

A SPECIAL CONUNDRUM: WHY SPECIAL MASTERS ARE THE APPROPRIATE REMEDY FOR ILL-APPORTIONED MAPS

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ABSTRACT

Every ten years, the United States undergoes a census to assess the population. Following the census, each state is tasked with redrawing its congressional and state legislature maps to conform to the population. Each district must contain approximately the same number of people in it. However, the state legislatures are often subject to litigation challenging the validity of their redrawn maps. This Comment explains why special masters are the appropriate remedy for ill-apportioned maps.

TABLE OF CONTENTS

I. Introduction.....	698
II. Background.....	699
A. What Is Redistricting, and Why Have There Been Lawsuits About It?	699
B. Who Are Special Masters, and What Is Their Purpose?..	702
III. Special Masters Are the Appropriate Remedy when the Legislature Fails to Produce Conforming Maps in a Timely Manner	703
A. Special Masters Can More Efficiently Fix Redistricted Maps than State Legislatures	704

* J.D., 2024 at Albany Law School. I am extremely grateful to my advisor, Professor Ava Ayers, for her guidance and suggestions throughout the writing process. I also would like to thank Professor Patrick Connors for his review and suggestions. Thank you also to my colleagues at *Albany Law Review* for their hard work in reviewing and editing this Comment. Any errors or omissions are my own.

B. The Legislature Loses Its Legitimacy in Creating Redistricted Maps when It Presents Unconstitutional Maps	706
C. Special Masters Are Unbiased and, Therefore, Will Draw the Most Representative and Fair Maps Possible	708
IV. Counterargument: The Legislature Should Be Able to Cure Non-Conforming Maps	711
A. The Legislature Should Be Afforded Great Deference in Being Able to Redraw the Maps.....	711
B. Special Masters Are More Expensive than the Legislature	715
V. Response: Why the Legislature Lacks the Authority to Redraw the Maps and Why the Cost Differences Are Not Significant Enough to Prevent the Use of Special Masters .	717
VI. Conclusion.....	721

I. INTRODUCTION

Imagine a story of an entrenched and respected politician with decades of service, whose congressional district was re-drawn by a former bartender, turned postdoctoral fellow. How could that happen? How could an immensely respected and tenured politician's career end at the hands of one individual with no political experience? This is a story all too familiar for the former United States representative for New York's twelfth congressional district, Carolyn Maloney, whose district was combined with fellow incumbent Jerry Nadler's district because of redistricting that occurred in 2022.¹ The maps were re-drawn by Dr. Jonathan Cervas, a 2020 Ph.D. graduate, who, yes, is a former Nevada bartender.² Now a professor at Carnegie

¹ See Gregory Krieg & Paul LeBlanc, *Nadler Wins Democratic Primary for New York's Redrawn 12th District in Clash Between Incumbents, CNN Projects*, CNN, <https://www.cnn.com/2022/08/23/politics/nadler-win-new-york-12-primary-election-democrats/index.html> [<https://perma.cc/6Z5X-63UD>] (Aug. 23, 2022, 11:31 PM).

² Jesse McKinley, *How a Mapmaker Became New York's Most Unexpected Power Broker*, N.Y. TIMES, <https://www.nytimes.com/2022/05/28/nyregion/jonathan-cervas-redistricting-maps-ny.html> [<https://perma.cc/FMX7-9LWG>] (June 22, 2023); Rebecca C. Lewis, *Who Is the Man Tasked with Redrawing New York's New District Lines?*, CITY & STATE N.Y. (Apr. 28, 2022), <https://www.cityandstateny.com/politics/2022/04/who-man-tasked-redrawing-new-yorks-new-district-lines/366253/> [<https://perma.cc/MZN7-55XE>].

Mellon University, Dr. Cervas served as the special master tasked with re-drawing New York's ill-apportioned maps.³

Every ten years, the United States federal government conducts a census to count the citizens in each state.⁴ As a result of the census, each state's population determines how many seats in the House of Representatives that state will have.⁵ The number of representatives a state has also impacts how many votes in the Electoral College each state will have.⁶ How the districts are drawn in each state for each House seat varies by state.⁷ However, several states engage in political gerrymandering, and sometimes even racial gerrymandering, to maximize their party's representation in the House while also greatly overstating that party's percentage of the state population.⁸ Similarly, regarding racial gerrymandering, states can minimize the voting interests of the minority races in the state through gerrymandering the racial minority communities together.⁹ These outcomes are necessarily inequitable.¹⁰ So, how do these issues get resolved? This Comment seeks to establish that special masters are the appropriate remedy to those gerrymandered maps.

II. BACKGROUND

A. *What Is Redistricting, and Why Have There Been*

³ McKinley, *supra* note 2. Professor Cervas is also a contributor to *Albany Law Review*, Volume 87's State Constitutional Commentary issue. Jonathan Cervas, Bernard Grofman, Scott Matsuda & Justine Kawa, *Partisan Gerrymandering Cases in State Supreme Courts in the 2020s Redistricting Round*, 87 ALB. L. REV. 1089 (2024).

⁴ *About the Decennial Census of Population and Housing*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/decennial-census/about.html> [https://perma.cc/GSQ4-MH5N] (Dec. 16, 2021).

⁵ *Id.*

⁶ *Distribution of Electoral Votes*, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/allocation> [https://perma.cc/A3RY-77GB] (June 26, 2023).

⁷ *See About Congressional Districts*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/congressional-dist.html> [https://perma.cc/9EVW-B6F2] (Oct. 30, 2023).

⁸ *See* Kristen Silverberg, Note, *The Illegitimacy of the Incumbent Gerrymander*, 74 TEX. L. REV. 913, 920, 922 (1996).

⁹ David Rosborough, *Alabama's New Electoral Lines Are Racially Gerrymandered—Here's Why*, ACLU (Nov. 16, 2021), <https://www.aclu.org/news/voting-rights/alabamas-new-electoral-lines-are-racially-gerrymandered-heres-why> [https://perma.cc/2CLR-QMSX].

¹⁰ *See* Silverberg, *supra* note 8, at 923.

Lawsuits About It?

After the 2020 census, states redrew their maps to account for the population data.¹¹ Then, in many states, litigation ensued.¹² Several lawsuits have resulted in the maps being upheld, but some have not.¹³ The maps that have not survived judicial scrutiny have had a wide variety of remedies employed to rectify the defects.¹⁴ The crux of the argument here is that special masters are the best remedy to correct the maps. Special masters are the best remedy because of their timeliness, efficiency, and relative lack of bias.¹⁵

Redistricting is the process in which every ten years, the state governments redraw congressional maps based on the data in the U.S. census.¹⁶ The redrawing of congressional district lines must provide “substantially equal” representation to all citizens, regardless of race, gender, ethnicity, or other protected characteristics.¹⁷ However, states have redrawn their congressional maps in between censuses, and the Supreme Court has refused to strike down those maps.¹⁸

¹¹ See *Status of Redistricting After the 2020 Census*, BALLOTPEDIA, https://ballotpedia.org/Status_of_redistricting_after_the_2020_census [https://perma.cc/C5JH-GY5U].

¹² See, e.g., *Allen v. Milligan*, 599 U.S. 1, 15–16 (2023), *cert. granted sub nom. Merrill v. Milligan*, 142 S. Ct. 879 (2022) (mem.) (for Alabama); *Byrd v. Black Voters Matter Capacity Bldg. Inst., Inc.*, 339 So. 3d 1070, 1079–80 (Fla. Dist. Ct. App.), *cert. denied*, 340 So. 3d 475 (Fla.), *vacated per curiam*, 340 So. 3d 569 (Fla. Dist. Ct. App. 2022) (for Florida); *Robinson v. Ardoin*, 37 F.4th 208, 215 (5th Cir. 2022) (per curiam), *cert. dismissed as improvidently granted*, 143 S. Ct. 2654 (2023) (mem.) (for Louisiana); *Rivera v. Schwab*, 512 P.3d 168, 173–74 (Kan. 2022) (for Kansas); *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194, at *26–27 (Md. Cir. Ct. Mar. 25, 2022) (for Maryland); *Harkenrider v. Hochul*, 197 N.E.3d 437, 442 (N.Y. 2022); *Hoffmann v. N.Y. State Indep. Redistricting Comm’n*, 192 N.Y.S.3d 763, 766 (App. Div.), *aff’d*, 234 N.E.3d 1002 (N.Y. 2023) (for New York); *Harper v. Hall*, 868 S.E.2d 499, 512, 513 (N.C.), *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022) (mem.), *vacated*, *Harper v. Hall*, 886 S.E.2d 393 (N.C.), *aff’d*, *Moore v. Harper*, 600 U.S. 1 (2023) (for North Carolina); *League of Women Voters of Ohio v. Ohio Redistricting Comm’n*, 198 N.E.3d 812, 815, 818 (Ohio 2022) (per curiam) (for Ohio); *Carter v. Chapman*, 270 A.3d 444, 450 (Pa.), *cert. denied sub nom. Costello v. Carter*, 143 S. Ct. 102 (2022) (mem.) (for Pennsylvania); *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 7 (2024) (for South Carolina); *Wis. Legislature v. Wis. Elections Comm’n*, 595 U.S. 398, 399–400 (per curiam), *enforced*, *Johnson v. Wis. Elections Comm’n*, 972 N.W.2d 559 (Wis. 2022) (for Wisconsin).

¹³ See *Redistricting Litigation Roundup*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0> [https://perma.cc/Q7C3-97SJ] (July 7, 2023).

¹⁴ See *id.*

¹⁵ See *infra* Sections III.A, III.C.

¹⁶ Rebecca Green, *Redistricting Transparency & Litigation*, 71 SYRACUSE L. REV. 1121, 1122 (2021) (citing U.S. CONST. art. I, § 2, cl. 3).

¹⁷ See *Reynolds v. Sims*, 377 U.S. 533, 560–61, 568 (1964).

¹⁸ See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 421, 447 (2006) (upholding part of Texas’s district lines, which were redrawn in 2003 based on 2000 census data).

Redistricting maps commonly leads to litigation on a variety of claims, ranging from violating the Voting Rights Act (“VRA”), violating state constitutional provisions, and unlawful political gerrymandering.¹⁹ The litigation referenced above addresses disputes arising from redistricting after the 2020 census.²⁰ Litigation has been common regarding redistricting since the formation of the country.²¹ The Supreme Court recently decided two of the most important redistricting cases in decades, *Allen v. Milligan* and *Moore v. Harper*.²² In *Allen*, the question was “[w]hether the State of Alabama’s 2021 redistricting plan for its seven seats in the United States House of Representatives violated [section] 2 of the [VRA], 52 U.S.C. § 10301.”²³ *Ardoin v. Robinson*, a redistricting case from Louisiana with almost identical facts to *Allen*,²⁴ was being held in abeyance pending the decision in *Allen*.²⁵ *Allen* held that an Alabama redistricted map violated section 2 of the VRA.²⁶ Meanwhile, *Moore* held that “[t]he Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review,” which means that state legislatures are not immune from state courts reviewing redistricted maps under the theory that legislative maps are to be drawn solely by state legislatures.²⁷ While those cases did not all involve special masters,²⁸ they serve as a useful backdrop for the redistricting litigation that has been undertaken since the last census.

¹⁹ See cases cited *supra* note 12.

²⁰ See cases cited *supra* note 12.

²¹ See LEE DRUTMAN, NEW AM., WHAT WE KNOW ABOUT REDISTRICTING AND REDISTRICTING REFORM 8 (2022).

²² See Helen Brewer, *High Court Settles the Status of Legal Theories Affecting Redistricting*, NCSL (Aug. 25, 2023), <https://www.ncsl.org/state-legislatures-news/details/high-court-settles-the-status-of-legal-theories-affecting-redistricting> [<https://perma.cc/BZG4-ZZWU>].

²³ Brief for Appellants at i, *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (mem.), *sub nom.* *Allen v. Milligan*, 599 U.S. 1 (2023) (Nos. 21-1086, 21-1087), 2022 WL 1276146, at *i.

²⁴ Compare *Robinson v. Ardoin*, 37 F.4th 208, 215–16 (5th Cir. 2022) (per curiam) (regarding a motion to stay a District Court order that “require[d] the Louisiana Legislature to enact a new congressional map with a second [B]lack-majority district” after it had enacted a map with “just one [B]lack-majority district”), with *Allen*, 599 U.S. at 16 (regarding a stay of a District Court order that preliminarily enjoined Alabama from using a map that had “only one district in which [B]lack voters constituted a majority”).

²⁵ See *Ardoin v. Robinson*, 142 S. Ct. 2892, 2892 (2022) (mem.). *Allen* was formerly called *Merrill v. Milligan*. Michael Li & Yuriy Rudensky, *Allen v. Milligan: Gerrymandering at the Supreme Court (Formerly Merrill v. Milligan)*, BRENNAN CTR. FOR JUST. (Sept. 29, 2022), <https://www.brennancenter.org/our-work/research-reports/merrill-v-milligan-gerrymandering-supreme-court> [<https://perma.cc/MT2W-NAN3>].

²⁶ *Allen*, 599 U.S. at 16, 23.

²⁷ *Moore v. Harper*, 600 U.S. 1, 22 (2023).

²⁸ See *Allen*, 599 U.S. at 15 (state-chosen mapmaker); *Robinson*, 37 F.4th at 215 (legislature); *Moore*, 600 U.S. at 12 (special masters).

These cases are just the redistricting cases the Supreme Court decided during the 2022-23 term.²⁹ Needless to say, the history of redistricting and the ensuing litigation is a long one.³⁰

B. Who Are Special Masters, and What Is Their Purpose?

In the past, courts have appointed individuals to be “neutral observer[s]” to oversee orders of those courts.³¹ In fact, “It is becoming almost commonplace in complex federal court cases for special masters to be appointed as mediators or facilitators of other alternative dispute resolution processes.”³² Special masters are a remedy in litigation to a variety of different issues.³³

But who are special masters? Usually, special masters are attorneys or other experts selected based on their expertise and familiarity with the litigated issue.³⁴ Special masters are “like administrative agencies within the judiciary, appointed to carry out the new tasks we give to courts. Like administrative agencies, they are justified by their expertise, efficiency and availability.”³⁵ The issues special masters resolve include “discovery, case management, fact-finding, settlement and remedial functions.”³⁶ Usually, special masters are best utilized when the litigation is lengthy or presents a novel or complex issue that requires someone with special knowledge or expertise to resolve it.³⁷

Special masters have served contrasting functions, depending on whether they are appointed pursuant to the Federal Rules of Civil

²⁹ *U.S. Supreme Court*, DEMOCRACY DOCKET, [https://www.democracydocket.com/scotus/\[https://perma.cc/4ZVM-TMD9\]](https://www.democracydocket.com/scotus/[https://perma.cc/4ZVM-TMD9]).

³⁰ See *Timeline of Redistricting Cases Heard by the Supreme Court of the United States*, BALLOTPEDIA, https://ballotpedia.org/Timeline_of_redistricting_cases_heard_by_the_Supreme_Court_of_the_United_States [https://perma.cc/2AE7-AXS2].

³¹ See *2004 Special Masters Conference: Transcript of Proceedings*, 31 WM. MITCHELL L. REV. 1193, 1198 (2005).

³² Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299, 1301 (2005) (citing *In re Kensington Int'l Ltd.*, 368 F.3d 289 (3d Cir. 2004); *United States v. Yonkers Bd. of Educ.*, 29 F.3d 40 (2d Cir. 1994)).

³³ See Jokela & Herr, *supra* note 32, at 1303–07.

³⁴ See *id.* at 1302–03, 1313; see also DAVID D. SIEGEL & PATRICK M. CONNORS, NEW YORK PRACTICE § 379, at 940 (6th ed. 2018) (discussing how referees are usually lawyers “appointed by the court to conduct a hearing or to perform some court-related function”).

³⁵ Margaret G. Farrell, *The Function and Legitimacy of Special Masters*, 2 WIDENER L. SYMP. J. 235, 238 (1997).

³⁶ *Id.*

³⁷ See Jonathan S. Liebowitz, *Special Masters: An Alternative Within the Court System*, 48 DISP. RESOL. J. 64, 67 (1993).

Procedure (“FRCP”) or state rules.³⁸ Under Rule 53 of the FRCP, special masters are used “in order to assist courts in coping with ever-increasing caseloads and in addressing difficult issues that require disproportionate judicial attention and expertise not otherwise available to the court.”³⁹ It should be noted that federal courts typically utilize special masters more often than state courts do, but state courts almost always have the legal authority to appoint special masters as well.⁴⁰ To support the argument that most state courts have that authority, the fact is that “[t]wenty-three states have a rule of civil procedure that nearly mirrors the pre-2003 amended F. R. C. P. Rule 53. Twenty-four states have a rule of civil procedure that differs from F. R. C. P. Rule 53, the current rule, and the pre-2003 amended version of the rule.”⁴¹

Overall, special masters are a remedy in state and federal courts who operate on a variety of levels, depending on the type of court appointing them. For the purposes of this Comment, this analysis will focus less on the procedural aspects of appointing special masters and more on their role and function as they pertain to redistricting. Therefore, this Comment will focus on examining why special masters are the appropriate remedy for non-conforming maps.

III. SPECIAL MASTERS ARE THE APPROPRIATE REMEDY WHEN THE LEGISLATURE FAILS TO PRODUCE CONFORMING MAPS IN A TIMELY MANNER

When the legislature fails to provide timely redistricted maps, it throws the entire system into disarray. With the time pressure that elections present, time is of the essence in redrawing the maps. Special masters, as this Comment will examine, are the appropriate remedy to redraw those non-conforming maps because of their expediency, the legislature’s lack of legitimacy after failing to provide conforming maps in a timely manner, and the expertise and unbiased nature that the special masters bring to the table.

³⁸ See Jokela & Herr, *supra* note 32, at 1300–01, 1303–07.

³⁹ Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347, 347 (2008).

⁴⁰ Alexis C. Fox, Comment, *Using Special Masters to Advance the Goals of Animal Protection Laws*, 15 ANIMAL L. 87, 93 (2008).

⁴¹ Jokela & Herr, *supra* note 32, at 1301. New York has provisions in its Civil Practice Law and Rules (“CPLR”) that allow referees to “have all the powers of a court in performing a like function,” and allow for a reference to referees with or without consent of the parties. N.Y. C.P.L.R. 4301 (McKinney 1983); N.Y. C.P.L.R. 4317(a)–(b) (McKinney 2006).

A. Special Masters Can More Efficiently Fix Redistricted Maps than State Legislatures

The first benefit of special masters being used to remedy non-conforming maps is that they work quickly and can re-draw maps quickly. As two scholars have pointed out, “referring case management matters to special masters, in a complex litigation matter or mass-tort case, the judge and special master are able to work on parallel tracks and move a case along more quickly.”⁴² Time is of the essence in elections. For instance, for federal elections, “federal statutes . . . establish the first Tuesday after the first Monday in November in even-numbered years as election day for federal officeholders.”⁴³ A court, in “enjoin[ing] a statewide election [due to invalid maps], caus[es] a great waste of time and money already spent on campaigns and preparation of necessary election machinery.”⁴⁴ Similarly, moving a primary election is extraordinarily difficult. As stated in *Merrill v. Milligan*:

[S]tate and local election officials need substantial time to plan for elections. Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges. The District Court’s order would require heroic efforts by those state and local authorities in the next few weeks—and even heroic efforts likely would not be enough to avoid chaos and confusion.⁴⁵

The easiest way to avoid the “heroic efforts”⁴⁶ required to move primary elections due to faulty redistricted maps is to employ a special master to redraw the maps in a timely fashion. A special master would provide a quicker turnaround in producing a redrawn redistricted map than would other solutions,⁴⁷ such as returning the

⁴² Jokela & Herr, *supra* note 32, at 1323.

⁴³ *Millsaps v. Thompson*, 259 F.3d 535, 536 (6th Cir. 2001); *see also* *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732, 735 (2021) (Thomas, J., dissenting from denial of certiorari) (citing 3 U.S.C. § 1).

⁴⁴ Daniel G. Zerfas, Comment, *Reapportionment and the Problem of Remedy*, 13 UCLA L. REV. 1345, 1349 (1966).

⁴⁵ *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays).

⁴⁶ *Id.*

⁴⁷ *See* G. Michael Parsons, *Justice Denied: Equity, Elections, and Remedial Redistricting Rules*, 19 J.L. SOC’Y 229, 243 (2019).

map to the legislature to fix the problem it had created in the first place. Ultimately, the expeditious pace a special master can work at is well-documented,⁴⁸ and would streamline and accelerate the process of redrawing redistricting maps.

With election dates being firm and primary dates set ahead of time, courts do not often push back the date of primaries.⁴⁹ Courts will grant a later primary date in the event of defective redistricted maps if a delayed “primary will accommodate the preparation of new Congressional maps and still provide ample time for compliance with [Uniformed and Overseas Citizens Absentee Voting Act].”⁵⁰ “[T]o avoid a chaotic situation for all . . . voters,”⁵¹ a special master is well equipped to fashion a new map that comports with the law as well as the time constraints that elections present. Scholars have found that using special masters assures that there will be as little delay as possible in redrawing the maps.⁵² Other scholars have similarly found that “a special master can help the court avoid any mistakes or oversights that would undermine the timely implementation of a remedy.”⁵³ The fact that special masters are readily able to develop a map for the federal and state elections in a timely fashion to avoid conflicts with election deadlines is a testament to their timeliness in a time-constrained issue. As one scholar has stated, using a special master to redraw maps “assures a constitutional plan with a minimum of delay and confusion.”⁵⁴ Therefore, special masters are an ideal solution for the complicated and otherwise time-consuming work⁵⁵ of redrawing the redistricted maps to conform with the law.

Scholars are not the only ones who believe that special masters are able to resolve disputes more efficiently. In fact, “Federal judges express great satisfaction in the work special masters conduct for the court and many attorneys and judges believe special masters assist courts in managing cases more efficiently.”⁵⁶ Also, retired U.S. District Judge Shira Scheindlin has said that “it make[s] sense to appoint a special master . . . [w]hen the court does not have the time or personnel to address the myriad disputes that often arise in large,

⁴⁸ See, e.g., Jokela & Herr, *supra* note 32, at 1323.

⁴⁹ See, e.g., Smith v. Clark, 189 F. Supp. 2d 503, 510–11 (S.D. Miss. 2002).

⁵⁰ See, e.g., United States v. New York, No. 1:10-CV-1214, 2022 WL 1473259, at *1, *2 (N.D.N.Y. May 10, 2022).

⁵¹ *Id.* at *2.

⁵² E.g., Zervas, *supra* note 44, at 1380.

⁵³ Parsons, *supra* note 47, at 243.

⁵⁴ Zervas, *supra* note 44, at 1380.

⁵⁵ See *id.* at 1346–47.

⁵⁶ Fox, *supra* note 40, at 93.

complex litigations.”⁵⁷ She has also said that it is “unfortunate” that some judges have never appointed special masters in civil litigation because “these appointments are very beneficial in resolving disputes quickly.”⁵⁸ Needless to say, scholars, judges, and special masters⁵⁹ often agree that the use of special masters provides for an expedient resolution.

In complicated civil litigation, such as actions involving redistricting, the use of a special master will allow for a speedy resolution to create maps that do not violate the law.⁶⁰ Since timeliness is essential in redistricting, a special master is the appropriate remedy for non-conforming maps. Otherwise, the states would face the “chaos and confusion” Justice Kavanaugh warned about in *Merrill*.⁶¹

B. The Legislature Loses Its Legitimacy in Creating Redistricted Maps when It Presents Unconstitutional Maps

The act of deferring to the legislature will only prolong the issues that require the legislative maps to be litigated in the first place. In fact, some scholars have found that a justification for using special masters is that “a malapportioned legislature does not have a legitimate claim to exercise its traditional responsibility, and that there is a substantial possibility that deference to the legislature will impede the remedial process.”⁶² Sending the maps back to be redrawn by the legislature would, therefore, just compound the issues because the legislature likely stalled and created the issues that resulted in the litigation.⁶³

⁵⁷ Shira Scheindlin, *How Courts and Litigants Can Benefit from Special Masters*, LAW360 (Jan. 8, 2020, 3:09 PM), <https://www.law360.com/articles/1231761/how-courts-and-litigants-can-benefit-from-special-masters> [https://perma.cc/94JF-76ZG].

⁵⁸ Shira Scheindlin, *The Use of Special Masters in Complex Cases*, LAW360 (Aug. 15, 2017, 11:36 AM), <https://www.law360.com/insurance-authority/general-liability/articles/950395/the-use-of-special-masters-in-complex-cases> [https://perma.cc/79EH-ZUU9].

⁵⁹ See, e.g., *2004 Special Masters Conference: Transcript of Proceedings*, *supra* note 31, at 1236, 1242, 1244, 1251.

⁶⁰ See also *Castle Aero Fla. Int'l, Inc. v. Mktg. & Fin. Servs., Inc.*, Civ. No. 11-2672, 2013 WL 12149691, at *3 (D. Minn. Apr. 5, 2013) (“find[ing] that the complications of dealing with a bank based in Lichtenstein, along with the detailed nature of the account statements, ma[d]e the appointment of a Special Master prudent . . . [to] more effectively resolve the issues in a timely manner” (citing FED. R. CIV. P. 53(a)(1)(C))).

⁶¹ *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays).

⁶² Zerfas, *supra* note 44, at 1380.

⁶³ See, e.g., *Allen v. Milligan*, 599 U.S. 1, 15–16 (2023); *Vieth v. Jubelirer*, 541 U.S. 267, 272 (2004) (plurality opinion).

The use of gerrymandered maps by state legislatures promotes public distrust in the legislature and raises fundamental questions regarding the legislature's legitimacy in redrawing their own grossly disproportionate maps. To be sure, "an incumbent gerrymander[] perverts the democratic system, undermines legitimacy and accountability, encourages voter apathy, and institutionalizes a racial bias."⁶⁴ Furthermore,

What is most disturbing about political gerrymandering . . . [is] that insiders capture and manipulate the very processes from which they draw their legitimacy. Even as the Court has struggled to identify standards, it has acknowledged that manipulation of the political process by insiders to entrench incumbents—both in redistricting and in other contexts—works a democratic harm.⁶⁵

Allowing the state legislatures to redraw their non-conforming maps is counterintuitive to the democratic process because the maps, being drawn to maximize both a political party and incumbent advantage, fly in the face of keeping democratically elected individuals accountable to their constituents.⁶⁶ When state legislators have drawn their maps in a way to maximize their own electoral advantage in re-election campaigns, it makes little sense to allow those same legislators to have the opportunity to cure the maps of their own intentional design.⁶⁷

With how important timing is with elections, the legislature has a duty to provide maps after the census a timely fashion to meet the election schedule.⁶⁸ However, after time-consuming litigation, when a court finds that a map violates the law it's too late for the legislature to provide conforming maps.⁶⁹ In fact, the New York Court of Appeals held that when the Constitution has a deadline for the submission of redistricted maps, and when the maps have not been cured before that deadline, then "[t]he procedural unconstitutionality of the

⁶⁴ Silverberg, *supra* note 8, at 913.

⁶⁵ D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 692 (2013) (citing *Vieth*, 541 U.S. at 292).

⁶⁶ See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 623 (2002).

⁶⁷ See Robert Yablon, *Gerrylaundry*, 97 N.Y.U. L. REV. 985, 986–87 (2022) (citing *Rucho v. Common Cause*, 588 U.S. 684, 722 (2019) (Kagan, J., dissenting)).

⁶⁸ See *Deadlines and Timelines for Congressional Redistricting*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/deadlines-and-timelines-congressional-redistricting> [<https://perma.cc/K9SX-3PD6>] (Aug. 10, 2021).

⁶⁹ See, e.g., *Harkenrider v. Hochul*, 197 N.E.3d 437, 455 (N.Y. 2022).

congressional and senate maps is, at this juncture, incapable of a legislative cure.”⁷⁰ Even one scholar in favor of deferring to the legislature to fix non-conforming maps acknowledges that “[i]t might be true that deference to the legislature is not based on constitutional grounds.”⁷¹

Furthermore, scholars have found that the creation of backup maps by special masters does not interfere with the political process of redistricting, and does not strip the legislature of its authority to draw the initial maps.⁷² In fact, “courts routinely cure the violation discovered in the litigation by crafting their own remedial plan” to the redistricted map.⁷³ The courts have this kind of discretion because when the redistricted map is “constitutionally unacceptable and the legislature ha[s] failed to enact a new redistricting plan, [the court’s] powers are broad. [The court] may adopt in whole a proposed plan, adopt a proposed plan with some modifications, or draw up a new plan.”⁷⁴ In fact, some courts go as far as to say that when a state “[l]egislature, whose duty it is to adopt a redistricting plan for [that state]’s congressional districts according to federal constitutional requirements, has failed to do so, this court *must*.”⁷⁵

In sum, when the state legislature has failed to adopt a conforming redistricting plan, the legislature has lost its opportunity to do so for that redistricting plan. Furthermore, as a result, it becomes the duty of the courts to adopt a conforming plan, and they can appropriately do so through the help of special masters.

C. Special Masters Are Unbiased and, Therefore, Will Draw the Most Representative and Fair Maps Possible

Another reason that special masters are the ideal solution to redrawing maps is their unbiased and apolitical nature. Typically, litigation over redistricted maps begins because the maps benefited

⁷⁰ *Id.* at 440, 455.

⁷¹ Zerfas, *supra* note 44, at 1381.

⁷² See Parsons, *supra* note 47, at 243.

⁷³ Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131, 1132 (2005).

⁷⁴ O’Sullivan v. Brier, 540 F. Supp. 1200, 1202–03 (D. Kan. 1982) (first citing *Donnelly v. Meskill*, 345 F. Supp. 962 (D. Conn. 1972); *Dunnell v. Austin*, 344 F. Supp. 210 (E.D. Mich. 1972); *David v. Cahill*, 342 F. Supp. 463 (D.N.J. 1972); *Skolnick v. State Electoral Bd.*, 336 F. Supp. 839 (N.D. Ill. 1971); and then citing *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982); *Preisler v. Sec’y of State*, 341 F. Supp. 1158 (W.D. Mo.), *aff’d sub nom.* *Danforth v. Preisler*, 407 U.S. 901 (1972); *Md. Citizens Comm. for Fair Cong. Redistricting, Inc. v. Tawes*, 253 F. Supp. 731 (D. Md.), *aff’d sub nom.* *Alton v. Tawes*, 384 U.S. 315 (1966)).

⁷⁵ *E.g.*, *Good v. Austin*, 800 F. Supp. 551, 552 (E.D. Mich. 1992) (emphasis added).

one party over another or assured the re-election of the incumbents.⁷⁶ The conflict within the legislature that created the unconstitutional maps can be fixed by a third party—an uninterested special master. A special master would alleviate the bias that would otherwise go into map-making by the legislature and signed by the Governor. In contrast, scholars have opined that special masters are able to draw unbiased maps that are representative of the population and able to prevent communities from being split up.⁷⁷

To avoid the issues that arise out of political gerrymandering,⁷⁸ an unbiased special master will allow the maps to be drawn without trying to benefit one party over another. In fact, one scholar has said that the ideal special masters do not have a political stake in the outcome and are experts in redistricting, which provides for the most representative maps possible.⁷⁹ In particular, courts utilize special masters for the specific reason of canceling out the biases associated with the parties to the lawsuit, who typically have political goals in their redistricting plans.⁸⁰ The neutrality that special masters bring to the table allows for the most equitable maps to be formed outside of the political sphere, where all differences are taken into account so as to not disenfranchise any particular group.

Furthermore, special masters provide a level of expertise in the redistricting process that members of the legislature do not have at the time of creating disputed maps. Indeed, special masters are well-trained experts at their craft who are “answerable only to the judges who appoint them.”⁸¹ The other option is the legislature, which drew the original maps while dealing with a variety of other legislation, and very few legislators are likely experts on redistricting.⁸² Regarding special masters, the court can appoint special masters for redistricting cases who are experts in neutral map drawing. Some scholars have said that “[a] special master who possesses the right qualifications is in a better position to resolve the

⁷⁶ See Green, *supra* note 16, at 1132.

⁷⁷ See Zerfas, *supra* note 44, at 1380.

⁷⁸ See *supra* text accompanying notes 64–65.

⁷⁹ See Persily, *supra* note 73, at 1150.

⁸⁰ See Lisa Marshall Manheim, *Redistricting Litigation and the Delegation of Democratic Design*, 93 B.U. L. REV. 563, 618 (2013).

⁸¹ Farrell, *supra* note 35, at 238.

⁸² See also Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 489 (2017) (“Many state legislatures are composed of part-time lawmakers who are relatively inactive overseers; state agencies are often poorly funded and potentially less expert than their federal counterparts; civil service reforms have removed neutrality from some state bureaucracies; and interest groups, the media, and courts may be relatively inactive or ineffective checks on gubernatorial actions.”).

dispute as compared to a judge with little or no technical expertise.”⁸³ This “much-needed expertise and specialization [in] cases involving highly specialized issues”⁸⁴ is exactly why special masters provide an avenue for accurate map-making that is reflective of the population demographics by providing an expert who understands those complex issues.

Special masters are also “authorized to retain appropriate assistants and experts, as may be reasonably necessary for [them] to accomplish [their] task within the time constraints imposed.”⁸⁵ Special masters are experts in their own right, but when a special master requires outside input, it is of extreme importance to give the special master the tools necessary to be able to draw the best possible maps.⁸⁶ In fact, outside experts whom the special master retains in the process of redrawing the maps are extremely helpful to the special master, and provide more legitimacy to the redrawn maps.⁸⁷ This practice is not uncommon, and it has been stated that:

When courts do appoint special masters, they often turn to appointed experts for help in formulating a remedy. The typical pattern for these combination appointments at the remedial stage is that the master is a generalist who coordinates the process or assumes functions that involve taking evidence, while the experts play a more “hands on” role. In voter redistricting cases, for example, courts have designated special masters to conduct hearings on the proposed redistricting plans, but these masters looked, in turn, to experts to evaluate or design redistricting plans.⁸⁸

These practices allow for the special master to take an unbiased look at the maps to redraw them in a way that conforms with the state

⁸³ Jokela & Herr, *supra* note 32, at 1314.

⁸⁴ *Id.* at 1323.

⁸⁵ See, e.g., Rodriguez v. Pataki, 207 F. Supp. 2d 123, 125 (S.D.N.Y. 2002).

⁸⁶ See Costa v. Super. Ct. of Sacramento Cnty., 128 P.3d 675, 711 (Cal. 2006) (Kennard, J., concurring and dissenting) (“The Legislature shall make such appropriations . . . as necessary to provide the panel of Special Masters with equipment, office space, and necessary personnel, including counsel and independent experts in the field of redistricting and computer technology, to assist them in their work.”).

⁸⁷ See Diaz v. Silver, 978 F. Supp. 96, 124–25 (E.D.N.Y.), *aff’d*, 522 U.S. 801 (1997) (mem.).

⁸⁸ Ellen E. Deason, *Managing the Managerial Expert*, 1998 U. ILL. L. REV. 341, 386.

and federal constitutions,⁸⁹ while also being able to call help from outside experts to assist in making the maps as ideally as possible.

As a case study, it is helpful to examine the process in Nevada when its redistricting process came to an impasse. When “[t]he Nevada Legislature was unsuccessful at attempting a plan to redistrict the state as required by law,” the court, “[i]n an effort to take politics out of the matter, . . . appointed three qualified special masters: a Republican, a Democrat and an independent, each bringing specialized experience with respect to rural and large county knowledge and legislative expertise.”⁹⁰ Following these experts redrawing the maps, “[t]he net effect was that through a series of hearings before the special masters and the First Judicial District Court, Nevada was redistricted with minimum cost to the state, and no appeal was filed by either party.”⁹¹ The expertise, unbiased nature, and expediency provided by the special masters provided Nevada with conforming maps that were not challenged because of their fairness to all parties.

Special masters bring several important qualities to the table, including their expertise and unbiased outlooks. These qualities provide for conforming maps that do not often get challenged and provide the citizens of the states with the fairest maps possible.

IV. COUNTERARGUMENT: THE LEGISLATURE SHOULD BE ABLE TO CURE NON-CONFORMING MAPS

Critics of allowing special masters to redraw redistricted maps base their assertions on two theories: the state legislatures are the ones with the authority to redraw the maps, and the courts must give them deference. And using special masters to cure maps costs more than reconvening the legislature to redraw the maps. This Comment will examine each of those theories in turn.

A. The Legislature Should Be Afforded Great Deference in

⁸⁹ See *supra* text accompanying note 17; *Redistricting Criteria*, NCSL, <https://www.ncsl.org/redistricting-and-census/redistricting-criteria> [<https://perma.cc/9PN3-E2G5>] (July 16, 2021).

⁹⁰ Max Cortes, *First Judicial District Court, Rural Court Column: First Judicial District Court Hears Variety of Political Cases*, NEV. LAW., Sept. 2019, at 34, 34.

⁹¹ *Id.* See generally *Guy v. Miller*, No. 11 OC 00042 1B, 2011 WL 7665876 (Nev. Jud. Dist. Ct. Dec. 8, 2011).

Being Able to Redraw the Maps

The most common counterargument to special masters is that special masters bypass the legislature, and that the legislature should be given the opportunity to cure the maps so that they conform with the law. One scholar has suggested that the use of special masters “ignores some of the practical foundations of the concept of ‘primary legislative responsibility,’ and fails to develop an adequate case for depriving the legislature of an opportunity to reapportion.”⁹² As discussed previously, the state legislatures are primarily tasked with redrawing district maps,⁹³ and some states even provide in their constitutions that the legislature should be given the opportunity to cure defective maps if time allows.⁹⁴

Some judges have argued that, regardless of the proximity to elections, the legislature should be given a fair opportunity to cure the maps. For instance, in *Szeliga v. Lamone*, it was found that the state’s legislature should have “an opportunity to develop a new Congressional Plan that is constitutional.”⁹⁵ Also, in dissent in *Harkenrider v. Hochul*, several judges believed that the legislature should be afforded the opportunity to redraw the maps with stricter guidelines for the timeframe.⁹⁶ Some of those dissenting judges also wrote that they did not believe that it was even permissible for the court to refer the redrawing of the maps to a special master without the legislature the first being given the opportunity.⁹⁷

Following the New York Court of Appeals’s decision in *Harkenrider*, the issue of redistricting was raised again in New York to address the problem of timeframes. Specifically, the New York Supreme Court, Appellate Division Third Judicial Department (New York’s intermediate appellate court) was “in the uncomfortable position of discerning what the Court of Appeals intended by its silence regarding the critical issue of the duration relative to the judicial remedy it imposed.”⁹⁸ The case arose after the *Harkenrider* decision, in which the petitioners were seeking to “compel the [Independent Redistricting Commission (“IRC”)] ‘to prepare and

⁹² Zerfas, *supra* note 44, at 1380.

⁹³ See *supra* text accompanying note 27.

⁹⁴ See, e.g., N.Y. CONST. art. III, § 4.

⁹⁵ *Szeliga v. Lamone*, No. C-02-CV-21-001816, 2022 WL 2132194, at *46 (Md. Cir. Ct. Mar. 25, 2022).

⁹⁶ See *Harkenrider v. Hochul*, 197 N.E.3d 437, 457 (N.Y. 2022) (Troutman, J., dissenting in part); *id.* at 471–72 (Wilson, J., dissenting); *id.* at 476 (Rivera, J., dissenting).

⁹⁷ *Id.* at 458 (Troutman, J., dissenting in part); *id.* (Wilson, J., dissenting).

⁹⁸ *Hoffmann v. N.Y. State Indep. Redistricting Comm’n*, 192 N.Y.S.3d 763, 767 (App. Div. 2023).

submit to the [L]egislature a second redistricting plan and the necessary implementing legislation for such plan . . . in order to ensure a lawful plan is in place . . . for subsequent elections this decade.”⁹⁹ The Third Department discussed that “[t]o hold today that the passing of the deadline leaves petitioners with no remedy would render meaningless the distinct constitutional command that the IRC create a second set of maps.”¹⁰⁰ The court, in emphasizing *Harkenrider*’s references to the map being for the 2022 election, decided that “in the complete absence of any explicit direction, we decline to infer that the [c]ourt intended its decision to have further ramifications than strictly required. Accordingly, we do not conclude that *Harkenrider* forecloses the relief now sought by petitioners,” and as such “direct[ed] the IRC to commence its duties forthwith.”¹⁰¹ The Court of Appeals then affirmed, holding that “the IRC should comply with its constitutional mandate by submitting to the legislature, on the earliest possible date . . . a second congressional redistricting plan and implementing legislation.”¹⁰²

While some scholars argue for legislative deference, scholars also note the importance of the structure of the state legislatures. The members of the legislatures are democratically elected individuals who, if their constituents disapprove of their policies, can be voted out in their next election.¹⁰³ However, special masters are shielded from this by the fact that they are appointed by the court, and only are removed by the court. As one scholar has stated, “[u]nlike legislative courts and administrative agencies, special masters are not accountable, even indirectly, to the electorate . . . [and] special masters can be dismissed only by the . . . judges who appoint them.”¹⁰⁴ This insulation provides the special masters with less accountability to the general public and allows them to be protected from all but the judges who appointed them. This isolation also allows for the “adoption of a plan which ignores any justifiable legislative desires [that] will probably generate amendments which the courts might find difficult to overrule, to say nothing about justifying their original exclusion.”¹⁰⁵ As scholars have described,

⁹⁹ *Id.* at 765, 766.

¹⁰⁰ *Id.* at 769.

¹⁰¹ *Id.* at 768, 770.

¹⁰² *Hoffmann v. N.Y. State Indep. Redistricting Comm’n*, 234 N.E.3d 1002, 1022 (N.Y. 2023).

¹⁰³ See *Indivisible States: How State Legislatures Work*, INDIVISIBLE, <https://indivisible.org/resource/indivisible-states-how-state-legislatures-work> [<https://perma.cc/44AJ-ZZFS>].

¹⁰⁴ Farrell, *supra* note 35, at 288.

¹⁰⁵ Zerfas, *supra* note 44, at 1380.

this particular situation “places the courts in a vulnerable position and heightens the potentiality of further litigation.”¹⁰⁶

Along with scholars, the courts have shown reluctance to challenge legislative decision-making in the redistricting process and have given the legislatures great deference. For instance, the West Virginia Supreme Court of Appeals has declared that:

[T]his Court is unwilling to disavow the “strong policy of deference to state legislatures in devising redistricting plans. Redistricting and reapportioning legislative bodies [are] a legislative task which . . . courts should make every effort not to preempt. State policies and state preferences are for a state’s elected representatives to decide[,]” and courts should not intercede unless there is a direct constitutional violation.¹⁰⁷

Furthermore, the Supreme Court of Vermont has similarly found that “so long as the Legislature has weighed the necessary criteria and its decision is not irrational or illegitimate, we will defer to the Legislature’s judgment in resolving tensions between constitutional and statutory criteria for reapportionment.”¹⁰⁸ On the federal level, “the Supreme Court has indicated that policy choices of a state’s legislature take precedence in redistricting.”¹⁰⁹ In fact, “both Congress and the Supreme Court have been highly deferential to the states to determine their own redistricting policy.”¹¹⁰

Typically, those opposed to bypassing the legislature to cure defective maps will discuss how, in redistricting a state, the Supreme Court requires that the state’s legislative branches keep their powers to redraw defective maps.¹¹¹ They also discuss how that right will only be conceded by the state legislatures when the legislature has refused to protect individuals’ constitutional rights or when there is

¹⁰⁶ *E.g., id.*

¹⁰⁷ *State ex rel. Cooper v. Tennant*, 730 S.E.2d 368, 394 (W. Va. 2012) (quoting *Deem v. Manchin*, 188 F. Supp. 2d 651, 655 (N.D. W. Va. 2002)).

¹⁰⁸ *In re Reapportionment of Woodbury*, 861 A.2d 1117, 1125 (Vt. 2004) (citing *In re Reapportionment of Montgomery*, 647 A.2d 1013, 1014 (Vt. 1994)).

¹⁰⁹ *Gonidakis v. LaRose*, 599 F. Supp. 3d 642, 673 (S.D. Ohio 2022) (emphasis omitted) (citing *Upham v. Seamon*, 456 U.S. 37, 40–41 (1982); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978)).

¹¹⁰ Nathan S. Catanese, Note, *Gerrymandered Gridlock: Addressing the Hazardous Impact of Partisan Redistricting*, 28 NOTRE DAME J.L., ETHICS & PUB. POL’Y 323, 338 (2014).

¹¹¹ See, e.g., Alfred M. Mamlet, *Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits*, 33 EMORY L.J. 685, 710 (1984).

an impending deadline that cannot otherwise be met.¹¹² In fact, even when a state legislature engages in partisan gerrymandering that shields incumbents from losing a reelection bid, courts have refused to limit the legislature's power to redraw the maps.¹¹³

Regardless of the circumstances surrounding the redistricted maps, courts showing high levels of deference to state legislatures in the past, as well as the courts being unwilling to intervene or redraw maps on several occasions, is often the crux of the argument that legislatures should receive deference in their redistricting process. Therefore, those in favor of deferring to the legislature will argue for that kind of deference in all redistricting cases.

B. Special Masters Are More Expensive than the Legislature

Several critics of special masters believe that special masters should not be used because of their expense. Their reasoning ranges from who is paying to how much the special masters cost taxpayers.

Something to keep in mind is that courts have great discretion in being able to designate special masters and other experts in complex litigation, but sometimes these special masters and experts can increase the costs of the litigation.¹¹⁴ The paucity of neutral experts coincides with the high costs associated with the special masters.¹¹⁵ Judges are able to charge the costs of utilizing special masters, as well as any expert assistants they require, to the government.¹¹⁶ Taxpayers having to foot the bill for not just the special master, but any expert the special master hires, critics argue, is too expensive.¹¹⁷

Typically, the fees of special masters are upheld when the “expenses are normally charged to fee-paying clients, and are not general overhead.”¹¹⁸ The ability of special masters to bill for anything “of value,” critics argue, will allow for special masters to

¹¹² See, e.g., *id.*

¹¹³ See Michael S. Kang, *To Here from Theory in Election Law*, 87 TEX. L. REV. 787, 806 (2009) (reviewing HEATHER GERKIN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009)).

¹¹⁴ Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129, 2133 (2020).

¹¹⁵ See *id.*

¹¹⁶ See James S. DeGraw, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800, 806 n.38 (1991) (citing Nat'l Org. for Reform of Marijuana L. v. Mullen, 828 F.2d 536, 545–46 (9th Cir. 1987); N.Y. State A.R.C., Inc. v. Carey, 706 F.2d 956, 964 n.12 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983)).

¹¹⁷ See Burch & Williams, *supra* note 114, at 2144–45; DeGraw, *supra* note 116, at 827; Richard H. Agins, Comment, *An Argument for Expanding the Application of Rule 53(b) to Facilitate Reference of the Special Master in Electronic Data Discovery*, 23 PACE L. REV. 689, 700 (2003).

¹¹⁸ See *Jackson v. Nassau Cnty. Bd. of Supervisors*, 157 F.R.D. 612, 621 (E.D.N.Y. 1994).

charge for services that “‘have no intrinsic value’ nor ‘contribute significantly’ to the preparation of the proposed redistricting plan.”¹¹⁹ In fact, the critics “generally oppose awarding fees at such high rates for what is essentially public interest work.”¹²⁰ Those same critics will not say that the *service* of special masters, which is essentially public interest work, is not worth the expensive fees, regardless of the quality of the special master’s work.¹²¹ This shows that critics often do not dispute the quality of the special master’s work, or the effort and time that went into the work. Rather, they believe that the work is “public interest work” that does not deserve to be compensated as highly as the fee is set.¹²²

Several scholars have pointed to the fact that, in the long-term, utilizing a special master results in decreased costs.¹²³ However, two scholars in favor of using special masters conceded that the utilization of special masters can be more expensive than other alternatives.¹²⁴ Scholars have found that while special masters can be expensive, their costs are outweighed by the benefits they provide.¹²⁵ It seems the general consensus would be that, in the short term, special masters cost more than deferring to the legislature to cure the maps to conform to the law.

The following issue is also raised: how much special masters should get paid? How special masters incur and calculate their fees is an important question because of the high fees special masters often charge.¹²⁶ The special master “model is resource-intensive since it often requires the employment of a legal team to help the special master develop a report to accompany the plan, as well as the employment of one or more experts to assist in production of the plan and the accompanying affidavits.”¹²⁷

The next question critics raise is: who is paying for the use of a special master? Judge Scheindlin noted that in her experience, compensation “can be allocated to one party or both parties, or can

¹¹⁹ See *id.* at 619, 621; see also Burch & Williams, *supra* note 114, at 2144–45.

¹²⁰ See *Fund for Accurate & Informed Representation, Inc. v. Weprin*, Nos. 92-CV-283, 92-CV-720, 92-CV-0593, 1992 WL 512410, at *2 (N.D.N.Y. Dec. 23, 1992); see also Farrell, *supra* note 35, at 273.

¹²¹ See *Fund for Accurate & Informed Representation, Inc.*, 1992 WL 512410, at *2; see also Burch & Williams, *supra* note 114, at 2144–45.

¹²² See *Fund for Accurate & Informed Representation, Inc.*, 1992 WL 512410, at *2; see also Farrell, *supra* note 35, at 273.

¹²³ See, e.g., Scheindlin, *supra* note 57; Farrell, *supra* note 35, at 274; see also 2004 *Special Masters Conference: Transcript of Proceedings*, *supra* note 31, at 1248.

¹²⁴ See Jokela & Herr, *supra* note 32, at 1311.

¹²⁵ See, e.g., *id.*; Farrell, *supra* note 35, at 274.

¹²⁶ David I. Levine, *Calculating Fees of Special Masters*, 37 HASTINGS L.J. 141, 142–43 (1985).

¹²⁷ Persily, *supra* note 73, at 1148.

change as the matter progresses depending on the circumstances. Parties typically share the costs of special masters, but some courts have assigned all costs to the party whose behavior in some way caused the need for the appointment.”¹²⁸ This increased expense that special masters cause would either cost the parties more¹²⁹ and, therefore, be an unavailable avenue for parties challenging the maps to remedy the maps, or the state whose map is being challenged will pass those costs off to the taxpayers.¹³⁰ It is of paramount importance that “[c]ourts . . . never lose sight of the fact that the fees in a case of this kind are paid from public funds.”¹³¹ The fact that the bill is footed to the taxpayers makes the costs of special masters extremely important in deciding the method to cure faulty redistricted maps.

Therefore, critics would argue that the costs associated with the use of special masters in redrawing the maps are too high compared to the alternatives. As such, the argument goes that the ability of individuals to challenge the maps will be hindered,¹³² and the costs are borne by the whole state through taxpayer money.

V. RESPONSE: WHY THE LEGISLATURE LACKS THE AUTHORITY TO REDRAW THE MAPS AND WHY THE COST DIFFERENCES ARE NOT SIGNIFICANT ENOUGH TO PREVENT THE USE OF SPECIAL MASTERS

In responding to the argument from critics that special masters strip the legislature of its ability to redraw the maps, it is important to note that the ability of a legislature to redraw the maps is not an absolute right. Specifically,

the requirement that federal courts defer in the first instance to states does not entail the conclusion that only state legislatures are empowered to redistrict, or that a legislature is obligated to undertake redistricting even after another

¹²⁸ Scheindlin, *supra* note 58. Judge Scheindlin also has discussed other costs involved in litigation, specifically who pays for recovering electronically stored data in e-discovery. *See* SIEGEL & CONNORS, NEW YORK PRACTICE, *supra* note 34, § 362, at 869–70 n.9 (discussing *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003)).

¹²⁹ *See* Farrell, *supra* note 35, at 273.

¹³⁰ *See* Agins, *supra* note 117, at 700 (stating that “[t]he court system, rather than the parties, absorbs the cost of the magistrate’s services, thereby imposing an additional expense on taxpayers who already are obliged to provide the litigants with a no-cost forum for dispute resolution”).

¹³¹ *Fund for Accurate & Informed Representation, Inc. v. Weprin*, Nos. 92-CV-283, 92-CV-720, 92-CV-0593, 1992 WL 512410, at *2 (N.D.N.Y. Dec. 23, 1992) (quoting *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 748 (6th Cir. 1979); citing *Reed v. Rhodes*, 691 F.2d 266, 267 (6th Cir. 1982)).

¹³² *See* Burch & Williams, *supra* note 114, at 2144–45.

institution already has drawn valid districts. Rather, the redistricting jurisprudence simply provides a sequence for the redistricting process, leaving redistricting initially to states and limiting federal courts to a backup role.¹³³

Therefore, it follows that other avenues of redistricting are not foreclosed by the legislature's ability to redistrict. Also, it is important to note that "[t]he state forfeits this discretion only when intransigence is due to opposition to the constitutional right vindicated in the liability stage."¹³⁴ This indicates the possibility of allowing the courts to have the ability to take redrawing redistricted maps into their own hands through the appointment of special masters. Furthermore, courts only redraw the redistricted maps when the legislature has failed to do so by the election deadlines.¹³⁵ When such a time-crunch is at hand, it becomes paramount that the court take the expedient measure of appointing a special master to redraw the maps to avoid "chaos and confusion" because there "would [be] little time to make sure that affected voters were correctly placed in their new districts."¹³⁶

It should also be addressed that giving the state legislatures unlimited leeway in drawing and redrawing the redistricted maps could prove to be troublesome. This collection of power would "increas[e] procedural deference to legislatures[, which] may invite the very harm it seeks to ameliorate. By lowering the political cost of a constitutional violation, such deference increases the incentives for legislatures to commit violations in the first place."¹³⁷ This unchecked power to redraw non-conforming maps would certainly create more problems than the potential solution is worth. In fact, some judges believe "that [a] judicial remedy [can] cure[] the IRC's failure to act by lawfully establishing a redistricting plan for the ordinary duration, leaving no uncured violation of law."¹³⁸ As eloquently stated by Justice Pritzker in his *Hoffmann* dissent:

There is likely no disagreement that a properly conducted and constitutionally mandated legislative redistricting

¹³³ Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 781 (2004).

¹³⁴ Mamlet, *supra* note 111, at 710.

¹³⁵ *See id.* at 702.

¹³⁶ *See United States v. Jones*, 846 F. Supp. 955, 960 (S.D. Ala. 1994), *aff'd*, 57 F.3d 1020 (11th Cir. 1995).

¹³⁷ Parsons, *supra* note 47, at 231.

¹³⁸ *Hoffmann v. N.Y. State Indep. Redistricting Comm'n*, 192 N.Y.S.3d 763, 775 (App. Div. 2023) (Pritzker, J., dissenting).

process with the bipartisan involvement of the IRC would have, at least in theory, been preferable to resorting to litigation and judicially drawn maps. However, since the IRC failed in this regard, *it was necessary to resort to Plan B*, the safety valve designed to remedy political stalemate, which took the form of a judicially drawn congressional map.¹³⁹

Regarding the costs of using special masters, scholars have found that while special masters might be expensive, their costs are worth the quality of their work.¹⁴⁰ While special masters likely cost more than deferring to the legislature to cure the maps to conform to the law, in the long term, the use of special masters is likely cumulatively much less expensive.¹⁴¹ Indeed, scholars have pointed out that special masters are often viewed as the cheapest means to reach the end goal of the court and litigants.¹⁴² While the costs of special masters can be a counterargument to utilizing them, it is often the minority argument that critics use to the position that the courts should defer to the legislature.¹⁴³

Courts have also balanced the fees of special masters versus their benefits by considering whether any “infringe[ment] upon the guaranteed right of access to the justice system [is] offset by the efficiency of master-assisted litigation.”¹⁴⁴ This balancing of costs allows them to be kept in a reasonable range.

Returning to critics’ concerns of “public interest work” being compensated so highly,¹⁴⁵ it is worth noting that “[t]he quality of the Special Master’s work in light of the complexity of the task is an important consideration in determining the special master’s fee.”¹⁴⁶ That is because “[t]he task require[s] urgent attention due to the immanency of the election season, and [the special master] and [their] staff respond[s] to [the Court’s] call immediately. The services rendered by [the special master] and [their] staff under these trying circumstances [a]re worth the rates charged.”¹⁴⁷ The special master’s rates originally set or requested are also not the *end all, be all* that

¹³⁹ *Id.* at 776 (emphasis added).

¹⁴⁰ *See, e.g.,* Farrell, *supra* note 35, at 274; Jokela & Herr, *supra* note 32, at 1311.

¹⁴¹ *See supra* text accompanying notes 123–24.

¹⁴² *E.g.,* Farrell, *supra* note 35, at 274.

¹⁴³ *See* Zerfas, *supra* note 44, at 1380–81.

¹⁴⁴ *E.g.,* Peter v. Progressive Corp., 986 P.2d 865, 873–74 (Alaska 1999).

¹⁴⁵ *See supra* text accompanying notes 120, 122.

¹⁴⁶ Fund for Accurate & Informed Representation, Inc. v. Weprin, Nos. 92-CV-283, 92-CV-720, 92-CV-0593, 1992 WL 512410, at *4 (N.D.N.Y. Dec. 23, 1992).

¹⁴⁷ *See id.*

critics fear, as courts are willing to “strike[] a compromise” in the special master’s fees where it is appropriate.¹⁴⁸ Specifically, at least one court has found that a special master’s “rate strikes a compromise between what some parties implicitly deem to be reasonable . . . while also taking into account that the Special Master’s work was worth the amount requested and that he was never given notice that his set rate of compensation might be reduced.”¹⁴⁹ This leeway allows for a compromise in fees for special masters, which would also limit the price allocated to taxpayers.¹⁵⁰ Therefore, original fees set by special masters before redrawing the maps are not final.

To provide for an expedient resolution, it makes sense to not significantly limit or impair the discretion of the special master redrawing the maps by limiting the funds available to them, because special masters are not able to provide their services in complex litigation if their powers are limited to such a degree that their assistance is not feasible.¹⁵¹ In fact, “[w]hen measured against the prospect of trying the case for years (had that been feasible at all), the costs of using the services of a special master fade into insignificance.”¹⁵² Most notably, as stated by the United States District Court for the District of Arizona, the public

benefitted from the Special Master’s expertise because the Court considered his report in reaching an expeditious decision on the constitutionality of the IRC Plan. Accordingly, it is only a slight inconvenience that all the parties and intervenors charged with formulating and implementing the State’s decennial redistricting plans shoulder the responsibility for the Special Master’s fees.¹⁵³

Therefore, since the public receives the benefit of the appropriately drawn maps, it makes sense for the public to pay for it. In accordance with case law, those fees are not substantial in the least since “[e]very effort should be made to keep these expenses as low as reasonably

¹⁴⁸ See, e.g., *id.* at *5.

¹⁴⁹ *Id.*

¹⁵⁰ See *supra* note 130 and accompanying text.

¹⁵¹ See Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 396 (1986).

¹⁵² Liebowitz, *supra* note 37, at 67.

¹⁵³ *Navajo Nation v. Ariz. Indep. Redistricting Comm’n*, 286 F. Supp. 2d 1087, 1097 (D. Ariz. 2003).

possible.”¹⁵⁴ It is also important to note that the cost is worth it because special masters protect each citizen’s right to vote.¹⁵⁵

It is true; special masters are not free. However, in the grand scheme of the quality of the redrawn maps, as well as the amount of time the special masters put into drawing those quality maps, the cost pales in comparison to the product.

Overall, while there are admittedly downsides to utilizing special masters to redraw redistricted maps, those negatives are far outweighed by the positives. Therefore, special masters are the appropriate remedy to redrawing nonconforming maps, even with the aforementioned criticisms.

VI. CONCLUSION

Ultimately, “We owe it to our judges and our litigators to make use of every available tool to bring cases to a just, speedy, and inexpensive conclusion.”¹⁵⁶ Redistricting is a fundamental procedure that our government must undertake after each census.¹⁵⁷ When legislators who have the necessary majorities gerrymander their maps in ways that violate federal or state constitutions, a remedy must be made to cure those maps.

Critics will argue that the appropriate remedy for maligned maps is allowing the legislature to cure those defects. Their arguments are twofold: (1) that the state legislatures are the ones with the authority to redraw the maps and the courts must give them deference;¹⁵⁸ and (2) using special masters to cure maps costs more than reconvening the legislature to redraw the maps.¹⁵⁹

For the aforementioned reasons, these arguments should not win. It makes little sense to allow the legislators who intentionally and illegally gerrymandered their states’ redistricted maps the chance to cure those maps, as they have lost the legitimacy to do so.¹⁶⁰ It then follows that the legislatures will try to make minimal changes to the maps and hide behind the deference courts generally give them.¹⁶¹

¹⁵⁴ See *Fund for Accurate & Informed Representation, Inc.*, 1992 WL 512410, at *2 (quoting *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 748 (6th Cir. 1979); citing *Reed v. Rhodes*, 691 F.2d 266, 267 (6th Cir. 1982)).

¹⁵⁵ See *Silverberg*, *supra* note 8, at 925.

¹⁵⁶ Merril Hirsh, *A Revolution that Doesn’t Offend Anyone: The ABA Guidelines for the Appointment and Use of Special Masters in Civil Litigation*, JUDGES’ J., Fall 2019, at 30, 35.

¹⁵⁷ See *supra* text accompanying note 16.

¹⁵⁸ See discussion *supra* Section IV.A.

¹⁵⁹ See discussion *supra* Section IV.B.

¹⁶⁰ See *supra* text accompanying notes 62–63.

¹⁶¹ See *supra* note 63 and accompanying text.

Second, while there are costs associated with special masters that are borne by the taxpayers, those fees are maintained at a reasonable rate and provide for fairly drawn maps.¹⁶² Furthermore, reconvening the state legislatures to redraw the maps is not without cost to taxpayers.¹⁶³ Overall, costs associated with special masters redrawing maps are minimal and worthwhile.

The benefits of using special masters far outweigh the negatives. The need for a fast solution makes centralizing the duty to a single special master expeditious to elections.¹⁶⁴ Furthermore, the special masters bring unique expertise to the process, as well as an unbiased eye.¹⁶⁵ Lastly, as mentioned, the legislature loses the opportunity to cure its defective map when it intentionally and unlawfully gerrymanders the maps, exceeding its time constraints to fix it.¹⁶⁶

In sum, there are a variety of arguments for and against the use of special masters to cure redistricted maps to conform to the law. The arguments for and against the use of special masters can often be used against each other. Those arguments range from the unbiased nature of special masters, their expertise, and their costs, to the legislature's role in curing defective maps.

In conclusion, it is respectfully submitted that special masters are the best available remedy to cure defective redistricted maps when the legislature fails to provide conforming maps in a timely manner.

¹⁶² See *supra* notes 114, 130, 154 and accompanying text.

¹⁶³ See *supra* text accompanying notes 64–65.

¹⁶⁴ See discussion *supra* Section III.A.

¹⁶⁵ See discussion *supra* Section III.C.

¹⁶⁶ See discussion *supra* Section III.B.