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 VOLANTE,

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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Index No. E2022-0116CV

Motion Sequence No.: 002

Justice Patrick F. McAllister

MEMORANDUM OF LAW OF THE SENATE MAJORITY LEADER AND THE SPEAKER OF THE ASSEMBLY IN OPPOSITION TO PETITIONERS' MOTION TO AMEND

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Senate Majority Leader Andrea Stewart-Cousins and Speaker of the Assembly Carl Heastie, by and through their attorneys, Cuti Hecker Wang LLP and Graubard Miller, respectfully submit this memorandum of law in opposition to Petitioners' motion to amend the Petition.

ARGUMENT

Petitioners commenced this special proceeding challenging only the congressional plan, not the Senate plan. Five days later, Petitioners moved to amend, seeking to expand their claims to include both the congressional plan and the Senate plan. Petitioners have not provided any compelling reason for why their proposed challenge to the Senate plan was not timely included in the original Petition. In any event, because amendment would be futile, Petitioners' motion should be denied.

It is well established that leave to amend should be denied when granting leave would be futile. *See*, *e.g.*, *Silverstein v. Pillersdorf*, 199 A.D.3d 539 (1st Dep't 2021); *Saferstein v. Mideast Sys., Ltd.*, 143 A.D.2d 82, 83 (2nd Dep't 1988); *Doyle Detective Bureau, Inc. v. Bommattei*, 134 A.D.2d 914, 915 (4th Dep't 1987). Allowing Petitioners to expand this special proceeding to include a challenge to the Senate plan would be futile for three reasons.

First, Petitioners' own purported expert, Sean Trende, has submitted a putative expert report that confirms beyond dispute that the Senate plan is *not* an unconstitutional partisan gerrymander. The graph on page 21 of Mr. Trende's report is fatal to Petitioners' attempt to expand this case to include the Senate plan. That graph orders the 63 Senate districts from most Republican-leaning (to the left) to most Democrat-leaning (to the right). The dots show the likely election results in the enacted plan, and the bars show the likely results in Mr. Trende's simulated plans. With respect to the enacted Senate plan, Mr. Trende's data shows that the

enacted Senate plan will give the Democrats 49 seats, whereas every single one of the 5,000 randomly generated maps in his ensemble gives the Democrats at least 51 seats (and the majority give them at least 53 seats). Thus, far from demonstrating that the Legislature acted with an improper intent to disfavor Republicans, Mr. Trende's simulations confirm that the enacted Senate plan actually *favors Republicans* because it is likely to give the Republicans between two to four more seats than in any of Mr. Trende's simulated plans. Any attempt to attack the Senate plan therefore would be futile.

Second, article III, section 5 of the Constitution requires this Court render decision in this case before April 4, 2022 (60 days from its commencement). It would be exceedingly difficult, and all but impossible, for the Court to comply with that strict constitutional deadline if this case were expanded to include not just the congressional plan but also the Senate plan. Even if the Court were to grant Petitioners' motion to amend immediately after the March 3, 2022 hearing, Respondents would have to be afforded a reasonable amount of time to prepare and file an Answer to the voluminous and complex additional allegations in the proposed Amended Complaint. Moreover, Petitioners have sought leave to engage in what they clearly hope will be far-reaching discovery, which would implicate legislative privilege and other weighty privilege issues that could not possibly be addressed adequately on anything close to the constitutionally required schedule. Were Respondents directed to produce any privileged documents or directed to sit for depositions that would invade an applicable privilege, there likely would be appeals that would cause additional delay. Thus, there simply is not anywhere close to enough time to do what Petitioners say they are trying to do.

Third, the relief Petitioners propose to seek in the proposed Amended Petition would include both enjoining the 2022 Senate election and "[s]uspending or enjoining 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." Dkt. No. 18, at 82. Any attempt to obtain such relief would be futile because it plainly is not available.

To get on the ballot for the June 2022 primary, a candidate must submit designating petitions containing the required number of voter signatures. Candidates are allowed to begin collecting signatures on March 1, 2022, and the deadline for submitting petitions is April 7, 2022. N.Y. Election Law § 6-158(1). Each voter may sign only one petition, and any signatures collected outside of this 37-day window are void. *Id*. § 6-134(3)-(4). Because signatures count only if the voter signing the petition resides in the district in which the candidate is seeking to run, *id*. § 6-136(2), it is impracticable for candidates to begin collecting signatures on March 1 if the new district lines have not yet been established or if there is uncertainty about which redistricting plan is operative.

The Supreme Court has repeatedly admonished that courts should not enjoin state election laws in the period close to an election. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); *see also Democratic Nat'l Comm. v. Wisconsin State Legis.*, 141 S. Ct. 28 (2020); *Andino v. Middleton*, 141 S. Ct. 9 (2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam). As Justice Kavanaugh explained earlier this month:

> Filing deadlines need to be met, but candidates cannot be sure what district they need to file for. Indeed, at this point, some potential candidates do not even know which district they live in. Nor do incumbents know if they now might be running against other incumbents in the upcoming primaries.
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> On top of that, state 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.
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> . . .
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> When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others.

Merrill v. Milligan, 142 S. Ct. 879, 879-81 (2022) (Kavanaugh, J., concurring).

The common-sense principle at the core of the federal *Purcell* doctrine – that courts must not sow confusion by tinkering with election rules during an election cycle – has been widely embraced by state courts as well. *See In re Khanoyan*, 65 Tex. Sup. Ct. J. 207, 2022 WL 58537 (Jan. 6, 2022) (denying challenge to redistricting for 2022 election because of the timing of the election and nature of the relief sought); *Alliance for Retired Americans v. Secretary of State*, 240 A.3d 45, 54 (Me. 2020) (denying injunctive relief and holding that court should not alter rules on eve of election); *Singh v. Murphy*, Doc. No. A-0323-20T4, 2020 WL 6154223, at *14-15 (N.J. App. Div. 2020) (same); *League of United Latin American Citizens of Iowa v. Pate*, 950 N.W.2d 204, 216 (Iowa 2020) (same); *In re Hotze*, 627 S.W.3d 642, 645-46 (Tex. 2020) (same); *Ohio Democratic Party v. LaRose*, 159 N.E.3d 852, 879 (Ohio 2020) (reversing lower court's grant of injunction shortly before the election and stating that altering the rules close to the election would "fuel distrust in the integrity of the election process"); *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 387 (Fl. 2015) (noting that after lower court found redistricting plan unconstitutional and approved the Legislature's remedial plan, it nevertheless ordered the upcoming 2014 election "to proceed under the unconstitutional 2012 plan due to time constraints"); *Dean v. Jepsen*, 51 Conn. L. Rptr. 111, 2010 WL 4723433, at *7 (Conn. Super. Ct. Nov. 3, 2010) (denying injunctive relief and noting that "by filing her action so close to the

election, the plaintiff risks injecting impermissible confusion and disruption in the electoral process"); *Chicago Bar Ass'n v. White*, 386 Ill. App. 3d 955, 961 (2008) ("[W]e agree[] that there are too many obstacles at this late date to alter the method of voting," noting that late changes would "result in voter confusion," and "[a]s an election draws closer, that risk will increase") (quoting *Purcell*, 519 U.S. at 4-5); *Quinn v. Cuomo*, 69 Misc. 3d 171, 177-78 (N.Y. Sup. Ct. Queens Cnty. 2020) (refusing to grant injunction where election date was five weeks away, noting that late-stage reinstatement of special election could lead to "great expense" and "voter confusion" which "in itself, is violative of the very intent and purpose of the Election Law").

New York courts have made clear in the reapportionment context that even when a plan is unconstitutional, a fast-approaching election should nevertheless proceed under the plan, and a new, constitutionally compliant plan should be enacted for future elections. *See 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) (ordering election to proceed under unconstitutional plan given "the imminence of the spring primary election, the first day for signing designating petitions being but three weeks away," and finding that "if employed as a temporary measure, the plan before us, having been adopted by the representative body, is preferable, generally and despite some measure of infirmity, to a plan to be fashioned by the court, as would otherwise be necessary in this case, by reason of the present time exigencies"); *Duquette v. Bd. of Sup'rs of Franklin Cnty.*, 32 A.D.2d 706 (3d Dep't 1969) (applying same principle); *Pokorny v. Bd. of Sup'rs. of Chenango Cnty.*, 59 Misc. 2d 929, 934 (N.Y. Sup. Ct. Chenango Cnty. 1969) (same); *see also Abate v. Mundt*, 33 A.D.2d 660, 663 (2d Dep't), *aff'd*, 25 N.Y.2d 309 (1969), *aff'd*, 403 U.S. 182 (1971) (though reapportionment plan was held constitutional, even the dissenting judges in the Second Department and Court of

Appeals held that the election should proceed under what they found to be an unconstitutional plan given time exigencies).

Courts have repeatedly refused to implement the extreme remedy of enjoining election deadlines. *See Burns v. Flynn,* 155 Misc. 742, 744 (N.Y. Sup. Ct. Albany Cnty. 1935), *aff'd*, 245 A.D. 79 (3d Dep't 1935), *aff'd*, 268 N.Y. 601 (1935) (refusing to enjoin election even though legislators had entirely failed to reapportion, to avoid violating the rights of voters); *In re Khanoyan*, 65 Tex. Sup. Ct. J. 207, 2022 WL 58537, at *5 (noting that delaying the election would be "an extremely disruptive and fraught judicial imposition"); *see also Honig*, 31 A.D.2d at 989 (election proceeded despite unconstitutional reapportionment plan; remedy was ordered for future elections); *Duquette*, 32 A.D.2d at 706 (same); *Pokorny*, 59 Misc. 2d at 934 (same).

Moreover, the federal Uniformed Overseas Citizens Absentee Voting Act of 1986 requires that ballots be transmitted to overseas military personnel no later than 45 days before a federal election. 52 U.S.C. § 20302(a) (formerly 42 U.S.C. §§ 1973ff(1)-(7), *as amended by* Pub. L. No. 111-84, subtitle H, 575-589, 123 Stat. 2190, 2318-2335 (2009)). To comply with this requirement in advance of the June primary election, ballots must be finalized and transmitted to overseas military personnel on or before May 14, 2022. In 2012, United States District Judge Sharpe of the Northern District of New York entered a permanent injunction setting New York's federal primary to occur on the fourth Tuesday in June to permit compliance with the 45-day UOCAVA requirement. *United States v. State of New York*, No. 10 Civ. 1214 (GLS)(RFT), 2012 WL 254263, at *2 (N.D.N.Y. Jan. 27, 2012). Any attempt to alter the June primary date – which is the logical endpoint of Petitioners' request to "pause" upcoming election deadlines – would risk violating federal law and, at a minimum, would require approval by Judge Sharpe in the Northern District of New York. U.S. Const., art. VI, cl. 2.

Attacking the Senate plan, which Petitioners' own purported expert confirms is not biased in favor of the Democrats, seeking to expand this case significantly yet still conclude it by the impending deadline set forth in the Constitution, and seeking to upset New York's statutory election calendar after it already has begun would be triply futile. The Court therefore should deny the motion to amend.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that leave to amend the Petition should be denied.

Dated: February 24, 2022
New York, New York

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ATTORNEY CERTIFICATION

I, Eric Hecker, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this memorandum of law complies with the bookmark requirement in section 202.5(a)(2) of the Uniform Civil Rules for the Supreme Court and the County Court (22 NYCRR 202.5(a)(2)) and with the word count limit set forth in section 202.8-b(a) of the Uniform Civil Rules for the Supreme Court and the County Court (22 NYCRR 202.8-b) because it contains 2,035 words, not including the parts of the memorandum excluded under section 202.8-b(b). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum.

Dated: February 24, 2022
New York, New York

/s/ Eric Hecker
Eric Hecker