginia recently selected Mr. Trende to serve as a special master to redraw successfully Virginia's redistricting maps. Pets.' Resp. Br.10–11 (citing R.232–34). And a court in Maryland relied almost entirely upon his analysis to declare that State's congressional map a partisan gerrymander, explaining that it "gave great weight" to Mr. Trende's "testimony and evidence" and commending his work as "an example of a deliberate, multifaceted, and reliable presentation." Pets.' Resp. Br.45 (quoting *Szeliga v. Lamone*, Nos. C-02-CV-21—001773, -001816 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022), slip op. at 83–84). But even putting Mr. Trende's credentials aside, the record below independently confirms the reliability of his analyses here, as Respondents' own expert Dr. Barber successfully replicated Mr. Trende's findings after Dr. Barber independently generated 50,000 of his own simulated maps, using the same simulation methodology that Mr. Trende used in this case, which methodology Dr. Barber's mentor—Dr. Imai—pioneered. Pets.' Resp. Br.30–31, 44–45.

Fifth, Respondents claim that the 35,000 total maps that Mr. Trende generated for his congressional-district analysis suffered from a redundancy problem, Senate Letter Br.6, 9–10; Assembly Letter Br.7, but there is absolutely no record evidence to support this claim, which means that Respondents continue flagrantly to mislead the courts on this point, *see* Pets.' Resp. Br.44–45. And, in any event, Respondents' expert Dr. Barber confirmed Mr. Trende's conclusions after creating his own, independent 50,000-simulation-map analysis, without mentioning any redundancy concerns. Pets.' Resp. Br.45.

Sixth, Respondents criticize Petitioners and Mr. Trende for not reviewing or submitting into evidence the specific, individual maps in the set of 35,000 computer-generated maps. Senate Letter Br.6, 9; *see also* Assembly Letter Br.7. But Respondents never requested Mr. Trende's maps through discovery, and so they have waived any challenge to their absence. Pets.' Resp. Br.46–47. The reason that Respondents never made this request is obvious: the point of creating thousands of simulated maps is the mathematical analysis of the data derived from this simulation set, not any individual map. Pets.' Resp. Br.46–47. Respondents' cherry-picking and criticism of two generated maps by Dr. Imai—who was not an admitted expert in this case—makes no sense, Senate Letter Br.8–9, given that they had direct access to Dr. Barber's 50,000 maps, which maps

replicated Mr. Trende's analysis, and yet Respondents did not identify any maps of concern or relevance in Dr. Barber's extremely large dataset. Pets.' Resp. Br.46–47.

Finally, Respondents claim that Mr. Trende failed to consider communities of interest generating his set of maps, Senate Letter Br.8; Assembly Letter Br.8–9, but the Appellate Division correctly explained the futility of this argument: "It is implausible that the failure to account for this one criterion in the simulated maps coincidentally resulted in showing that the enacted map had all four republican-leaning districts being more republican-leaning, all the next nine most competitive districts being more democrat-leaning, and the 'safest' democrat-leaning districts falling within the range of the simulated maps," Appellate Division Decision, slip op. at 7. Aside from communities of interest, Mr. Trende controlled for all other constitutional criteria. Specifically, in his reply report, Mr. Trende ran an additional set of 10,000 simulations while "freezing" portions of the map so they that they would not split municipalities—which are well recognized communities of interest—and found no changes in his results. Pets.' Resp. Br.41–42 (citing R.1038–39). He then ran an additional set of 10,000 simulations while "freezing" portions of the enacted map to account for majority-minority districts, and again he found no change in results, and did the same for core retention. Pets.' Resp. Br.41–42 (citing R.1039–42). And as for the other criteria that Respondents identify, Senate Letter Br.8; Assembly Letter Br.9, Mr. Trende used the exact same compactness setting on his simulations as did Respondents' expert, as well as the standard "county preservation toggle," thus these would not lead to inaccurate results. Pets.' Resp. Br.42 (citing R.2816–17); R.3046-47.

IV. The Remedy For The Legislature's Unconstitutional Actions Must Be For 2022, Including To Avoid Establishing A "One Free Gerrymander" Precedent

As Petitioners explained before the Appellate Division, Pets.' Resp. Br.49–52, and in their letter brief before this Court, the remedy here must apply for 2022, under the New York Constitution's expedited procedures for reviewing redistricting challenges. If this Court overturns the lower courts' decision that the remedy here should be for 2022, that would—in effect—establish a "one free gerrymander" precedent for all future redistricting lawsuits, given that Petitioners filed their lawsuit on the day the Governor signed the unconstitutional maps. Pets.' Letter Br.5.

Respondents' have no meaningful response to either the Constitution's expedited procedures, or the perverse "one free gerrymander" precedent that their approach would enshrine in New York law. Respondents first argue that redistricting will be completed faster in future decades which could—perhaps—allow for a remedy in the first election cycle, under their approach. *See* Gov. Letter Br.5–6; Assembly Letter Br.9–10. Respectfully, that makes no sense. The People adopted the 2014 Anti-Gerrymandering Amendments precisely because they understood that the Legislature engaged in relentless gerrymandering decade-after-decade. If the Legislature knows that if it enacts the maps in future decades on February 3, as it did this year, and the Courts will say that is too late for challengers to obtain relief in the first election cycle, that is just what the Legislature will do.

Respondents also argue—for the first time in this case—that "a sufficiently egregious gerrymander would warrant immediate preliminary relief," at the outset of the litigation, before the party has put in its evidence, but that the congressional map here did not meet that bar at the preliminary stage of this case. Gov. Letter Br.5–6. This assertion is, frankly, astounding. As soon as the Legislature enacted the 2022 congressional map, good-government groups left, right, and center saw the map as an egregious, nationally embarrassing gerrymander, while even the map's proponents—such as proposed *amicus* Congressman Sean Patrick Maloney—could only defend it as perverse revenge for what other States had done in the 2010 redistricting cycle:

- Dave Wasserman, a nonpartisan national elections expert, noted that the congressional map is "an effective gerrymander," designed so that Democrats will "gain three seats and eliminate four Republican seats," creating "probably the biggest shift in the country." Grace Ashford & Nicholas Fandos, *N.Y. Democrats Could Gain 3 House Seats Under Proposed District Lines*, N.Y. Times (Jan. 30, 2022), *available at* https://www.nytimes.com/2022/01/30/nyregion/new-york-redistricting-congressional-map.html.

- The nonpartisan election website FiveThirtyEight described the map as so "skewed toward Democrats" and "egregious" as to "represent[ ] a failure for [New York's] new redistricting process." Nathanial Rakich, *New York's Proposed Congressional Map Is Heavily Biased Toward Democrats. Will It Pass?*, FiveThirtyEight (Jan. 31, 2022), *available at* https://fivethirtyeight.com/features/new-yorks-proposed-congressional-map-is-heavily-biased-toward-democrats-will-it-pass/.

- Michael Li, an attorney for the left-leaning Brennan Center for Justice, noted that the congressional map "isn't good for democracy," because it is "a master class in gerrymandering, . . . tak[ing] out a number of Republican incumbents very strategically." Nick Reisman, *How the Proposed Congressional Lines Could Alter New York's Politics*, Spectrum News 1 (Feb. 1, 2022), *available at* https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2022/02/01/how-the-proposed-congressional-lines-could-alter-ny-s-politics.

- Laura Ladd Bierman, the executive director of the League of Women Voter of New York State, called it "shameful" that the Legislature had denied New Yorkers "a fair redistricting process," and explained that the congressional map "reflect[s] a Legislature that appears to care more about favoring partisan interests than it does for fair maps." *NYC Would Get More Seats in State Senate Under Proposed Maps*, N.Y. Daily News Feb. 1, 2022), *available at* https://www.nydailynews.com/news/politics/new-york-elections-government/ny-state-senate-nyc-seats-legislative-redistricting-20220202-2xoyaqnvlfhdliax5tosbnuage-story.html.

- The League of Women Voters of New York State also released a public statement that same day, noting that the congressional map "reflect[ed] a Legislature that appears to

care more about favoring partisan interests than it does for fair maps." *League of Women Voters' Statement on Congressional, Senate, and Assembly Maps Released by the Legislature*, The League of Women Voters of New York State (Feb. 1, 2022), *available at* https://lwvny.org/wp-content/uploads/2022/02/LWVNY-Statement-on-Maps-02.01.2
022.pdf.

- The Unity Map Coalition, a group of leading legal voting rights advocacy organizations representing people of color in New York City, saw the map as an obvious example of the Legislature "revert[ing] to its old ways, putting the ambitions of elected officials above the needs of New Yorkers." *Unity Coalition Rejects NYS Legislature's Proposed Redistricting Plans*, Unity Coalition (Feb. 2, 2022), *available at* https://www.latinojustice.org/en/news/unity-coalition-rejects-nys-legislatures-proposed-redistricting-plans.

- Duncan Hosie, a legal fellow with the American Civil Liberties Union's Ruth Bader Ginsburg Liberty Center, noted that even though "New York's Democratic establishment knows" that "[g]errymandering is wrong, no matter who does it," the congressional map was proof "Democrats chose raw power over principle" and committed the "sin" of "weaponizing the machinery of government against political opponents." Duncan Hosie, *New York's Gerrymander Is an Affront to Democratic Principles*, Wall St. J. (Feb. 6, 2022), *available at* https://www.wsj.com/articles/new-yorks-gerrymander-is-an-affront-to-democratic-principles-republican-votes-disctricts-maps-hypocrisy-11644176113.

- Cynthia Appleton, the Democratic chairwoman for Wyoming County called the map "an absolute travesty." Jerry Zremski, *New Congressional Map Sparks Gerrymandering Outcry*, Buffalo News (Jan. 31, 2022), *available at* https://buffalonews.com/news/new-congressional-map-sparks-gerrymandering-outcry/article_0ab6b528-82e6-11ec-8d7b-07d7c0c217b8.html.

- Melanie D'Arrigo, a Democratic candidate running in Congressional District 3, harshly criticized the gerrymandered map, noting that New Yorkers should not and could not "stay silent as we watch the state legislature publish a map that extreme gerrymanders our district," and questioned how the congressional map was "fair to the people." Jacob Kaye, *State Legislature Shares Congressional Redistricting Map*, Queens Daily Eagle (Feb. 1, 2022), *available at* https://queenseagle.com/all/state-legislature-shares-version-of-congressional-redistricting-map.

- Proposed amicus Congressman Sean Patrick Maloney, who also serves as chair of the Democratic Congressional Campaign Committee, defended the map as "restitution" for what he alleged was "years" of prior Republican gerrymandering in other States. Nat'l Republican Redistricting PAC (@GOPRedistrict), Twitter (Feb. 9, 2022, 3:19 PM), https://twitter.com/gopredistrict/status/1491507079479181312?s=10.

If all of this was not sufficient to qualify the 2022 congressional map for Respondents' new preliminarily "sufficiently egregious gerrymander," Gov. Letter Br.5–6, exception to the one-free-gerrymander rule that they would have this Court create, no map will ever qualify for that exception.

Respondents' claim that allowing a remedy for 2022 would "disrupt the orderly administration of the election process," Senate Letter Br.11, is foreclosed by judicial estoppel, *Lorenzo v. Kahn*, 954 N.Y.S.2d 331, 333 (4th Dep't 2012), and is factually wrong. When requesting a stay from the Appellate Division, Legislative Respondents admitted that, given this Court's intent to expedite consideration of this case, "the Legislature now knows it would be able to consider and enact replacement maps promptly in the first week of May 2022, approximately 3 ½ months before August 23, 2022," which would allow the full elections in 2022 to proceed under the remedial maps. Email from Craig R. Bucki to Justice Lindley (Apr. 7, 2022 5:58 PM EST). That concession was, of course, well-grounded. As Co-Executive Director for the New York State Board of Elections Todd D. Valentine explained in a sworn affidavit, the Board of Elections and local election officials have a noted, successful history in adjusting to election changes necessitated by exigent circumstances, and there would be plenty of time to adjust and hold successful 2022 elections under remedial, constitutional maps by rescheduling the primary election to August 2022. Pets.' Letter Br.5–6 (citing R.2326–29).

Finally, Respondents' argument that the Court should allow the Legislature yet more time to "complete the complex process of drafting a redistricting statute" beyond even the April 30, 2022 deadline that the Appellate Division set, Senate Letter Br.11–12, is another effort to delay the remedy here past the 2022 election, while (again) contradicting what Respondents told the Appellate Division when they were seeking a stay from that Court. The Legislature has now had 25 days since the Supreme Court's March 31, 2022 Decision and Order to draw constitutional maps, and the full 30-day period satisfies the "full and reasonable opportunity" requirement prescribed in the Constitution. *See* N.Y. Const. art. III, § 5. Indeed, Respondents argued below—when seeking a stay from the Appellate Division—that the 30-day period that the Legislature placed into the redistricting legislation here, *see* § 3(i) of 2021–2022 S.8172-A and A.9039-A, and § 2 of 2021–2022 S.8185-A and A.9040-A, was precisely the time it needed to adopt remedial maps. And the lower courts have given the Legislature all of the guidance that it could possibly need, explaining that the 2022 congressional map pressed Republican voters "into a few [r]epublican-leaning districts, while spreading [d]emocratic voters as efficiently as possible." Appellate Division Decision, slip op. at 6 (brackets in original); *see also* R.19. This is the classic packing-and-cracking that is the hallmark of unconstitutional gerrymandering, as Justice Kagan explained in *Rucho*, 139 S. Ct. at 2513–14. Indeed, the Special Master is already hard at work undoing this unconstitutional packing and cracking as he draws a remedial congressional map, having now received multiple submissions of proposed congressional remedial maps from the public.

Sincerely,

Misha Tseytlin

cc: All Counsel of Record (via email)