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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REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO AMEND

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ARGUMENT

Just five days after initiating this special proceeding, Petitioners filed with this Court a Motion For Leave To Amend and corresponding proposed Amended Petition, seeking to add claims against the Senate map that were near-identical to those claims already raised against the Legislature's previously released 2022 congressional map. When Petitioners filed this Motion and Amended Petition, Respondents had taken no action in this lawsuit. Given that this Court has already scheduled a single return date on this Motion For Leave To Amend and the original Petition, and that Petitioners have filed a single combined Memorandum Of Law In Support Of Petition And Amended Petition, NYSCEF No.25, covering arguments for why both the congressional and Senate maps are procedurally improper and obvious gerrymanders (to which Respondents have filed their Memoranda of Law in response and to dismiss the Petition, NYSCEF Nos.72, 82), Respondents have no credible basis to contest this proposed amendment.

The Amended Petition easily meets the capacious standard for amendment, and this Court should exercise its substantial discretion to permit the timely amendment. First, each of the claims Petitioners raise in the Amended Petition are meritorious. *See Putrelo Constr. Co. v. Town of Marcy*, 137 A.D.3d 1591, 1593 (4th Dep't 2016). The 2022 Senate map is exactly as procedurally invalid as the 2022 congressional map, given the Legislature's failure to comply with the plain, textual requirements of Article III, Section 4 of the New York Constitution, and both the 2012 congressional and Senate maps—the only validly enacted or adopted maps remaining—are now malapportioned. Petitioners' Memorandum Of Law In Support Of Motion For Leave To Amend ("Mem.") at 4–5, NYSCEF No.22. The Amended Petition's substantive allegations of gerrymandering related to the 2022 Senate map are also sufficient—indeed, compelling—given that the enacting process, statistical analysis of the map, and individual district lines all show that the Legislature drew Senate districts "to discourage competition or for the purpose of favoring or

disfavoring incumbents or other particular candidates or political parties." Mem.5 (quoting N.Y. Const. art. III, § 4(c)(5)). All of these well-pleaded allegations also suffice for Petitioners' request for a declaratory judgment. *See* Mem.6. Respondents will suffer no prejudice as a result of amendment, given that Petitioners moved to amend before *any* Respondent took any actions in this case. Mem.7–8. Thus, this Court should grant Petitioners leave to amend, and allow them to file the Amended Petition already provided to the Court.

Respondents' contrary arguments are all meritless.

First, Respondents Senate Majority Leader Andrea Stewart-Cousins and Speaker of the Assembly Carl Heastie (collectively "Legislative Respondents"), contend that this Court should deny amendment because it would be futile. Memorandum Of Law Of The Senate Majority Leader And The Speaker Of The Assembly In Opposition To Petitioners' Motion To Amend ("Leg. Opp.") at 1–2, NYSCEF No.74. But the limited argument that they make on this point belies their claim. Legislative Respondents nowhere even mention Petitioners' *procedural* claims against the 2022 Senate map, or the argument that the 2012 Senate map is now unconstitutionally malapportioned. *See* Mem.4–5. And the Governor makes no claims about futility of amendment. *See generally* Governor's Memorandum Of Law Opposing Motion To Amend The Petition ("Gov. Opp."), NYSCEF No.91.

And while Legislative Respondents argue that it would be futile to allow Petitioners to add substantive claims against the 2022 Senate map as gerrymandered, *see* Leg. Opp. 1–2, their limited submission on this point is both misguided and incomplete. They claim that "[t]he graph on page 21 of Mr. Trende's report is fatal to Petitioners' attempt to expand this case to include the Senate plan," because the enacted plan will give the Democrats 49 of 63 seats, whereas all of the computer-generated maps gives Democrats at least 51 seats, claiming this as proof that the map

favors Republicans. *See* Leg. Opp. 1–2. But this risible assertion ignores that each of the enacted Senate districts is crafted to reduce competitiveness and ensure that the Democratic Party maintains a safe supermajority in the Senate, while also "naïve[ly]" treating as same all districts with 50.1% or greater Democratic voters, even though the practical effects of a 50.1% Democratic district and a 90% Democratic district are worlds apart. Reply of Sean P. Trende at 6–14. The failure to grasp this distinction is fatal to Legislative Respondents' approach, and also why they could not proffer any literature (or any authority at all) supporting their "methodology" for analyzing redistricting maps. *See* Leg. Opp. 1–2. Moreover, Legislative Respondents ignore entirely the partisan purposes underlying the Democrats' attempts to create at least 43 nearly unbreachable Democratic strongholds. For example, Mr. Trende explains that the map is specifically drawn such that "[w]here the map drawers could afford to avoid partisanship, they did," but once the districts began to "approach the 60% threshold" for Democratic support, "map drawers sought . . . to ensure that Democratic performance in the districts remained as close to that threshold as possible" in "exactly two thirds of the districts." Expert Report of Sean Trende at 20, NYSCEF No.26. Importantly, a two-thirds supermajority is what the New York Constitution requires of the Legislature in order to overcome any veto, N.Y. Const. art. IV, § 7, and so creating a Senate map that essentially guarantees Democrats 43 or more seats without any real competition is exactly what the Legislature sought to do here.

Second, Legislative Respondents argue that granting leave to file the proposed Amended Petition is likely to delay these proceedings, making it "all but impossible" for the Court to render its decision within the 60-day deadline provided in Article III, Section 5 of the Constitution. Leg. Opp. 2. Not so. Respondents have already engaged fully with Petitioners' procedural arguments—which arguments are identical as to the 2022 congressional map and 2022 Senate map. *See*

NYSCEF Nos. 72 at 9–17; 82 at 17–22. Respondents' contrary arguments on the procedural claims are plainly insufficient to contradict the clear text of Article III, Section 4. On this basis alone, the Court should invalidate the 2022 state Senate map as unconstitutional immediately, with no risk of running up against the 60-day constitutional deadline for the Court's decision. Then, during this Court's consideration and creation of remedial maps, which can proceed just as expeditiously as this case has thus far, Respondents can submit responses to Petitioners' *substantive* arguments against the 2022 Senate map in the interests of creating a complete appellate record for any eventual appeal. Thus, nothing about Petitioners' amendment request either risks delaying this case or "hinder[ing]" Respondents "in the preparation of [their] case," *Kimso Apartments, LLC v. Gandhi*, 24 N.Y.3d 403, 411 (2014), or presents any risk to this Court's decisional deadline.

Third, Respondents contend that this court should deny amendment because Petitioners' request that this Court "[s]uspend[ ] or enjoin[ ] the operation of any other state laws that would undermine this Court's ability to offer effective and complete relief to Petitioners for the November 2022 [Senate] elections and related primaries" is "not available," on the basis of *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), and similar cases. Leg. Opp. 2–3 (alteration in original) (quoting NYSCEF Nos.18 at 82); *see also* Gov. Opp. 3–4. Beside the fact that Petitioners made this same request for relief in their *original* Petition, NYSCEF No.1 at 66, none of the cases Respondents cite prohibit this Court from enjoining certain election laws to allow for complete relief to Petitioners. The "*Purcell* principle" only prohibits "lower federal courts" from "alter[ing] . . . [State] election rules on the *eve* of an election," in order to avoid the confusion that any such alterations would cause. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (emphasis added). *Purcell* certainly does not bar this *state* Court from

enforcing its State's election-law-related constitutional provisions, as the U.S. Supreme Court's recent and different treatment of appeals from state-court judgments versus federal-court judgments confirms. *See, e.g.*, *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1 (2020); *Democratic Nat'l Comm v. Wis. State Legislature*, 141 S. Ct. 28 (2020). Indeed, the U.S. Supreme Court has long validated the "legitimacy of state *judicial* redistricting," noting that state courts' "judicial supervision of redistricting" is exactly what that Court "encouraged." *Growe v. Emison*, 507 U.S. 25, 34 (1993). Thus, nothing in *Purcell* or other federal precedent at all precludes this Court from granting Petitioners' reasonable request for suspension of certain election deadlines pending this Court's completion of this case, including as to the Senate districts.

Legislative Respondents' other caselaw citations, Leg. Opp. 4–5; *see also* Gov. Opp. 3–4, have no bearing on *this* Court's authority to enjoin certain early-stage election processes to *avoid* confusion, given the likelihood that the Court will declare the 2022 Senate map invalid. In *In re Khanoyan*, 637 S.W.3d 762 (Tex. 2022), the challengers filed their request for mandamus 10 days *after* the candidate filing period ended, mere days before ballots needed to be printed and mailed, and so the relief would "disrupt the *ongoing* election process." *Id.* at 766 (emphasis added). Legislative Respondents' citation of *League of Women Voters of Florida v. Detzner*, 172 So.3d 363 (Fl. 2015), provides them no support, as the parties there did not challenge the *trial court's* decision to defer the effective date of the remedial plan, *see id.* at 387. And in each of the other cases Legislative Respondents cite, the plaintiffs sought to enjoin ongoing elections, after waiting to make their legal challenge. *See All. for Retired Am. v. Sec'y of State*, 240 A.3d 45, 49–50, 54 (Me. 2020) (refusing to enjoin absentee-ballot deadlines during the COVID-19 pandemic because the plaintiffs filed their challenge to the election laws over three months after the declaration of the pandemic emergency, and waited another 44 days before seeking preliminary-injunctive

relief); *Singh v. Murphy*, No. A-0323-20T4, 2020 WL 6154223, at *14–15 (N.J. App. Div. 2020) (challenging laws due to COVID-19 *after* primary election took place); *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 215 (Iowa 2020) (denying challenge to absentee ballot rules filed over a year after the law was enacted, on the eve of the election); *In re Hotze*, 627 S.W.3d 642, 645 (Tex. 2020) (denying mandamus challenge to election that was "already underway"); *Ohio Democratic Party v. LaRose*, 159 N.E.3d 852, 880 (Ohio Ct. App. 2020) (reversing an injunction against certain absentee-ballot-request rules that the trial court entered while electors were already requesting absentee ballots); *Dean v. Jepsen*, No. CV106015774, 2010 WL 4723433, at *7 (Conn. Sup. Ct. Nov. 3, 2010) (denying candidate's injunction request to remove opponent from ballot, filed seven days before election day, while "the election process has already been well under way"); *Chi. Bar Ass'n v. White*, 898 N.E.2d 1101, 1104 (Ill. App. Ct. 2008) (denying request to amend ballot petition language when ballots were already printed with a little over a week remaining before election day). Here, Petitioners filed their challenges to the 2022 congressional and Senate maps within days after the maps were released to the world and then enacted, asking this Court to enjoin or delay any early election processes necessary to allow the Court to consider Petitioners' deeply important challenge to those maps within its constitutionally mandated 60-day window, *see* N.Y. Const. art. III, § 5, providing the Court with ample time and to avoid unnecessary voter confusion related to upcoming elections.

Legislative Respondents' other precedent is similarly unavailing and irrelevant. *See* Leg. Opp. 5–6. In *Quinn v. Cuomo*, 126 N.Y.S.3d 636 (Sup. Ct. Queens Cnty. 2020), for example, the Court refused the petitioners' belated request to reinstate a cancelled special election, filed just five weeks before that canceled election was to take place, noting that the "petitioner's delay" was what created the "considerable" "difficulties," "great expense," and "voter confusion" that would

result if that court were to grant the 11th hour request for reinstatement. *Id.* at 641. Again, Petitioners filed their Petition and amendment request within only days of the Legislature's enactment, so Respondents cannot attribute any such delay to them. This Court has ample time to accept Petitioners' Amended Petition, enjoin both maps on the procedural issue already fully joined by the parties' briefing, and adopt remedial maps for both Congress and the Senate, all with plenty of time to hold the 2022 elections under the remedial, constitutional maps without any voter confusion or risk of noncompliance with federal Judge Sharp's injunction requiring the primary election to occur on the fourth Tuesday in June. *See United States v. New York*, 2012 WL 254263, at *2 (N.D. N.Y. Jan. 27, 2012);[*] *contra* Leg. Opp. 5. Petitioners' limited, reasonable request that the Court delay certain early election deadlines while it considers their crucial challenge to the gerrymandered maps is completely unlike Legislative Respondents' cited cases in which parties sought to enjoin *entire elections*, and so this entire line of argument is irrelevant to this case and particularly irrelevant to Petitioners' early filed Motion To Amend The Petition. *See* Leg. Opp. 5–6 (citing *Burns v. Flynn*, 281 N.Y.S. 494, 496–97 (Sup. Ct. Albany Cnty. 1935); *Honig v. Bd. of Sup'rs of Rensselear Cnty.*, 31 A.D.2d 989, 989 (3d Dep't 1969); *Duquette v. Bd. of Sup'rs of Franklin Cnty.*, 32 A.D.2d 706 (3d Dep't 1969); *Pokorny v. Bd. of Sup'rs of Chenango Cnty.*, 302 N.Y.S.2d 358, 363–64 (Sup. Ct. Chenango Cnty. 1969).

Fourth, the Governor contests amendment on the grounds that she never received sufficient service of the Order To Show Cause seeking leave to amend. Gov. Opp. 1–3. This argument is frivolous and now moot. As an initial matter, the Governor admits that the Attorney General

[*] In any event, Judge Sharpe's order explicitly provides that his decision "by no means precludes New York from . . . selecting a different date, so long as the new date fully complies with UOCAVA," 2012 WL 254263, at *2, and so this Court could push back other election deadlines, including the primary date if it absolutely needed to, so long as military personnel receive ballots at least 45 days before that election, 52 U.S.C. § 20302(a).

received service of the second Order To Show Cause at her New York City office, rather than their preferred Regional Office in Rochester, Gov. Opp. 1–3; NYSCEF No.76 at 2, and thereafter appeared in this case defending the Governor and filing written opposition to Petitioners' Motion For Leave To Amend, waiving any contention they might have on this point, *Duffy v. Schenck*, 341 N.Y.S.2d 31, 33 (Sup. Ct. Nassau Cty.), *aff'd*, 42 A.D.2d 774 (2d Dep't 1973). Furthermore, because the Attorney General received all of the pertinent documents related to this Order To Show Cause and Petitioners' Motion For Leave To Amend, she simply cannot claim any "prejudice," *Duffy*, 341 N.Y.S.2d at 33, and the Court is free to "disregard[ ]" their claims of purely "technical defect," *O'Brien v. Pordum*, 120 A.D.3d 993, 994 (4th Dep't 2014). Nevertheless, to avoid any need for this Court to waste resources dealing with this frivolous argument (including whether it is so frivolous as to be sanctionable), Petitioners have now served all their filed documents on the Rochester Regional Office of the Attorney General as a courtesy, mooting this issue, as evidenced by the Affidavits of Service Petitioners filed with the Court today.

Fifth, the Governor incorrectly argues that amendment would be futile against them because they were not "involved with the creation of the challenged maps," so Petitioners' claim that the 2022 Senate map is substantively unconstitutional as an impermissible gerrymander is unrelated to them. Gov. Opp. 4–6. Article III, Section 4(c)(5) provides that "the following principles shall be used *in the creation of* state senate and . . . congressional districts," including the principle that "[d]istricts shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." N.Y. Const. art. III, § 4(c)(5). Of course, Senate districts are not "creat[ed]," *id.*, until the Governor signs into law the redistricting bills, *Matter of King v. Cuomo*, 81 N.Y.2d 247, 252 (1993); N.Y. Const. art. IV, § 7, as the Governor did here, and the mandatory process for enacting redistricting

legislation explicitly notes the Governor's participation in the process, N.Y. Const. art. III, § 4(b). Thus, the Governor's intent to enact redistricting legislation for the benefit of the Democratic Party, including regarding the Senate map, *see* NYSCEF No.18, ¶¶ 8, 59, 217, 262, is plainly relevant to Petitioners' claims that the map violates the Constitution's explicit prohibition against creating districts "to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties." N.Y. Const. art. III, § 4(c)(5).

Relatedly, the Governor is a proper respondent given her role within the Executive Branch and in administering elections. The Governor is the "chief executive officer" of the State, responsible for "manag[ing] the operations of the divisions of the executive branch," *Dorst v. Pataki*, 90 N.Y.2d 696, 700 (1997), including the Board of Elections, "itself an executive agency," *Clark v. Cuomo*, 66 N.Y.2d 185, 190 (1985). For that reason, Petitioners named the Governor as a respondent in this case, as well as all other persons or entities who play a role in elections, to ensure that the Court will be able to provide Petitioners complete relief on their critical claims related to the State's 2022 redistricting. *See* CPLR § 1001; N.Y. Unconsolidated Laws § 4221.

In any event, the Governor is named in this lawsuit because she is required to be by the New York Constitution and applicable statutes. Article III, Section 5 provides that "[a]n apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe," N.Y. Const. art III, § 5, and the Legislature has provided that apportionments may be reviewed by the supreme court "upon such service thereof upon the attorney-general, *the president of the senate*, the speaker of the assembly and *the governor*." N.Y. Unconsolidated Laws § 4221 (emphases added). This is why numerous challenges to redistricting in this State have routinely named the Governor as a party, *see, e.g.*, *Schneider v. Rockefeller*, 31 N.Y.2d 420 (1972); *Bay Ridge Cmty.*

Council v. Carey, 454 N.Y.S.2d 186, 188 (Sup. Ct. Kings Cty. 1982); *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 75 (1992), and the Governor's inapposite citations to federal precedent in support of their claims of immunity, *see* Gov. Opp. 6 (citing *Favors v. Cuomo*, 285 F.R.D. 187, 207 (E.D.N.Y. 2012); *United States v. Johnson*, 383 U.S. 169, 177–80 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951); *Citizens Union of City of N.Y. v. Attorney Gen. of N.Y.*, 269 F. Supp. 3d 124, 149 (S.D.N.Y. 2017); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975)), are irrelevant to this issue.

Sixth and finally, the Governor is plainly incorrect to claim that amendment is futile because this suit is nonjusticiable or that she is somehow immune from suit regarding her relevant actions in the redistricting process. Gov. Opp. 6–11. Accepting either of these contentions would again require the Court to ignore entirely the 2014 amendments to the Constitution, explicitly providing this Court jurisdiction to "review" any "apportionment by the legislature, or other body," N.Y. Const. art. III, § 5, for its compliance with all the mandatory substantive provisions governing map-drawing, including the prohibition against partisan gerrymandering, *id.* § 4(c)(5). All the caselaw the Governor cites regarding both her purported immunity and the alleged nonjusticiability of redistricting predates the 2014 amendments. And those amendments *explicitly* gave the "supreme court" the authority to review "any law establishing congressional or state legislative districts" for whether the law "violate[s] the provisions of this article," granting this Court the authority to determine whether any maps violate the requirements of Article III, Section 4, and then "render [a] decision" on those claims. *Id.* § 5. Furthermore, as previously discussed, Article III, Section 4 requires the Court to determine whether any persons involved in the creation of districting maps had the "purpose of favoring or disfavoring incumbents or other particular candidates or political parties," *id.* § 4(c)(5), including the Governor, who is a necessary

party to this lawsuit, *supra* pp. 9–10. And, given the Governor's role within the Executive Branch and authority over the executive-branch agencies that administer elections, *see supra* pp. 8–9, the claims against her are proper in light of Petitioners' requested relief—seeking to stop any elections from occurring under these unconstitutional maps. Thus, the Governor is plainly not immune from suit and this Court can and must "render [a] decision" on Petitioners' claims. N.Y. Const. art. III, § 5.

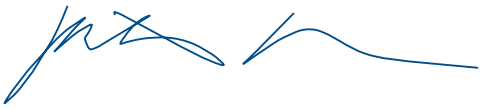
CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court grant them leave to file their Amended Petition and thereafter grant that Amended Petition.

Dated: New York, New York
March 1, 2022

Respectfully submitted,

TROUTMAN PEPPER HAMILTON SANDERS LLP

By: 

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CERTIFICATION

I hereby certify that the foregoing Reply Memorandum Of Law complies with the bookmarking requirement and word count limitations set forth in Rules 202.5(a)(2) and 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court. This memorandum of law contains 3,501 words, excluding parts of the document exempted by Rule 202.8-b(b).

Dated: March 1, 2022
New York, New York

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