To be Argued by:
TIMOTHY F. HILL
(Time Requested: 30 Minutes)

APL-2023-00121
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Appellate Division–Third Department Docket No. CV-22-2265

Court of Appeals

of the

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 –

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,

(For Continuation of Caption See Inside Cover)

BRIEF FOR RESPONDENTS-APPELLANTS

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– and –

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

Respondents,

– 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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Jurisdictional Statement

This Court has jurisdiction pursuant to CPLR 5601(a) (dissents on the law at the Appellate Division), and CPLR 5601(b)(1) and CPLR 5601(b)(2) (constitutional ground in judgment of court of original instance and Appellate Division). *See* R-8, R-410.

Statement of Related Cases

As of the date of this filing, there is no active related litigation; the only related case is *Harkenrider v. Hochul*, 38 N.Y.3d 494, 502-503, 197 N.E.3d 437 (2022), which has been fully and finally adjudicated.

QUESTIONS PRESENTED

Question 1: Does the IRC or its Commissioners have any constitutional authority to prepare or make a "second" redistricting recommendation?

Response: No. The constitutional deadline for IRC to undertake such act was January 25, 2022, or February 28, 2022 at the latest.

Question 2: Was it proper for the Third Department to find that the remedy in *Harkenrider* was an interim order solely intended for use in the 2022 election?

Response: No. The Third Department made two critical errors in this regard. First, the prevailing Petitioners in Harkenrider sought and obtained a remedy under Article III, §4(e) of the constitution, and as such the court-ordered redistricting will remain in effect through the 2030 decennial census. The notion that this Court was "silent" on the issue of the remedy's duration is an erroneous misnomer—by ordering a plan as §4(e) authorizes the judiciary to do, this Court gave effect to a plan that will have the duration that the constitutional says has. There is nothing in the pleading, litigating, or final adjudication of *Harkenrider* (through all three levels of the state court system including by this Court of Appeals) that could possibly be construed as effectuating such a result.

Second, the question of the duration of the remedy established in *Harkenrider* was improperly undertaken in this proceeding.

3. Was this Article 78 mandamus proceeding to compel the IRC to undertake a specific act mandated by the constitution timely commenced when filed over five months after, according to the Petitioners, the IRC declared it would not be take that act?

No. The applicable statute of limitations for an Article 78 proceeding is four months. Under settled law, the accrual date upon which the limitations period begins to run, specifically for a proceeding in the nature of a mandamus to compel under CPLR 7803(1), is the date of declaration of non-action. Accordingly, this proceeding commenced a month beyond such expiration was not timely commenced and is time barred. It is also untimely under laches considerations. Notably, the short-lived and doomed-to-fail unconstitutional legislation enacted by the Legislature in 2021 has no relevance whatsoever to the statute of limitations. The legislation did not convert the mandatory constitutional directives addressed to the IRC (that are the subject of this proceeding) into discretionary ones.

PRELIMINARY STATEMENT

This special proceeding brought within the narrow confines of an Article 78 proceeding in the nature of a mandamus to compel was properly dismissed because the act Petitioners sought to compel was in conflict with and precluded by the constitution (the provisions in Article III, §4 establish deadlines for the performance

of the act that long had passed) and because Petitioners, as a result of subsequent and superseding events, including this Court's adjudication of *Matter of Harkenrider v. Hochul*, and the binding precedent established thereby, did not possess a clear legal right to the relief sought.

The Appellate Division's reinstatement and outright granting of the Amended Petition is marred by multiple, substantial errors of law. The majority opinion issued by the Third Department simply cannot be reconciled with the plain language of the constitution and the precedential force of this Court's holding in *Harkenrider*, which scrutinized the same constitutional provisions on the same set of underlying facts from the vantage and with the responsibility of being the State's highest court and final word.

The lynchpin for the majority's remarkable conclusion is its indulgence and endorsement of the revisionist fiction that the *Harkenrider* remedy that this Court carefully confirmed as constitutional, a court-ordered map for the State's congressional districts, was merely an interim fix, temporarily employed solely for the 2022 elections under exigent and emergency conditions imposed by the election calendar. This was made up out of whole cloth. Indeed, neither the Petition nor the Amended Petition makes any mention of, let alone asserts, such an unbelievable premise.

STATEMENT OF FACTS – PROCEDURAL HISTORY

Every ten years, once census data is made available, New York State's senate, assembly and congressional districts must be reapportioned to account for any population shifts and potential changes in the state's allotted number of congressional representatives. *See N.Y. Const., Art. III,* § 4. This process is known as "redistricting."

In this redistricting process, "exclusive legislative control has repeatedly resulted in stalemates, with opposing political parties unable to reach consensus on district lines—often necessitating federal court involvement in the development of New York's congressional maps…. Among other concerns, the redistricting process has been plagued with allegations of partisan gerrymandering—that is, one political party manipulating district lines in order to disproportionately increase its advantage in the upcoming elections, disenfranchising voters of the opposing party….". *Harkenrider v Hochul,* 38 N.Y.3d 494, 502-503, 197 N.E.3d 437 (2022).

In 2014, the New York State Constitution was amended with the passage of a set amendments addressed at eliminating partisan gerrymandering in the redistricting of election districts. *See N.Y. Const., Art. III,* § 4(c)(5). Prior to said amendments, the State Legislature had exclusive control over the redistricting

process. *See Harkenrider, supra* ("In New York, prior to 2012, the process of drawing district lines was entirely within the purview of the legislature,[] subject to state and federal constitutional restraint and federal voting laws, as well as judicial review."). The 2014 amendments changed "both the substantive standards governing the determination of district lines and the redistricting process" itself. *Id.*, at *2. These amendments were "carefully crafted to guarantee that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission that is constitutionally required to pursue consensus to draw district lines. The procedural amendments—along with a novel *substantive* amendment of the State Constitution expressly prohibiting partisan gerrymandering, ... were enacted in response to criticism of the scourge of hyper-partisanship, which the United States Supreme Court has recognized as 'incompatible with democratic principles'". *Id.*, at 513-14.

Thus, pursuant to the 2014 amendments, the New York State Independent Redistricting Commission (the "IRC") was established to determine the district lines. *See N.Y. Const., Art. III*, §§ 4 & 5-b. The IRC is a bi-partisan commission, which consists of ten members appointed by the majority and minority leaders of the State Legislature, meeting the criteria set forth in the State Constitution. See *id.*, at § 5-b(a)-(c). The State Constitution also sets a specific timeframe within

which the IRC may act. Specifically, Article III, §4(b) of the New York State Constitution provides that:

> The independent redistricting commission established pursuant to section five-b of this article shall prepare a redistricting plan to establish senate, assembly, and congressional districts every ten years commencing in two thousand twenty-one, and shall submit to the legislature such plan and the implementing legislation therefor *on or before January first or as soon as practicable thereafter but no later than January fifteenth in the year ending in two beginning in two thousand twenty-two.* *** If either house shall fail to approve the legislation implementing the first redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto, each house or the governor if he or she vetoes it, shall notify the commission that such legislation has been disapproved. Within fifteen days of such notification *and in no case later than February twenty-eighth,* the redistricting commission shall prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan.

Id. (Emphasis added).

The IRC is obliged to undertake the initial drawing of a set of proposed redistricting maps within the constitutionally mandated timeline. *N.Y. Const., Art. III,* §§ 4 & 5-b. The proposed maps are then to be submitted to the Legislature for a vote, without amendment. *Id.* Should these initial maps be rejected, the IRC is to prepare a second set of maps, (once again within a constitutionally mandated timeline) for the Legislature to vote on, again without amendment. *See N.Y. Const., Art. III,* § 4; *Harkenrider*, 38 N.Y.3d, at 510 ("If the legislature rejects the IRC's first plan, the Constitution requires the IRC to go back to the drawing board, work to reach consensus [i.e., because the aforesaid "caveat" (allowing multiple

tied but sub-7 vote plans to be submitted) doesn't apply in this second round], and 'prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation' to the legislature within 15 days and in no case later than February 28th."). If this second set of maps is rejected, only then can the Legislature make amendments to the IRC's proposed maps. *N.Y. Const., Art. III,* § 4. If necessary, failures in the redistricting process are subject to redress through judicial intervention and a court-ordered process of preparing redistricting maps and plan. Id.

However, perhaps "forecasting that the IRC would not comply with its constitutional obligations, in the summer of 2021—before the IRC had even been given a chance to fulfill its constitutional role—the legislature attempted to amend the Constitution to add language authorizing it to introduce redistricting legislation 'if . . . the redistricting commission fails to vote on a redistricting plan and implementing legislation by the required deadline' for any reason. *Harkenrider*, 38 N.Y.3d, at 516-17 (referencing 2021 NY Senate-Assembly Concurrent Res. S515, A1916). This proposed amendment was categorically rejected by New York State voters. *Id.* As explained in *Harkenrider, t*he legislature "then attempted to fill a purported 'gap' in constitutional language by *statutorily* amending the IRC procedure in the same manner" *(id*. 517), however "[n]eedless to say, the bipartisan process was placed in the State Constitution specifically to insulate it from

capricious legislative action and to ensure permanent redistricting reform absent further amendment to the Constitution, which has not occurred" and the 2021 legislation was found "unconstitutional to the extent that it permits the legislature to avoid a central requirement of the reform amendments." *Id.*

The 2020 Census triggered the redistricting process. As a result of population change, New York State lost a congressional seat and other existing districts were "malapportioned" necessitating a redistricting. *Harkenrider, supra,* at 504. As such, starting with the next redistricting cycle after the passage of the amendments (the 2020 cycle) the IRC was formed. The various commissioners were appointed, and the IRC commenced its work, holding the numerous (not less than 12) required public hearings through 2021. *See N.Y. Const., Art. III*, § 4 ("The independent redistricting commission shall conduct not less than one public hearing on proposals for the redistricting of congressional and state legislative districts in each of the following (i) cities: Albany, Buffalo, Syracuse, Rochester, and White Plains; and (ii) counties: Bronx, Kings, New York, Queens, Richmond, Nassau, and Suffolk.").

In December 2021 and January 2022, after the public hearings concluded, the IRC met and ultimately was unable to agree on a set of proposed maps. "According to members appointed by the minority party, after agreement had been reached on many of the district lines, the majority party delegation of the IRC

declined to continue negotiations on a consensus map, insisting they would proceed with discussions only if further negotiations were based on their preferred redistricting maps." *Harkenrider*, 38 N.Y.3d at, 504.

The IRC was to submit the proposed redistricting plan (and the accompanying implementing legislation) on or before January 1, 2022, or as soon as practicable thereafter, but no later than January 15, 2022. *See N.Y. Const. Art. III*, § 4(b).

Given its impasse, in early January 2022, the IRC submitted two sets of proposed redistricting plans to the Legislature (a set from each delegation) as per the Constitution. *See id., and N.Y. Const., Art. III*, § 5-b(g).

These maps were rejected by the Legislature. Upon being notified of the rejection, the IRC was charged with preparing a second set of proposed plans for legislative review within 15 days (specifically, on or before January 25). *See N.Y. Const. Art. III*, § 4(b) (*"*If either house shall fail to approve the legislation implementing the first redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto, each house or the governor if he or she vetoes it, shall notify the commission that such legislation has been disapproved. Within fifteen days of such notification and in no case later than *February twenty-eighth*, the redistricting commission shall prepare and submit to

the legislature a second redistricting plan and the necessary implementing legislation for such plan.")(Emphasis added).

On January 24, 2022, the day before the 15-day deadline expired, and over a month before the IRC's February 28, 2022 deadline to complete the redistricting process, "the IRC announced that it was deadlocked and, as a result, would not present a second plan to the legislature." *Harkenrider,* 38 N.Y.3d, at 504-505.

Within a week of the IRC's January 24, 2022 announcement, the Democratic controlled Legislature —in control of both the Senate and Assembly— without "consultation or participation by the minority Republican Party" prepared and enacted new redistricting maps. *Id.* On February 3, 2022, the New York State Governor signed this new redistricting legislation into law. *Id*. ("…which also superseded the two percent limitation imposed in 2012 on the legislature's authority to amend IRC plans.").

On the same day, February 3, 2022, various New York State voters commenced a proceeding under New York State Constitution Article III, § 5 and Unconsolidated Laws § 4221, *Harkenrider v. Hochul*, No. E2022-0116CV, in Steuben County,[1] alleging that the "process by which the 2022 maps were enacted was constitutionally defective because the IRC failed to submit a second redistricting plan as required….and, as such, the legislature lacked authority to

[1]2022 WL 1819491, at *1 (Sup. Ct., Steuben Co., Mar. 31, 2022).

compose and enact its own plan." *Harkenrider,* 38 N.Y.3d, at 505. That proceeding also alleged that the congressional map was unconstitutionally gerrymandered because it "'packed' minority-party voters into a select few districts and 'cracked' other pockets of those voters across multiple districts." Id.

After trial, "the Supreme Court declared the congressional, state senate and state assembly maps 'void' under the State Constitution" and that the congressional map "violated the constitutional prohibition on gerrymandering…." *Id.* An appeal followed, and a divided Appellate Division vacated the declaration that the senate and assembly maps were unconstitutional but otherwise affirmed and remitted. *Id.* The parties thereafter cross appealed as of right to the Court of Appeals, resulting in a decision ultimately remitting the matter to the Supreme Court who, with the assistance of the special master, was directed to "adopt constitutional maps with all due haste." *Id*., at 523. The Court of Appeals expressly found that "the legislature's enactment of the 2022 redistricting maps contravened the Constitution." *Id.*, at 509 ("To conclude otherwise, … would be to render the 2014 amendments—touted as an important reform of the redistricting process—functionally meaningless.").

In Harkenrider, the Court of Appeals found that where a redistricting plan is void and unconstitutional, as was the case here, the State Constitution authorizes the judiciary to step in and "order the adoption of, or changes, to a redistricting

plan." *Id.,* at 523*; and N.Y. Const., Art. III*, § 4(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."). Specifically, the Court of Appeals held -- not that the IRC should propose new maps -- but that, "[w]here as here, legislative maps have been determined unenforceable, we are left in the same predicament as if no maps had been enacted. Prompt judicial intervention is both necessary and appropriate to guarantee the People's right to a free and fair election." *Harkenrider,* at 522. Judicial intervention resulted in the constitutionally appropriate judicial remedy – the appointment of a Special Master and the creation of a party neutral, non-gerrymandered, redistricting map/reapportionment plan. (R.230 *et seq*.). As per the State Constitution, such "[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). Neither the *Harkenrider* decision nor the Special Master's Report contemplates that the map prepared by the Special Master is to be considered an interim map. (R. 230 *et seq*.). As such, the current, effective redistricting plan is not an interim plan but remains in effect until the 2030 Census

mandates redistricting once more. (R. 418) (Pritzker, J. dissenting). It should be noted that the special master did not engage in the map drawing process "de novo," but rather, he expressly drew upon the "considerable volume of information and public comments that had been compiled *by the Redistricting Commission*" as well as "poured over thousands of pages of court records and testimony that was presented *to the Redistricting Commission*," as well as reviewing "several hundred submissions of testimony via email or through the court docket that came after or just before" his appointment and a significant amount of further comments from the public and concerned groups and political scientists. (R. 233-34) (emphasis added).

At paragraph 14 of the Amended Petition, Petitioners misleadingly imply that the Court of Appeals determined that the only 2022 elections will occur under the court-ordered plan and proceed to suggest, without any legal authority or basis whatsoever, that subsequent elections should occur under plans adopted through the IRC and the Legislature. (R.269). However, the Court of Appeals directed a course of action, in adherence with §4(e) of the Constitution, that required a court-order adoption of a redistricting plan to apply through the next decennial cycle.

The Petitioners did not seek to intervene in *Harkenrider* proceeding at any time.

Petitioners did not commence their proceeding until June 28, 2022. Petitioners did not seek to commence a mandamus proceeding when the IRC announced it was deadlocked on January 24, 2022, nor did they object when the Governor signed into law the Legislature-drawn plans on February 3, 2022.

Petitioners did not seek to commence a mandamus proceeding at any time prior to the IRC's February 28, 2022 Constitutional deadline which foreclosed the time period within which the IRC could act. The IRC had and has no authority to act beyond this date. *See N.Y. Const., Art. III, §* 4(b). As such, contrary to the lower Court's determination, the underlying proceeding was timely.

POINT I

THE CONGRESSIONAL MAP IS NOT INTERIM

In arriving at its determination, the lower court improperly indulged the ever-evolving fabrication—an argument that Petitioners never plead but thereafter made the centerpiece of their argument—that *Harkenrider*'s remedy was only interim. *See Matter of Hoffmann v. N.Y. State Ind. Redistricting Commn.,* 217 A.D.3d 53 (3d Dep't 2023)("[W]e are now in the uncomfortable position of discerning what the Court of Appeals intended by its silence regarding the critical issue of the duration relative to the judicial remedy it imposed."). Despite both admitting being "necessarily limited in [its] ability to infer such intention" and acknowledging the

"clear default duration for electoral maps provided for in the NY Constitution," (id.), the Third Department proceeded to blindly draw such an inference, ignore the constitutional default that in fact answers the question, and completely disregard the binding holding and precedent of this Court.

Contrary to the lower court's erroneous conclusion, this Court was not "silent" on duration. No duration need be given. *Harkenrider* was expressly brought pursuant to Article III §4(e) and sought the judicial remedy prescribed therein—a court-ordered redistricting plan. In awarding the Petitioners therein such relief, this Court both acknowledged the authority to do so under the Constitution, specifically §4(e), and endorsed the constitutional application of such a remedy in that action. Accordingly, the plan that resulted is the end product of the appropriate, constitutional process. And, as such, the plan falls within the meaning of §4(e)'s clear articulation that such "[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). That the judicial remedy is a constitutional remedy is one of the key holdings of this Court in *Harkenrider* and it should not be disturbed. *See Harkenrider v. Hochul*, 38 N.Y.3d 494, 515 (2022)("the IRC process enshrined in the Constitution is the *exclusive* method of redistricting, absent court intervention following a violation of the law, incentivizing the legislature to

encourage and support fair bipartisan participation and compromise throughout the redistricting process.")

The Amendments sought to curb, or indeed, end the practice of legislators choosing their voters. And, the exercise of §4(e) here did advance a goal of the 2014 Amendments—when the legislature attempted to force a gerrymandered plan, and an egregious one at that, even as measured against the business as usual practices out of the pre-Amendment playbook, upon the People of New York, the Amendments' appropriate apparatus was invoked to invalidate the very infirm map the legislature attempted to push though, and an appropriate replacement was installed. Moreover, this replacement map was not created in a vacuum. As the Special Master's Report makes clear, it incorporated the IRC's work and extensive public comment. (R.230 et seq.). Thus, it fully comports "the overarching policy of the constitutional provision: broad engagement in a transparent redistricting process." *Matter of Hoffmann v. N.Y. State Ind. Redistricting Commn,* 217 A.D.3d 53 (3d Dep't 2023). That this Court would have ordered an "interim" measure without plainly identifying it as such, or fashioning a subsequent remedy is preposterous.

This Court's decision in Harkenrider was widely publicized. No one—not the parties to the case, not the public, not academia, and I dare say not this Court—

remotely entertained or were left believing that Harkenrider's remedy was an emergency interim measure.[2] In finding that:

> [T]he default duration for electoral maps also limits the degree to which judicial remediation should influence the redistricting process: "[t]he process for redistricting congressional and state legislative districts established by [the redistricting amendments] 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" (NY Const, art III, § 4 [e] [emphasis added]). The Court of Appeals, as it emphasized in *Harkenrider*, was required to fashion a remedy that would provide valid maps in time for the 2022 elections, and it did so (*see Matter of Harkenrider v Hochul, 38 NY3d at 522*). To interpret the Court's decision as further diverting the constitutional redistricting process, such that the IRC cannot now be called upon to do its duty, would directly contradict this express limiting language in the provision that grants the courts the power to intervene. Simply put, the Court was not "required" to divert the constitutional process beyond the then-imminent issue of the 2022 elections. For these several reasons, in the complete absence of any explicit direction, we decline to infer that the Court intended its decision to have further ramifications than strictly required. Accordingly, we do not conclude that *Harkenrider* forecloses the relief now sought by petitioners.

(*Hoffmann*, 217 A.D.3d 53 [3d Dep't 2023]) the Third Department abandoned its judicial role, ignored the plain meaning of this Court's Determination and constitutional remedy, and began improperly re-writing the New York State

[2] *See, e.g., Rifkin, R., Redistricting for the 2022 Elections,* (Aug. 3, 2022)(Explainer, Government Law Center at Albany Law School offering a retrospective review of the redistricting process and the *Harkenrider* litigation, and stating, with respect to the end result being the court-ordered map of districts drawn by the special master: "These are the maps that are to be used in the 2022 congressional and senate elections as well as in all such elections until the next redistricting in 2032.")

Constitution and the Amendments at issue. This Court did not conclude that the Constitution is silent on duration and did not conclude that the duration of the judicial remedy is the length of time it is required. Of course, the Constitution says no such thing. And this Court did not make such an interpretation or rule upon same. The bottom line is that this Court would have specified if the remedy was interim. And, would have specified the next step is any was required. That is all the evidence that is needed to resolve the (false and manufactured issue). If this Court meant interim, it would have said so. This is all the truer given that the explicit default in the Constitution is that any approved plan is a decade long plan. in sum, not only does the constitution not contemplate an interim remedy. *Harkenrider*, does not refer to its remedy as interim. And, a limited duration (or expiration) cannot simply be "read into" this Court's determination.

Notably, while the decision of this Court was not unanimous in Harkenrider, none of the Judges of this Court, whether the majority or the dissenters, indicated that the remedy would be an interim map.

An interim map is not specifically contemplated by the constitution. Nor is it the norm. For example, in the last cycle of congressional redistricting, litigated in *Favors v. Cuomo*, the federal court, which was also operating under a tight timeframe, ordered court-drawn maps of New York's congressional districts, and those districts remained in place for the balance of the post 2010 census decade. And

while there may be instances of interim maps being used in redistricting litigation, they are always expressly identified as such.[3] The amazing postulation Petitioners advance is that this Court ordered a remedial map of New York's congressional districts—a weighty decision of substantial public importance, interest, and exposure—and somehow didn't tell anyone, didn't see fit to describe the remedial plan it was endorsing as interim, and didn't even mention it once during an extended oral argument that explored numerous other remedial possibilities.

Because an interim plan, if it could have been implemented at all, would have represented the exception, not the norm, the decision to proceed under such unusual framework would have been spelled out with perfect and unmistakable clarity. This common tenet of statutory interpretation [*see, e.g., Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686, n8 (1983) ("[i]f Congress had intended the far-reaching result urged by respondents, it plainly would have said so")] and "principled basis of legal analysis" applies equally to caselaw. *See Sikorsky Aircraft Corp. v. United States*, 2012 U.S. Claims LEXIS 1150, at *2-3 (Fed Cl Sep. 25, 2012) *citing Hamilton v. Lanning*, 130 S. Ct. 2464, 2474 (2010) (commenting that if a legal text was "to carry a specialized—and indeed, unusual—meaning" the progenitors of that text "would

[3] See, e.g., *Veasey v. Abbott*, 2020 US Dist LEXIS 255611, at *13-14 (SD Tex May 27, 2020)("On August 10, 2016, this Court issued its Order Regarding Agreed Interim Plan for Elections (the Interim Remedial Order or "IRO").

have said so expressly.") and *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 469, 109 S. Ct. 2558 (1989).

The admonition of Justice Kennedy in *Public Citizen*, *supra,* is particularly apt here: "[r]eluctance to work[] with the basic meaning of words in a normal manner undermines the legal process." *See id.* The threat to the integrity of the judiciary is all the more pronounced when the argument is being made to the very Court that wrote the decision.

Notably, in *Harkenrider* the position of the Legislative Majority was that remedial maps, if any, should not take effect *until after* the 2022 election. *See id.* The Governor took the same approach, contending that if the Court invalidates the congressional or senate redistricting maps, it should defer implementation of any remedial maps until the next election cycle. *Id.*

Neither the Petition nor the Amended Petition in this case allege as fact or assert as argument the fiction at the center of the Third Department's majority opinion—that *Harkenrider* imposed only a temporary, interim remedy in the form of a congressional map for use in the 2022 elections only, and the corollary imagining that it did so because it was acting under the extreme exigency of an upcoming election. The word "interim" does not appear anywhere in the Petition or Amended Petition, nor do the words "temporary," "emergency," or "exigent." And, to be sure, there is no cause of action or prayer for relief in Petitioners' pleadings

placing the issue of the duration of *Harkenrider's* remedy before the court for adjudication. Notably, the issue was still not even raised in Petitioners' memoranda of law in support of its order to show case. None of this is surprising—since the this Court, of course, did not in fact issue an interim remedy.

The concept was first mentioned solely as a basis to oppose the *Harkenrider* petitioners from intervening. Thereafter, a version of this position appeared when Petitioners opposed the motions to dismiss this proceeding. Notably, however, Petitioners, at that time, noted that it was *not clear whether* the Harkenrider court remedy was for 2022 or for the entire decade. Somehow, by the time of the argument of their appeal before the Third Department, this never-pleaded position had morphed into an audacious and certain declaration, albeit completely unfounded, that this Court's *Harkenrider* was interim and limited to the 2022 election. Petitioners, thus, went from not even mentioning the issue, to stating that it was not clear, to arguing as a matter of certain fact that the *Harkenrider* map was merely interim.

By the time of their reply brief on appeal, Petitioners were so enamored of their own invented premise that they simply refer to *Harkenrider's* plan as the "interim remedy" as though by saying so that actually made it so. Nevermind that this astonishing position was not pleaded by Peitioners, or that they expressly stated

that the issue was not addressed. Petitioners' appeal argued with a straight face that this thing that never was (an interim map), was and is the case.

Shockingly, however, the Third Department fully endorsed this position. *Hoffmann.,* 217 A.D.3d at 53. First summarizing that Petitioners contend "the court-ordered congressional map adopted in *Harkenrider* was merely an interim map for the purpose of the 2022 elections", the majority, in the very next sentence, remarks that "these arguments are compelling." *See id.*

And now Petitioners will presumably attempt to convince this Court—which obviously presided over, decided, and authored the opinion, and well knows what it did and did not do—that it said something it did not say and issued a remedy that it did not issue.

Exigency, in any case, is not evidence of an intent to limit a remedy to interim status. All redistricting litigation is attended by some degree of exigency. There is always the next election looming, and there is always a desire to have legal districts in place before the next election.

It is no more silent on the duration of the remedy by not specifically indicating it extends beyond 2022 than a plan could be accused of being silent on duration for failing to specify that it terminates following the next decennial census. A plan that

emerges from the §4 process, whether it is a legislative plan or a judicial plan, is a "plan"—and as such is in place until the subsequent decennial census.

POINT II

THE PLAIN MEANING OF ARTICLE III, SECTION 4(e)

The plain meaning of §4(e) is not difficult to discern or to apply. It is all of two sentences and resides appropriately at and constitutes the terminus of Article III, Section 4. Despite the readily accessible language and clear and unambiguous import of §4(e), the Third Department has rendered it meaningless.

Section 4(e) provides:

> 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.

The Third Department uncritically adopted, wholesale, an argument presented by the Governor's amicus brief that posits that a §4(e) judicial remedy has an effective duration for however long that remedy could be deemed to be necessary or

required. This is an outlandish postulation that has no basis in the constitution's plain language and attempts to write in provisions that simply are not there and which, if anything, contradict the plain meaning of the actual language.

This argument relies inordinately on a gross misinterpretation of the word "required" in §4(e) and a fictionalized narrative of its application in *Harkenrider*.

The Third Department entertained and embraced Petitioners' attempted cure all–the fiction that the sole basis upon which this Court based its decision in *Harkenrider* was the exigency of the political calendar as it then existed. This position consciously ignores what is both obvious and explicit in *Harkenrider*—that the primary circumstance requiring the court there to order the adoption of a redistricting plan was that the legislatively enacted plan contained multiple violations of law—including that the IRC did not make its second recommendation, that the Legislature acted without legal authority in drawing its own maps, and that the Legislative majority enacted a plan that was an egregious partisan gerrymander. These were the facts that "required" the court to order, as a remedy, a redistricting plan. These were the facts that meant that any future election that went forward without a remedy would have New Yorkers voting in wholly unconstitutional congressional and state senate districts.

The particulars of the political calendar may very well have informed this Court's choices in terms of the tools and procedures it employed in fashioning the

§4(e) remedy, but regardless of whether the court employed a special master, or drew the maps itself, or took some other approach to supply the corrective plan, any such result would be a court-ordered plan under §4(e) of the constitution.

Although this Court was no doubt cognizant of the need to produce a remedial map *in time for* the 2022 elections, that is not at all the same thing as suggesting that the Court intended to provide a remedy *solely for* the 2022 elections. Indeed, there is nothing in *Harkenrider* to even remotely suggest the latter. To the contrary, the impetus to act quickly was not to accomplish a temporary fix; the need to act quickly was to avoid having an election based upon grossly unconstitutional districts.

Significantly, it was the Governor and the Legislative Majority in Harkenrider that desperately asked this Court to defer the installation of the remedial plan until after the 2022 election—in other words, to give them at least one election under the unconstitutional maps they foisted upon the People. There was, thus, no question amongst any of the parties that the remedial court-ordered plan would apply through the 2030 decennial census; the only question was whether the Legislature could get away with one election going forward under its unconstitutional maps. This Court appropriately rejected that distasteful plea, which itself embodied all of the ills that the Amendments sought to correct, and ordered the Steuben County Supreme Court to proceed under the express authority

the Amendments provide to the judiciary to check such legislative bad acts. Notably, none of the parties sought an interim remedy.[4]

Perhaps even more significantly the Petitioners herein expressly sought the same result as the Legislature. They wanted the legislatively enacted map to stand notwithstanding its critical infirmities including, notably, the

The Third Department's holding cannot stand; it writes into the constitution language that plainly does not exist—i.e., that if temporal circumstances in any way influence the choices made in fashioning a remedial plan, such remedial plan will only stay in effect for so long as such temporal circumstances exist and when they subside, another remedial plan should be created commensurate with the timeframes then available. This is absurd and unworkable. But, most importantly, it is simply not in the constitution. Indeed, as noted, it is contrary to the constitution, as the very next sentence in §4(e) clearly provides that a plan, whether legislative or judicial, shall remain in effect for the balance of the decade.

This Article 78 mandamus proceeding solely seeks to compel the IRC to undertake a specific act.[5] It is not a challenge to the present congressional districts

[4] When this Court held that the procedural violations were incapable at this juncture of a legislative cure, that was not because of any impending timelines; rather, that was because, as this Court clearly stated, the time for the IRC to act had passed.

[5] It anachronistically asks the IRC to undertake a task that was required to have been completed long ago and has already been remedied and superseded by judicial action authorized by the constitution.

and includes no prayer for relief to invalidate the present districts or to modify or change the present districts. Second, there is nothing in the constitution that suggests seriatim judicial review—particularly, as here, where the prior court action provided a remedy for the very same violation or defect that is the subject of the subsequent proceeding.[6]

Despite their editorial rants against the process that this Court expressly endorsed, and a result map they do not appreciate, Petitioners confirm out of necessity that they do not actually seek to overturn or invalidate the existing maps. But the constitution does not contemplate the displacement of existing maps without a judicial directive. This is why the concept of the Harkenrider remedy as a temporary placeholder is an attractive concept for Petitioners. It just happens not to be true.

POINT III

STARE DECISIS

"Stare decisis is the doctrine which holds that common-law decisions should stand as precedents for guidance in cases arising in the future and that a rule of law once decided by a court, will generally be followed in subsequent cases presenting

[6] This does not mean that a court-ordered plan is blanketly immune from further judicial review. Just as a legislatively enacted plan could be challenged on its redistricting merits, so too could a judicial map alleged to be suffering from substantive infirmities be challenged and perhaps invalidated. But that simply is not the case these Petitioners have brought.

the same legal problem … Even under the most flexible version of the doctrine applicable to constitutional jurisprudence, prior decisions should not be overruled unless a 'compelling justification' exists for such a drastic step." *Matter of State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, 25 N.Y.3d 799, 819 (2015) (internal citations and quotations omitted). Applying the doctrine, this Court noted in Fitzgerald, supra, that "[e]ven if we were to disagree with our holding in *Amato*, we would nonetheless be bound to follow it under the doctrine of stare decisis." *Id*.

"Stare decisis promotes predictability in the law, engenders reliance on our decisions, encourages judicial restraint and reassures the public that our decisions arise from a continuum of legal principle rather than the personal caprice of the members of this Court." *People v. Peque*, 22 N.Y.3d 168, 194 (2013).

"The ultimate principle is that a court is an institution and not merely a collection of individuals; just as a higher court commands superiority over a lower not because it is wiser or better but because it is institutionally higher. This is what is meant, in part, as the rule of law and not of men." *People v. Bing*, 76 N.Y.2d 331, 360 (1990) (Kaye, dissenting).

"That there are now four votes for those same rejected policy considerations is, of course, not a valid reason to overrule the case" *People v. Bing*, 76 N.Y.2d

331, 360 (1990) (Kaye, dissenting) citing Wachtler, *Stare Decisis and a Changing New York Court of Appeals*, 59 St John's L Rev 445 (1985).

While deviation from prior precedent and relaxed adherence to stare decisis may be justified as a "rejection of archaic and obsolete doctrine which has lost its touch with reality" (*People v. Peque,* 22 N.Y.3d 168, 194 (2013) citing *Hobson,* 39 NY2d at 487), Harkenrider was decided just last year, and reflects a matter that the Court plainly gave the issue thorough treatment and consideration.

Adherence is additionally important here because the remedial phase of *Harkenrider* was never appealed. Any attempt to arrive at a contrary result should have been explored in an appeal from the court order establishing the plan. To belatedly seek a conflicting result is improper.

POINT IV

THIS ARTICLE 78 MANDAMUS PROCEEDING IS TIME BARRED

The Third Department endorsed and adopted wholesale Petitioners' cumbersome and illogical argument that the pendency of the short-lived 2021 legislation functioned as some kind of a stay or toll because it converted mandatory constitutional directives into discretionary ones. The 2021 legislation did no such thing. The 2021 legislation attempted to address a possible and anticipated contingency. It did not remove in any manner the mandatory nature of the constitutional directives. A timely action for mandamus could have been brought

within the time when such action would have been constitutionally viable and relevant, and the 2021 legislation would not have been a bar to same.

The 2021 legislation (which the Legislative majority knew or should have known was unconstitutional and would be stricken upon judicial review) provided an alternative that should have been anathema to the Petitioners. After all, that legislation sought to *empower* the Legislature draw districts *without* any input from the IRC. The 2021 purported to be a gap-filler to allow the Legislature to act if the IRC did not. In no way did it extend, suspend, or make irrelevant the IRC's constitutional deadline for submission of a second plan. The IRC was as much "enjoined by law" to act during the period of time that the doomed legislation was on the books as it was before it was enacted or after it was stricken.

The position taken by Petitioners and accepted by the Appellate Division is at odds with the stated (but transparently disingenuous) objective of this proceeding, to include IRC involvement in the process. The fact that Petitioners were aligned in interest with the Legislative majority and were not motivated to seek IRC involvement because the legislatively drawn maps created a more appealing outcome for them does not toll the statute of limitations. Indeed, it is exceedingly telling that Petitioners attempted to characterize the 2021 legislation as something that so allayed their concerns as to excuse their untimely pursuit of mandamus against the IRC. The 2021 legislation would not have resulted in IRC action or IRC

involvement in redistricting—it would have resulted in the Legislature drawing the lines on their own *without* IRC input. Such overreach and unilateral self-dealing by Legislative majority was the ill that the Amendments sought to ameliorate. It is highly problematic, however, that the Third Department's majority opinion also embraced this theory.

The untimeliness of this proceeding is not a merely technical ground requiring dismissal; it is substantive as well. Petitioners' delay was a deliberate, wet thumb in the air test of which way the winds were blowing. Petitioners wanted and would have been content if the Legislature's gerrymandered map remained in place, monitored the litigation pertaining to Assembly districts, and appeared even to have entertained the possibility of being rescued by the now-quashed hail mary "independent legislature theory" that was making its way to the Supreme Court in *Moore v. Harper*.

The Third Department failed to conduct any analysis whatsoever as to the accrual date of the applicable statute of limitations or when it expired. Rather, with a gloss that fails to comport with any applicable law, the Third Department adopted wholesale the Petitioners' absurd and defective theory that the 2021 legislation somehow tolled the statute from running. This is plain error.

The basis for this proceeding is that the IRC failed to comply with a mandatory directive contained in the constitution by failing to submit a second plan. This

proceeding was commenced on June 28, 2022, over five months after the IRC announced, on January 24, 2022, that it would not be submitting a second plan to the Legislature. Under settled New York law, as specifically addressed to Article 78 mandamus proceedings, the date of such announcement starts the running of the limitations period.

In a mandamus proceeding seeking to compel a government actor to perform a duty that is enjoined by law, the four-month statute of limitations in CPLR 217 begins to run on the date that it refuses to perform the alleged duty. *See Montco Constr. Co. v. Giambra*, 184 Misc.2d 970, 972, 712 N.Y.S.2d 766, 768 (Sup. Ct., Erie Co., 2000); *see also Smuckler v. City of N.Y.*, 2009 N.Y. Slip Op. 30816(U), ¶ 9 (Sup. Ct., N.Y. Co. 2009) (the statute of limitations on a mandamus petition begins to run upon a respondent's refusal to perform a duty enjoined upon it by law.).

An Article 78 "proceeding seeking mandamus to compel accrues even in absence of a final determination. Hence, the statute of limitations for such a proceeding runs not from the final determination but from the date upon which the agency refuses to act." *193 Realty LLC v. Rhea*, 2012 N.Y. Slip Op. 51865(U), ¶ 6, 37 Misc. 3d 1203(A), 1203A, 964 N.Y.S.2d 61 (Sup. Ct., N.Y. Co. 2012) (*citing Ruskin Assocs., LLC v. State of N.Y. Div. of Hous. & Community Renewal*, 77 A.D.3d 401, 403, 908 N.Y.S.2d 392 [1st Dep't 2010]).

In *Van Aken v. Town of Roxbury*, 211 A.D.2d 863, 864, 621 N.Y.S.2d 204, 205-06 (3rd Dep't 1995), the court held that the fourth-month limitations period for the mandamus proceeding therein began to run when the Town Attorney issued a letter conveying that the Town was refusing to perform its mandatory duty to maintain a road.

Here, Petitioners affirmatively allege and expressly acknowledge that the IRC clearly declared on January 24, 2022 that it would not perform the act this mandamus proceeding seeks to compel (the submission of a second set of maps). Paragraph 37 of the amended petition alleges that "[o]n January 24, 2022, Chair Imamura announced that the IRC was deadlocked and would not submit a second round of recommended congressional plans to the Legislature." Like the Town Attorney letter in *Van Aken, supra,* such statement is a clear declaration and refusal and, as such, triggered the running of the statute on a mandamus to compel. Under the specific controlling law as to when a proceeding under CPLR 7803(1) accrues, Petitioners' claim thus accrued on January 24, 2022, and the limitations period expired on May 24, 2022. This proceeding was commenced on June 28, 2022, over a month after the expiration of the statute of limitations.

POINT V

THIS RELIEF SOUGHT BY THIS ARTICLE 78 MANDAMUS PROCEEDING IS BARRED BY THE CONSTITUTION

This special proceeding brought within the narrow confines of an Article 78 proceeding in the nature of a mandamus to compel (*see* NY CPLR §7803(1)) was properly dismissed because the act the Petitioners sought to compel was in conflict with and precluded by the constitution (the provisions of which establish deadlines for the performance of the act that long had passed) and because Petitioners, as a result of subsequent and superseding events, including this Court's adjudication of *Matter of Harkenrider v. Hochul*, and the binding precedent established thereby, did not possess "a clear legal right" to the relief sought. *See Matter of Altamore v. Barrios-Paoli*, 90 N.Y.2d 378, 384-85 (1997) ("Manifestly, mandamus does not lie to compel an official act for which no legal basis exists"); *Council of City of New York v. Bloomberg*, 6 N.Y.3d 380, 388 (2006) (mandamus cannot compel an unconstitutional act); *Matter of Thorsen v. Nassau County Civ. Serv. Comm'n*, 32 A.D.3d 1037, 1037-38 (2d Dep't 2006) ("Mandamus will not lie to compel a public official to perform a vain or useless or illegal act."); *NY Civ. Liberties Union v. State*, 4 N.Y.3d 175, 184 (2005) ("Mandamus is available, however, only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law").

Because the constitutional deadlines have passed and because Harkenrider's remedy addressed the violation, the IRC is without authority to act and cannot be compelled to act without such authority.

Dated: September 18, 2023
Sayville, New York

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: Sayville, New York
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STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
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