*To Be Argued By:*
Misha Tseytlin
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# Court of Appeals

STATE OF NEW YORK

ANTHONY S. HOFFMANN, MARCO CARRIÓN, COURTNEY GIBBONS, LAUREN FOLEY, MARY KAIN, KEVIN MEGGETT, CLINTON MILLER, SETH PEARCE, VERITY VAN TASSEL RICHARDS, and NANCY VAN TASSEL,

*Petitioners-Respondents,*

For an Order and Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules

*against*

THE NEW YORK STATE INDEPENDENT REDISTRICTING COMMISSION, INDEPENDENT REDISTRICTING COMMISSION CHAIRPERSON KEN JENKINS, INDEPENDENT REDISTRICTING COMMISSIONER IVELISSE CUEVAS-MOLINA, INDEPENDENT REDISTRICTING COMMISSIONER ELAINE FRAIZER,

*Respondents-Respondents,*

*(Caption Continued on the Reverse)*

## BRIEF FOR INTERVENORS-RESPONDENTS-APPELLANTS

TROUTMAN PEPPER HAMILTON SANDERS LLP
*Attorneys for Intervenors-Respondents-Appellants*
875 Third Avenue
New York, New York 10022
212-704-6000
misha.tseytlin@troutman.com

*Of Counsel:*
Misha Tseytlin

*Date Completed: September 18, 2023*

INDEPENDENT REDISTRICTING COMMISSIONER ROSS BRADY, INDEPENDENT REDISTRICTING COMMISSIONER JOHN CONWAY III, INDEPENDENT REDISTRICTING COMMISSIONER LISA HARRIS, INDEPENDENT REDISTRICTING COMMISSIONER CHARLES NESBITT, and INDEPENDENT REDISTRICTING COMMISSIONER WILLIS H. STEPHENS,

*Respondents-Appellants,*

*and*

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,

*Intervenors-Respondents-Appellants.*

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## PRELIMINARY STATEMENT

On January 24, 2022, the Independent Redistricting Commission ("IRC") announced that it would violate its constitutional duty to send the Legislature a second-round congressional map, and the deadline for the IRC to act expired the next day. The Legislature then purported to adopt its own congressional map without receiving the mandatory second-round IRC map, in violation of the Constitution. The same day that the Governor signed the Legislature's map into law, Intervenors-Respondents-Appellants ("Intervenors") filed suit, challenging that map as (1) violating the mandatory IRC/Legislature procedures for redistricting, and (2) substantively unconstitutional as a partisan gerrymander. This Court ultimately agreed with Intervenors in *Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022), holding, as most relevant here, that the IRC's failure to send to the Legislature a second-round congressional map rendered the resulting map procedurally unconstitutional, *id.* at 516–17. As a remedy, this Court directed the Steuben County Supreme Court to "order the adoption of . . . a redistricting plan" under Article III, Section 4(e) of the New York Constitution, given that the procedural unconstitutionality was, "at th[at] juncture, incapable of a legislative cure" because "[t]he deadline in the Constitution for the IRC to submit a second set of maps has long since passed." *Id.* at 523. The Steuben County Supreme Court complied with this directive, adopting a final congressional map on May 21, 2022, and then modifying that map on June 2, 2022.

On June 28, 2022, Petitioners—after failing in multiple gambits to undermine the *Harkenrider* map, including one of the Petitioners bringing a federal lawsuit so meritless that the U.S. District Court for the Southern District of New York rejected it as an assault on "[f]ree, open, rational elections" and "respect for the courts," *see infra* pp.21–22—filed a mandamus action challenging the IRC's January 2022 failure to execute its constitutional duties. As the core relief sought in this lawsuit, Petitioners asked the Albany County Supreme Court to order the IRC to submit a second-round congressional map to the Legislature, so that the Legislature could adopt a new congressional map, which would replace the *Harkenrider* map.

This lawsuit is legally defective in four independently fatal respects.

*First*, Petitioners' lawsuit is plainly untimely, including under CPLR 217(1)'s four-month statute of limitations. Petitioners did not file their mandamus action for more than five months after the IRC violated its constitutional duty to submit a second-round map to the Legislature in January 2022. Since CPLR 217(1) provides a four-month limitations period for mandamus lawsuits, Petitioners' lawsuit fails.

*Second*, Petitioners' requested relief—adoption of a replacement map through the IRC/Legislature process—violates Article III, Section 4(e)'s prohibition on mid-decade redistricting. Section 4(e)'s first sentence requires courts to "adopt[ ]" a congressional map for the State when the IRC/Legislature process fails to do so. That map then governs state elections for a decade, until the next census, subject to

only one exception: a court may order "modifi[cations]" to that map to remedy a violation of law. The Steuben County Supreme Court adopted the entirely lawful *Harkenrider* map under Section 4(e), so it governs for a decade. Petitioners ask the courts to order the adoption of a map that will replace the *Harkenrider* map, which violates Section 4(e)'s ban on mid-decade redistricting. Further, Petitioners' request for the adoption of a replacement map violates Section 4(e)'s second sentence, which permits only a "modifi[cation]" of a map "adopt[ed]" under the first sentence.

*Third*, Petitioners' requested mid-decade redistricting is also impermissible because it contravenes this Court's holding in *Harkenrider* that only a court can adopt a map to remedy a violation of the IRC/Legislature process after the constitutional deadlines for IRC action have passed. In crafting the remedy for the IRC's and Legislature's violations of the Constitution's mandatory redistricting process, this Court explained that a judicially adopted map under Section 4(e) was then the only permissible remedy for the breakdown of the IRC/Legislature process because the violation was, "at this juncture, incapable of a legislative cure" since "[t]he deadline in the Constitution for the IRC to submit a second set of maps has long since passed." *Harkenrider*, 38 N.Y.3d at 523. This holding controls, and Petitioners' belated challenge fails for the same reason—the constitutional deadline for the IRC to submit a second-round map has clearly "long since passed." *Id.*

*Finally*, even if Petitioners' lawsuit was timely and their requested relief constitutionally permissible, they brought it in the wrong court. Petitioners claim they want the Albany County Supreme Court to "modify" the *Harkenrider* map under Section 4(e). But any request to modify a court order must be brought in the court that issued the order, which is the Steuben County Supreme Court.

In all, Petitioners' untimely Petition is an attack on both the New York Constitution's prohibition against mid-decade redistricting and this Court's decision in *Harkenrider*. As the League of Women Voters has explained, Petitioners' requested relief "undermines" the 2014 Amendments and "reduces the[ir] effectiveness . . . as an instrument for realizing the people's goal of reducing, if not eliminating, racial and partisan gerrymandering." *Amicus Curiae* Br. of League of Women Voters of N.Y. at 4–5, No.APL-2023-00121 (Sept. 8, 2023) ("LWV Br."). Other good government groups similarly have critiqued this lawsuit's underpinnings, with the Executive Director of Common Cause New York explaining that there is "absolutely no justification for re-opening the congressional maps other than to try and give the Legislature more influence over the maps." Susan Arbetter, *Common Cause New York Calls Redrawing Congressional Maps Before 2024*

*'Politically Inappropriate'*, Spectrum Local News (Apr. 14, 2023).[1] Just last Term, this Court enforced the 2014 Anti-Gerrymandering Amendments, in a decision with which not all Judges of this Court agreed. Approving Petitioners' gambit for a mid-decade gerrymander now would undermine the People's faith in the neutral enforcement of those Amendments, cause needless confusion by authorizing the replacement of the *Harkenrider* map with a new map, and undermine the core principles of *stare decisis* and respect for the rule of law.

## QUESTIONS PRESENTED

I. Whether Petitioners' Article 78 Petition is untimely, having been filed over four months after the IRC refused to draft second-round redistricting maps.

Answer of the Supreme Court: The Albany County Supreme Court erred in holding that this lawsuit was timely because Petitioners' claims were not ripe until May 20, 2022,[2] when the *Harkenrider* map went into effect. R.16–17.

Answer of the Appellate Division: The Appellate Division majority incorrectly held that the Petition was timely because the Petitioners' claims "accrued

[1] Available at https://spectrumlocalnews.com/nys/central-ny/politics/2023/04/14/common-cause-n-y--calls-redrawing-congressional-maps--politically-inappropriate-.

[2] The Albany County Supreme Court referred to the Steuben County Supreme Court's initial order issuing its final map, before modifying it to correct certain block-on-border violations, as having gone into effect on "May 20, 2022." R.17. However, although that order was signed on May 20, 2022, it was not filed with the clerk, received by NYSCEF, and issued to the parties and public until May 21, 2022. *Harkenrider* No.670 at 5. Thus, Intervenors refer to that order as having been issued and entered on May 21, 2022.

when the 2021 legislation was deemed unconstitutional," which occurred "on March 31, 2022." R.413–14 (citation omitted). The two dissenting Justices concluded that Petitioners' claims accrued on either January 24, 2022, when the IRC publicly announced it would not submit second-round maps to the Legislature, or on January 25, 2022, when the IRC's deadline to do so expired, meaning their filing of the mandamus petition more than five months later, on June 28, 2022, was untimely under CPLR 217(1). R.419–21 (Pritzker, J., dissenting).

II. Whether Petitioners' requested relief violates N.Y. Const. art. III, § 4(e)'s prohibition against mid-decade redistricting.

Answer of the Supreme Court: The Supreme Court concluded that because Section 4(e) permits a court "to order the adoption of . . . a redistricting plan as a remedy for a violation of law," N.Y. Const. art. III, § 4(e), the Steuben County Supreme Court properly adopted its congressional map consistent with the Constitution and that this map must stay "in full force and effect, until redistricting takes place again following the 2030 federal census." R.18–19.

Answer of the Appellate Division: The Appellate Division majority did not engage with Article III, Section 4(e)'s text, instead concluding that the IRC had "an indisputable duty" to submit second-round maps, and so Petitioners were entitled to adoption of a replacement map. R.416–17. The dissenting Justices concluded that Petitioners' requested remedy went well beyond a "modified" map, rendering inapplicable the constitutional provisions allowing for IRC involvement or a court-

ordered change to the existing map, *see* R.424 (Pritzker, J., dissenting), and that, additionally, Section 4(e) foreclosed Petitioners' requested relief because "the Constitution requires that such court-ordered maps remain in place until after the next census," R.421–22 (Pritzker, J., dissenting).

III. Whether Petitioners' requested relief violates N.Y. Const. art. III, § 4(b) because the constitutional deadline for IRC action has passed.

Answer of the Supreme Court: The Albany County Supreme Court correctly held that "there is no authority for the IRC to issue a second redistricting plan after" the constitutional deadline for IRC action. R.18.

Answer of the Appellate Division: The Appellate Division majority acknowledged the expiration of the constitutional deadline for the IRC to submit second-round maps, but failed to follow this Court's holding because doing so would "leave[ ] petitioners with no remedy" and "would render meaningless the distinct constitutional command that the IRC create a second set of maps." R.416–17. The dissenting Justices concluded that because the IRC "failed" to complete its duty to submit second-round maps to the Legislature, "it was necessary to resort to Plan B, the safety valve designed to remedy political stalemate, which took the form of a judicially drawn congressional map." R.425 (Pritzker, J., dissenting).

IV. If Petitioners' Article 78 Petition does seek a "modifi[cation]" of the Steuben County Supreme Court map, as Petitioners now claim, whether this is an impermissible collateral attack brought in the wrong court.

Answer of the Supreme Court: The Albany County Supreme Court erred in holding, based upon principles relevant only to *res judicata*, that this lawsuit is not a collateral attack on the Steuben County Supreme Court's judgment. R.15–16.

Answer of the Appellate Division: The Appellate Division majority incorrectly concluded that "this proceeding does not constitute a collateral attack on th[e Steuben County Supreme Court's] determination" because the Appellate Division was addressing "a discrete and previously unaddressed issue in a proceeding brought by different parties." R.417 n.5. The dissenting Justices concluded that "the judicially adopted remedy in *Harkenrider* was authorized and . . . repaired the procedural and substantive infirmities," thereby implicitly concluding that any modification of the *Harkenrider* map would be a collateral attack on the Steuben County Supreme Court's judgment. *See* R.423–24 (Pritzker, J., dissenting).

## JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal as of right under CPLR 5601(a), because in the Appellate Division "there [was] a dissent by at least two justices on a question of law in favor of the party taking such appeal," CPLR 5601(a), which "brings up for review all issues that the Appellate Division decided adversely to the

appellant, even those on which no Appellate Division justice dissented," *Reis v. Volvo Cars of N. Am.*, 24 N.Y.3d 35, 41 (2014) (citation omitted).

## NO RELATED LITIGATION

Pursuant to Court of Appeals Rule of Practice 500.13(a), Intervenors state that they are unaware of any other litigation related to this appeal.

## BACKGROUND

### A. Legal Background

#### 1. The 2014 Anti-Gerrymandering Amendments Set Up An Exclusive Redistricting Process That Requires The IRC And Legislature To Work Together To Adopt A Redistricting Map On A Specific Schedule At The Start Of The Decade

The People of New York forcefully rejected partisan gerrymandering in 2014, amending Article III, Sections 4 and 5 of the New York Constitution, and adding a new Section 5-b to the same Article (collectively, "the 2014 Amendments"). The 2014 Amendments lay out a mandatory process that "*shall govern* redistricting in this state," N.Y. Const. art. III, § 4(b), (e) (emphasis added), with specific requirements and a definite timeline for completing each step in the process, *see id.* §§ 4(b), (c), 5-b(a), (e). That process begins with the establishment and funding of the IRC "[o]n or before February first of each year ending with a zero" following the release of each decennial census. *Id.* § 5-b(a), (e). The IRC must hold certain public hearings, and, "[a]t least thirty days prior to the first public hearing and in any event no later than September fifteenth of the year ending in one or as soon as

practicable thereafter, the [IRC] shall make widely available to the public, in print form and using the best available technology, its draft redistricting plans, relevant data, and related information." *Id.* § 4(c)(6). The IRC then must hold at least 12 public hearings, with at least one in each of the cities of "Albany, Buffalo, Syracuse, Rochester, and White Plains," and in each of the counties of "Bronx, Kings, New York, Queens, Richmond, Nassau, and Suffolk." *Id.*

After the conclusion of those hearings, the IRC "shall prepare a redistricting plan to establish senate, assembly, and congressional districts," and must submit those maps to the Legislature "as soon as practicable," but in no event "later than January fifteenth." *Id.* § 4(b). The Legislature must then vote on those maps "without amendment." *Id*. If the Legislature rejects the maps, or if the Governor vetoes, then the process returns to the IRC. *Id.* "Within fifteen days" of notification of the Legislature's rejection, but "in no case later than February twenty-eighth," the IRC must then "prepare and submit" a second round of maps to the Legislature. *Id*. At this point, the Legislature must vote on those second-round maps, again "without amendment." *Id.*; *Harkenrider*, 38 N.Y.3d at 510. Only then, if the Legislature rejects the IRC's second-round maps, or if the Governor vetoes the second-round maps, can the Legislature add "amendments" to the IRC's proposed maps and vote on the amended maps. N.Y. Const. art. III, § 4(b); N.Y. Legis. Law § 93(1).

### 2. Article III, Section 4(e) Provides That The Judiciary Must "Adopt[ ]" A Replacement Map If The IRC/Legislature Process Fails To Achieve A Map By The Constitutional Deadline, While Also Mandating That Such A Court-Adopted Map Stay In Place For The Full Decade

Article III, Section 4(e) of the 2014 Amendments authorizes courts to "adopt[ ]" redistricting maps in certain circumstances, while also prohibiting mid-decade redistricting. The first sentence of Section 4(e) mandates that "[t]he process for redistricting congressional [ ] districts established by this section and sections five and five-b of this article"—meaning the IRC/Legislature process above—"shall govern redistricting in this state except to the extent that a court is *required* to order the *adoption of*, or changes to, a redistricting plan as a remedy for a violation of law." N.Y. Const. art. III, § 4(e) (emphases added). Thus, as relevant here, if the IRC/Legislature process fails to generate a final map at the start of the decennial period, whether because of the failure of the IRC or legislative deadlock or gubernatorial veto, then a court is "required" to "adopt[ ]" a constitutionally compliant redistricting map. *Id.* Section 4(e)'s second sentence then provides that "[a] reapportionment plan and the districts contained in *such plan*"—that is, the plan adopted under the process described above, including, as relevant here, one "adopt[ed]" by a court as described in the first sentence—"shall be in force until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero unless *modified* pursuant to court order." *Id.* (emphases added).

Article III, Section 4(e)'s ban on mid-decade redistricting reinforces the 2014 Amendments' prohibition against partisan gerrymandering. Mid-decade redistricting is a notorious practice that is used for partisan gerrymandering, with certain legislatures redistricting in the middle of a decade "with the sole purpose of achieving a [partisan] congressional majority," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 417 (2006) ("*LULAC*"), "to benefit the political party that most recently received unified control of the state government," Patrick Marecki, *Mid-Decade Congressional Redistricting in a Red and Blue Nation*, 57 Vand. L. Rev. 1935, 1961 (2004). In one infamous mid-decade redistricting orchestrated by former House Majority Leader Tom DeLay, Texas Republicans redistricted Texas's congressional map, flipping it from a 17-15 Democratic majority to a 21-11 Republican majority in Texas's congressional delegation. Appellants' Br. on the Merits, *LULAC*, 2006 WL 53996, at *17–18 (U.S. Jan. 10, 2006).

Congress, for the last decade, has unsuccessfully attempted to ban this practice with the Coretta Scott King Mid-Decade Redistricting Prohibition Act, which would serve to preclude any "State which has been redistricted in the manner provided by law" from being "redistricted again until after the next apportionment of Representatives," unless a court finds that the existing map is, in some way, illegal.

H.R.42, 118th Cong. (2023).[3] But this federal ban would be unnecessary for New York, as the People have already outlawed the practice through the New York Constitution, requiring that any "reapportionment plan and the districts contained in such plan shall be in force until the effective date of a plan based upon the subsequent federal decennial census," and only authorizing judicial "modifi[cation]" of that map to address any legal infirmities in the map. N.Y. Const. art. III, § 4(e).

### B. The *Harkenrider* Litigation

#### 1. The IRC Violates Its Constitutional Obligation To Submit A Second-Round Map To The Legislature, But The Legislature Purports To Adopt A Map Anyway

In 2020, the decennial census and corresponding redistricting process presented the State's first opportunity to apply the 2014 Amendments' redistricting scheme. *Harkenrider*, 38 N.Y.3d at 504. The IRC initially abided by this process in 2021 by holding public hearings to gather input on its map-drawing process from citizens across the State. *Id.* But the IRC's negotiation process began to break down along party lines. *Id.* Unable to agree on any consensus map, the majority-appointed and minority-appointed party delegations opted instead to each submit an initial redistricting plan to the Legislature. *Id.* On January 10, 2022, the Legislature

[3] Available at https://www.congress.gov/bill/118th-congress/house-bill/42. This same bill has been regularly introduced since 2013. H.R.134, 117th Cong. (2021); H.R.44, 116th Cong. (2019); H.R.75, 114th Cong. (2015); H.R.2490, 113th Cong. (2013).

rejected both plans. 2021–2022 N.Y. Reg. Sess. Leg. Bills A.8587, A.8588, A.8589, A.8590, S.7631, S.7632, S.7633, S.7634; *see also Harkenrider*, 38 N.Y.3d at 504.

The Legislature's rejection of these plans sent the redistricting process back to the IRC to draft and submit a second set of revised maps within 15 days of the Legislature's rejection—January 25, 2022. N.Y. Const. art. III, § 4(b); *Harkenrider*, 38 N.Y.3d at 504. On January 24, one day before the constitutional deadline, the IRC announced that it would not submit maps to the Legislature. *Harkenrider*, 38 N.Y.3d at 504–05. Thus, the IRC violated its constitutional duty to submit second-round redistricting plans within 15 days on January 25. N.Y. Const. art. III, § 4(b).

The Legislature's Democratic majority had hoped for just such a deadlock, and attempted to build in a work-around that would permit it to enact gerrymandered—first via unsuccessful constitutional amendment and later via unconstitutional legislation. *Harkenrider*, 38 N.Y.3d at 516–17. In 2021, the Legislature referred to the People a constitutional amendment that would alter Article III, Section 4(b) to allow the Legislature to introduce its own maps if "the [IRC] fails to vote on a redistricting plan and implementing legislation by the required deadline." *See 2021 Statewide Ballot Proposals*, New York State Board of Elections.[4] Following New Yorkers' rejection of this constitutional amendment,

[4] Available at https://www.elections.ny.gov/2021BallotProposals.html.

Governor Hochul signed into law a statute passed by the Legislature to achieve the same result. *Harkenrider*, 38 N.Y.3d at 516–17. That legislation operated just like the failed amendment, purporting to permit the Legislature to enact its own maps "if the [IRC] does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan" to the Legislature. L.2021, c. 633, § 1.

Relying on this unconstitutional legislation, the Legislature's Democratic majority purported to adopt its own congressional redistricting plan after the IRC's announcement, *see* 2021–2022 N.Y. Reg. Sess. Leg. Bills S.8196, A.9039-A (as technically amended by A.9167), even though the Legislature did not have authority to adopt any map under the 2014 Amendments, *see Harkenrider*, 38 N.Y.3d at 504–05, 508–17. The map was also 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); *see Harkenrider*, 38 N.Y.3d at 518–20. Governor Hochul signed this unconstitutional congressional redistricting plan into law on February 3, 2022. *Harkenrider*, 38 N.Y.3d at 505.

### 2. After The IRC/Legislature Process Breaks Down In 2022, The *Harkenrider* Intervenors Bring A Lawsuit Seeking A Court-Adopted Map Under Section 4(e)

On the same day that Governor Hochul signed the Democrats' map into law, Intervenors in this case brought a lawsuit challenging the congressional map in the

Steuben County Supreme Court. *See Harkenrider* No.1 at 1.[5] Intervenors first explained that the existing congressional map was now unconstitutional because it was adopted after the 2010 decennial census, *Harkenrider* No.18 at 16–19, 75–77, and then challenged the Legislature's 2022 map on both procedural and substantive grounds. Intervenors argued that the map violated the constitutionally mandated procedure because the IRC had "not adopt[ed] and introduce[d] second-round maps to the Legislature within 15 days," which deprived the Legislature of authority to act. *See id.* at 73–75, N.Y. Const. art. III, §§ 4, 5. Because the map was unconstitutional and now incapable of any IRC/legislative cure, Intervenors argued that the only remedy was for the courts to draw a remedial map. *Harkenrider* No.18 at 75. Intervenors also argued that the Legislature's map substantively violated Article III, Section 4(c)(5) as a partisan gerrymander. *See id.* at 77–78. If the court held that the Legislature's plan substantively, but not procedurally, violated the constitution, Intervenors explained that the Legislature would have one opportunity to adopt a lawful map. *Id.* at 82; *see also* N.Y. Const. art. III, § 5.

[5] All citations to e-filings in *Harkenrider v. Hochul*, Index No.E2022-0116CV (Steuben Cnty. Sup. Ct.), may be found at https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=kmywkTvfcaoSsQ66zseQsg==&display=all. Such documents are cited as "*Harkenrider* No.__." When the Albany County Supreme Court dismissed Petitioners' Amended Petition, it considered and incorporated the relevant efilings from *Harkenrider* into the record in this case. R.19 n.12.

On March 31, 2022, the Steuben County Supreme Court issued its decision in favor of Intervenors on both procedural and substantive constitutional grounds. *Harkenrider* No.243 at 8–14. On appeal, the Fourth Department affirmed the map's substantive constitutional violation but reversed the Steuben County Supreme Court's finding of a procedural violation. *Harkenrider v. Hochul*, 204 A.D.3d 1366, 1366–75 (4th Dep't 2022). Holding that the Legislature had one chance to correct the plan's substantive defects, as Intervenors had argued would be the case if they lose on their constitutional procedure argument, the Fourth Department granted the Legislature "until April 30, 2022 to enact a constitutional replacement for the congressional map." *Id.* at 1375.

### 3. This Court Orders The Steuben County Supreme Court To "Adopt" A Redistricting Map Under Section 4(e)'s First Sentence Because "The Deadline In The Constitution For The IRC To Submit A Second Set Of Maps Has . . . Passed"

Following the parties' cross-appeals, this Court accepted supplemental letter briefs and then held oral argument. At that oral argument, after counsel for the Speaker of the Assembly acknowledged that the members of the IRC "did not do their job," Oral Argument Transcript at 6, *Harkenrider v. Hochul*, No.60 (N.Y. Apr. 26, 2022) ("*Harkenrider* Tr."),[6] this Court probed counsel as to alternative remedies, including a remedy focused on the IRC. Judge Rivera asked whether the proper

[6] Available at https://www.nycourts.gov/ctapps/arguments/2022/Apr22/Transcripts/042622-60-Oral%20Argument-Transcript.pdf.

remedy for the constitutional procedure violation was to "sue the IRC" to force it "to comply with its constitutional duty." *Id.* at 33. Judge Cannataro continued this inquiry, asking whether one could sue to "compel [the IRC] to act in accordance with their constitutional mandate." *Id.* at 46. In response to these lines of questioning, counsel for Intervenors explained that these remedies were nonstarters now because the "constitutional time frame" for IRC action had passed. *Id.* at 40. Similarly, counsel for the Speaker acknowledged that interested voters could have sued the IRC in January 2022, but that "the time" for doing so had "passed." *Id.* at 46. When Judge Troutman questioned whether "the remedy [should] match the error," counsel for Intervenors explained that the "remedy" must be "the one the Constitution provides," namely, a judicially adopted map. *Id.* at 41.

In its decision, this Court concluded that the Legislature's congressional map was procedurally and substantively unconstitutional, and—most relevant here—agreed with Intervenors' remedial arguments. The map "was procedurally unconstitutional" because the Constitution's "constitutionally mandated procedure" "permits the legislature to undertake the drawing of district lines only after two redistricting plans composed by the IRC have been duly considered and rejected," so the IRC's unconstitutional dereliction of duty deprived the Legislature of authority to enact any maps, rendering unconstitutional the Legislature's enacted map. *Harkenrider*, 38 N.Y.3d at 509, 511–12, 521 (emphasis omitted). This Court

also explained that its conclusion would not engender gamesmanship because if IRC members "fail either to appear at IRC meetings or to otherwise perform their constitutional duties," a challenger could seek "judicial intervention in the form of a mandamus proceeding . . . to ensure the IRC process is completed as constitutionally intended," within the constitutional period for IRC action. *Id.* at 515 n.10.

On the appropriate remedy, this Court held that because "[t]he deadline in the Constitution for the IRC to submit a second set of maps ha[d] long since passed," the IRC/Legislature's procedural violation was "incapable of a legislative cure." *Id.* at 523. To cure the "procedural unconstitutionality of the congressional . . . map[ ]," this Court instructed the Supreme Court to "adopt constitutional maps" itself "with the assistance of a neutral expert . . . following submissions from the parties, the legislature, and any interested stakeholders who wish to be heard." *Id.*

Judge Troutman dissented in part, agreeing with the majority's finding of a constitutional procedure violation, but disagreeing as to the proper remedy. *See id.* at 526–27 (Troutman, J., dissenting in part). Because this Court's decision resulted in a judicially adopted "electoral map" that could be in place "for the next 10 years," *id.* at 527, Judge Troutman explained that a better and constitutionally permissible remedy would be to order the Legislature "to adopt one of the IRC-approved plans on a strict timetable," *id.* at 526. This Court's majority rejected that approach, reasoning that IRC and legislative involvement was no longer constitutionally

permissible because "the deadline in the Constitution for the IRC to submit a second set of maps has long since passed." *Id.* at 523 & n.20 (majority opinion).

#### 4. The Steuben County Supreme Court "Adopt[s]" A Map Under Section 4(e)'s First Sentence, Notwithstanding Petitioners' Attempts to Undermine Its Efforts

On remand, the Steuben County Supreme Court began the process of "adopt[ing]," N.Y. Const. art. III, § 4(e), a "final enacted [congressional] map[ ]" with the help of a Special Master, *Harkenrider* No.696 at 1; *see Harkenrider* No.670. To assist it in drawing preliminary and final maps, the Supreme Court invited interested persons to submit proposed maps and allowed people to appear and testify on proposed maps before the Court and the Special Master. *See Harkenrider* No.670 at 1–2. The Special Master then drafted preliminary remedial maps with the aid of thousands of comments submitted to the Court and the voluminous existing testimony that had been submitted to the IRC. *Id.* at 4–11.

Several of the Petitioners here—Courtney Gibbons, Lauren Foley, Seth Pearce, Verity Van Tassel Richards, and Nancy Van Tassel—represented by some of the same counsel, objected to the Special Master's preliminary map and argued that the map should only govern the 2022 elections. *See* R.328–38. Petitioners urged, as relevant here, that the Supreme Court should "ensure that the map drawn by the Special Master only be used for the 2022 congressional election," and then to "require the elected representatives of the people . . . to enact a congressional map

that complies with both the United States and New York Constitutions to be used for the rest of the decade." R.328, 337–38. Intervenors pointed out in response that limiting the remedial map only to the 2022 elections would violate this Court's decision and the Constitution. *Harkenrider* No.660 at 3 n.†.

On May 21, 2022, the Steuben County Supreme Court issued its final map, along with the Special Master's in-depth report. *Harkenrider* No.670 at 1–31. Then, on June 2, 2022, that court modified the map to correct certain violations of the Constitution's block-on-border requirement, N.Y. Const. art. III, § 4(c)(6), and ordered that the map "as modified" now "bec[a]me the *final* enacted redistricting map[ ]," *Harkenrider* No.696 at 1 (emphasis added). None of the Petitioners here, nor any other interested party, sought to appeal either of these orders.

Also during the Steuben County Supreme Court's remedial proceedings, Petitioner Anthony Hoffman, along with several others, sought relief in the U.S. District Court for the Southern District of New York, requesting a mandate that the already-declared-unconstitutional map that was "passed by the New York Legislature and signed by Governor Hochul on February 3, 2022," be used in the impending 2022 congressional elections. Compl. at 3, 13, 15–16, *De Gaudemar v. Kosinski*, No.1:22-cv-3534 (S.D.N.Y. May 2, 2022), Dkt.1. The Southern District harshly rejected this request as an attempt to "impinge[ ] . . . on the public perception of both" "[f]ree, open, rational elections" and "respect for the courts," noting that

his "Hail Mary pass" request would "hav[e] the New York primaries conducted on district lines that the State says are unconstitutional." Transcript of Hearing at 15, 40, *De Gaudemar*, No.1:22-cv-3534 (S.D.N.Y. May 4, 2022), Dkt.38.

As a result of the Steuben County Supreme Court's and the Special Master's efforts, New York presently has one of the most competitive congressional maps in the country. As Justice Pritzker noted in his dissent below, under the *Harkenrider* map, "almost one in five seats are competitive." R.418 (Pritzker, J., dissenting) (quoting Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, Brennan Center for Justice (Aug. 11, 2022)[7]). The source that Justice Pritzker cited explains this is "the highest percentage in the country for a large state." Li & Leaverton, *supra*.

### C. Procedural Background

#### 1. Petitioners Wait Five Months After The IRC Violates Its Constitutional Obligation To Bring A Mandamus Lawsuit To Require The IRC To Submit A Second-Round Map

On June 28, 2022—over five months after the IRC announced that it would not fulfill its constitutional duty to submit second-round maps to the Legislature—Petitioners, most of whom participated in the proceedings in the Steuben County Supreme Court or the Southern District of New York, initiated this mandamus

[7] Available at https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction.

proceeding in the Albany County Supreme Court. R.24–25. In particular, Petitioners filed an Amended Petition on July 14, seeking an order from the Court to (1) "compel" the IRC's members "to 'prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan,'" to be put in place "following the 2022 elections" to be "used for subsequent elections this decade"; and (2) to therefore limit the *Harkenrider* map to only the 2022 elections, so that a new map, following the reinstatement of the IRC, "can be used for subsequent elections this decade." R.266, 284.

### 2. The Albany County Supreme Court Dismisses Petitioners' Lawsuit As Violating Section 4(e)'s Prohibition Against Mid-Decade Redistricting, But The Third Department Reverses

The Albany County Supreme Court dismissed the Amended Petition on September 12, 2022. R.8–21. The Court explained that Petitioners' requested relief would violate the "Constitutional mandate that approved redistricting plans be in place for" a 10-year period and "would provide a path to an annual redistricting process, wreaking havoc on the electoral process." R.18–19. The Court also held that "there is no authority for the IRC to issue a second redistricting plan after February 28, 2022," to remedy this procedural constitutional violation. R.18. The Court did, however, disagree with Respondents and Intervenors on two points. First, regarding the lawsuit's timeliness, the Court held that Petitioners had filed within CPLR 217(a)'s four-month statute of limitations for mandamus actions because a

justiciable controversy between Petitioners and the IRC did not accrue until May 20, 2022, when "the new 2022 Congressional Maps went into effect." R.17. And, second, the Court disagreed that the Amended Petition constituted an impermissible collateral attack under principles of *res judicata* only. R.15–16.

The Third Department reversed the Supreme Court in a 3-2 split decision. R.410–26. The majority declined to dismiss Petitioners' mandamus action as untimely—albeit on different reasoning than the Albany County Supreme Court—because the majority concluded that Petitioners' claim did not accrue until March 31, 2022, when the Steuben County Supreme Court determined that the Legislature's 2021 legislation was unconstitutional. R.414. The majority then held that Petitioners were entitled to relief on the merits, R.414–17, without—with all respect—meaningfully engaging with either Section 4(e)'s ban on mid-decade redistricting or this Court's holding that the Constitution requires the judiciary to adopt a map to remedy a failure of the IRC/Legislature process after "[t]he deadline in the Constitution for the IRC to submit a second set of maps has long since passed." *Harkenrider*, 38 N.Y.3d at 523. Finally, the majority rejected Intervenors' collateral-attack argument in a single footnoted sentence. R.417 n.5.

Justice Pritzker filed a dissenting opinion in which Justice Egan, Jr., concurred. R.418–26 (Pritzker, J., dissenting). The dissent would have dismissed this lawsuit as untimely, explaining that Petitioners filed their Petition over four

months after they should have known of the IRC's abdication of its duty in January 2022. R.419–21 (Pritzker, J., dissenting). Turning to the merits, the dissent then closely examined Section 4(e)'s language, explaining that the Constitution required the *Harkenrider* map to "remain in place until after the next census." R.421–22 (Pritzker, J., dissenting). The dissenting Justices explained that Petitioners' requested relief violates Section 4(e) because it goes beyond a mere "modifi[cation]" of the map, and contravenes the constitutional principle that "such court-ordered maps remain in place until after the next census." R.421–22 (Pritzker, J., dissenting). The dissent also explained that Petitioners' requested relief was constitutionally impermissible under Section 4(b) because once the IRC "failed" to complete its constitutional duty and the deadline for IRC action passed, "it was necessary to resort to Plan B, the safety valve designed to remedy political stalemate, which took the form of a judicially drawn congressional map." R.425 (Pritzker, J., dissenting).

The Brady Respondents and Intervenors timely filed their notices of appeal on July 25, 2023. R.404–09.

## ARGUMENT

### I. Point I: Petitioners' Lawsuit Is Untimely

#### A. Petitioners Failed To File This Lawsuit Within Four Months Of Claim Accrual, So It Is Untimely

1. CPLR 217(1) requires that petitions for "mandamus to compel the performance of a duty," *Kolson v. N.Y.C. Health & Hosps. Corp.*, 53 A.D.2d 827,

827 (1st Dep't 1976)—in which a petitioner has a legal right to agency action and "a corresponding nondiscretionary duty on the part of the administrative agency," *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educ. Servs.*, 77 N.Y.2d 753, 757 (1991)—must be filed "within four months," CPLR 217(1), of the commencement of the statute of limitations, triggered when "a body or officer refuse[s] . . . to act or to perform a duty enjoined by law," *Waterside Assocs. v. N.Y. State Dep't of Envtl. Conservation*, 72 N.Y.2d 1009, 1010 (1988) (citation omitted). CPLR 217(1) sets an outer limit on the time in which a mandamus-to-compel action must be brought, which limit begins to accrue upon the respondent's refusal "to act or to perform [the] duty" the petition seeks to compel. *Id.*; *see also Kolson*, 53 A.D.2d at 827.

2. Here, the Amended Petition is time-barred under CPLR 217(1) because Petitioners filed it over four months after the IRC announced, on January 24, 2022, that it "would not present a second plan to the legislature," as Section 4(b) requires, or the following day, on January 25, when the IRC's 15-day window to submit a second-round congressional map to the Legislature expired. *See Harkenrider*, 38 N.Y.3d at 504–05; N.Y. Const. art. III, § 4(b). Any mandamus action seeking to compel the IRC to present a second plan to the Legislature had to be filed within four months of the IRC's refusal to perform its duty. *See Waterside Assocs.*, 72 N.Y.2d at 1010. This Court confirmed this accrual date in *Harkenrider*, making clear that a mandamus action accrues when the IRC's members "fail to perform their

constitutional duties." 38 N.Y.3d at 515 n.10. As this Court explained, once these IRC "members fail [ ] to appear at IRC meetings" or otherwise do not undertake "their constitutional duties," litigants can bring a "mandamus proceeding" to "ensure the IRC process is completed as constitutionally intended." *Id.* Counsel for the Speaker of the Assembly acknowledged at oral argument in *Harkenrider* that interested voters could have "brought" a "lawsuit" against the IRC when it failed "to act in accordance with [its] constitutional mandate." *Harkenrider* Tr.46.

The IRC "refus[ed] to perform [its] duty," *Kolson*, 53 A.D.2d at 827, in January of 2022, over four months before Petitioners filed suit, rendering this mandamus action untimely, CPLR 217(1). The IRC refused to perform its duty on January 24, 2022, when it "announced that it was deadlocked and, as a result, would not present a second plan to the legislature," and followed through with that public refusal by allowing its January 25, 2022, deadline to expire without further action. *Harkenrider*, 38 N.Y.3d at 504–05; *see id.* at 515 n.10. Those were the applicable dates on which the IRC's refusal to perform its duty triggered CPLR 217(1)'s four-month limitations period. *Waterside Assocs.*, 72 N.Y.2d at 1010. Therefore, Petitioners had until May 24 or 25, 2022, to file this mandamus petition. But Petitioners chose to wait and see how the remedial map-drawing process in the Steuben County Supreme Court—including their various litigation efforts to undermine that process, *see supra* pp.20–22—would play out. Only after

Petitioners' efforts failed and they saw the *Harkenrider* map, which the Steuben County Supreme Court adopted on May 21, 2022, and modified on June 2, 2022, did they file this lawsuit on June 28, 2022. *See supra* pp.21–23. That delay is impermissible under CPLR 217(1), which requires lawsuits seeking to compel an officer or state body's performance of its duty—as Petitioners seek here, *see* R.284—to be filed within four months of the refusal to carry out the duty.

2. The Appellate Division majority held that the Legislature's unconstitutional 2021 gap-filling legislation delayed the accrual of Petitioners' claim because it permitted the Legislature to enact its own map without the IRC's submission of second-round maps, so Petitioners' claim could not accrue until a court deemed that legislation unconstitutional, which the Steuben County Supreme Court first did on March 31, 2022. R.413–14. But the Appellate Division's holding misconstrues the nature of the constitutional harm that New York citizens suffer when the IRC fails to perform its constitutional duty.

*Harkenrider* already held that a mandamus petition for unconstitutional IRC inaction accrues at the time of the inaction, 38 N.Y.3d at 515 n.10, which holding follows from the constitutional harm that all citizens suffer when the IRC undermines the redistricting process by violating its mandatory duties. This Court explained that a "mandamus proceeding" is appropriate when the IRC members "fail" to "perform their constitutional duties." *Id.* That makes sense. If the IRC

fails to act, that "derail[s]" the Constitution's mandatory "redistricting process," *id.*, thereby imposing harm on "any citizen," *see* N.Y. Const. art. III, § 5. Nothing more needs to happen for a mandamus petition, like this one, to ripen for any New Yorker.

Put another way, the IRC's failure to "perform [its] constitutional duties," *Harkenrider*, 38 N.Y.3d at 515 n.10, imposes actual, concrete injury on all citizens by disrupting the redistricting process that the Constitution provides. As *Harkenrider* explained, such "procedural requirements matter and are imposed precisely because, as here, they safeguard substantive rights." *Id.* at 512 n.9. The 2014 Amendments were "carefully crafted" to impose a constitutional requirement that the IRC "pursue consensus to draw district lines" in light of the harm that "hyper-partisanship" and gerrymandering inflict on the democratic process. *Id.* at 513–14. If IRC members "fail" to "perform [those] constitutional duties" in a timely manner, *id.* at 515 n.10, that harms all New Yorkers, such that they can file a mandamus petition at that time.

Petitioners have effectively conceded this point, while responding to a different argument in this case. In their Opposition to Intervenors' alternate request for stay pending appeal, Petitioners stated that "a mandamus action cannot ripen before the respondent agency fails to undertake its constitutionally obligated duties, . . . which is to say, blows its deadline." Opposition To Cross-Motion For Stay Pending Appeal at 12–13, No.APL-2023-00121 (N.Y. Sept. 5, 2021) (Mot.

No.2023-600) ("Pets.' Stay Opp."). Since the Legislature rejected the first-round maps on January 10, the IRC had a hard deadline of January 25 to submit second-round maps. *Harkenrider*, 38 N.Y.3d at 504–05. Thus, under Petitioners' own words, because the IRC "bl[e]w[ ] its deadline," Pets. Stay Opp.12–13, on January 25,[8] Petitioners' Article 78 mandamus Petition, first filed on June 28, is untimely under CPLR 217(1), as filed over four months after the triggering date.

Notably, Petitioners framed their injuries as flowing from the IRC "blowing the deadline" from the very outset of this case, predicating their alleged harm in their Petition on the IRC's "fail[ure]" to "perform its constitutional duties." *Harkenrider*, 38 N.Y.3d at 515 n.10. Petitioners claimed that the "IRC abandoned its *constitutional* duty" under the 2014 Amendments because, "[r]ather than prepare and submit a second round of maps as was *constitutionally required by Article III, Section 4(b)*," the IRC "failed to send a second round of plans to the Legislature." R.266–67 (emphases added); *see also* R.268 ("[T]he IRC did not complete its constitutionally required redistricting duties[.]"); R.275 (same). Indeed, the sole

[8] Intervenors believe that the triggering of CPLR 217(1) does not occur, as Petitioners assert, when an agency "blows its deadline," Pets.' Stay Opp.12–13, but when "a body or officer refuse[s] . . . to act or to perform a duty enjoined by law," *Waterside Assocs.*, 72 N.Y.2d at 1010. In this case, the IRC publicly refused to submit second-round maps on January 24, meaning that is the date that triggers the four-month statute of limitations. CPLR 217(1). But whether the triggering date is January 24 (as Intervenors believe), or January 25 (as Petitioners now concede), Petitioners missed their deadline to file by over a month.

count of Petitioners' Article 78 Petition is titled "Failure to Fulfill Constitutional Duty Under Article III, Sections 4 and 5 of the New York Constitution," under which Petitioners quoted this Court's conclusion in *Harkenrider* that "the IRC and the legislature failed to follow the procedure commanded by the State Constitution," and then noted that "[t]he Court of Appeals [in *Harkenrider*] was correct: The IRC failed to complete its mandatory duty to submit a second set of congressional plans to the Legislature for consideration." R.283–84 (citation omitted).

The Appellate Division was thus incorrect to tie all of Petitioners' harms, and thus the triggering of their claim, to a judicial determination that the Legislature's 2021 gap-filling legislation was unconstitutional. Even if Petitioners suffered some *additional* harm when the Steuben County Supreme Court struck down the 2021 legislation—which is a rather dubious proposition itself, as citizens are generally benefited, not harmed, by the invalidation of an unconstitutional law—any such harm is irrelevant because a *different* harm, one suffered by all New Yorkers in January 2022, occurred when the IRC abdicated its constitutional duties. After all, the unconstitutional legislation only purported to permit the Legislature to draw its own maps "if the [IRC] does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan," L.2021, c. 633, § 1, nowhere excusing the IRC from "its constitutional obligations," or somehow rendering the IRC's failure to perform those obligations harmless as to New Yorkers.

With all respect to the Appellate Division, this is a straightforward case of a party missing its statutory deadline to sue. If Petitioners had brought their mandamus lawsuit on January 25, no one would have dreamed of arguing—let alone succeeded in arguing—that their claim was somehow not yet ripe. That is the end of the inquiry, regardless of whether the invalidation of the unconstitutional legislation imposed some additional harm on Petitioners. The question is when Petitioners *first* could have brought their mandamus action, *see Waterside Assocs.*, 72 N.Y.2d at 1010; *Kolson*, 53 A.D.2d at 827, and it is beyond serious dispute that Petitioners could have done so by, at the latest, January 25, 2022.

3. The Albany County Supreme Court's timeliness analysis—which the Appellate Division majority neither adopted nor even discussed, *see* R.420 n.3 (Pritzker, J., dissenting)—was similarly mistaken. The Supreme Court held that Petitioners' cause of action accrued in May 2022, the date the "new 2022 Congressional Maps" went into effect. R.17. But the issue in this lawsuit is the IRC's purported failure to act pursuant to Article III, Section 4(b), making the purported May 20 (actually May 21, *see supra* p.5 n.2) enactment date irrelevant here. A claim "to compel the performance of a duty" accrues upon an officer or state body's "refusal to perform such [a] duty," *Kolson*, 53 A.D.2d at 827; *Harkenrider*, 38 N.Y.3d at 515 n.10, so, contrary to the Albany County Supreme Court's holding,

Petitioners' claim accrued when the IRC refused or failed to perform its constitutional duties on January 24 or 25, 2022.

### B. Alternatively, General Equitable Timeliness Principles Bar Petitioners' Mandamus Petition

Because the mandamus relief available under Article 78 is equitable, courts maintain "discretion . . . to deny review under article 78." *See Anderson v. Lockhardt*, 310 N.Y.S.2d 361, 362 (Westchester Cnty. Sup. Ct. 1970); *see Ouziel v. State*, 667 N.Y.S.2d 872, 876 (Ct. Cl. 1997). Courts have authority to "dismiss[ ] as untimely" an Article 78 petition for mandamus, *see Hill v. Giuliani*, 272 A.D.2d 157, 157 (1st Dep't 2000), if filed outside the time when relief may be granted, *see U.S. Bank Nat'l Ass'n v. Losner*, 145 A.D.3d 935, 938 (2d Dep't 2016); *Sheerin v. N.Y. Fire Dep't Articles 1 & 1B Pension Funds*, 46 N.Y.2d 488, 495–96 (1979).

Here, Petitioners' Article 78 petition is also untimely under equitable principles applicable to the mandamus relief Petitioners seek, apart and aside from CPLR 217(1)'s four-month deadline. The Constitution establishes date-certain deadlines for IRC participation in the redistricting process, including for submission of second-round maps to the Legislature. Under Article III, Section 4(b), the IRC must submit second-round maps to the Legislature "[w]ithin fifteen days" of the Legislature notifying the IRC that it rejected the first-round maps, "and in no case later than February [28]." N.Y. Const. art. III, § 4(b). As this Court explained, before the "deadline in the Constitution for the IRC to submit a second set of maps

ha[d] long since passed," a party seeking to force the IRC to do its duty and stop IRC members hoping to "derail the redistricting process by refusing to participate" could seek "judicial intervention in the form of a mandamus proceeding." *See Harkenrider*, 38 N.Y.3d at 515 n.10, 523. But by instead waiting and filing this mandamus action almost half a year later, Petitioners waited far too long.

This makes sense under equitable principles in the time-sensitive redistricting context, in particular. *See Losner*, 145 A.D.3d at 938; *Anderson*, 310 N.Y.S.2d at 362; *Ouziel*, 667 N.Y.S.2d at 876. Permitting litigants to file lawsuits requiring IRC action months after the expiration of the constitutional redistricting process deadlines would allow them to await the conclusion of a remedial judicial map-drawing process, *Harkenrider*, 38 N.Y.3d at 521–23; *see also Sheerin*, 46 N.Y.2d at 495–96, to see whether they politically prefer the court's judicially created maps. That is just what occurred here: Petitioners waited until after the Steuben County Supreme Court issued its map to see whether they found that map politically favorable, filing this Article 78 Petition only on June 28, 2022. R.24–43.

## II. Point II: Petitioners' Request Violates Article III, Section 4(e)'s Prohibition On Mid-Decade Redistricting

A. When construing constitutional provisions, courts' "starting point must be the text . . . look[ing] for the intention of the People and giv[ing] to the language used its ordinary meaning." *Harkenrider*, 38 N.Y.3d at 509 (citations omitted). And when looking for ordinary meaning, this Court commonly refers to "dictionary

definitions as useful guideposts in determining the meaning of a word or phrase." *Yaniveth R. ex rel. Ramona S. v. LTD Realty Co.*, 27 N.Y.3d 186, 192 (2016).

Article III, Section 4(e) imposes an additional barrier to partisan gerrymandering, beyond the protections of the IRC process and the explicit ban on redistricting to favor or disfavor incumbents, political candidates, or political parties found in Article III, Sections 4(b) and (c). Section 4(e) provides:

> (e) The process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article shall govern redistricting in this state except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.
>
> A reapportionment plan and the districts contained in such plan shall be in force until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero unless modified pursuant to court order.

N.Y. Const. art. III, § 4(e). As relevant to the issue in this case, the first sentence explains that the default IRC/Legislature redistricting process governs map-drawing at the beginning of each decade, but then mandates that if that process fails, a court is "required" to "adopt[ ]" a constitutionally compliant map for the State. *Id.* The map that is "adopt[ed]" under Section 4(e)'s first sentence—either via the IRC/Legislature "process for redistricting" or the courts should that process fail in some way—is the map for the State resulting from the decennial redistricting process. *Id.* The second sentence then mandates that any "reapportionment plan and the districts contained in such plan"—that is, the plan "adopt[ed]" via the

IRC/Legislature process or the courts under the prior sentence—will remain "in force" until the next census, unless a court "modified" that map. *Id.*

The specific terms in Section 4(e)'s second sentence make clear that any changes to the "adopt[ed]" map in the first sentence are limited only to judicial-ordered "modifi[cations]." The Oxford English Dictionary defines "modify" as "[t]o make partial or minor changes to; to alter (an object) in respect of some of its qualities, now typically so as to improve it; to cause to vary without radical transformation." *Modify*, OED Online (3d. ed. Dec. 2022).[9] Merriam-Webster's Collegiate Dictionary similarly defines "modify" as "to make less extreme: Moderate" and "to make minor changes in." *Modify*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003). Black's Law Dictionary confirms this meaning, defining "modify" as "[t]o make somewhat different; to make small changes to (something) by way of improvement, suitability, or effectiveness." *Modify*, Black's Law Dictionary (11th ed. 2019). These dictionaries consistently define modify as only permitting partial changes, not whole replacement. *See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994) ("Virtually every dictionary we are aware of says that 'to modify' means to change moderately or in minor fashion."). Thus, the "modifi[cation] by court order" that Section 4(e)'s second sentence

[9] Accessible at https://www.oed.com/dictionary/modify_v.

authorizes can only amount to specific changes to the adopted map to address some legal defect in that map, not the "adoption" of a new map. N.Y. Const. art. III, § 4(e).

The map that either the IRC/Legislature or a court "adopt[s]" under Section 4(e)'s first sentence is the State's map for the decade, assuming that map survives initial court review (or in the case of a court-adopted map, appellate review), subject only to later "modif[ication]" to address any legal errors that a court later finds in that map. *Id.* Such "modifi[cations]" of an existing map must, in turn, be tailored to address any legal infirmities in the "adopt[ed]" map. This occurred, for example, when the Steuben County Supreme Court modified on June 2, 2022, the map it issued on May 21, 2022, to correct some extant violations of the constitutional block-on-border rule. N.Y. Const. art. III, § 4(c)(6), *see supra* p.21.

Article III, Section 4(e)'s prohibition against mid-decade redistricting serves the vital interests of promoting stability in the State's adopted redistricting maps and public confidence in the redistricting process, while curtailing partisan gerrymandering. The 2014 Amendments "create a new and permanent [redistricting] process," A.B. 5388, Spons. Memo. (N.Y. 2012), and "enshrin[e] it in the constitution [to] ensure that the process will not be changed without due consideration," S.B. 2107, Spons. Memo. (N.Y. 2013). That constitutional redistricting process requires decade-long maps—regardless of whether such maps were adopted via the IRC/Legislature process, or by the courts under Section 4(e).

This protects against partisan actors who wish to redistrict mid-decade for "the sole purpose of achieving a [partisan] congressional majority," *LULAC*, 548 U.S. at 417—a particularly dangerous form of gerrymandering that allows partisans to change districts that are not performing to their preference and ensconce a protected party advantage based upon demonstrated results in immediately prior elections, *id.* at 465–66 (Stevens, J., concurring in part). The decade-long requirement also avoids confusion for voters who "have come to know their districts and candidates," *Fouts v. Harris*, 88 F. Supp. 2d 1351, 1354 (S.D. Fla. 1999), candidates who have relied upon election districts to plan their campaigns, *Quinn v. Cuomo*, 126 N.Y.S.3d 636, 641 (Queens Cnty. Sup. Ct. 2020) (candidates suffer "hardship that borders on unfairness" when election districts change), and election officials, who would have to administer elections on new maps in the middle of the decade, *Amicus Curiae* Br. for Lawyers Democracy Fund at 6–27, No.APL-2023-00121 (Sept. 8, 2023).

B. Here, Petitioners' requested relief of ordering the adoption of a replacement map through judicially restarting the IRC/Legislature process violates Article III, Section 4(e)'s ban on mid-decade redistricting in at least two ways.

*First*, Petitioners' request is constitutionally impermissible because it seeks to obtain the mid-decade redistricting that Section 4(e) prohibits. Petitioners point to no legal infirmity with the Steuben County Supreme Court's map, as required to "modif[y]" that map. N.Y. Const. art. III, § 4(e). The Steuben County Supreme

Court faithfully followed this Court's directive to adopt a redistricting map pursuant to Section 4(e)'s first sentence, which "the Constitution explicitly authorizes," *Harkenrider*, 38 N.Y.3d at 523. Upon the completion of that process, the map that the Steuben County Supreme Court "adopt[ed]," N.Y. Const. art. III, § 4(e), became New York's congressional map until the next decennial census, and no one appealed to challenge the map's legality in any respect. While Petitioners may have preferred the Legislature to have adopted a decade-long map instead, that preference does not support the conclusion that the *Harkenrider* map is infected with any illegality, such that it could be subject to any constitutional judicial "modifi[cation]." *Id.*

*Second*, Petitioners' requested relief is constitutionally impermissible because it falls beyond the judicially ordered "modifi[cation]" that Article III, Section 4(e)'s second sentence permits. Given that "modified" or "modification" carries "a connotation of increment or limitation," it does not encompass the adoption of a new, replacement map, which is what Petitioners seek. *MCI Telecomms.*, 512 U.S. at 225. As noted above, Section 4(e) only permits a court to "modif[y]" the map "adopt[ed]" under Section 4(e)'s first sentence. N.Y. Const. art. III, § 4(e). Petitioners' request that the judiciary order the IRC to send a second-round submission to the Legislature, so that the Legislature can adopt a new, replacement map, is in no plausible sense a judicial "modification" of the *Harkenrider* map under Section 4(e).

C. The Appellate Division majority did not meaningfully engage with the text of Article III, Section 4(e). Instead, it merely reasoned that Petitioners' request for mid-decade redistricting was available because "[t]he IRC had an indisputable duty" to submit second-round maps and that *Harkenrider* "left unremedied the IRC's failure to perform." R.416. The Appellate Division's analysis is incorrect.

The Appellate Division did not address either of the fatal defects with Petitioners' request under Section 4(e)'s text, as explained immediately above. The IRC, of course, "had an indisputable duty" to submit second-round maps to the Legislature under Section 4(b), as the Appellate Division recognized. R.416. But when the IRC failed to do so, Section 4(e) "authorize[d] the judiciary to 'order the adoption of, or changes to, a redistricting plan' in the absence of a constitutionally-viable legislative plan." *Harkenrider*, 38 N.Y.3d at 522 (quoting N.Y. Const. art. III, § 4(e)). And *that* map—validly "adopt[ed]" by the courts under Section 4(e)—is *the* "reapportionment plan" that must remain "in force until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero unless *modified* pursuant to court order." N.Y. Const. art. III, § 4(e) (emphasis added). The only exception to that "adopt[ed]" map's mandatory decade-long application is if "modified pursuant to court order," *id.*, which could only be justified by a legal defect in the *Harkenrider* map. Petitioners identified no such defect, nor have they requested any "modif[ication]" of the map. *See supra* p.39.

While the fact that Petitioners do not seek a judicial "modif[ication]" of the *Harkenrider* map is reason enough to reject the Appellate Division's reasoning, it is also worth noting that the Appellate Division was factually and legally wrong when it held that *Harkenrider* did not provide a remedy for the violation of constitutional procedure that took place in January 2022 simply because it did not order the particular remedy that Petitioners seek here as against the IRC. This Court's *Harkenrider* decision addressed Intervenors' challenge to "the lack of compliance *by the IRC and the legislature* with the procedures set forth in the Constitution," and noted that "the IRC's fulfillment of its constitutional obligations was unquestionably intended to operate as a necessary precondition to, and limitation on, the legislature's exercise of its discretion in redistricting." 38 N.Y.3d at 508–09, 514 (emphasis added). As this Court explained, because the 2014 Amendments "permit[ ] the legislature to undertake the drawing of district lines only after two redistricting plans composed by the IRC have been duly considered and rejected," that created a process where the IRC and Legislature operated in tandem on the mandatory procedures for redistricting. *Id.* at 511–14. Moreover, this Court premised its remedy on the fact that "the procedural unconstitutionality" of the congressional map was "incapable of a legislative cure" specifically because "[t]he deadline in the Constitution for the IRC to submit a second set of maps has long since passed," meaning that the Legislature's *and IRC's* procedural violation could not be remedied any other way

than via a judicially adopted map. *Id.* at 523. In other words, this Court resolved the procedural constitutional violation, encompassing the procedural violation that Petitioners erroneously rely on here. R.267–69; *see also* R.275–76, 282–84. And the Court's remedy explicitly covered that violation, "order[ing]" the Steuben County Supreme Court to judicially adopt a redistricting plan under Section 4(e). *Harkenrider*, 38 N.Y.3d at 523.

Finally, as the Albany Court Supreme Court correctly noted, Petitioners' atextual interpretation of Section 4(e) would create "a path to an annual redistricting process, wreaking havoc on the electoral process," R.18–19, offering partisan actors multiple chances to mid-decade gerrymander (which is, of course, Petitioners' hoped-for result in bringing this lawsuit). This State has a long history of redistricting "result[ing] in stalemates, with opposing political parties unable to reach consensus on district lines," *Harkenrider*, 38 N.Y.3d at 502, including in the last redistricting before the People adopted the 2014 Amendments, *see Favors v. Cuomo*, No.11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012). If the Legislature is unable to adopt a new map after the IRC's second-round submission that Petitioners seek—including, if some Democratic legislators decline to participate in another partisan gerrymander—the *Harkenrider* map would stay in place for 2024. And if the Democrats who control the Legislature once again keep their delegation in line—and thereby effectively execute a gerrymander that targets

the multiple Republican incumbent representatives that won their seats under the competitive *Harkenrider* map, *see supra* p.22—that map itself would likely again fall in court as an unconstitutional partisan gerrymander. Then the litigation process would repeat again in 2025, with the same or new petitioners filing a new mandamus lawsuit, arguing that the Legislature never completed *its* constitutional duty to adopt a map. *See* N.Y. Const. art. III, § 4(b). This constant redistricting would cause just the voter confusion and opportunities for mid-decade gerrymandering that the People outlawed with Section 4(e). *See supra* pp.37–39.

## III. Point III: Petitioners' Requested Relief Is Also Unconstitutional Because As This Court Held In *Harkenrider*, Only A Court Can Adopt A Map To Remedy A Violation Of The IRC/Legislature Process After "The Deadline In The Constitution For The IRC To Submit A Second Set Of Maps Has . . . Passed"

Petitioners' requested relief is unconstitutional for the additional reason that, as this Court held in *Harkenrider*, only the courts can adopt a map after the IRC's constitutional deadline to submit a second set of maps has passed. 38 N.Y.3d at 523.

A. The question of what remedy is available to resolve a violation of the constitutional procedure governing redistricting maps was squarely before this Court in *Harkenrider*. In their briefing before this Court and at oral argument, the parties disagreed over whether, if this Court were to agree with Intervenors' constitutional-procedure arguments, this Court could order relief other than that specified in Article III, Section 4(e)'s first sentence—that is, the judicial "adopt[ion]" of the map.

As Intervenors explained before this Court, Section 4(e) provides that the "process for redistricting congressional and state legislature districts established by this section and sections five and five-b of this article *shall* govern redistricting in this state," unless "a court is required to order the adoption of, or changes to, a redistricting plan." N.Y. Const. art. III, § 4(e) (emphasis added). Intervenors argued that this text means that if the IRC/Legislature process fails and the constitutional deadline passes, then the *only* constitutionally available remedy would be a judicially adopted map. *See* Petitioners' Supplemental Letter Br.5–6, *Harkenrider v. Hochul*, APL 2022-00042 (N.Y. Apr. 23, 2022).[10] Intervenors further noted that Article III, Section 4 "is explicit that the Legislature never obtains the authority to draw its own maps *unless and until it considers two rounds of IRC submitted maps*." Petitioners' Supplemental Response Letter Br.3, *Harkenrider v. Hochul*, APL 2022-00042 (N.Y. Apr. 24, 2022).[11] The Constitution does not state another remedy, Intervenors explained, "because its exclusive redistricting process does not allow alternative processes, other than the court-drawn-map failsafe." *Id.*; N.Y. Const. art. III, § 4(e).

[10] Available at https://courtpass.nycourts.gov/Public_search (search "60" in "Decision No."; select "Harkenrider v. Hochul"; select "Harkenrider v. Hochul_App-Res_Harkenrider_BRF").

[11] Available at https://courtpass.nycourts.gov/Public_search (search "60" in "Decision No."; select "Harkenrider v. Hochul"; select "Harkenrider v. Hochul_App-Res_Harkenrider_ResponseBRF").

The *Harkenrider* respondents, in turn, argued that the Constitution "is silent as to the appropriate procedures to be utilized" if the IRC fails to submit second-round maps to the Legislature "as constitutionally directed." Executive Respondents' Supplemental Letter Br.3, *Harkenrider v. Hochul*, APL 2022-00042 (N.Y. Apr. 23, 2023).[12] Therefore, they asked this Court to conclude that Section 4(e) does not "prescribe a judicial remedy upon a lawsuit as the only way forward after a breakdown" of the constitutional redistricting process. *Id.* at 4.

This Court also discussed the remedy issue at oral argument with counsel. Judge Rivera asked counsel for Intervenors whether the proper remedy for the "procedural defect[ ]" that Intervenors identified was "to require the IRC to comply with its duty." *Harkenrider* Tr.33–34. Judge Rivera went on to suggest that, "if that's the area you want to cure, then the remedy has got to focus on that entity," that is, the IRC. *Id.* at 34; *see* LWV Br.6–7. Judge Troutman engaged in similar questioning, asking whether "the remedy [should] match the error." *Harkenrider* Tr.41. In responding to these questions, Intervenors' counsel explained that the "remedy should be the one the Constitution provides," *id.*, and that, under the

[12] Available at https://courtpass.nycourts.gov/Public_search (search "60" in "Decision No."; select "Harkenrider v. Hochul"; select "Harkenrider v. Hochul_ Res-App_Hochul_BRF").

Constitution, the IRC/Legislature "could [not] possibly fix" the procedural violation now, "because [the IRC] did not [meet] the deadline," *id.* at 36.

In its decision, this Court sided firmly with Intervenors on this remedial dispute, explaining in clear terms:

> The procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure. The deadline in the Constitution for the IRC to submit a second set of maps has long since passed.

38 N.Y.3d at 523. This Court thus rejected respondents' contention that "the legislature must be provided a 'full and reasonable opportunity to correct . . . legal infirmities' in redistricting legislation." *Id.* (citation omitted). Instead, this Court pointed to the language of Article III, Section 4(e), which "explicitly authorizes judicial oversight of remedial action in the wake of a determination of unconstitutionality." *Id.* at 523. Consistent with that language, this Court ordered judicial adoption of a replacement map as the remedy for the IRC and the Legislature's procedural constitutional violation—with no suggestion that the IRC could constitutionally submit a second set of proposed maps following the expiration of its deadline to do so. *Id.* at 523–24; *see* LWV Br.7.

If this Court in *Harkenrider* believed that the Constitution permitted it to return redistricting to the IRC/Legislature process, it presumably would have so ordered, and that process could have produced a map more quickly than the remedy

this Court did order. The IRC was, at the time, in place, funded, and composed of Commissioners who had conducted public hearings across the State the previous Fall. Had this Court ordered the IRC to submit a second-round map shortly after its April 27 ruling, the IRC/Legislature process could have adopted a new map in less time than the Steuben County Supreme Court, with the aid of a Special Master, took to do so. This Court did not order that relief only because "[t]he deadline in the Constitution for the IRC to submit a second set of maps ha[d] long since passed." *Harkenrider*, 38 N.Y.3d at 523.

At the very minimum, had this Court believed that the Constitution permitted the IRC to reconvene after 2022 for mid-decade redistricting, it would have expressly designated the judicially adopted map as a mere interim map, so as to give guidance to the People. Nowhere in *Harkenrider* did this Court suggest that the judicially adopted map would be a mere interim map, or that the Constitution would allow the IRC and the Legislature to engage in mid-decade redistricting following the 2022 election cycle. *See* 38 N.Y.3d at 521–24. As the League of Women Voters of New York explains, any contention that this Court "consigned the electorate, the political parties, the members of Congress and the New York Senate elected at the 2022 election . . . to guess that new maps would be created after the election" is, accordingly, "simply preposterous." LWV Br.7–8.

B. This Court's binding holding in *Harkenrider* ends this lawsuit. As *Harkenrider* held, only a judicially adopted map was available as a remedy for the procedural constitutional violation because the constitutional deadline for the IRC to submit a second-round map to the Legislature "has long since passed." 38 N.Y.3d at 523. This Court concluded that a remedy directed at the IRC and the Legislature was impermissible for that reason and only that reason. 38 N.Y.3d at 523–24. This Court should reach the same conclusion here and hold that Petitioners' requested relief is constitutionally unavailable, under core principles of *stare decisis*, given that the January 2022 deadline has now passed for much longer. *See People v. Hobson*, 39 N.Y.2d 479, 487 (1976); LWV Br.13–15.

C. The Appellate Division did not grapple with this Court's clear holding that the deadline for the IRC to submit second-round maps has "passed," *Harkenrider*, 38 N.Y.3d at 523, and, instead, claimed that *Harkenrider* was "silent" on this point, R.416. With all respect, that blinks reality. Again, this Court held—in the clearest terms imaginable—that a judicially adopted map was necessary because the "deadline in the Constitution for the IRC to submit a second set of maps has long since passed," so the "procedural unconstitutionality of the [maps] is, at this juncture, incapable of a legislative cure." *Harkenrider*, 38 N.Y.3d at 523.

The few phrases from *Harkenrider* that the Appellate Division cited do not support its holding. The Appellate Division pointed to this Court's introductory

acknowledgment that "judicial oversight is required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election," R.412 (quoting *Harkenrider*, 38 N.Y.3d at 502), but that in no way suggests that this Court intended the judicially adopted map to *only* be used in the 2022 election. The Appellate Division also pointed to this Court's acknowledgment that the 2014 amendments were intended to "guarantee" that "redistricting maps have their origin in the collective and transparent work product of a bipartisan commission," and that this Court saw a "reason to forgo the overarching intent of the amendments" given the "then-fast-approaching 2022 election cycle," R.415, but this Court did no such thing: rather, it carefully analyzed the constitutional language—which expressly provides for a ten-year judicially adopted map, *see supra* pp.46–47—and then concluded that the only remedy that language provided under the circumstances was a judicially adopted map, *Harkenrider*, 38 N.Y.3d at 523–24. While some Judges of this Court disagreed with that holding after careful study of the issue, *see id.* at 526–27 (Troutman, J., dissenting), *Harkenrider* is binding as *stare decisis*.

D. Finally, the Appellate Division, First Department's decisions in *Nichols v. Hochul* do not caution a different result as to this issue, but, in any event, Intervenors present multiple arguments here that would not impact the holding in *Nichols*.

In *Nichols*, the petitioners challenged the State Assembly map as unconstitutional for violating the same constitutional process at issue in

*Harkenrider*. The First Department concluded that the State Assembly map was "invalid due to procedural infirmities," and ordered the New York County Supreme Court to address "the proper means for redrawing the state assembly map, in accordance with N.Y. Const, art III, § 5-b." *Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep't 2022) ("*Nichols I*"); *see also Nichols v. Hochul*, 177 N.Y.S.3d 424, 429 (N.Y. Cnty. Sup. Ct. 2022) ("*Nichols II*"). Section 5-b(a), in turn, provides that the IRC "shall be established" whenever "a court orders that congressional [ ] districts be amended." N.Y. Const. art. III, § 5-b(a). On remand, the New York County Supreme Court held that Section 5-b(a) gave the Supreme Court "the rare opportunity" to provide the IRC "a second bite of the apple" and so ordered the IRC to formulate a proposed State Assembly map and "submit [it] to the legislature" by a date certain for the Legislature's vote. *Nichols II*, 177 N.Y.S.3d at 431–33.

The *Nichols* remedial decision, permitting an IRC/Legislature process to redistrict the State Assembly map, violates this Court's binding remedial holding in *Harkenrider* for the same reasons Intervenors explain in this section of their Opening Brief. Section 5-b(a) provides for only a specific type of relief: it allows the IRC to reconvene "at any . . . time a court orders that congressional or state legislative districts be *amended*." N.Y. Const. art. III, § 5-b(a) (emphasis added). So, for example, if a court were to hold that a map adopted under the constitutional process in Article III, Section 4(b) violated Section 2 of the Voting Rights Act ("VRA"), 52

U.S.C. § 10301, by not including a majority-minority district required under controlling law, that court could reestablish the IRC to assist the court in "amend[ing]" the map. N.Y. Const. art. III, § 5-b(a). As this Court acknowledged in *Harkenrider*, *see* 38 N.Y.3d at 523, however, certain constitutional infirmities may only be remedied through the "adopt[ion]" of a court-drawn map to replace the challenged map once the IRC's constitutional deadlines have expired, N.Y. Const. art. III, § 4(e). Once "[t]he deadline in the Constitution for the IRC to submit a second set of maps has . . . passed," no "legislative cure" is available, and only "judicial oversight of remedial action" is permitted. *Harkenrider*, 38 N.Y.3d at 523. The New York County Supreme Court issued its decision ordering the IRC to restart the redistricting process on the State Assembly map under Section 5(b) many months after the constitutional deadline for IRC action had passed, *see Nichols II*, 177 N.Y.S.3d 424, which is an approach that this Court specifically rejected, *see Harkenrider*, 38 N.Y.3d at 523.

That said, this Court need not reach that issue if it agrees with any of Intervenors' other arguments. As the New York Supreme Court recognized in *Nichols*, that case did not "implicate[ ]" Article III, Section 4(e) at all, as no Assembly map had yet been lawfully adopted under the first sentence of Section 4(e). *Nichols II*, 177 N.Y.S.3d at 429 (noting that Section 4(e) was "not relevant" to that case). Put another way, in *Nichols* there was "no approved map," *id.*, and so

those courts were "left in the same predicament as if no map[ ] had been enacted," *Harkenrider*, 38 N.Y.3d at 522, whereas here there is presently an "adopt[ed]" congressional map that must "be in force" for the remainder of the decade. N.Y. Const. art. III, § 4(e). That is why counsel for the Speaker of the Assembly in both *Harkenrider* and *Nichols* stated in *Nichols* that the State Assembly "respect[ed]" the fact that the court's remedial map would "determine the lines for all of congress . . . for the next 10 years." Oral Argument Recording at 29:55–30:17, *Nichols v. Hochul*, No.154213/2022 (1st Dep't Jan. 17, 2023).[13]

## IV. Point IV: If This Court Concludes That The Requested Relief Seeks A Constitutionally Permissible "Modifi[cation]" Of The *Harkenrider* Map Under Section 4(e), Then This Lawsuit Was Filed In The Wrong Court

If this Court were to determine that Petitioners' requested relief is somehow a permissible "modif[ication]" of the *Harkenrider* map under Section 4(e), which Intervenors strongly believe it is not, *see supra* Point II, this Court should reverse the Appellate Court's decision under the collateral attack doctrine.

A. The collateral attack doctrine prevents litigants from challenging the validity of a prior court ruling without filing a motion for reconsideration or a motion to vacate in the same court in which that ruling was rendered. *See Gager v. White*, 53 N.Y.2d 475, 484 n.1 (1981); *Divito v. Glennon*, 193 A.D.3d 1326, 1328 (4th

[13] Available at https://wowza.nycourts.gov/vod/wowzaplayer.php?source=ad1&video=AD1_Archive2023_Jan17_11-59-13.mp4.

Dep't 2021); *Calabrese Bakeries, Inc. v. Rockland Bakery, Inc.*, 83 A.D.3d 1060, 1061 (2d Dep't 2011) ("A motion for relief from a default judgment must be brought in the original action or proceeding. A plenary action or proceeding for such relief will not lie."); CPLR 4404(b), 5015. This bar on collateral attacks "is applicable not only to the parties but to other interested persons, who were not parties, as well." *Donato v. Am. Locomotive Co.*, 283 A.D. 410, 414 (3d Dep't 1954). "[A]ny interested person" desiring relief from a court ruling must file a motion directly with the "court which *rendered* the judgment or order." CPLR 5015(a) (emphasis added).

B. Here, as Petitioners framed their own case in order to try to fit in Section 4(e)'s terms, they seek a "modif[ication of the]" the *Harkenrider* map. *See* App. Div. NYSCEF Doc.36 at 26–27 (Jan. 20, 2023). But any modification of a judicially adopted map is necessarily a request to modify the order adopting that map. And, of course, such an order can only come from the court that issued the map, under the bedrock civil procedure principles articulated immediately above. That is why the Steuben County Supreme Court had to issue its order on June 2, 2022, modifying its May 21 map to comply with the block-on-border rule. *See supra* p.21. Surely, challengers could not have filed in a different Supreme Court, in another part of the State, to obtain such a modification of the Steuben County Supreme Court's May 21 order adopting the map. For the same reasons, if Petitioners are judged to be requesting a "modif[ication]" of the *Harkenrider* map—contrary to all of the

arguments Intervenors put forth above, *see supra* Point II—then Petitioners should have filed this lawsuit in Steuben County, not Albany County.

C. The Appellate Division purported to address this argument in a footnote, stating without further explication that it was "addressing a discrete and previously unaddressed issue in a proceeding brought by different parties." R.417 n.5. The Supreme Court took much the same approach, relying upon *res judicata* principles that apply only to parties in a litigation. R.15. Even putting to the side that the Appellate Division was wrong to conclude that the issue was "unaddressed" in *Harkenrider*, *see supra* Point III, if Petitioners are correct that they are seeking a judicial modification of the *Harkenrider* map under Section 4(e), an order requiring such a modification is necessarily a collateral attack on that order, regardless of the identity of the parties making the request, and thus must be filed in the Court that issued the order. *See Donato*, 283 A.D. at 414. That is precisely why CPLR 5015(a) permits non-parties to seek modification of judicial orders.

## CONCLUSION

The Court should reverse the Appellate Division, Third Department, and affirm the Supreme Court's dismissal of Petitioners' Article 78 mandamus Petition.

Dated: New York, NY
September 18, 2023

Respectfully Submitted,

TROUTMAN PEPPER HAMILTON SANDERS LLP
875 Third Avenue
New York, New York 10022
(212) 704-6000
misha.tseytlin@troutman.com

By: _____
MISHA TSEYTLIN

## CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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Dated: New York, NY
September 18, 2023

Respectfully Submitted,

TROUTMAN PEPPER HAMILTON SANDERS LLP
875 Third Avenue
New York, New York 10022
(212) 704-6000
misha.tseytlin@troutman.com

By: _____
MISHA TSEYTLIN