SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

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

Index No. E2022-0116CV

Petitioners,

-against-

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

Respondents.

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PETITIONERS' REPLY BRIEF ADDRESSING REMEDIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Other Authorities

ARGUMENT

In their Supplemental Brief Addressing Remedies, NYSCEF No. 232 ("Supp. Br."), Petitioners answered both questions that this Court asked the parties to brief. On the first question, Petitioners explained that, absent the death, expulsion, or resignation of a Congressmember, the plain text of Article I, § 2 of the U.S. Constitution and the U.S. Supreme Court's interpretations of that language do not permit States to establish special elections for Congress outside of the every-two-year, typical election period. Supp. Br. 2–3 (citing U.S. Const. art. I, § 2; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783, 821 (1995)). Under Article III, Section 5 of the New York Constitution, however, which gives this Court broad authority to review and remedy unconstitutional maps, N.Y. Const. art. III, § 5, this Court likely does have the authority to schedule a special 2023 election for the New York Senate, as this later enacted provision would trump the New York Constitution's similar mandate for two-year terms for state Senators, *see* N.Y. Const. art. III, § 2; *Reiff v. N.Y.C. Conciliation & Appeals Bd.*, 491 N.Y.S.2d 565, 567 (Sup. Ct. N.Y. Cnty. 1985). Supp. Br. 3–4.

On the second question, Petitioners explained that not only *could* this Court order remedial, constitutional congressional and state Senate maps for the November 2022 elections and related primaries, it *should* do so. Supp. Br. 4. The New York Constitution specifically envisions an expedited proceeding, providing this Court with authority to "invalid[ate]" unconstitutional maps "in whole or in part" within a 60-day timeframe, N.Y. Const. art. III, § 5, and no statutory timeframes can frustrate this Court's *constitutional* authority, *In re N.Y. Juvenile Asylum*, 172 N.Y. 50, 57 (1902). Supp. Br. 4–6. ***Thus, the Constitution clearly contemplates remedies for this election cycle, at least in a case like this one where the Petitioners filed their challenge on the very same day the Governor signed the unconstitutional maps into law***. Supp. Br. 5. Petitioners also explained that there is ample time remaining to grant Petitioners' requested remedy for this

election cycle—*affecting only the elections for Congress and state Senate, not any other state or local elections*—given that an August primary would permit sufficient time to draw new maps and would not violate any federal laws, consistent with numerous other States' own election calendars and recent court decisions to delay certain preliminary-election deadlines. Supp. Br. 6–9. Finally, neither *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), *Merrill v. Milligan*, 142 S. Ct. 879 (2022), nor any other U.S. Supreme Court decision precludes this *state* Court from engaging in "precisely the sort of state judicial supervision of redistricting [the U.S. Supreme Court] ha[s] encouraged." *Growe v. Emison*, 507 U.S. 25, 34 (1993). Supp. Br. 9–10.

Respondents do not grapple with the first question on which this Court granted supplemental briefing, seeming to concede by silence that the U.S. Constitution precludes scheduling special congressional elections in 2023. *See* NYSCEF Nos. 233, 234, 237. This means that unless this Court orders a remedy now, the unconstitutional congressional map will remain in place until 2024, forcing New Yorkers to live under an unconstitutionally gerrymandered map for two full years. Respondents' other arguments—all claiming in various ways that it is nigh-impossible to move any election deadlines to accommodate this Court in imposing a 2022 remedy for Respondents' 2022 gerrymandering—contradict the Senate Majority Leader's own comments to the press about this very lawsuit and the relief Petitioners have asked for, noting that the Legislature and legislative leaders are fully capable of "***be[ing] nimble should [they] have to be***" with election deadlines and processes. Nick Reisman, *State Senate Districts Will Also Face Legal Challenge in New York*, Spectrum News 1 (Feb. 9, 2022) (emphasis added).[1] This Court should

[1] *Available at*: https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2022/02/09/state-senate-districts-will-also-face-legal-challenge-in-new-york.

hold Respondent Senate Majority Leader and her legislative brethren to their promise, and all of Respondents' contrary arguments against immediate relief are meritless.

First, Respondents insultingly invoke the possibility of appeal and concomitant automatic stay as a reason for this Court not to remedy any constitutional infirmities in this election cycle. NYSCEF No. 233 ¶¶ 13–14; NYSCEF No. 234 at 3–4; NYSCEF No. 237 at 4. But given the constitutional priority that Article III, Section 5 imposes on this case, requiring that the courts "shall give precedence [to this case] over all other causes and proceedings," N.Y. Const. art. III, § 5, there is every reason to think that the Fourth Department and/or Court of Appeals will act within days on Petitioners' immediate motion to lift any automatic stay, just as the Fourth Department acted within two days on Petitioners' similar request regarding this Court's grant of their discovery motion, *see* NYSCEF No. 134 at 1 & Ex. A. Furthermore, while this supplemental briefing is not the proper forum to discuss the merits of Petitioners' claims, if this Court were to find—as Petitioners strongly believe it should—that these maps are unconstitutional, the appellate courts are likely to give great respect and deference to this Court's decision, *see, e.g.*, *People v. Mateo*, 2 N.Y.3d 383, 410 (2004) ("Of course, [g]reat deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor." (citation omitted)); *985 Amsterdam Ave. Hous. Dev. Fund Corp. v. Beddoe*, 126 A.D.3d 562, 563 (1st Dep't 2015) ("The court's determination of this factual issue is entitled to deference."), and would very likely want remedial maps in place as soon as possible. In any event, Respondents' threats of automatic stays actually cut against them here: if the appellate courts do not want a remedy for 2022, they can simply deny Petitioners' motion to vacate any such automatic stay, and there will be no effect of this Court's order during the pendency of the appeal.

Second, Respondents repeat their refrain that the *Purcell* principle—including the most recent U.S. Supreme Court case out of Alabama, *Merrill*, 142 S. Ct. 879—should preclude relief. As a preliminary matter, the U.S. Supreme Court decisions that Respondents cite clearly demonstrate that the Court has not extended *Purcell* to preclude state court action to change election deadlines in order to cure unconstitutional state laws, including state maps. *See Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring) ("While the Pennsylvania applications [*Scarnati v. Boockvar*, 141 S. Ct. 644 (2020) and *Republican Party of Pennsylvania v. Boockvar*, 141 S. Ct. 1 (2020)] implicated the authority of state courts to apply their own constitutions to election regulations, this case involves federal intrusion on state lawmaking processes. Different bodies of law and different precedents govern these two situations and require, in these particular circumstances, that we allow the modification of election rules in Pennsylvania but not Wisconsin."); *see also Merrill*, 142 S. Ct. at 879 (Kavanaugh, J., concurring); *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Kavanaugh, J., concurring); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) ("This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." (citations omitted)).

Respondents have no answer to the multiple recent examples of other states moving primary and other election-related deadlines in the face of redistricting challenges, including partisan gerrymandering claims just like this one, ***in this very election cycle***. *Compare* Supp. Br. 7–8, *with* NYSCEF No. 233 ¶¶ 9–10; NYSCEF No. 234 at 10–12. The state court cases Respondents cite do not provide support for their assertion that "the highest Courts of several States have recently applied *Purcell* without jurisdictional qualms." NYSCEF No. 234 at 10. Many of these cited challenges were dismissed due to the plaintiffs' procedural errors or own

delays plainly not present here, where Petitioners filed their Petition on the day the Governor signed. *See In re Khanoyan*, 637 S.W.3d 762, 766 (Tex. 2022) (relators' request for relief was ineffective to "avoid the[ ] practical consequences" of their choices and would leave in place only a map "that Relators agree violates *federal* law"); *In re Hotze*, 627 S.W.3d 642, 646 (Tex. 2020) (precluding relief after finding "no justification" for petitioners' "lengthy delay" and failure to "diligently [ ] protect their rights"); *Liddy v. Lamone*, 919 A.2d 1276, 1288–89 (Md. 2007) (finding challenge brought 18 days before general election was time barred under the doctrine of laches and distinguishing from previous timely challenge brought 35 days before general election); *Quinn v. Cuomo*, 126 N.Y.S.3d 636, 641 (Sup. Ct. Queens Cnty.) (declining to "[g]rant[ ] petitioner's relief in light of his own delay"), *aff'd as modified*, 183 A.D.3d 928 (2d Dep't 2020) (finding governor's action was valid and petitioner's claim was time barred); *Dean v. Jepsen*, No. CV106015774, 2010 WL 4723433, at *9 (Conn. Super. Ct. Nov. 3, 2010) (dismissing complaint for lack of standing). In other cases, the plaintiffs simply failed to meet their burden to show injunctive relief was appropriate. *See League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 208–15 (Iowa 2020) (affirming denial of temporary injunction after finding plaintiffs could not show a likelihood of success on any of their claims); *All. for Retired Ams. v. Sec'y of State*, 240 A.3d 45, 57 (Me. 2020) (same); *Jones v. Sec'y of State*, 239 A.3d 628, 631–32 (Me. 2020) (same); *Singh v. Murphy*, No. A-0323-20T4, 2020 WL 6154223, at *2, *14 (N.J. Super. Ct. App. Div. Oct. 21, 2020) (same). In some cases, courts ruled against the plaintiffs on the merits. *See Fay v. Merrill*, 256 A.3d 622, 654–55 (Conn. 2021) (upholding as constitutional the governor's order expanding absentee voting, as ratified by the state legislature); *Ohio Democratic Party v. LaRose*, 159 N.E.3d 1241, 1256 (Ohio Ct. App. 2020) (affirming denial of permanent injunction after finding challenged "directive does not violate the law"); *Chi. Bar Ass'n v. White*,

898 N.E.2d 1101, 1107 (Ill. App. Ct. 2008) (holding that addition of corrective notice complied with constitutional ballot requirements and was appropriate remedy). And in *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363 (Fla. 2015), after finding Florida's new congressional map to be unconstitutional, the court "urge[d] that the redrawing of the map be expedited" in order to put in place constitutional maps before the next general election. *Id.* at 416–17.

The New York cases Respondents cite are, if anything, even further afield. NYSCEF No. 233 ¶ 10; NYSCEF No. 234 at 10–11. Unlike the case at hand, where the Constitution explicitly requires that unconstitutional maps "shall" be "invalid[ated]," challenges must be decided within 60 days, and this Court must put such cases before all others, N.Y. Const. art. III, § 5, Respondents' cited cases lack an explicit constitutional mechanism and remedy, *see* NYSCEF No. 233 ¶ 10; NYSCEF No. 234 at 10–11. These cases deal with the prosaic issue of the malapportionment of certain county boards' districting plans, *Honig v. Bd. of Sup'rs of Rensselaer Cnty.*, 31 A.D.2d 989, 989 (3d Dep't 1969), *aff'd* 24 N.Y.2d 861 (1969); *Duquette v. Bd. of Sup'rs. of Franklin Cnty.*, 32 A.D.2d 706, 706 (3d Dep't 1969); *English v. Lefever*, 442 N.Y.S.2d 385, 391 (Sup. Ct. Rockland Cnty. 1981); *Pokorny v. Bd. of Sup'rs. of Chenango Cnty.*, 302 N.Y.S.2d 358, 359 (Sup. Ct. Chenango Cnty. 1969); *see also Abate v. Mundt*, 25 N.Y.2d 309, 317 (1969), *aff'd*, 403 U.S. 182 (1971) (upholding the Rockland County apportionment plan as constitutional), and violation of statutory requirements in New York City Council districts, *Badillo v. Katz*, 32 N.Y.2d 825, 827 (1973). As such, none of these cases bear on this Court's authority and duty under the constitutional provisions governing this case. *See* N.Y. Const. art. III, §§ 4, 5.

Third, although Respondents lay out various claimed barriers to holding a primary in August on constitutional maps, each of their points falls apart upon even cursory examination.

Respondents misleadingly argue that adopting replacement maps would take a lot of time. NYSCEF No. 233 ¶¶ 2–3; NYSCEF No. 234 at 3–4; NYSCEF No. 237 at 4. Not so. Should the Court agree with Petitioners on their procedural argument and take on the task of mapdrawing itself, all parties could quickly submit their own remedial maps for the Court's consideration, even within 14 days of the Court's decision finding the 2022 Maps to be unconstitutional partisan gerrymanders, consistent with the timeframe that the North Carolina Supreme Court recently used for submission of party maps. *See, e.g.*, *Harper v. Hall*, 867 S.E.2d 554, 558 (N.C. 2022).

In the event the Court agrees only on Petitioners' substantive claim, requiring it to give the Legislature another opportunity to draw constitutional maps, the remedial process could still move very quickly. Here, the Legislature and Governor enacted these unconstitutional maps 11 days after the Commission did not follow the constitutional process for enacting a map; therefore, it is beyond dispute that the Legislature can act very quickly when it so desires, and *that* 11-day period set by the Legislature's own recent practice is the "reasonable" time that the New York Constitution contemplates. *See* N.Y. Const. art. III, § 5. So, again, a two-week window for the Legislature to enact replacement maps would be "reasonable," *id.*, and wholly consistent with recent practice in other States, *see Harper*, 867 S.E.2d at 558. Nothing about Article III, Section 5's requirement that the Legislature "have a full and reasonable opportunity to correct" the maps, N.Y. Const. art. III, § 5, would limit this Court's authority to set such an 11- or 14-day deadline and maintain an active, supervisory role over the remedial process. Indeed, even Respondents acknowledge that the Court would retain jurisdiction over and "play[ ] a critical role in" the remedial process, including "evaluating the sufficiency of any such remedial steps taken by the Legislature," NYSCEF No. 233 ¶ 14, as the Constitution contemplates, N.Y. Const. art. III,

§ 5.[2] And, even if the Court wanted to give the Legislature additional time to create replacement maps, there is still ample time to move the primary elections back to August 2022, which would easily fit the rest of the primary election schedule, as discussed immediately below.

Respondents also exaggerate the difficulty of holding an election once new, constitutional maps are adopted. Respondents variously contend that it would be "virtually impossible," NYSCEF No. 234 at 4, or "[im]practicable" to hold elections under new, constitutional congressional or Senate maps for the 2022 primary, NYSCEF No. 233 ¶ 14, or that doing so would have "financial, logistical and administrative burdens," NYSCEF No. 237 at 4, but they find little support for these claims, and all necessary election processes can be well completed by simply moving back the primary to August. For example, Respondents' affiant, Thomas Connolly, acknowledges that New York's 58 local boards of elections "largely" completed the process of applying the new district lines to all 12 million plus New York voters *in less than a month*, "by March 1, 2022." NYSCEF No. 236 ¶ 16. Similarly, although Mr. Connolly contends that redrawing election districts for new maps and establishing polling sites is "a significant undertaking," NYSCEF No. 236 ¶ 19, he also notes that the standard timeline for assigning polling places after districts are drawn takes only roughly a month without any pressing, and he provides no reason why that period cannot be shortened, if necessary, NYSCEF No. 236 ¶ 22; *see also* NYSCEF No. 237 at 3–4. Thus, everything Respondents and their affiant claim is fully compatible with, for example, an August 23 primary election under constitutional maps.

[2] While Respondent Speaker bizarrely claims that any infirmities alleged against replacement maps would require Petitioners to file a new Petition with new proceedings, NYSCEF No. 234 at 4, this is plainly wrong, as even Respondent Senate Majority Leader acknowledges that "this Court" would be "tasked with evaluating the sufficiency of any such remedial steps taken by the Legislature," NYSCEF No. 233 ¶ 14, consistent with the constitutional text, N.Y. Const. art. III, § 5.

While Respondents broadly contend that holding elections under constitutional maps is not feasible given the ballot signature requirements and timelines relating thereto, even assuming "that by June 1 all appeals will have been exhausted," NYSCEF No. 234 at 5, they ignore various ways this Court could alleviate the supposed new deadlines within their own proposed schedule. For example, although Respondents contend that the new schedule would need a *new* 37-day period for ballot petitions, the courts could simply order the Board of Elections to accept the previous petitions and signatures from "[a]ny individual who has already filed to run for public office in 2022," *see Harper v. Hall*, 865 S.E.2d 301, 302 (2021); N.Y. Const. art. III, § 5, thereby shortening the supplemental election processes that would follow the Court's adoption of new maps. But regardless of this Court's other tools to ensure a smooth election schedule, even Respondents' suggestion of a new 37-day window for ballot petition signatures is fully compatible with an August 23 primary date.

In any event, Respondents are simply wrong when they contend that a two-month delay in the primary schedule would not suffice to allow New York elections officials to adequately prepare for and complete their election duties. The Board of Elections and related local officials have a successful history of altering election processes at the eleventh hour to accommodate exigent circumstances and have performed ably under such conditions. Affidavit of Todd D. Valentine ("Valentine Aff.") ¶¶ 4–5. Indeed, if this Court were to order the primary elections for Congress and state Senate to be held on August 23, 2022, that would provide ample time for the Board to complete the ballot-access process and comply with federal requirements for elections and absentee ballots, and the impacts on county boards would be minimal at most. Valentine Aff. ¶¶ 8–12. And pushing back these primary dates would have no negative effect on the ability of

New York's election officials to conduct a successful general election thereafter. Valentine Aff. ¶¶ 13–14.

Nor would following Petitioners' proposed schedule to remedy the 2022 Maps' constitutional infirmities at all risk violating federal law or implicating the 2012 federal-court injunction in *United States v. New York*, No. 1:10-cv-1214, 2012 WL 254263 (N.D.N.Y. Jan. 27, 2012). Under the Uniformed and Overseas Citizens Voting Act of 1986 ("UOCAVA"), as amended by the Military and Overseas Voter Empowerment ("MOVE") Act, States must transmit absentee ballots to absent uniformed services or overseas voters "not later than 45 days before [an] election" for federal office. 52 U.S.C. § 20302(a)(8)(A). Moving the primary back to August 23 would in no way risk New York violating this provision, given that this 45-day deadline applies to every single state, *see id.*, and many States already hold their primaries in August or later, *see* Fed. Voting Assistance Program, *Primary Elections By State and Territory* (2022).[3] Judge Sharpe's opinion in *United States v. New York* similarly presents no barrier to moving the primary election. There, Judge Sharpe established New York's election date of "the fourth Tuesday in June for the non-presidential primary" because it was "in the best interest of the State" given past noncompliance with UOCAVA and the MOVE Act, but he explicitly noted that his decision "by no means precludes New York from reconciling their differences and selecting a different date, so long as the new date fully complies with UOCAVA," recognizing that "a permanent primary date is best left to New York," with immediate relief only necessary "to preserve federally protected voting rights" back in 2012. *New York*, 2012 WL 254263, at *2.

Finally, Respondents' brief invocation of the U.S. Constitution's Elections Clause, NYSCEF No. 234 at 12, is misplaced. The Elections Clause provides, in part, that "[t]he Times,

[3] *Available at*: https://www.fvap.gov/guide/appendix/state-elections.

Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. While Respondents assert that the Elections Clause "prohibits this Court from erasing the Congressional-election calendar enacted into law by New York's Legislature," NYSCEF No. 234 at 12, they do not suggest that such Clause would prohibit granting relief against the 2022 Maps at issue here, and that concession by silence applies to moving election deadlines as well. Accordingly, Respondents have forfeited any argument invoking the Election Clause in this case if Petitioners prove their constitutional claims. *See Soler v. Jersey Boring & Drilling Co.*, 143 A.D.3d 421, 422 (1st Dep't 2016). But even if there were no waiver or forfeiture, their position is inconsistent with *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015).

* * *

The People of New York enshrined in the New York Constitution a prohibition against partisan gerrymandering and an unusually expedited process for litigating claims that such unconstitutional gerrymandering has occurred. In the face of this constitutional mandate from the People, all of Respondents' practical concerns and quibbling with election timelines should yield to the higher constitutional values of having constitutional maps for the 2022 election cycle.

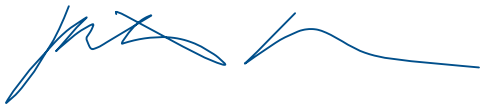
CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court grant Petitioners' Requested Timing And Scope Of Remedy.

Dated: New York, New York
March 22, 2022

Respectfully submitted,

TROUTMAN PEPPER HAMILTON SANDERS LLP

By: 

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CERTIFICATION

I hereby certify that the foregoing memorandum of law complies with the bookmarking requirement and word count limitations set forth in Rule 202.8-b of the Uniform Rules of Supreme and County Courts. *See* 22 NYCRR § 202.8-b. This memorandum of law contains 3,539 words, excluding parts of the document exempted by Rule 202.8-b(b).

Dated: New York, New York
March 22, 2022

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