

STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

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,

Index No.
E2022-0116CV

Assigned Justice:
Hon. Patrick F.
McAllister, A.J.S.C.

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.

**MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS'
SUPPLEMENTAL BRIEF ADDRESSING REMEDIES**

Respectfully submitted,

GRAUBARD MILLER
The Chrysler Building
405 Lexington Avenue, 11th Floor
New York, New York 10174
Telephone No. (212) 818-8800

PHILLIPS LYTTLE LLP
One Canalside, 125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-8400

C. Daniel Chill
Elaine M. Reich
-- Of Counsel --

Craig R. Bucki
Steven B. Salcedo
Rebecca A. Valentine
-- Of Counsel --

Attorneys for Respondent Speaker of the Assembly Carl Heastie and the Assembly Majority

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
ARGUMENT	2
POINT I THE POSSIBILITY OF SPECIAL ELECTIONS IN 2023 DOES NOT DRIVE THE REMEDY.....	2
POINT II AT THIS LATE STAGE, REPLACEMENT MAPS ALMOST CERTAINLY COULD NOT BE DRAWN IN TIME FOR THE 2022 GENERAL ELECTIONS.....	3
A. Replacement maps likely would not be finalized until this fall, if not later	3
B. Even under the most optimistic timeline, it would be virtually impossible to hold the 2022 elections using replacement maps.....	4
POINT III EVEN IF REPLACEMENT MAPS COULD BE DRAWN IN TIME FOR THE 2022 ELECTIONS, THE REQUIRED OVERHAUL OF THE ELECTION CALENDAR WOULD GENERATE CHAOS.....	7
A. Interfering with the 2022 elections would overwhelm this State’s election infrastructure, confuse voters, and prejudice aspiring candidates for office	7
B. This Court should adhere to the <i>Purcell</i> principle, which warns against judicial interference in impending elections	8
POINT IV THE FEDERAL CONSTITUTION DOES NOT ALLOW THIS COURT TO CHANGE THE CONGRESSIONAL ELECTION CALENDAR.....	12
CONCLUSION.....	13
CERTIFICATE OF COMPLIANCE WITH 22 N.Y.C.R.R. § 202.8-b	14

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Abate v. Mundt</i> , 33 A.D.2d 660, <i>aff'd</i> 25 N.Y.2d 309 (1969), <i>aff'd</i> 403 U.S. 182 (1971)	11
<i>Abbott v. Perez</i> , 585 U.S. ___, 138 S. Ct. 2305 (2018)	2, 11
<i>Alliance for Retired Americans v. Sec'y of State</i> , 240 A.3d 45 (Me. 2020)	10
<i>Badillo v. Katz</i> , 32 N.Y.2d 825 (1973).....	10
<i>Bullock v. Weiser</i> , 404 U.S. 1065 (1972)	11
<i>Caster v. Merrill</i> , 2022 WL 264819 (N.D. Ala. Jan. 24, 2022).....	9
<i>Chicago Bar Ass'n v. White</i> , 386 Ill. App. 3d 955 (1st Dist. 2008)	10
<i>Dean v. Jepsen</i> , 2010 WL 4723433 (Conn. Super. Ct. Nov. 3, 2010)	10
<i>Democratic Nat'l Comm. v. Wis. State Legislature</i> , 141 S. Ct. 28 (2020)	9, 12
<i>Duquette v. Bd. of Supervisors of Franklin County</i> , 32 A.D.2d 706 (3d Dep't 1969)	11
<i>Ely v. Klahr</i> , 403 U.S. 108 (1971)	11
<i>English v. Lefever</i> , 110 Misc. 2d 220 (Sup. Ct. Rockland County 1981).....	11
<i>Fay v. Merrill</i> , 256 A.3d 622 (Conn. 2021)	10
<i>Frank v. Walker</i> , 574 U.S. 929 (2014)	9

Honig v. Board of Supervisors of Rensselaer County,
31 A.D.2d 989 (3d Dep’t), *aff’d*, 24 N.Y.2d 861 (1969) 10

In re Hotze,
627 S.W.3d 642 (Tex. 2020) 10

Jones v. Sec’y of State,
239 A.3d 628 (Me. 2020)..... 10

In re Khanoyan,
637 S.W.3d 762 (Tex. 2022) 10

Kilgarlin v. Hill,
386 U.S. 120 (1967) (*per curiam*) 11

League of United Latin Am. Citizens of Iowa v. Pate,
950 N.W.2d 204 (Iowa 2020) (*per curiam*) 10

League of Women Voters of Fla. v. Detzner,
172 So.3d 363 (Fla. 2015)..... 10

Liddy v. Lamone,
919 A.2d 1276 (Md. 2007) 10

Merrill v. Milligan,
142 S. Ct. 879 (2022)..... 2, 5, 8, 9, 10

Moore v. Harper,
142 S. Ct. 1089 (2022)..... 9, 12

Ohio Democratic Party v. LaRose,
159 N.E.3d 852 (Ohio Ct. App. 10th Dist. 2020) 10

Matter of Orans,
15 N.Y.2d 339 (1965)..... 4

Pokorny v. Bd. of Supervisors of Chenango County,
59 Misc. 2d 929 (Sup. Ct. Chenango County 1969)..... 11

Purcell v. Gonzalez,
549 U.S. 1 (2006) (*per curiam*)8, 9, 10

Quinn v. Cuomo,
69 Misc. 3d 171 (N.Y. Sup. Ct. Queens County 2020) 10

Republican Nat’l Comm. v. Democratic Nat’l Comm.,
140 S. Ct. 1205 (2020) (*per curiam*)..... 9

<i>Republican Party of Pa. v. Boockvar</i> , 141 S. Ct. 1 (2020)	12
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	4
<i>Singh v. Murphy</i> , 2020 WL 6154223 (N.J. Super. Ct. App. Div. Oct. 21, 2020)	10
<i>U.S. Term Limits, Inc. v. Thornton</i> , 514 U.S. 779 (1995)	3
<i>Upham v. Seaman</i> , 456 U.S. 37 (1982)	2
<i>Veasey v. Perry</i> , 574 U.S. 951 (2014)	9
<i>Wells v. Rockefeller</i> , 394 U.S. 542, 547 (1969)	2, 11
<i>Whitcomb v. Chavis</i> , 396 U.S. 1055 (1970)	11
Statutes	
52 U.S.C. § 20302(a)(8)(A)	5, 6
N.Y. ELEC. LAW § 6-136(2)	8
N.Y. ELEC. LAW § 6-154	5
N.Y. ELEC. LAW § 10-108(1)(a)	5, 6
Other Authorities	
22 N.Y.C.R.R. § 202.8-b	14
22 N.Y.C.R.R. § 1250.9(a)	3
N.Y. CONST. art. III, § 5	4, 7
CPLR 5519(a)(1)	3
Jeff Barker, “I say the serenity prayer”: Maryland redistricting court cases keep candidates, election officials in limbo, THE BALTIMORE SUN, Mar. 20, 2022, 2022 WLNR 8848073	12

Tim Henderson, *Redistricting Delays Scramble State Elections*, THE PEW
 CHARITABLE TRUSTS (STATELINE), Mar. 10, 2022, 2022 WL 8066659 12

U.S. CONST. art. I § 4, cl. 1 12

Respondent Carl Heastie, Speaker of the New York State Assembly, along with the Assembly Majority (collectively, the “Speaker”), respectfully submits this memorandum of law in opposition to Petitioners’ supplemental brief on remedies (Dkt. No. 232).

PRELIMINARY STATEMENT

During oral argument on March 3, 2022, this Court correctly observed that “even if ... the maps violated the Constitution and must be redrawn, it is highly unlikely that a new viable map could be drawn and be in place within a few weeks or even a couple of months” (Dkt. No. 231 at 70:6–9). Accordingly, this Court declined to upend the 2022 election calendar established by the Legislature (*id.* at 69:24–25). That decision was correct and should not be disturbed.

Petitioners ask this Court to reconsider its decision and to override various statutory election deadlines (Dkt. No. 232). They primarily argue that special elections in 2023 would violate the Federal Constitution, so any replacement maps therefore must be finalized in time for the 2022 elections. They also assert there is “ample time” before the November 8, 2022 general elections for this Court to render its decision, for the exhaustion of all appeals, for the Legislature to draw new maps, for the resolution of any challenges to those new maps, for primary elections to occur, and for the completion of the many other steps involved in an election cycle (*id.* at 10).

Petitioners’ request is untethered from reality and should be rejected. The 2022 election cycle is already underway, and it would be virtually impossible to finalize new maps in time for the general election. Even if it were somehow possible, doing so would overburden the State’s election infrastructure, confuse voters, and prejudice the candidates.

Further, this Court's authority to order special elections in 2023 is not controlling. If special elections are not an option, the solution is not to generate chaos by shoehorning replacement maps into this year's elections. Rather, any new maps that are required should become effective for the 2024 elections.

ARGUMENT

POINT I

THE POSSIBILITY OF SPECIAL ELECTIONS IN 2023 DOES NOT DRIVE THE REMEDY

In its initial determination as to Petitioners' requested remedy, this Court declined to override New York's political calendar, observing that if the maps were invalidated "it is highly unlikely that a new viable map could be drawn and be in place within a few weeks or even a couple of months" and that new elections could be held in 2023, if necessary (Dkt. No. 231 at 70:6-9).

In their supplemental brief addressing remedies, Petitioners contend that the United States Constitution would preclude a special Congressional election in 2023 (Dkt. No. 232 at 6). On this basis, they ask this Court to upend the statutory electoral calendar, already underway, and by judicial fiat substitute a different, truncated election calendar.

Yet the Supreme Court has made clear that when, as here, an election cycle has commenced and electoral deadlines are near, Congressional elections can proceed even under defective lines, even if that would result in two-year terms for the Congress members so elected. *E.g.*, *Merrill v. Milligan*, 142 S. Ct. 879 (2022); *Abbott v. Perez*, 585 U.S. ___, 138 S. Ct. 2305 (2018); *Upham v. Seaman*, 456 U.S. 37 (1982); *Wells v. Rockefeller*, 394 U.S. 542, 547 (1969) ("Since the 1968 primary election was only three months away on March 20, we cannot say that there was error in permitting the 1968 elections to proceed under the

[redistricting] plan despite its constitutional infirmities”). Consequently, there is no need or warrant to toy with New York’s current electoral calendar.¹

At bottom, whether or not a Congressional election can be held in 2023 does not drive the remedy, and affords no basis for overturning the statutory election calendar. If this Court doubts its authority to order special elections in 2023, the solution is not to force the 2022 elections into new and unknown maps — which, as explained below, would be deeply problematic if not impossible. Instead, any new maps should become effective for the regularly-scheduled elections of 2024.

POINT II

AT THIS LATE STAGE, REPLACEMENT MAPS ALMOST CERTAINLY COULD NOT BE DRAWN IN TIME FOR THE 2022 GENERAL ELECTIONS

A. Replacement maps likely would not be finalized until this fall, if not later

Petitioners suggest that the primary date be moved to August 2022, and they imply that replacement maps could be finalized in a few months (Dkt. No. 232 at 10). Their position ignores reality. This special proceeding will not end when this Court renders a decision on or before April 4, 2022. Should Petitioners somehow prevail — despite the rigorous beyond-a-reasonable-doubt burden they bear, and despite the glaring defects in their experts’ analytics — Respondents would appeal to the Appellate Division, and that appeal would trigger an automatic stay under CPLR 5519(a)(1). Respondents normally would have six months to perfect the appeal. 22 N.Y.C.R.R. § 1250.9(a). Even if the appellate court were to order a shorter timeframe, perfection and briefing would be a weeks-

¹ Notably, Petitioners cite no direct authority to support the alleged prohibition on off-year elections. The case upon which they principally rely, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), involved term limits, not the timing of elections. *Thornton* does not speak to whether, much less hold that, “a state court cannot abridge the term of any duly elected Congressman,” as Petitioners assert (Dkt. No. 232 at 7).

long process. And that appeal could be followed by an appeal to the Court of Appeals.

These appeals would not likely be resolved until June or July 2022, if not later.

Moreover, the end of the appellate process would not be the end of the story. Replacement maps would need to be drawn. And under the State Constitution, the Legislature is entitled to a “full and reasonable opportunity” — not a truncated or rushed opportunity — “to correct the [maps’] legal infirmities.” N.Y. CONST. art. III, § 5; *see also Matter of Orans*, 15 N.Y.2d 339, 352 (1965) (reaffirming that “legislative reapportionment is primarily a matter for legislative consideration and determination”) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)).² The Legislature would need time to consider the specific unconstitutionality identified by the Courts and to enact appropriate remediation. New replacement maps would also need to comply with other State and Federal Constitutional requirements, as well as the Federal Voting Rights Act (*see* Dkt. No. 94 at 12–13 (describing legal requirements applicable to legislative-district maps)). By the time this process is complete, the 2022 elections likely will have come and gone. What’s more, Petitioners might be dissatisfied with the Legislature’s replacement maps and commence yet another special proceeding, thereby starting the cycle over again.

B. Even under the most optimistic timeline, it would be virtually impossible to hold the 2022 elections using replacement maps

A statewide election is not just a day when citizens vote. It involves a complex array of interdependent administrative responsibilities. In fact, as Justice Kavanaugh recognized only last month, “[r]unning elections state-wide is extraordinarily complicated and difficult Those elections require enormous advance preparations by

² Petitioners concede that, if the enacted maps were invalidated due to alleged improper intent, the Legislature is entitled to an “opportunity to enact constitutional replacement maps” (Dkt. No. 25 at 62).

state and local officials, and pose significant logistical challenges.” *Merrill v. Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). New York State’s elections are no exception.

The 2022 political calendar (Dkt. No. 6) proves the point. In a 37-day period, aspiring candidates must collect hundreds of petition signatures to qualify for primary elections; signatures are subject to challenge by adversaries;³ primary ballots are certified, printed, and mailed to absentee voters and to military members at least 45 days before the primaries;⁴ early in-person voting is held for nine days; in-person voting occurs on Primary Day; and votes are counted. This process of certification, printing, mailing, voting, and counting repeats for the general elections, which will be held on November 8, 2022. Not even the first of these many steps can be taken until district maps are finalized.

Considering all these interconnected pieces of an election, it is highly unlikely that 2022 elections can be held under replacement district maps. Suppose (to be unrealistically optimistic) that by June 1 all appeals will have been exhausted, the Legislature will have drawn new maps, and Petitioners will have decided not to challenge those new maps. Assuming the statutory 37-day window to collect petition signatures would begin one week later — thereby giving potential candidates almost no time to consider whether they will run for office in the reconfigured districts, and no time to fundraise or build a campaign — primary elections could not occur until October, as the following table illustrates:

³ N.Y. ELEC. LAW § 6-154.

⁴ N.Y. ELEC. LAW § 10-108(1)(a); 52 U.S.C. § 20302(a)(8)(A).

Thirty-seven day period to collect signatures begins:	June 8
Thirty-seven day period ends:	July 15
Board of Elections certifies primary ballots, after considering challenges to signatures:	Early August
Primary ballots mailed to military members:	Mid-August
Primary election occurs (must be at least 45 days after ballots are sent to military members): ⁵	Early October
Primary-election votes, including absentee votes, counted and tallied:	Mid-October

With a primary election in early October — or even in late September — general-election ballots cannot be certified, printed, and mailed to military members 45 days before the November 8 general election, as is required by law. N.Y. ELEC. LAW § 10-108(1)(a); 52 U.S.C. § 20302(a)(8)(A). Thus, even under Petitioners' best-case, wildly unrealistic scenario, and with a rushed timeline, holding the 2022 elections under new maps would not be feasible.

In the face of these realities, Petitioners insist that the State Constitution somehow requires replacement maps to become effective during this election cycle. While the Constitution sets a 60-day deadline for this Court to render a decision, it does not

⁵ N.Y. ELEC. LAW § 10-108(1)(a); 52 U.S.C. § 20302(a)(8)(A).

require replacement maps to become effective at any particular time. N.Y. CONST. art. III, § 5. The Constitution does allow the Legislature to prescribe “reasonable regulations” governing review of redistricting maps by the Supreme Court. *Id.* Thus, arguably, the Legislature could have imposed a timing requirement for new maps. But it did not. And again, nowhere does the Constitution require new redistricting maps to become effective immediately, notwithstanding the impossibility or impracticality of such a scenario. The 60-day limit still serves an important purpose: it helps ensure that State Supreme Court review will proceed quickly so that all appeals, efforts by the Legislature to re-draw invalidated maps, and challenges to the re-drawn maps will conclude in time for the following election cycle. For these reasons, this Court should decline Petitioners’ invitation to rewrite the Constitution.

POINT III

EVEN IF REPLACEMENT MAPS COULD BE DRAWN IN TIME FOR THE 2022 ELECTIONS, THE REQUIRED OVERHAUL OF THE ELECTION CALENDAR WOULD GENERATE CHAOS

A. Interfering with the 2022 elections would overwhelm this State’s election infrastructure, confuse voters, and prejudice aspiring candidates for office

As explained above, finalizing replacement maps in time for this year’s elections would be virtually impossible. To have any chance of doing so, this Court would need to override statutory election deadlines and lop off several months from the election calendar. Even if such a truncated election cycle were possible, it would create a chaotic, confused, and rushed election that would cause immeasurable harm.

For instance, Petitioners’ proposed overhaul of the election calendar would prejudice candidates and voters. Aside from the deadlines detailed above, elections obviously also entail fundraising and campaigning. Candidates need time to introduce

themselves to voters and potential donors, who likewise need time to consider the various candidates vying for their support. This process cannot begin until final district maps are in place: before then, candidates do not know whom to court, and voters and donors do not know which candidates to consider. More fundamentally, until district boundaries are set, potential candidates may not even know whether they will run for office. After all, the location of district lines could mean the difference between running against a powerful incumbent or running to fill an empty seat.

Petitioners' proposal also ignores that the 2022 elections are already underway. Aspiring candidates began collecting petition signatures on March 1, and likely continued doing so in reliance on this Court's March 3 pronouncement that the district lines would not change from those set by the 2022 enacted maps. Collecting signatures requires investments of time and money, which would go to waste if the maps were drawn a second time for 2022, as candidates must gather signatures from voters who reside in the relevant district. N.Y. ELEC. LAW § 6-136(2). And candidates have been campaigning in their new districts; swapping those candidates for others due to changed district maps would confuse voters. Campaign funds would also be wasted, inasmuch as they were spent on outreach in regions that are no longer part of the candidate's district.

Thus, in addition to overburdening the election infrastructure, interference with the 2022 elections would confuse voters and prejudice candidates. Any hypothetical change to the district maps should therefore take effect in 2023 or 2024.

B. This Court should adhere to the *Purcell* principle, which warns against judicial interference in impending elections

It is well settled that courts should not “enjoin a state’s election law in the period close to an election.” *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring) (citing

Purcell v. Gonzalez, 549 U.S. 1 (2006) (*per curiam*)). The so-called *Purcell* principle “reflects a bedrock tenet of election law: 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*, 142 S. Ct. at 880–81 (Kavanaugh, J., concurring).

In *Merrill*, for instance, a Federal District Court determined that Alabama’s redistricting maps likely violated Federal law. *Caster v. Merrill*, 2022 WL 264819, at *2 (N.D. Ala. Jan. 24, 2022). That Court therefore enjoined the State from holding Congressional elections under the likely-illegal maps, even though primary elections were scheduled to begin five months later, on May 24, 2022. *Id.* The United States Supreme Court granted a stay of that injunction, which allowed the election to proceed under the challenged maps. *Merrill*, 142 S. Ct. at 879. Justice Kavanaugh noted that the District Court’s injunction was “a prescription for chaos.” *Id.* at 880. As would be true here under Petitioners’ proposal, candidates and voters “now do not know who will be running against whom Filing deadlines need to be met, but candidates cannot be sure what district they need to file for [S]ome potential candidates do not even know which district they live in.” *Id.*

Last month’s *Merrill* decision is no outlier — the United States Supreme Court has often rejected attempts to change the rules of impending elections, as Petitioners ask this Court to do here. *E.g.*, *Moore v. Harper*, 142 S. Ct. 1089 (2022) (Mem); *Democratic Nat’l Comm. v. Wis. State Legislature*, 141 S. Ct. 28 (2020) (Mem); *Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct. 1205 (2020) (*per curiam*); *Veasey v. Perry*, 574 U.S. 951 (2014) (Mem); *Frank v. Walker*, 574 U.S. 929 (2014) (Mem).

The *Purcell* principle is based on common sense, and this Court should adopt it. Although the principle was developed by the Federal Courts, the key reasons animating it apply everywhere. No matter the Court, interference in an impending election creates chaos and must be avoided. Consequently, the highest Courts of several States have recently applied *Purcell* without jurisdictional qualms. *E.g.*, *In re Khanoyan*, 637 S.W.3d 762, 764 (Tex. 2022); *League of United Latin Am. Citizens of Iowa v. Pate*, 950 N.W.2d 204, 215–16 (Iowa 2020) (*per curiam*); *In re Hotze*, 627 S.W.3d 642, 645 n.18 (Tex. 2020); *Alliance for Retired Americans v. Sec’y of State*, 240 A.3d 45, 54 (Me. 2020); *Jones v. Sec’y of State*, 239 A.3d 628, 631 (Me. 2020); *see also Fay v. Merrill*, 256 A.3d 622 (Conn. 2021); *Ohio Democratic Party v. LaRose*, 159 N.E.3d 852, ¶ 82 (Ohio Ct. App. 10th Dist. 2020); *Singh v. Murphy*, 2020 WL 6154223, at *14–15 (N.J. Super. Ct. App. Div. Oct. 21, 2020); *League of Women Voters of Fla. v. Detzner*, 172 So.3d 363, 387 (Fla. 2015); *Liddy v. Lamone*, 919 A.2d 1276, 1287–88 (Md. 2007); *Chicago Bar Ass’n v. White*, 386 Ill. App. 3d 955, 961 (1st Dist. 2008); *Quinn v. Cuomo*, 69 Misc. 3d 171, 177–78 (N.Y. Sup. Ct. Queens County 2020); *Dean v. Jepsen*, 2010 WL 4723433, at *7 (Conn. Super. Ct. Nov. 3, 2010).⁶

Relatedly, New York State Courts have allowed upcoming elections to proceed under unlawful maps. For instance, in *Badillo v. Katz*, the Court of Appeals allowed New York City local elections to proceed, even though the district maps violated State law. 32 N.Y.2d 825, 827 (1973). Similarly, in *Honig v. Board of Supervisors of Rensselaer County*, the

⁶ Petitioners assert that “[u]nder *Purcell*, it is permissible ‘for a State on its own to’ modify ‘its election laws close to a State’s elections,’” by selectively quoting *Merrill*, 142 S. Ct. at 881 (Dkt. No. 232 at 13). Their characterization of *Merrill* is misleading. The full quote is as follows: “It is one thing for a State on its own to toy with its election laws close to a State’s elections. But it is quite another thing for a federal court to sweep in and re-do a State’s election laws in the period close to an election.” *Merrill*, 142 S. Ct. at 881. This language suggests (correctly) that respect for state sovereignty is an additional reason why Federal Courts should not disrupt upcoming elections. And as State Legislatures enact electoral calendars in the first place, the New York State Legislature should be the institution responsible for altering any election deadlines.

Court of Appeals affirmed the Appellate Division's decision not to disturb upcoming elections, despite invalidating the subject redistricting plan. 31 A.D.2d 989 (3d Dep't), *aff'd*, 24 N.Y.2d 861 (1969). Other New York State Courts have reached similar conclusions. *E.g.*, *Duquette v. Bd. of Supervisors of Franklin County*, 32 A.D.2d 706 (3d Dep't 1969); *English v. Lefever*, 110 Misc. 2d 220, 230 (Sup. Ct. Rockland County 1981); *Pokorny v. Bd. of Supervisors of Chenango County*, 59 Misc. 2d 929 (Sup. Ct. Chenango County 1969); *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).

Likewise, the United States Supreme Court has recognized that “if a [redistricting] plan is found to be unlawful very close to the election date, the only reasonable option may be to use the plan one last time.” *Abbott v. Perez*, 138 S. Ct. at 2324. Accordingly, the Court has allowed upcoming elections to proceed under unconstitutional maps for practical reasons. *E.g.*, *Bullock v. Weiser*, 404 U.S. 1065 (1972) (Mem); *Ely v. Klahr*, 403 U.S. 108, 114–15 (1971); *Whitcomb v. Chavis*, 396 U.S. 1055 (1970); *Wells v. Rockefeller*, 394 U.S. 542, 547 (1969); *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967) (*per curiam*).

As has been all too common throughout this lawsuit, Petitioners' arguments rely primarily on out-of-state caselaw (Dkt. No. 232 at 11–12). Specifically, they point out that courts in Maryland, Pennsylvania, and North Carolina moved their States' election deadlines earlier this year (*id.*). But given the controlling New York State authorities above — including binding precedent from the Court of Appeals — decisions from other States simply have no weight here. In fact, other States' experiences demonstrate why New York's 2022 elections should continue as scheduled under the existing maps. When Courts have compressed the election calendars, rushed the re-drawing of district maps, or both, chaos

and confusion have ensued.⁷ This Court should spare New York a similar fate, adhere to its March 3, 2022 decision, and decline to disturb the ongoing 2022 elections.

POINT IV

THE FEDERAL CONSTITUTION DOES NOT ALLOW THIS COURT TO CHANGE THE CONGRESSIONAL ELECTION CALENDAR

Under the Federal Constitution's Elections Clause, "[t]he Times, 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 (emphasis added). "[I]f [that] language ... is taken seriously, there must be *some* limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for the conduct of federal elections." *Moore*, 142 S. Ct. at 1091 (Alito, J., concurring) (emphasis in original). The Elections Clause "would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election." *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 1 (2020) (statement of Alito, J.).

The Elections Clause's plain text prohibits this Court from erasing the Congressional-election calendar enacted into law by New York's Legislature. And because this Court cannot change the Congressional-election calendar, it should not change the calendar governing the State Senate's elections, either: interfering with one election but not the other would create even more prejudice than interfering with both.

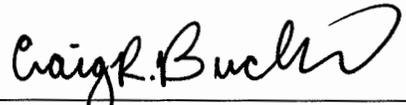
⁷ See, e.g., Jeff Barker, "I say the serenity prayer": Maryland redistricting court cases keep candidates, election officials in limbo, THE BALTIMORE SUN, Mar. 20, 2022, 2022 WLNR 8848073; Tim Henderson, *Redistricting Delays Scramble State Elections*, THE PEW CHARITABLE TRUSTS (STATELINE), Mar. 10, 2022, 2022 WL 8066659.

CERTIFICATE OF COMPLIANCE WITH 22 N.Y.C.R.R. § 202.8-b

This memorandum of law complies with 22 N.Y.C.R.R. § 202.8-b because it contains 3,986 words, excluding the caption, table of contents, table of authorities, and signature block. The word count was generated by the word-processing system used to prepare this document.

Dated: Buffalo, New York
March 21, 2022

PHILLIPS LYTTLE LLP

By:  _____

Craig R. Bucki
Steven B. Salcedo
Rebecca A. Valentine

Attorneys for Respondent
Speaker of the Assembly Carl Heastie
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-8400
cbucki@phillipslytle.com
ssalcedo@phillipslytle.com
rvalentine@phillipslytle.com

Doc #10293712