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February 15, 2022

**VIA NYSCEF**

Honorable Patrick F. McAllister
Supreme Court, Steuben County
3 East Pulteney Square
Bath, New York 14810



**Re: *Harkenrider, et al. v. Hochul, et al.*, Index No. E2022-0116CV (Sup. Ct. Steuben Cnty.)**

Dear Justice McAllister:

We represent Petitioners in the referenced CPLR Article 4 special proceeding and write in response to the letter of Respondent the Senate Majority Leader ("Majority Leader") filed earlier today. The Majority Leader's letter makes a number of legally and factually unsupported assertions, all of which demonstrate her desire to delay this expedited litigation regarding Respondents' blatantly partisan-gerrymandered redistricting maps. Petitioners respond to each of the Majority Leader's erroneous assertions in turn.

*First*, and remarkably, the Majority Leader claims Your Honor lacks authority even to schedule a telephonic/video conference, without providing any support for that bizarre, nonsensical position. Maj. Leader Ltr. at 1–2, 4. There are multiple pending, time-sensitive, and important matters upon which the parties could not agree and, therefore, that require Your Honor's prompt attention. Most prominently—and as explained more fully below—Petitioners have indeed already requested that this Court stay the upcoming March 1, 2022 date for when candidates may begin collecting petition signatures to be placed on the ballot, N.Y. Elec. Law §§ 6-134(4), 6-158(1); *see* NYSCEF Doc. No.1 ¶ 34 & at 67 ¶ F; NYSCEF Doc. No.18 ¶ 36 & 82 ¶ F, and have requested that the Court order expedited discovery from Respondents, NYSCEF Doc. No.48 at 1–3. That the Majority Leader seeks to avoid even a straightforward scheduling conference before Your Honor on these and other pressing matters betrays her desire to delay this crucially important litigation and avoid scrutiny—judicial and otherwise—at all costs.

*Second*, the Majority Leader complains about Petitioners' filing of their Memorandum of Law In Support Of The Petition And Amended Petition, their supporting Expert Reports, and their other supporting papers—all of which were submitted with the Court yesterday. Maj. Leader Ltr. at 1–2. The Majority Leader is unable to identify any prohibition on Petitioners' filing their

supporting papers in advance of the Return Date on the Petition. To the exact contrary, CPLR 409(a) provides only that parties must "furnish to the court all papers served . . . [u]pon the hearing."

In any event, as Petitioners noted in their accompanying letter also filed with the Court yesterday, Respondents *expressly agreed* that they would not move to strike these papers, so long as Petitioners filed them by yesterday's date. NYSCEF Doc. No.49 at 1. Petitioners honored that agreement, putting in a remarkable amount of work in a short period of time—which is especially notable given that Respondents only released their redistricting maps to the world two weeks ago, and of course adopted them even more recently than that. NYSCEF Doc. No.25 at 8. In light of that agreement between the parties, all of the Majority Leader's complaints of procedural impropriety and her cited case law—which does not support her, regardless, *see Buckley v. Zoning Bd. of Appeals*, 189 A.D.3d 2080, 2081 (4th Dep't 2020) (reciting general proposition that special-proceeding hearings are equivalent to summary-judgment hearings)—are irrelevant and ring hollow.



*Third*, the Majority Leader argues that this Court has no authority to expedite Petitioners' requested discovery, Maj. Leader Ltr. at 1–2, but that is obviously incorrect. As Petitioners explained in their Memorandum supporting their requested discovery here, this Court has broad discretion to order discovery from Respondents on an expedited timeline. NYSCEF Doc. No.48 at 4–5 (citing CPLR §§ 3106(b), 3107; *Rational Strategies Fund v. Hill*, 977 N.Y.S.2d 669, 669 (Sup. Ct. N.Y. Cnty. 2013) (citing *J.G. v. Zachman*, 34 A.D.3d 1277 (4th Dep't. 2006))). Petitioners' Memorandum of Law in support of their Motion for leave to conduct expedited discovery explains the very compelling reasons for this Court to exercise that discretion and order expedited discovery in this case. NYSCEF Doc. No.48 at 5–9. Among other things, the New York Constitution explicitly states that redistricting cases like Petitioners' case here take "precedence . . . over all other causes and proceedings," and it further provides that the Court "shall render its decision within sixty days after a petition is filed." N.Y. Const. art. III, § 5. Thus, under this straightforward constitutional text, this Court and all the parties must resolve this case expeditiously, including by completing any necessary discovery on an accelerated timeline.

*Fourth*, the Majority Leader complains that Petitioners, whose counsel signed and filed a letter explaining the meet and confer process in detail, did not file also file a duplicative affirmation of good faith along with their Order to Show Cause for why Petitioners should be granted leave to conduct expedited discovery. Maj. Leader Ltr. at 3–4 (citing 22 NYCRR 202.7). However, there is no requirement that Petitioners file such an affirmation under the circumstances here (*i.e.*, a motion for leave to pursue discovery in a special proceeding), because 22 NYCRR 202.7 applies only when a party asks the court to resolve disputes surrounding the *production and other ongoings* of discovery, which Petitioners' proposed Order to Show Cause to seek discovery does not ask this Court to do. *See, e.g.*, *Amherst Synagogue v. Schuele Paint Co.*, 30 A.D.3d 1055, 1057 (4th Dep't 2006); *Eaton v. Chahal*, 553 N.Y.S.2d 642, 645 (Sup. Ct. Rensselaer Cnty. 1990). Rather, Petitioners are seeking leave to conduct discovery in the first place. None of the the case law that the Majority Leader cites contradicts this point. *See* Maj. Leader Ltr. at 4; *Baez v. Sugrue*,

300 A.D.2d 519, 520–21 (4th Dep't 2006); *Yargeau v. Lasertron*, 74 A.D.3d 1805, 1806 (4th Dep't 2010). Nevertheless, to avoid frivolous litigation on this issue and any further, needless delay—both of which appear to be what Respondents desire rather than engaging in the merits—Petitioners have today (*i.e.*, well before the return date) filed an Affirmation Of Good Faith with the Court under 22 NYCRR 202.7. Therefore, this issue—which is a wasteful distraction anyway—is now moot.

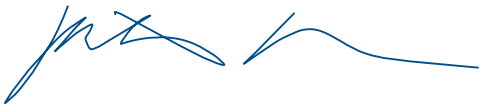
*Fifth*, the Majority Leader's assertion that *Purcell v. Gonzales*, 549 U.S. 1 (2006) (per curiam), forecloses this Court's ability to enjoin or stay the impending election-related deadlines during the pendency of this Court's consideration of the Petition is plainly incorrect, and cuts entirely against Respondents. *See* Maj. Leader Ltr. at 4. The "*Purcell* principle" precludes "lower federal courts" from "alter[ing] the election rules [of a State] on the *eve* of an election," given the confusion that such alteration would cause, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam) (emphasis added); *see also Merrill v. Milligan*, No. 21A375, 2022 WL 354467 at *2 (U.S. Feb. 7, 2022) (Kavanaugh, J., concurring). *Purcell* does not bar a state court like this Court from enforcing its State's election-law-related constitutional provisions. *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).

That said, *Purcell* strongly supports Petitioners' request. Petitioners made their request for injunctive relief against certain early election-activity deadlines *before those deadlines even began, see* N.Y. Elec. Law § 6-134(4), and well before actual voting, *id.* § 8-600(1), thus they are not seeking to alter election rules "on the eve of an election," *Republican Nat'l Comm.*, 140 S. Ct. at 1207. Further, Petitioners' request seeks to *avoid* election confusion, *id.*, since it would eliminate the need for candidates to seek signatures to run for office in unconstitutionally gerrymandered districts that must be redrawn, per the Petition's claims here. NYSCEF Doc. No. 1 ¶ 34, at 65–67; NYSCEF Doc. No.25 at 56–57. Notably, the New York Constitution *requires* this Court to adjudicate the Petition within 60 days, thus this Court must render its judgment to be effective *this election cycle*. N.Y. Const. art. III, § 5. *Purcell* thus weighs powerfully *in favor* of this Court enjoining these election-related deadlines now, given this mandatory 60-day constitutional deadline, so as to minimize any possible voter confusion.

*Finally*, the Majority Leader's assertion that Petitioners have not moved for an injunction against N.Y. Elec. Law § 6-134(4) or any other impending election-related deadlines is misleading. Maj. Leader Ltr. at 4. Petitioners commenced this action by filing a Petition (and mere days later a proposed Amended Petition) that explicitly requests such injunctive relief, NYSCEF Doc. No.1 ¶ 34 & at 67 ¶ F, and their Memorandum Of Law reiterates that same request, NYSCEF Doc. No.25 at 56–57, thus the filing of an additional motion for an injunction would have been both unnecessary and cumulative. And while the Majority Leader criticizes Petitioners' Memorandum Of Law In Support Of The Petition briefing on this issue as too short, Maj. Leader Ltr. at 4, that is deeply unfair given that the need for such injunctive relief is so obvious. Specifically, Respondents' redistricting maps here are blatantly unconstitutional, N.Y. Const.

art. III, § 4(c), thus there is no sense in requiring candidates to gather signatures in order to run for elected office from districts that will surely be redrawn, NYSCEF Doc. No.25 at 56–57.

Sincerely,



Bennet J. Moskowitz

Misha Tseytlin

cc: All Counsel Of Record (via NYSCEF and email)