APL-2023-00121
Albany County Clerk's Index No. 904972-22
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)

MOTION TO VACATE STAY PENDING APPEAL

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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,

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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,

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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-

The New York State Independent Redistricting Commission; Independent Redistricting Commission Chairperson Ken Jenkins; Independent Redistricting Commissioner Ivelisse Cuevas-Molina; Independent Redistricting Commissioner Elaine Frazier,

Respondents,

-and-

Case No. APL-2023-00121

Appellate Division, Third Department Docket No. CV-22-2265

Albany County Supreme Court Index No. 904972-22

NOTICE OF MOTION TO VACATE STAY PENDING APPEAL

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.

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Richard Alexander Medina, sworn to on August 11, 2023, with exhibits, including the accompanying Memorandum of Law, dated August 11, 2023, the undersigned will move this Court at the courthouse of the Court of Appeals, 20 Eagle Street, Albany, New York, on August 21, 2023, at 10:00 a.m., or as soon therefore as counsel can be heard, for an Order pursuant to CPLR 5519(c) vacating or clarifying any automatic stay imposed by CPLR 5519(a)(1) pending appeal of the Order of the Appellate Division, Third Department in the above-captioned matter, together with such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that opposition papers, if any, must be filed with the Clerk's office on or before the return date under Rule 500.21(c).

Dated: August 11, 2023

Respectfully submitted,

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-and-

The New York State Independent Redistricting Commission; Independent Redistricting Commission Chairperson Ken Jenkins; Independent Redistricting Commissioner Ivelisse Cuevas-Molina; Independent Redistricting Commissioner Elaine Frazier,

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-and-

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE STAY PENDING APPEAL

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,

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PRELIMINARY STATEMENT

In 2014, New Yorkers voted for an independent, transparent, and democratic redistricting process that would reflect the diversity and values of the state. As this Court recently explained, the Redistricting Amendments were intended to usher in "a new era of bipartisanship and transparency." *Harkenrider v. Hochul*, 38 N.Y.3d 494, 503 (2022). In furtherance of those objectives, the Redistricting Amendments created the Independent Redistricting Commission ("IRC") and established an appointment process likely to result in partisan balance among its membership. The Redistricting Amendments also set out a carefully designed, multistep process for redistricting and substantive criteria for mapmakers to consider.

The new process was first tested during the latest round of redistricting—and the objectives that motivated the IRC's creation were thwarted when a handful of commissioners failed to discharge their mandatory duties under the New York Constitution. If the Legislature rejects the IRC's first map submissions, the Redistricting Amendments require the IRC to prepare and submit a second set of plans. Instead of following that mandatory process after the Legislature rejected the IRC's first round of plans in January 2022, several Republican-appointed commissioners refused even to meet, denying the IRC a quorum—and, with it, the capacity to complete its constitutional duties. The predictable result of this gamesmanship was a court-ordered congressional map drawn by a special master

with little time for public input and little regard for the values enshrined in the Redistricting Amendments.

To vindicate the purpose of the Redistricting Amendments, Petitioners-Respondents ("Petitioners") sought a writ of mandamus to compel the IRC to discharge its constitutional duty to submit a second set of maps for the Legislature's consideration. The Appellate Division granted the petition and ordered the IRC to proceed with its work "forthwith." The Republican-appointed IRC commissioners (the "Brady Respondents") have instead appealed, and now claim that an automatic stay applies and prevents the IRC from doing *any* work until the Court resolves this matter. By striking contrast, the IRC's Democratic-appointed commissioners (the "Jenkins Respondents") have *not* appealed, and instead stand ready to abide by the Appellate Division's order and complete the IRC's constitutional responsibilities.

Insofar as a stay does apply—which is far from clear—the Court should lift it.[1] Appellants are unlikely to succeed on the merits of this appeal. The Appellate Division correctly found that this action was timely and that Petitioners have a clear right to the relief sought. Moreover, the balance of hardships tips sharply against a stay: Delay will jeopardize the IRC's ability to complete its responsibilities in time for the 2024 primary elections, causing significant and irreparable harm to

[1] If this Court determines that there is no automatic stay in place, it should order the IRC to immediately take steps to comply with the Appellate Division's order.

Petitioners, candidates, election administrators, and New York voters. By contrast, neither the Brady Respondents nor anyone else would be prejudiced if the IRC were required to take steps to comply with the Redistricting Amendments during the pendency of this appeal. It is therefore in the public interest for the IRC to comply with the Appellate Division's order—immediately. Petitioners thus move the Court to vacate any present stay.

In the alternative, and at a minimum, Petitioners request that the Court make clear that the stay is limited and permits the IRC to meet and discuss the upcoming map-drawing process, draft maps, and take any other steps necessary to swiftly comply with the Appellate Division's order should this Court affirm.

BACKGROUND

I. Constitutional Framework

Following each decennial census, New York must undertake a redistricting process, reapportioning voters among the state's senate, assembly, and congressional districts. U.S. Const. art. I, § 2; N.Y. Const. art. III, § 4. Under the Redistricting Amendments, which the people of New York overwhelmingly approved in 2014, the IRC is tasked with carrying out the map-drawing process in the first instance—and, if necessary, the second. N.Y. Const. art. III, §§ 4, 5-b. The IRC must perform its duties in accordance with clear and explicit substantive directives embedded in Article III of the New York Constitution. *Id.* art. III, § 4(c).

The IRC comprises ten commissioners who are appointed in bipartisan fashion. Each party's legislative leaders appoint four commissioners, and a majority of those eight commissioners then appoint the remaining two. *Id.* art. III, § 5-b(a). The Redistricting Amendments require that, "to the extent practicable," commissioners "reflect the diversity of the residents of this state with regard to race, ethnicity, gender, language, and geographic residence." *Id.* art. III, § 5-b(c). To that end, "the appointing authorities" are instructed to "consult with organizations devoted to protecting the voting rights of minority and other voters concerning potential appointees to the commission." *Id.*

When both houses of the Legislature are controlled by the same political party, the Redistricting Amendments require a seven-vote majority of the IRC to approve a redistricting plan and send it to the Legislature. *Id.* art. III, § 5-b(f)(1). If the IRC "is unable to obtain seven votes to approve a redistricting plan on or before January first . . . or as soon as practicable thereafter," it must submit to the Legislature the plan or plans that received the most votes. *Id.* art. III, § 5-b(g). The IRC must submit its first set of approved plans to the Legislature "on or before January first or as soon as practicable thereafter but no later than January fifteenth." *Id.* art. III, § 4(b). Each house of the Legislature must then vote on the IRC's submissions "without amendment." *Id.*

If the Legislature (or, through the veto process, the Governor) does not approve the IRC's first set of proposed maps, then the IRC *must* repeat the process: The Redistricting Amendments provide that, "[w]ithin fifteen days of [] notification [that the first set of plans was disapproved] and in no case later than February twenty-eighth, the [IRC] *shall* prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan." *Id.* (emphasis added). Upon receipt of the second set of IRC maps, the Legislature must again vote on the maps "without amendment." *Id.* Should that vote fail, the IRC process is complete, and the Legislature assumes the redistricting pen to draw its own plans "with any amendments each house of the legislature deems necessary." *Id.*

II. The 2021 Redistricting Process

The current redistricting cycle provided the IRC's first opportunity to exercise its new, constitutionally mandated duties. The IRC convened as required in the spring of 2021, following receipt of data from the 2020 census. R. 275.[2] After months of meetings and hearings, which furnished the IRC with detailed input from concerned citizens across the state, the IRC voted on a first set of maps. *Id.* Because no single plan garnered the support of the required seven members, the IRC submitted the two plans that received the most votes—a Republican-proposed set of

[2] Citations to "R." in this memorandum refer to the record on appeal to the Appellate Division. *See* NYSCEF Doc. 35 (3d Dep't).

maps and a Democratic-proposed set of maps, each of which received five votes. *Id.* The Legislature rejected both maps on January 10, 2022. *Id.*

The Legislature's rejection of the first set of maps triggered the IRC's mandatory duty to go back to the drawing board and submit a second round of proposals to the Legislature. *See* N.Y. Const. art. III, § 4(b). But, on January 24, the five Democratic-appointed commissioners issued a statement explaining that their Republican colleagues had refused even to meet; this defiance continued for the next several weeks, frustrating the IRC's ability to prepare a second set of senate, assembly, and congressional maps. R. 275–76. Absent the required seven-member quorum, the IRC could not prepare new maps for legislative consideration, and the "outer" February 28 deadline for it to do so was not met—leaving New Yorkers without new maps, as the Redistricting Amendments do not squarely prescribe a course of action if the IRC fails to fulfill its constitutional obligations and submit a second set of maps to the Legislature. *Id.*

Relying on legislation passed in 2021 to address this gap in the Redistricting Amendments (the "2021 legislation"), the Legislature assumed control over the redistricting process and passed a new congressional plan on February 3. R. 276–77. The Governor signed the plan into law later that day. *See* A9167/S8196, A9039-A/S8172-A, A9168/S8197, S8185-A/A9040-A, 2022 Leg., Reg. Sess. (N.Y. 2022).

III. The *Harkenrider* Litigation

On the same day that the Governor signed the legislatively enacted maps, a group of Republican voters filed a petition in the Steuben County Supreme Court, claiming that the Legislature lacked constitutional authority to enact a redistricting plan because the IRC had not submitted a second proposal and that the enacted congressional map was therefore void ab initio. *See* R. 51–117. On March 31, 2022, the Steuben County Supreme Court enjoined use of the enacted congressional plan in the 2022 elections. R. 217–18.

The matter quickly made its way to this Court, which ultimately held that the 2021 legislation violated the Redistricting Amendments. *Harkenrider*, 38 N.Y.3d at 494. Specifically, this Court concluded that "the legislature and the IRC deviated from the constitutionally mandated procedure" required by the Redistricting Amendments' "plain language." *Id.* at 509. The Court described the "mandatory process for submission of electoral maps to the legislature" as follows:

> The IRC "*shall* prepare" and "*shall* submit" to the legislature a redistricting plan with implementing legislation, that IRC plan "*shall* be voted upon, without amendment" by the legislature, and—in the event the first plan is rejected—the IRC "*shall* prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation," which again "*shall* be voted upon, without amendment."

Id. at 501, 511 (quoting N.Y. Const. art. III, § 4(b)). Finding that "the detailed amendments leave no room for legislative discretion regarding the particulars of

implementation," the Court held the 2021 legislation unconstitutional because "the drafters of the [Redistricting Amendments] and the voters of this state intended compliance with the IRC process to be a constitutionally required precondition to the legislature's enactment of redistricting legislation." *Id.* at 515, 517.

This Court issued its decision on April 27, 2022—one week before the State Board of Elections' deadline to certify ballots for the imminent 2022 primary elections. Notwithstanding the Redistricting Amendments' provision giving the Legislature a "full and reasonable opportunity to correct . . . legal infirmities" in redistricting plans, N.Y. Const. art. III, § 5, the Court held that "[t]he procedural unconstitutionality of the congressional and senate maps is, *at this juncture*, incapable of a legislative cure" because the IRC had not submitted a second set of maps to the Legislature and there was no longer time for it to do so, *Harkenrider*, 38 N.Y.3d at 523 (emphasis added). Accordingly, the Court ordered the Steuben County Supreme Court to draw a new congressional map for the 2022 elections with the help of a special master. *See id.* at 524.

The Steuben County Supreme Court's adopted maps were the products of a rushed, opaque process, resulting in a congressional plan that split longstanding minority communities of interest. Unlike the constitutionally mandated IRC and legislative redistricting processes, the Steuben County Supreme Court provided no meaningful opportunity for public comment. New Yorkers who wished to have a

meaningful voice were required to travel to Bath, in person, for a one-day hearing—with only one week's notice. This posed a severe hardship for the vast majority of New Yorkers, including and especially minority voters, some of whom live hours away in New York City; voters who do not own cars; and voters whose personal circumstances do not allow them to take an entire day off work to participate in a court hearing.

Moreover, the Redistricting Amendments require that IRC commissioners "reflect the diversity of the residents of this state with regard to race, ethnicity, gender, language, and geographic residence" and mandate that "to the extent practicable the appointing authorities shall consult with organizations devoted to protecting the voting rights of minority and other voters concerning potential appointees to the commission." N.Y. Const. art. III, § 5-b(e). By contrast, the Steuben County Supreme Court selected its special master without regard to whether his experience and map-drawing process would protect the interests of New York's minority populations. R. 280–81. Ultimately, neither the process nor the maps reflected the state's diversity. The special master's map-drawing process took place exclusively in Steuben County, which is both geographically removed from New York's major metropolitan areas and one of the least racially diverse areas in the

state. R. 280.[3] Comments directed at the special master's proposed congressional map were due just two days after it was first released—which was followed by the map's ordered implementation just two days later, on May 20, 2022. R. 281. This truncated, closed-door process was a clear and dramatic departure from the constitutionally mandated map-drawing safeguards adopted by New York voters.

IV. The Present Litigation

Petitioners here are ten New York voters who were injured by the IRC's failure to complete its constitutionally mandated redistricting duties. They initiated the underlying Article 78 proceeding for a writ of mandamus on June 28, 2022, in the Albany County Supreme Court. Petitioners named as respondents the IRC and its members and sought a court order compelling them to "prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan," R. 266, thus completing the redistricting process as required by the Redistricting Amendments.

The petitioners in the *Harkenrider* litigation ("Intervenors," and together with the Brady Respondents, "Appellants") intervened in the underlying action, and they and the Brady Respondents—but *not* the IRC or the Jenkins Respondents—moved to dismiss. Supreme Court granted the motion. *See* R. 8–21. Supreme Court rejected

[3] While New York's statewide non-Hispanic white population is 55.3%, for example, Steuben County's is 93.4%. R. 280.

the argument that the petition was untimely, R. 16–17, but agreed with the Brady Respondents and Intervenors that the IRC could not submit a second set of redistricting plans after February 28, 2022, R. 17–19. Supreme Court further interpreted what it took to be this Court's silence as to the intended duration of the Steuben County maps to be an indication that they were meant to apply for the remainder of the decade. R. 11–12 & n.2.

Petitioners appealed, and the Appellate Division reversed Supreme Court's dismissal on July 13, 2023. *See generally Hoffmann v. N.Y. State Indep. Redistricting Comm'n*, 2023 N.Y. Slip Op. 03828, 2023 WL 4494494 (3d Dep't July 13, 2023). The Appellate Division first held that Petitioners' claim accrued when the 2021 legislation was declared unconstitutional and the underlying action was therefore brought within the applicable statute of limitations. *Id.* at *3. Turning next to this Court's *Harkenrider* decision, the Appellate Division concluded that nothing in that opinion forecloses the relief Petitioners seek here. *Id.* at *3–5. The Appellate Division noted that the *Harkenrider* opinion emphasized "that the maps being ordered would be 'for use in the 2022 election.'" *Id*. at *4–5 (quoting *Harkenrider*, 38 N.Y.3d at 502). The Appellate Division therefore rejected the argument that the Steuben County Supreme Court's maps must remain in place for the rest of the decade, explaining that while "there was a reason to forgo the overarching intent of the" Redistricting Amendments "due to the then-fast-approaching 2022 election

cycle," this Court "was not 'required' to divert the constitutional process beyond the then-imminent issue of the 2022 elections." *Id.* at *5. Furthermore, the Appellate Division concluded that "*Harkenrider* left unremedied the IRC's failure to perform its duty to submit a second set of maps" because only "two questions [were] posed before the Court of Appeals in *Harkenrider*, neither of which addressed the IRC's duty." *Id.* at *6. Given that "[t]he IRC had an indisputable duty under the NY Constitution to submit a second set of maps upon the rejection of its first set," the Appellate Division concluded that Petitioners "have demonstrated a clear legal right to the relief sought" and "direct[ed] the IRC to commence its duties forthwith." *Id.* at *5–6.

That was four weeks ago. In that time, the IRC has taken no public action indicating that it is complying with or intends to comply with the Appellate Division's order. Instead, both the Brady Respondents and Intervenors have noticed appeals, seeking to entrench the IRC's abdication of its constitutional duties for the next decade.[4] The Brady Respondents claim that a stay automatically follows under CPLR 5519(a)(1) and prevents the IRC from engaging in any activities to effectuate the Appellate Division's order while this appeal is pending. *See* Medina Aff. Exs. E

[4] Though the IRC itself is named as a respondent in this action, it is not represented as an entity here because it can act only through a majority vote of its commissioners, who take opposing positions in this litigation and are therefore separately represented.

& H. The Jenkins Respondents, by contrast, have indicated they "intend to take all steps legally permitted to ensure they are fully prepared to submit a second round of proposed congressional district lines for consideration by the Legislature." *Id.* Exs. F & I.

ARGUMENT

I. To the extent an automatic stay exists, it should be vacated.

This Court should vacate any stay in place and compel the IRC to fulfill its constitutional duties during the pendency of this appeal.

As a threshold issue, it is unclear whether the Brady Respondents are entitled to an automatic stay under CPLR 5519(a)(1). That statute applies to "the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state," whereas the Brady Respondents are members of an independent commission. Specifically, the Redistricting Amendments refer to commissioners as "*members*" of the IRC, not *officers*. N.Y. Const. art. III, § 5-b (emphasis added). Section 5-b also cross-references the definition of "state officer or employee" found in Section 73 of the Public Officers Law, which distinguishes between "*officers and employees* of . . . commissions," who generally fall within that statutory definition, and "*members or directors* of . . . commissions," who only fall within the statute if at least one member of the commission is appointed by the Governor. N.Y. Pub. Off. Law § 73(i)(iii)–(iv) (emphases added). Because no

member of the IRC is appointed by the Governor, *see* N.Y. Const. art. III, § 5-b(a), the commissioners seemingly fall outside the definition of "officer[s] . . . of the state" under New York law—and therefore do not qualify for an automatic stay under CPLR 5519(a)(1), *see Ronan v. Levitt*, 73 Misc. 2d 35, 36 (Albany Cnty. Sup. Ct.) (noting that individuals who "are not officers of the State within the meaning of the Statute . . . . are not entitled to the automatic stay"), *aff'd*, 42 A.D.2d 10 (3d Dep't 1973). Moreover, the IRC can act only through a majority vote of its members. N.Y. Const. art. III, § 5-b(f). The five Brady Respondents do not constitute a majority of the IRC, and therefore should not be allowed to halt the IRC's compliance with the Appellate Division's order. *See generally League of Women Voters of Mid-Hudson Region v. Dutchess Cnty. Bd. of Elections*, 2022 N.Y. Slip Op. 74123(U), 2022 WL 16830092 (2d Dep't Nov. 2, 2022) (confirming that no automatic stay under CPLR 5519(a)(1) was in place where only single member of two-member county board of elections appealed); Medina Aff. Ex. K.

Even if the Brady Respondents fall under CPLR 5519(a)(1), however, this Court, in its discretion, may vacate an automatic stay upon a showing of "a reasonable probability of ultimate success in the action, as well as the prospect of irreparable harm." *DeLury v. City of New York*, 48 A.D.2d 405, 405 (1st Dep't 1975); *see also* CPLR 5519(c) ("[T]he court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a)."). An automatic stay

should be vacated pending the hearing and determination of an appeal where "the public interest and welfare require" it. *Freeman v. Lamb*, 33 A.D.2d 974, 975 (4th Dep't 1970). Here, each of these considerations tilts sharply in favor of vacating any automatic stay and ensuring that the work of the IRC continues during the pendency of this appeal.

A. Petitioners have a reasonable probability of ultimate success in this appeal.

Petitioners are likely to prevail in this appeal. The Appellate Division correctly concluded, based on this Court's decision in *Harkenrider*, that the Redistricting Amendments impose upon the IRC a mandatory duty to submit a second proposed congressional map to the Legislature, and nothing in *Harkenrider* or the text of the Redistricting Amendments relieves the IRC of that duty or forecloses the relief sought by Petitioners simply because an emergency court-drawn map is currently in place. Appellants' alternative argument—that the underlying action was untimely—similarly fails, as the Appellate Division correctly held that Petitioners' claim accrued "when the 2021 legislation was deemed unconstitutional" and thus that "Petitioners commenced this proceeding . . . well within the period in which to do so." *Hoffmann*, 2023 N.Y. Slip Op. 03828, *3.

1. The Appellate Division correctly concluded that Petitioners have demonstrated a "clear legal right to the relief sought."

Petitioners are entitled to mandamus relief where a government "body or officer failed to perform a duty enjoined upon it by law." CPLR 7803(1); *see also Klostermann v. Cuomo*, 61 N.Y.2d 525, 540 (1984) (explaining that "function of mandamus [is] to compel acts that officials are duty-bound to perform, regardless of whether they may exercise their discretion in doing so"). To prevail, Petitioners must establish "'a clear legal right to the relief demanded' by demonstrating the 'existence of a corresponding nondiscretionary duty' on the part of the" relevant government body. *Waite v. Town of Champion*, 31 N.Y.3d 586, 593 (2018) (quoting *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 757 (1991)). Here, the Appellate Division correctly concluded that Petitioners have "demonstrated a clear legal right to the relief sought." *Hoffmann*, 2023 N.Y. Slip Op. 03828, *6.

a. This Court held in *Harkenrider* that the IRC's duty to submit a second round of maps is mandatory.

In *Harkenrider*, this Court rejected the "view that the IRC may abandon its constitutional mandate with no impact on the ultimate result" and "that the legislature may seize upon such inaction to bypass the IRC process and compose its own redistricting maps with impunity." 38 N.Y.3d at 517. In so ruling, the Court observed that the Redistricting Amendments provide that the IRC "*shall* prepare and submit to the legislature a second redistricting plan and the necessary implementing

legislation." *Id.* at 511 (quoting N.Y. Const. art. III, § 4(b)); *see also Nat. Res. Def. Council v. N.Y.C. Dep't of Sanitation*, 83 N.Y.2d 215, 220 (1994) ("The use of the verb 'shall' throughout the pertinent provisions illustrates the mandatory nature of the duties contained therein."). The Court therefore concluded that the Redistricting Amendments create a "*mandatory* process for submission of electoral maps to the legislature"—and, consequently, that "judicial intervention in the form of a mandamus proceeding" is among the options available to voters to enforce the IRC's mandatory duty. *Id.* at 501, 515 n.10 (emphasis added). Accordingly, as the Appellate Division concluded, "[t]he IRC had an indisputable duty under the NY Constitution to submit a second set of maps upon the rejection of its first set," *Hoffmann*, 2023 N.Y. Slip Op. 03828, *5, thus making an Article 78 mandamus proceeding the proper recourse to remedy the IRC's inaction.

b. *Harkenrider* did not remedy the violation claimed here.

Contrary to the assertions made by Appellants and the dissenting justices below, nothing in *Harkenrider* forecloses the relief Petitioners seek. In that case, the petitioners (Intervenors here) claimed that, because the redistricting maps enacted by the Legislature in 2022 were drawn without legal authority and therefore void, the previous decade's congressional map was the only valid map in existence, and its districts were malapportioned in violation of the one-person, one-vote requirement. The *Harkenrider* litigation thus remedied the Legislature's usurpation

of the IRC's authority and the consequent malapportionment, but the IRC's procedural violation was not and has never been redressed.

Further underscoring this fact is the nature of the relief ordered in *Harkenrider*: the drawing of new redistricting maps by a special master. The injury claimed by Petitioners in this case is *procedural* in nature. Their aim, as articulated in their amended petition, is to vindicate the Redistricting Amendments' purpose of ensuring that the redistricting process is "democratic, transparent, and conducted by the IRC and the Legislature pursuant to certain procedural and substantive safeguards." R. 268. The special-master process overseen by the Steuben County Supreme Court—though necessary under the exigencies of the moment—achieved none of these goals. It therefore could not have "cured" the violation of law at issue here.

This Court in *Harkenrider* instead ordered a limited remedy tailored to the particular legal violation and exigent situation that was before it. Because the previous decade's map was malapportioned due to changes in population over the previous decade—and with the midterm election season not only imminent, but *in progress*—if the Steuben County Supreme Court had not expeditiously created remedial maps with the help of a special master, there would have been no constitutional maps in place for 2022. In preventing that outcome, this Court was clear that it was exercising "judicial oversight . . . to facilitate the expeditious

creation of constitutionally conforming maps *for use in the 2022 election*." *Harkenrider*, 38 N.Y.3d at 502 (emphasis added).

That limited remedy was consistent with the remedial provision in the Redistricting Amendments, which provides that the IRC process "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). As the Appellate Division recognized, in *Harkenrider* this Court "was required to fashion a remedy that would provide valid maps in time for the 2022 elections, and it did so." *Hoffmann*, 2023 N.Y. Slip Op. 03828, *5. But, though the imminence of the midterm elections *required* the use of a special master in 2022, there is no reason why that necessary deviation from the process prescribed by the Redistricting Amendments should preclude the IRC from performing its constitutional duties for subsequent elections for the remainder of the decade. "Simply put, the court was not 'required' to divert the constitutional process beyond the then-imminent issue of the 2022 elections." *Id.*

c. The Redistricting Amendments do not foreclose the relief granted by the Appellate Division.

Moreover, nothing in the New York Constitution requires the *Harkenrider* map to remain in place for the next decade. Appellants and the dissenting justices below have argued that this result is mandated by the second sentence of Section 4(e): "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) (emphasis added). Appellants' contention that Section 4(e) requires the *Harkenrider* map to be kept in place for the remainder of the decade simply ignores the critical "unless" clause of that sentence.

Notably, Section 4(e) is silent as to *who* may "modify" a reapportionment plan "pursuant to court order." That question is instead addressed by different provisions of the Redistricting Amendments, which express a clear preference for the IRC and the Legislature to take initial responsibility for the drawing of remedial maps. Section 5-b(a) specifically provides that "[o]n or before February first of each year ending with a zero *and at any other time a court orders that congressional or state legislative districts be amended*, an independent redistricting commission *shall* be established to determine the district lines for congressional and state legislative offices." *Id.* art. III, § 5-b(a) (emphases added). And Section 5 provides that, in the event a court finds a law establishing congressional districts to be in violation of the Constitution, "the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." *Id.* art. III, § 5. Read together, these provisions make clear that the IRC and the Legislature have the power—and the responsibility—to modify or amend districting maps when ordered to do so by a court to remedy a violation of law.

Petitioners here sought—and obtained—a court order directing the IRC to "modify" or "amend" the state's congressional districts. That relief is entirely consistent with the text, history, and structure of the Redistricting Amendments.

Intervenors and the dissenting justices have argued that these remedial provisions do not apply here because Petitioners seek to "replace" the *Harkenrider* map, rather than merely "modify" or "amend" it. That distinction is without support in the constitutional text—and it is certainly untenable in the context of redistricting. Whenever a congressional map is "modified" or "amended," whether pursuant to court order or otherwise, the old map is necessarily and inevitably "replaced." Districts must maintain equal populations; any changes to the boundaries of one district, no matter how small, necessarily require changes to the boundaries of neighboring districts, with effects rippling throughout the map. There is thus no principled distinction between "modifying" (or "amending") a map and "replacing" a map. And while Intervenors have argued that "modification" means only "small changes," NYSCEF Doc. 74 (3d Dep't), they cannot offer any manageable standard for determining how much "modification" is too much.

2. Petitioners' Article 78 action was timely.

Appellants have also argued that the Petitioners' action was untimely. They are incorrect. The Appellate Division correctly concluded that Petitioners' claim accrued when the 2021 legislation was declared unconstitutional and that this action

was therefore filed well within the applicable four-month statute of limitations period set forth in CPLR 217(1). *See Hoffmann*, 2023 N.Y. Slip Op. 03828, *3. But even if the 2021 legislation had not been in place, Petitioners' action was timely filed. Any arguments to the contrary should be rejected.

Actions against governmental bodies or officers, including mandamus actions, "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." CPLR 217(1). An agency action is not "final and binding upon the petitioner" until the agency has "reached a definitive position on the issue that inflicts actual, concrete injury," which "may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." *Best Payphones, Inc. v. Dep't of Info. Tech. & Telecomms.*, 5 N.Y.3d 30, 34 (2005).

The IRC's inability to submit a second set of congressional maps did not inflict "actual, concrete injury" until this Court declared that the Legislature's gap-filling 2021 legislation was unconstitutional. *Id.* The relief sought by Petitioners and granted by the Appellate Division—an order compelling the IRC to complete the redistricting process mandated by law—would have been futile until that point. Prior to this Court's *Harkenrider* decision, the redistricting process *had* proceeded as prescribed by the operative law in place at the time. The 2021 legislation, which provided a mechanism for completing the constitutional redistricting process in the

event of IRC default, "prevented or significantly ameliorated" Petitioners' injury. *Id.* It therefore was not "reasonable for petitioners to demand that the IRC act" sooner. *Hoffmann*, 2023 N.Y. Slip Op. 03828, *7 (Pritzker, J., dissenting); *cf. League of Women Voters of N.Y. v. N.Y. State Bd. of Elections*, 206 A.D.3d 1227, 1231 (3d Dep't 2022) (per curiam) ("[I]n the absence of an express judicial order invalidating the assembly map, petitioner failed to demonstrate that it had a clear legal right to the relief demanded or that there was a corresponding nondiscretionary duty on the part of respondent[.]" (cleaned up)).

Notwithstanding that Petitioners' injury did not manifest until this Court issued its *Harkenrider* decision, Appellants argued below that this action accrued on January 24, 2022, when five members of the IRC issued a press release seeking to pressure their colleagues to schedule a meeting. *See* NYSCEF Doc. 54 (3d Dep't). The Appellate Division correctly rejected that argument. The January 24 press release simply described the state of affairs at that time, stating that five members of the IRC "have repeatedly attempted to schedule a meeting by [January 25, 2022], and our Republican colleagues have refused. This is the latest in a repeated pattern of Republicans obstructing the Commission doing its job." R. 359. A press release by five members of the ten-member IRC describing their efforts to schedule a meeting is not a "final and binding" determination that the IRC will not act. *Best Payphones*, 5 N.Y.3d at 34. Nor does it communicate the IRC's "definitive

position." *Id.* Indeed, the five commissioners who signed the January 24 statement could *not* bind the IRC under the Redistricting Amendments. *See* N.Y. Const. art. III, § 5-b(f) ("[N]o exercise of any power of the independent redistricting commission shall occur without the affirmative vote of at least a majority of the members[.]").[5]

Timeliness is not a bar to Petitioners' success in this appeal. Both the Appellate Division and Supreme Court correctly rejected Appellants' attempt to avoid adjudication on these grounds, and this Court should follow suit.

B. Petitioners will suffer irreparable harm from a stay of the Appellate Division's order, while Appellants will suffer no such harm if the stay is lifted.

Petitioners will suffer irreparable harm if the IRC is allowed to run out the clock once again, thereby depriving Petitioners of any meaningful relief for the 2024 elections. Entering a stay risks just that result. Under the briefing and argument schedule adopted by the Court, a decision in this appeal will likely issue no earlier

[5] Furthermore, the IRC had until February 28, 2022, to take "further administrative action," *Best Payphones*, 5 N.Y.3d at 34, as this Court has described February 28 as the "outer end date for the IRC process" and the "outer . . . constitutional deadline for IRC action," *Harkenrider*, 38 N.Y.3d at 522–23 nn.18–19; *see also* N.Y. Const. art. III, § 4(b) ("[I]n 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."). Accordingly, even if the 2021 legislation had not been in place, Petitioners' claim would have accrued when the IRC failed to act by February 28. Petitioners commenced this action within four months of that date, on June 28, 2022.

than this November. *See* Medina Aff. Ex. J (letter from clerk's office indicating that "[i]t is anticipated that the appeal will be calendared for argument during the November session"). But with the 2024 congressional primary elections scheduled for June 25, the petitioning period for candidates will begin on February 27, 2024, *see* N.Y. Elec. Law § 6-134(4)—just three months later. Before that date, the IRC must prepare and submit new plans and implementing legislation. The Legislature must then convene, consider the IRC's submissions, and accept or revise them. If the Legislature revises the maps, new implementing legislation must be drafted and approved by both chambers. The implementing legislation must then be signed by the Governor or passed over her veto. Local election officials must then prepare to conduct the June primary elections, sorting the precincts they administer into the correct congressional districts. And, finally, candidates must learn their new districts, and voters must familiarize themselves with candidates running in their new districts. Each of those steps takes time.

Given the many steps still to be completed, a stay pending appeal creates a grave risk that new maps will not be fully implemented before the 2024 elections—even if this Court affirms the Appellate Division. In that circumstance, Petitioners will be deprived of all meaningful relief and again be forced to vote using maps drawn in contravention of the values enshrined in the Redistricting Amendments.

Appellants, by contrast, will not suffer any harm if the stay is vacated. For starters, the Jenkins Respondents *agree* that the IRC has a constitutional duty to reconvene and prepare new maps, but are currently prevented from doing so without the cooperation of the Brady Respondents. Only the Brady Respondents oppose the petition and vacatur of the stay. And even they will not be irreparably harmed if the stay is lifted, as the Appellate Division's order requires only that the IRC undertake the constitutional duties that it has already been constituted to perform. Indeed, the IRC recently completed work on new assembly maps—again, under court order. *See* N.Y. Indep. Redistricting Comm'n, *State of New York: NYIRC Assembly 2023*, https://www.nyirc.gov/storage/plans/20230420/assembly_plan.pdf (last visited Aug. 10, 2023); *Nichols v. Hochul*, 212 A.D.3d 529, 530–31 (1st Dep't 2023). Plainly, the five recalcitrant Brady Respondents will not be irreparably harmed by continuing to perform their constitutional obligations while this appeal is pending. And allowing those commissioners to again abdicate their duties would only reward the intransigence that resulted in the current court-drawn maps and gave rise to Petitioners' mandamus action.

C. Lifting any stay that exists will serve the public interest.

Requiring the IRC to continue the process of drawing a new congressional map during the pendency of this appeal will further the public interest. The primary interest at stake in this case is the IRC's full compliance with the constitutional

redistricting process that the people of New York ratified in 2014. For the same reason a stay risks irreparable harm to Petitioners—by allowing the IRC to again default on its obligations ahead of an election—it also jeopardizes the public's interest in a transparent and democratic process.

Vacating the stay is also consistent with the public interest underpinning the automatic stay statute itself. The "public policy underlying CPLR 5519(a)(1)" is "to stabilize the effect of adverse determinations on governmental entities and prevent the disbursement of public funds pending an appeal that might result in a ruling in the government's favor." *Summerville v. City of New York*, 97 N.Y.2d 427, 433–34 (2002). That policy would not be served by continuing the automatic stay here.

First, as explained above, it is not likely that the appeal will result in a ruling in the Brady Respondents' favor. Nor is there any need to "stabilize the effect of adverse determinations on governmental entities," *id.* at 433, since there is enough time for the Court to resolve this appeal before maps need to be in place for the 2024 elections so long as the work begins soon. If this Court reverses the Appellate Division's order, then the *Harkenrider* maps will likely remain in place for the 2024 elections. But if this Court affirms, there must be enough time for the constitutional redistricting process to conclude before candidate petitioning begins next February. The best way to prepare for either eventuality is to allow the constitutional process to continue to run its course during the pendency of this appeal.

Second, the automatic stay will not prevent the disbursement of public funds because nothing in the Appellate Division's order requires the disbursement of additional funds. As explained by the then-IRC chair earlier in this litigation, the IRC "continues to be fully constituted" and "[t]here are no current staffing vacancies that would preclude the IRC from expeditiously undertaking the task of submitting a second round of proposed congressional districting plans for consideration by the Legislature." R. 359.

II. At a minimum, the Court should clarify that the IRC can and should take the steps necessary to quickly comply with the mandamus order.

At the very least, any conceivable harm the Brady Respondents might face would be fully ameliorated by a limited stay requiring the IRC to proceed with map drawing consistent with the constitutional process, but staying implementation of any new congressional map until the appeal is resolved. The Jenkins Respondents have stated that they "intend to take all steps legally permitted to ensure they are fully prepared to submit a second round of proposed congressional district lines for consideration by the Legislature." Medina Aff. Ex. F. This Court should order the Brady Respondents—who have asserted that they "are not aware of any IRC activities by the commissioners that would not be subject to the stay," *id.* Ex. H—to do the same.

Indeed, CPLR 5519(a)(1) provides that the filing of the notice of appeal "stays all proceedings to enforce the judgment or order appealed from." But there are

several steps that need to happen before any maps can be sent to the Legislature that do *not* qualify as "proceedings to enforce" the Appellate Division's judgment, including but not limited to, informing the public of the Appellate Division's decision; convening a meeting of the IRC to discuss the map-drawing process; and beginning the process of drafting amended maps. If the Court does not lift the stay completely—which it should do for the reasons described above—it should make clear that any stay does not preclude the IRC from taking these necessary preliminary steps.[6]

CONCLUSION

For the reasons stated above, the Court should vacate any automatic stay pending the determination of this appeal. *See* CPLR 5519(c). If the Court does not vacate any automatic stay, it should clarify that the IRC must act during the pendency of the stay.

[6] To the extent the Brady Respondents suggest that the IRC is no longer duly constituted, the Redistricting Amendments include no provision sunsetting or otherwise disbanding the IRC, let alone before the commissioners have completed their constitutionally assigned tasks. Moreover, neither the Brady Respondents nor anyone else has suggested during the course of this litigation that the IRC is no longer constituted—or that the commissioners named as respondents are no longer serving in that capacity and thus not amenable to suit.

Dated: August 11, 2023

Respectfully submitted,

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**Admitted pro hac vice*

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,

-and-

The New York State Independent Redistricting Commission; Independent Redistricting Commission Chairperson Ken Jenkins; Independent Redistricting Commissioner Ivelisse Cuevas-Molina; Independent Redistricting Commissioner Elaine Frazier,

Respondents,

-and-

Case No. APL-2023-00121

Appellate Division, Third Department Docket No. CV-22-2265

Albany County Supreme Court Index No. 904972-22

ATTORNEY AFFIRMATION OF RICHARD ALEXANDER MEDINA IN SUPPORT OF MOTION TO VACATE STAY PENDING APPEAL

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.

RICHARD ALEXANDER MEDINA, an attorney duly admitted to practice law before the courts of the State of New York, affirms the following under penalty of perjury:

1. I am an Associate with Elias Law Group LLP, attorneys for Petitioners-Respondents ("Petitioners") in the above-captioned matter. I respectfully submit this Affirmation in support of Petitioners' motion under CPLR 5519(c) for an order vacating or clarifying any automatic stay imposed by CPLR 5519(a)(1) pending appeal of the Order of the Supreme Court, Appellate Division, Third Department in the above-captioned matter.

2. This Motion is also supported by Petitioners' Memorandum of Law in Support of Motion to Vacate Stay Pending Appeal, dated August 11, 2023, which is incorporated by reference. Petitioners' arguments opposing any stay are set forth in detail in the Memorandum of Law.

3. Petitioners sought a writ of mandamus "commanding the New York State Independent Redistricting Commission and its commissioners to fulfill their

constitutional duty . . . by submitting a second round of proposed congressional districting plans for consideration by the Legislature, in order to ensure that a lawful plan is in place immediately following the 2022 elections and can be used for subsequent elections this decade."

4. On September 12, 2022, the Albany County Supreme Court entered an Order dismissing the Amended Petition in this action.

5. On July 13, 2023, the Appellate Division, Third Department entered an Opinion and Order granting the Amended Petition and directing the Independent Redistricting Commission ("IRC") and its commissioners to commence their duties "forthwith."

6. Attached hereto as **Exhibit A** is a true and correct copy of the Opinion and Order of the Appellate Division, Third Department entered in this matter on July 13, 2023, as corrected on July 14, 2023, along with Notice of Entry served on July 14, 2023.

7. On July 24, 2023, counsel for Petitioners wrote to counsel for the IRC commissioners, requesting confirmation that they would comply with the Appellate Division's Order and a description of the immediate steps they would take to do so. A true and correct copy of Petitioners' July 24 letter is attached hereto as **Exhibit B**.

8. On July 25, 2023, Intervenors-Respondents-Appellants ("Intervenors") served via NYSCEF a Notice of Appeal in the above-captioned action. A true and correct copy of Intervenors' Notice of Appeal is attached hereto as **Exhibit C**.

9. Also on July 25, 2023, the Republican-appointed IRC commissioners (the "Brady Respondents") served a separate Notice of Appeal. A true and correct copy of the Brady Respondents' Notice of Appeal is attached hereto as **Exhibit D**.

10. On July 26, 2023, counsel for the Brady Respondents wrote to counsel for Petitioners asserting that service of their Notice of Appeal effectuated a stay of enforcement proceedings pursuant to CPLR 5519(a)(1). A true and correct copy of the Brady Respondents' July 26 letter is attached hereto as **Exhibit E**.

11. Counsel for the remaining IRC commissioners (the "Jenkins Respondents") separately responded to Petitioners' July 24 letter on July 26, 2023. In their response, these non-appealing commissioners indicated that, while the appeal is pending before this Court, they "intend to take all steps legally permitted to ensure they are fully prepared to submit a second round of proposed congressional district lines for consideration by the Legislature." A true and correct copy of that correspondence is attached hereto as **Exhibit F**.

12. On July 31, 2023, counsel for Petitioners again wrote to counsel for the IRC commissioners to clarify what steps, if any, the IRC would take during the

pendency of this appeal to comply with the Appellate Division's Order. A true and correct copy of that correspondence is attached hereto as **Exhibit G**.

13. On August 2, 2023, counsel for the Brady Respondents responded that they are "not aware of any IRC activities by the commissioners that would not be subject to the stay." A true and correct copy of that correspondence is attached hereto as **Exhibit H**.

14. Also on August 2, 2023, counsel for the Jenkins Respondents responded that, in light of the Brady Respondents' position, "the full Commission will not be able to meet given that the Chair is precluded from calling a meeting without the consent of at least six other Commissioners." Counsel for the Jenkins Respondents further reiterated that her clients "are determined to ensure that redistricting by the Independent Redistricting Commission is the 'means of providing a robust, fair and equitable procedure for the determination of voting districts in New York' and agree that the 'right to participate in the democratic process is the most essential right in our system of governance,' as the Third Department held." Counsel wrote that her clients "are determined to see those goals realized in this process." A true and correct copy of this correspondence is attached hereto as **Exhibit I**.

15. On August 9, 2023, the undersigned received a copy of the Scheduling Letter from the Clerk of Court in this matter, dated August 8, 2023. As set forth in

that letter, briefing of this appeal is scheduled to be completed on November 6, 2023, and it is anticipated that the appeal will be calendared for argument during the November session. A true and correct copy of that letter is attached hereto as **Exhibit J**.

16. Attached hereto as **Exhibit K** is a true and correct copy of the Second Department's unpublished Order in *League of Women Voters of Mid-Hudson Region v. Dutchess County Board of Elections*, 2022 N.Y. Slip OP. 74123(U), 2022 WL 16830092 (2d Dep't Nov. 2, 2022), which is cited in Petitioners' Memorandum of Law, along with the papers upon which the motion was granted, excepting the exhibits attached thereto.

WHEREFORE, it is respectfully requested that this Court grant the relief sought in this Motion.

Dated: August 11, 2023

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Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

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-Appellants,

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 Ross Brady; Independent Redistricting Commissioner John Conway III; Independent Redistricting Commissioner Ivelisse Cuevas-Molina; Independent Redistricting Commissioner Elaine Frazier; Independent Redistricting Commissioner Lisa Harris; Independent Redistricting Commissioner Charles Nesbitt; and Independent Redistricting Commissioner Willis H. Stephens,

Respondents-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,

Intervenor-Respondents.

A.D. No. CV-22-2265

NOTICE OF ENTRY OF CORRECTED OPINION AND ORDER

PLEASE TAKE NOTICE that the annexed document is a true and correct copy of the Opinion and Order entered in this action in the Office of the Clerk of the Supreme Court of the

State of New York, Appellate Division, Third Judicial Department, on July 13, 2023, as corrected on July 14, 2023. *See* NYSCEF Doc. Nos. 80, 81.

Dated: July 14, 2023

ELIAS LAW GROUP LLP

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To: Counsel of record (via NYSCEF)

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 13, 2023 CV-22-2265

In the Matter of ANTHONY S. HOFFMANN et al.,
Appellants,
v
NEW YORK STATE INDEPENDENT REDISTRICTING COMMISSION et al.,
Respondents.

OPINION AND ORDER

Calendar Date: June 8, 2023

Before: Garry, P.J., Egan Jr., Pritzker, Reynolds Fitzgerald and McShan, JJ.

Elias Law Group, LLP, Washington, DC (*Aria C. Branch* of counsel, admitted pro hac vice), for appellants.

Jenner & Block LLP, Washington, DC (*Jessica Ring Amunson* of counsel, admitted pro hac vice), for Ken Jenkins and others, respondents.

Perillo Hill, LLP, Sayville (*Timothy F. Hill* of counsel), for Ross Brady and others, respondents.

Troutman Pepper Hamilton Sanders LLP, New York City (*Misha Tseytlin* of counsel), for Timothy Harkenrider and others, intervenors.

Letitia James, Attorney General, New York City (*Andrea W. Trento* of counsel), for the Governor and another, amici curiae.

Covington & Burling LLP, New York City (*P. Benjamin Duke* of counsel), for Scottie Coads and others, amici curiae.

Garry, P.J.

Appeal from a judgment of the Supreme Court (Peter A. Lynch, J.), entered September 14, 2022 in Albany County, which, in a proceeding pursuant to CPLR article 78, granted certain respondents' motions to dismiss the amended petition.

This CPLR article 78 proceeding involves the same factual circumstances as those that gave rise to *Matter of Harkenrider v Hochul* (38 NY3d 494 [2022]). Given the import of that prior proceeding to the mandamus relief sought here, those circumstances merit a rather lengthy discussion. Every 10 years, following each federal census, reapportionment of the senate, assembly and congressional districts in New York must be undertaken (*see* NY Const, art III, § 4). The power to draw those district lines was historically reserved to the Legislature, and, "[p]articularly with respect to congressional maps, exclusive legislative control has repeatedly resulted in stalemates, with opposing political parties unable to reach consensus on district lines" (*Matter of Harkenrider v Hochul*, 38 NY3d at 502). "[I]n response to criticism of [that] scourge of hyper-partisanship" (*id.* at 514), the People of the State of New York amended the NY Constitution in 2014 to reform the redistricting process, both procedurally and substantively, ushering in "a new era of bipartisanship and transparency" (*id.* at 503). This reform established respondent Independent Redistricting Commission (hereinafter the IRC) to draft the electoral maps. Most basically, the 2014 constitutional amendments charge the IRC with the obligation to prepare a redistricting plan and submit that plan, with appropriate implementing legislation, to the Legislature for a vote without amendment (*see* NY Const, art III, §§ 4 [b]; 5-b [a]). If that first plan is rejected, the IRC is required to prepare a second plan and the necessary implementing legislation that, again, would be subject to a vote by the Legislature without amendment (*see* NY Const, art III, § 4 [b]). Only upon rejection of that second plan may the Legislature, under the constitutional procedure, "amend[ ]" the maps drawn by the IRC (NY Const, art III, § 4 [b]). Any such legislative amendments are then statutorily limited to those that would affect no more than two percent of the population in any district (*see* L 2012, ch 17, § 3).

The 2020 federal census provided the first opportunity for the IRC to carry out its constitutionally-mandated duties. In the midst of that redistricting cycle, however, the Legislature attempted to amend the constitutional procedure and authorize itself to introduce redistricting legislation "[i]f . . . the [IRC] fails to vote on a redistricting plan and implementing legislation by the required deadline" (2021 NY Senate-Assembly Concurrent Resolution S515, A1916). Voters rejected that proposed amendment. Thereafter, in 2021, the Legislature enacted similar modifications to the constitutional

redistricting process by statute (*see* L 2021, ch 633). The IRC submitted its first redistricting plan to the Legislature on January 3, 2022 – before its January 15, 2022 deadline to do so (*see* NY Const, art III, § 4 [b]). Because the IRC had reached an impasse, it submitted the two maps that had garnered equal IRC support (*see* NY Const, art III, § 5-b [g]). On January 10, 2022, the Legislature rejected both of those maps, triggering the IRC's constitutional obligation to prepare and submit a second redistricting plan within 15 days and "in no case later than February [28, 2022]" (NY Const, art III, § 4 [b]). The IRC became deadlocked, and, on January 24, 2022, it announced that it would not be submitting a second redistricting plan to the Legislature. Shortly thereafter, the Legislature, invoking its 2021 legislation, composed new senate, assembly and congressional maps, which were signed into law on February 3, 2022.

The litigation in *Harkenrider* commenced immediately. The petitioners in that case argued, as relevant here, that the Legislature's 2022 enactment of congressional and senate maps was in contravention of the constitutional process (*Matter of Harkenrider v Hochul*, 38 NY3d at 505).[1] Ultimately, the Court of Appeals agreed that the enactment was procedurally unconstitutional (*id.* at 508-517).[2] To remedy that procedural violation, the Court concluded that "judicial oversight [wa]s required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election" (*id.* at 502). It then "endorse[d] the procedure directed by Supreme Court [(McAllister, J.)] to 'order the adoption of . . . a redistricting plan' (NY Const, art III, § 4 [e]) with the assistance of a neutral expert, designated a special master, following submissions from the parties, the [L]egislature, and any interested stakeholders who wish to be heard" (*Matter of Harkenrider v Hochul*, 38 NY3d at 523). Supreme Court complied with that directive, and, after a public hearing and receipt of substantial public comment, the court certified the congressional and senate maps prepared by a special master as "the official approved 2022 [c]ongressional map and the 2022 [s]tate [s]enate map" (*Matter of Harkenrider v Hochul*, 2022 NY Slip Op 31471[U], *4 [Sup Ct, Steuben County 2022]).

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[1] The assembly map was not challenged in *Harkenrider* (*Matter of Harkenrider v Hochul*, 38 NY3d at 521 n 15). That map was the subject of subsequent litigation (*Matter of Nichols v Hochul*, 212 AD3d 529 [1st Dept 2023], *appeal dismissed* 39 NY3d 1119 [2023]).

[2] It further held that the 2022 congressional and senate maps were unconstitutionally gerrymandered in favor of the majority party (*Matter of Harkenrider v Hochul*, 38 NY3d at 518-520).

The court subsequently made minor revisions to those maps and ordered that the maps, as modified, are "the final enacted redistricting maps" (*Matter of Harkenrider v Hochul*, Sup Ct, Steuben County, June 2, 2022, McAllister, J., index No. E2022-0116CV, NYSCEF doc. No. 696).

Petitioners thereafter commenced this CPLR article 78 proceeding to compel the IRC "to prepare and submit to the [L]egislature a second redistricting plan and the necessary implementing legislation for such plan . . . in order to ensure a lawful plan is in place . . . for subsequent elections this decade" (quotation marks omitted).[3] Certain IRC commissioners answered indicating that they did not oppose the relief sought by petitioners. Other commissioners, along with the *Harkenrider* petitioners – who are intervenors here – moved to dismiss the proceeding, foremost arguing that the redistricting process based upon the 2020 federal census is complete and that the congressional map generated by that process governs all elections until the redistricting process begins anew following the 2030 federal census. Supreme Court (Lynch, J.) agreed, dismissing the petition, and petitioners appeal.[4]

Initially, we reject the alternative ground for affirmance that this proceeding is untimely. The 2021 legislation in effect at the time of the IRC's failure to submit a second redistricting plan to the Legislature provided that, "[i]f the [IRC] does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan, the [IRC] shall submit to the [L]egislature all plans in its possession, both completed and in draft form, and the data upon which such plans are based," and that each house must then "introduce such implementing legislation with any amendments each house deems necessary" (*see* L 2021, ch 633, § 1). In this CPLR article 78 proceeding, petitioners seek strict compliance with the constitutionally enshrined IRC

[3] Petitioners originally sought relief with respect to both the congressional and senate maps, but their amended pleading pertains to the congressional map only.

[4] This Court granted two applications for leave to file amici curiae briefs: one by the Governor and the Attorney General and one by several voters, including the Civil Engagement Chair of the New York State Conference of the National Association for the Advancement of Colored People and two of the plaintiffs from *Favors v Cuomo* (2012 WL 928223, 2012 US Dist LEXIS 36910 [ED NY 2012]), litigation that challenged the Legislature's redistricting process following the 2010 federal census and resulted in a federal court ordering the adoption of a 2012 judicially-drafted congressional redistricting plan. The amici support granting the relief requested by petitioners.

procedure, which does not tolerate a nonvote. Thus, that claim accrued when the 2021 legislation was deemed unconstitutional to the extent that it permitted the Legislature "to avoid a central requirement of the reform amendments" (*Matter of Harkenrider v Hochul*, 38 NY3d at 517), a determination first made by Supreme Court (McAllister, J.) on March 31, 2022. Petitioners commenced this proceeding on June 28, 2022, well within the period in which to do so (*see* CPLR 217 [1]).

In support of their claim for mandamus relief, petitioners argue that, under the plain language of the NY Constitution, the IRC has a nondiscretionary duty to submit a second set of redistricting plans to the Legislature if its first set of plans is rejected by legislative vote. Petitioners assert that *Harkenrider* exclusively addressed the Legislature's constitutional violations and, thus, did not remedy the IRC's failure to perform that duty. They further claim that, because the court-ordered congressional map adopted in *Harkenrider* was merely an interim map for the purpose of the 2022 elections, they have a clear legal right to the performance of that duty.

Against the backdrop of the 2014 redistricting reforms, these arguments are compelling. As the sponsors explained, the reforms were intended "to achieve a fair and readily transparent process" and "ensure that the drawing of legislative district lines in New York will be done by a bipartisan, independent body" (Assembly Mem in Support, 2012 NY Senate-Assembly Concurrent Resolution S6698, A9526; Senate Introducer's Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). The carefully crafted constitutional process was further meant to enable, "[f]or the first time, both the majority and minority parties in the [L]egislature [to] have an equal role in the process of drawing lines" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). "Just as important, the enactment of the constitutional amendment" was intended to "give the voters of New York a voice in the adoption of this new process and[,] by enshrining it in the constitution, ensure that the process will not be changed without due considerations" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). These "far-reaching" constitutional reforms were anticipated to "set the standard for independent redistricting throughout the United States" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). Instead, the reforms were thwarted, and these goals were not met. As petitioners' counsel repeatedly asserted at oral argument, this proceeding seeks to "vindicate the purpose" of the redistricting amendments.

In addition to evaluating the various constitutional provisions cited to by the parties, we 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. We are necessarily limited in our ability to infer such intention in this delicate and highly charged matter of significant public concern. As certain respondents, and the dissent here, assert, there is a clear default duration for electoral maps provided for in the NY Constitution: "[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 decennial census taken in a year ending in zero unless modified pursuant to court order" (NY Const, art III, § 4 [e]).

Petitioners urge that the Court of Appeals was endeavoring simply to expediently provide a remedy for the immediately pressing needs of the 2022 election, pointing to various phrases within the *Harkenrider* decision. Indeed, the Court succinctly stated at the outset of its decision that the maps being ordered would be "for use in the 2022 election" (*Matter of Harkenrider v Hochul*, 38 NY3d at 502). It is repeated later that the state was left "without constitutional district lines for use in the 2022 primary and general elections" (*id.* at 521). Underscoring the urgency, there is then considerable discussion of the need to move the 2022 primaries (*id.* at 522-523). Ultimately, the subject map was certified as the "*2022* [c]ongressional map" (*Matter of Harkenrider v Hochul*, 2022 NY Slip Op 31471[U] at *4 [emphasis added]); this could equally refer to the year in which the map was adopted, effective or limited to. Most persuasively, throughout its decision, the Court continuously emphasized that the 2014 amendments "were carefully crafted to *guarantee*," or "*ensure*," "that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission" (*Matter of Harkenrider v Hochul*, 38 NY3d at 513, 514 [emphasis added]). It is apparent that, due to the then-fast-approaching 2022 election cycle, there was a reason to forgo the overarching intent of the amendments. The majority in *Harkenrider* concluded by acknowledging the guiding principle that the NY Constitution is "the will of the people of this state" and that it intended to adhere to that will in disposing of the matter before it (*id.* at 524). We too must be guided by the overarching policy of the constitutional provision: broad engagement in a transparent redistricting process.

Crucially, the same provision giving the 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.

Mandamus to compel lies where an administrative body has failed to perform a duty enjoined upon it by law, the performance of said duty is ministerial and mandatory, rather than discretionary, and there is a clear right to the relief sought (*see New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]; *Matter of Hussain v Lynch*, 215 AD3d 121, 125-126 [3d Dept 2023]). Discretionary acts involve the exercise of judgment that may produce different and acceptable results (*see Tango v Tulevech*, 61 NY2d 34, 41 [1983]; *see also Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018], *cert denied* ___ US ___, 139 S Ct 2651 [2019]).

The IRC had an indisputable duty under the NY Constitution to submit a second set of maps upon the rejection of its first set (*see* NY Const, art III, § 4 [b]). The language of NY Constitution, article III, § 4 makes clear that this duty is mandatory, not discretionary. It is undisputed that the IRC failed to perform this duty. Further, we agree with petitioners that *Harkenrider* left unremedied the IRC's failure to perform its duty to submit a second set of maps. There were two questions posed before the Court of Appeals in *Harkenrider*, neither of which addressed the IRC's duty (*Matter of Harkenrider v Hochul*, 38 NY3d at 501-502). The challenge brought and the remedy granted were directed at the Legislature's unconstitutional reaction to the IRC's failure to submit maps, rather than the IRC's failure in the first instance (*see id.* at 505-506; *Matter of Harkenrider v Hochul*, 76 Misc 3d 171, 173 [Sup Ct, Steuben County 2022], *mod* 204 AD3d 1366 [4th Dept 2022], *affd* 38 NY3d 494 [2022]). *Harkenrider* addresses the IRC's inaction solely by way of factual background, and the IRC's discrete failure to perform its

constitutional duty was left unaddressed until this proceeding.[5] Indeed, the fact that the deadline for the IRC's submission had passed influenced the practicalities of the remedy fashioned in *Harkenrider*; the only way to prepare valid maps for the 2022 election, at that time, was through judicial creation of those maps (*see Matter of Harkenrider v Hochul*, 38 NY3d at 523). To hold today that the passing of the deadline leaves petitioners with no remedy would render meaningless the distinct constitutional command that the IRC create a second set of maps.

In light of the foregoing, petitioners have demonstrated a clear legal right to the relief sought. This determination honors the constitutional enactments as the means of providing a robust, fair and equitable procedure for the determination of voting districts in New York.[6] The right to participate in the democratic process is the most essential right in our system of governance. The procedures governing the redistricting process, all too easily abused by those who would seek to minimize the voters' voice and entrench themselves in the seats of power, must be guarded as jealously as the right to vote itself; in granting this petition, we return the matter to its constitutional design.[7] Accordingly, we direct the IRC to commence its duties forthwith.

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[5] It follows that this proceeding does not constitute a collateral attack on that determination; we are merely addressing a discrete and previously unaddressed issue in a proceeding brought by different parties.

[6] We disagree with Supreme Court's characterization of petitioner's relief as "provid[ing] a path to an annual redistricting process," as the right to compel the IRC to submit a second set of redistricting maps will be exhausted once it has done so. We further note that the IRC's inability to reach consensus was subsequently overcome relative to the assembly maps (*see generally* New York Independent Redistricting Commission, *NYIRC Assembly 2023*, available at https://www.nyirc.gov/storage/plans/20230420/assembly_plan.pdf [last accessed July 6, 2023]).

[7] Our dissenting colleagues cite to a publication by the Brennan Center for Justice analyzing the most recent redistricting cycle nationwide (*see* Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, Brennan Center for Justice [Aug. 11, 2022], available at https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction [last accessed July 6, 2023]). We are happy to note that this analysis reveals that the highest percentage of competitive districts emerge from court-drawn maps and, unsurprisingly, that one-party control results in a much smaller percentage of competitive districts (*see* Li &

Reynolds Fitzgerald and McShan, JJ., concur.

Pritzker, J. (dissenting).

We respectfully dissent because, initially, we find the proceeding untimely and would affirm on this alternate ground. In addition, substantively and contrary to the majority's conclusions, it is our opinion that the Court of Appeals in *Matter of Harkenrider v Hochul* (38 NY3d 494 [2022]) remedied the refusal of respondent Independent Redistricting Commission (hereinafter the IRC) to perform its duty, and, further, that the court-ordered congressional map is not interim but, rather, final and otherwise in force until after the 2030 census. Since the map is final, there is no longer a ministerial duty for the IRC to perform and therefore mandamus cannot lie. Moreover, public policy and the spirit of the 2014 constitutional amendments do not support the notion that the IRC should get a mandamus mulligan. Significantly, the judicial redistricting plan has been found to be competitive – although perhaps too competitive for some (*see* Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, Brennan Center for Justice [Aug. 11, 2022], available at https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction [last accessed July 6, 2023] [noting that, in New York, under the court-ordered redistricting maps, "almost one in five seats are competitive, [which is] the highest percentage in the country for a large state"]). For these reasons, we would affirm Supreme Court's dismissal of the petition.

First, we turn our attention to the issue of timeliness. For purposes of a mandamus proceeding, pursuant to CPLR 217 (1), "a proceeding against a body or officer must be commenced within four months . . . after the respondent's refusal, upon the demand of the petitioner or the person whom he [or she] represents, to perform its duty" (*see Matter of EZ Props., LLC v City of Plattsburgh*, 128 AD3d 1212, 1215 [3d Dept 2015]). As relevant here, "[a] petitioner . . . may not delay in making a demand in order to indefinitely postpone the time within which to institute the proceeding. The petitioner must make his or her demand within a reasonable time after the right to make it occurs, or

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Leaverton). It further bears noting that the analysis concludes that, "[i]f Americans hope to reverse the long-term decline of competitive districts, reforms to create fairer, more independent map-drawing processes will be essential" (Li & Leaverton). This was the aim of the 2012-2014 Legislature, and we find that it created a path to be followed *now*, rather than waiting until the next decade.

after the petitioner knows or should know of the facts which give him or her a clear right to relief, or else, the petitioner's claim can be barred by the doctrine of laches. The term laches, as used in connection with *the requirement* of the making of a prompt demand in mandamus proceedings, refers solely to the unexcused lapse of time and does not refer to the equitable doctrine of laches" (*Matter of Granto v City of Niagara Falls*, 148 AD3d 1694, 1695 [4th Dept 2017] [internal quotation marks, brackets and citations omitted; emphasis added]; *see Matter of Sheerin v New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 NY2d 488, 495-496 [1979]). "Th[is] reasonable time requirement for a prompt demand should be measured by CPLR 217 (1)'s four-month limitations period, and thus, a demand should be made no more than four months after the right to make the demand arises" (*Matter of Zupa v Zoning Bd. of Appeals of Town of Southold*, 64 AD3d 723, 725 [2d Dept 2009] [citations omitted]). In certain instances, the commencement of a proceeding pursuant to CPLR article 78 constitutes a demand (*see Matter of Butkowski v Kiefer*, 140 AD3d 1755, 1756 [4th Dept 2016]; *Matter of Gopaul v New York City Employees' Retirement Sys.*, 122 AD3d 848, 849 [2d Dept 2014]).

Here, we must determine when it was reasonable for petitioners to demand that the IRC act and, therefore, when the statute of limitations accrued. As to the relevant time frame, on January 3, 2022, the IRC submitted the two plans to the Legislature that were rejected on January 10, 2022. Thereafter, the IRC was unable to come to a consensus regarding a second proposal and, on January 24, 2022, announced that it would not be submitting a second proposal. The Legislature began to draft its own plan, which was enacted on February 3, 2022. The *Harkenrider* proceeding was commenced that same day. On May 20, 2022, Supreme Court (McAllister, J.) issued the final order therein establishing the new state senate and congressional districts. On June 28, 2022, petitioners commenced the instant proceeding seeking to compel the IRC to submit a second proposed congressional redistricting plan to the Legislature. In our view, under black letter mandamus jurisprudence, it was no later than January 24, 2022 that "petitioner[s] kn[ew] or should [have] know[n] of the facts which [gave them] a clear right to relief" (*Matter of Granto v City of Niagara Falls*, 148 AD3d at 1695 [internal quotation marks and citation omitted]). However, petitioners did not make a demand until June 28, 2022, when they commenced this proceeding, over a month past the running of the four-month statute of limitations set forth in CPLR 217 (1). As such, "petitioner[s] unreasonably delayed in making the demand and . . . this proceeding is barred by laches" (*Matter of Densmore v Altmar-Parish-Williamstown Cent. School Dist.*, 265 AD2d 838, 839 [4th Dept 1999], *lv denied* 94 NY2d 758 [2000]; *see Matter of Granto v City of Niagara Falls*, 148 AD3d at 1696; *Matter of van Tol v City of Buffalo*, 107 AD3d 1626, 1627 [4th Dept 2013]; *Matter of Schwartz v Morgenthau*, 23 AD3d 231, 233 [1st Dept

2005], *affd* 7 NY3d 427 [2006]; *compare Matter of Speis v Penfield Cent. Schs.*, 114 AD3d 1181, 1183 [4th Dept 2014]; *Matter of Selective Ins. Co. of Am. v State of N.Y. Workers' Compensation Bd.*, 102 AD3d 72, 76-77 [3d Dept 2012]).[1]

Briefly, we reject the alternate theories that have been advanced in this case as to when the statute of limitations accrued. First, it is true that NY Constitution, article III, § 4 (b) provides that, if the initial redistricting plan is rejected by the Legislature, the IRC, "[w]ithin [15] days of such notification and in no case later than February [28th], . . . shall prepare and submit . . . a second redistricting plan."[2] Here, however, this February 28 date has no relevance or application inasmuch as, on January 24, the IRC announced that it would not submit a second plan. Moreover, the 15-day period to act after legislative rejection ended on January 25. Additionally, when the Legislature passed its own redistricting plan on February 3, the IRC *lost its ability* to *on its own* propose a second redistricting plan to the Legislature. As such, the February 28 date is a red herring. Further, we disagree with the majority's assertion that the statute of limitations did not accrue until the gap-filling legislation of 2021 was declared unconstitutional.[3] To that end, the gap-filling legislation purported to allow 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, ch 633, § 1). Significantly, this legislation did not excuse the IRC from "its constitutional obligations" to propose a second plan, which is precisely what petitioners, and the majority, claim is the "the

[1] Certainly, the unreasonableness of petitioners' delay in commencing this action is evident given that the *Harkenrider* petitioners' filing of a 67-page, 226-paragraph petition on February 3, 2022, just over one week after the IRC announced it would not be submitting a second redistricting plan and the same day the Legislature enacted its own plan. Indeed, from a laches point of view, it is reasonable to conclude that the delay was due to petitioners having favored the gerrymandered legislative maps, rather than the failure of the IRC to act.

[2] The plain language of this section establishes that the IRC has 15 days to prepare a second plan. The February 28 deadline does not extend this time frame, but rather is the final date for preparation of a second plan, even if that date does not provide the IRC with 15 days to prepare a second plan.

[3] Although the majority does not discuss and explicitly reject the timeliness analysis of Supreme Court (Lynch, J.), its analysis implicitly does so. We are also unpersuaded by the court's timeliness analysis.

procedural violation at issue in this case." However, this harm would exist even if the gap-filling legislation was found constitutional because this legislation caused the same injury asserted in this mandamus proceeding, usurping the role of the IRC and enacting maps prior to the IRC offering a second plan. Thus, even if the gap-filling legislation had been found constitutional, it would have no bearing whatsoever on petitioners' assertion that the IRC failed to perform its constitutionally mandated duty by neglecting to submit a second congressional map, which triggered the mandamus relief requested herein and set the accrual date.[4] As unlikely as it sounds, the gap-filling legislation should simply have led petitioners to be aligned with the *Harkenrider* petitioners, at least as to the need for IRC action *before* a final map is drawn by the Legislature.

Moving to the merits, even if the proceeding was timely, we would still affirm Supreme Court's dismissal of the petition based upon substantive infirmities. At the outset, we reject petitioners' contention, with which the majority agrees, that the court-ordered congressional map is interim – in place only for the purpose of the 2022 elections – rather than in place until after the 2030 census. Indeed, determination of this issue is crucial as the mandamus relief sought is hard-tethered to the duration of the relief ordered in *Harkenrider*. To that end, we disagree with the majority's position that the Court of Appeals, in *Harkenrider*, left us "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." To the contrary, the plain language of the NY Constitution provides the duration in clear terms. "The process for redistricting congressional and state legislative districts [established by NY Constitution, article III, §§ 4, 5 and 5-b] 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 decennial census taken in a year ending in zero unless modified pursuant to court order" (NY Const, art III, § 4 [e]). The Court of Appeals directly cited to, and thereby incorporated, this section when discussing and approving the judicially drawn maps ordered by Supreme Court; "[t]hus, we endorse the procedure directed by Supreme Court to 'order the adoption of . . . a redistricting plan' " (*Matter of Harkenrider v Hochul*, 38 NY3d at 523, quoting NY Const, art III, § 4 [e]). Notably, there is no caveat nor limitation as to duration and, as such, it is our opinion that the Constitution requires that such court-ordered maps remain

[4] In fact, the Court of Appeals noted in *Harkenrider* that mandamus could be one of the avenues of a voter aggrieved by IRC inaction (38 NY3d at 515 n 10). Of course, the proceeding would need to be timely (*see* CPLR 217 [1]).

in place until after the next census (*see* NY Const, art III, § 4 [e]). More to the point, the courts *could have* – yet did not – expressly order that the plan adopted in *Harkenrider* be interim and only remain in place until the IRC took action and implemented a legislative plan that met constitutional requirements following the 2022 election (*see e.g. Ely v Klahr*, 403 US 108, 110-111 [1971]; *Honig v Board of Supervisors of Rensselaer County*, 24 NY2d 861, 862 [1969]).

From a common sense point of view, we find the meaning clear and it is implausible to assert that any of the members of the Court of Appeals would leave the voters to grapple with an issue of this magnitude.[5] Moreover, this view is also supported by Judge Troutman's reasoned dissent, wherein she raised the concern that the plan "may" be in place "for the next 10 years" (*Matter of Harkenrider v Hochul*, 38 NY3d at 527 [Troutman, J., dissenting]).[6] Further, if it were an interim order, presumably there would be a directive that the IRC reconvene and the constititutionally mandated redistricting

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[5] We are also unpersuaded that it can be gleaned from the decisions in *Harkenrider* that the court-ordered congressional map only be used for the 2022 election cycle (*see Matter of Harkenrider v Hochul*, 38 NY3d 494; *Matter of Harkenrider v Hochul*, 204 AD3d 1366 [4th Dept 2022]; *Matter of Harkenrider v Hochul*, 76 Misc 3d 171 [Sup Ct, Steuben County 2022]). Although these decisions refer generally to the "2022 election" and the "2022 maps" (*see id.*), these references are not determinative, but rather are references to the next scheduled election for which the court-ordered maps would of course apply. Moreover, as pointed out by the majority, Supreme Court, after minor revisions to the maps were made, ordered that they are "the final enacted redistricting maps" (*Matter of Harkenrider v Hochul*, Sup Ct, Steuben County, June 2, 2022, McAllister, J., index No. E2022-0116CV, NYSCEF doc. No. 696).

[6] Judge Troutman's use of the word "may" does not imply that the plan endorsed by the Court of Appeals is interim. Although the default duration for the redistricting maps is 10 years (*see* NY Const, art III, § 4 [e]), the duration is subject to other potentially successful challenges during the 10-year period, such as federal litigation under the Voting Rights Act (42 USC § 1973). Additionally, had the majority intended the plan to be interim, surely Judge Troutman's colleagues would have explained this to her and presumably clarified this issue in the majority decision, allaying her concerns in this regard and alleviating the need to dissent on this point. In other words, if the plan were interim, there would be no need to be concerned with a 10-year term – nor would there be much ado arising from a one-year sunsetting order.

process begin anew after the one-year period. Indeed, it is well "recognize[d] that a congressional districting plan will usually be in effect for at least 10 years and five congressional elections" (*Kirkpatrick v Preisler*, 394 US 526, 533 [1969]), much as there is a strong public policy in favor of the finality of elections (*see generally Matter of Lichtman v Board of Elections of Nassau County*, 27 NY2d 62, 66 [1970]). So too should there be a strong public policy in favor of the finality of the establishment of electoral districts, as "[l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system" (*Reynolds v Sims*, 377 US 533, 583 [1964]).

Next, we disagree with the majority's conclusion that the remedy in *Harkenrider* failed to address the IRC's refusal to submit a second set of redistricting maps to the Legislature.[7] To the contrary, it is our opinion that the Court of Appeals quite clearly considered and addressed the IRC's constitutional violation, specifically its refusal to act, which is the precise injury alleged herein. The majority decision in *Harkenrider* rejected the State respondents' request for a chance to repair the legislation at issue and explained that "[t]he 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*" (*Matter of Harkenrider v Hochul*, 38 NY3d at 523 [emphasis added]). As such, the Court of Appeals, in considering a legislative fix, rejected same in part because, in their view, it was too late for the IRC to act. Further, the Court framed one of the petitioners' arguments, with which the Court agreed, as an assertion "that, *in light of the lack of compliance by the IRC* and the [L]egislature with the procedures set forth in the Constitution, the [L]egislature's enactment of the 2022 redistricting maps contravened the Constitution" (*Matter of Harkenrider v Hochul*, 38 NY3d at 508-509 [emphasis added]). Thus, the failure of the IRC to act, which is the limited subject of the instant mandamus proceeding, was considered and in fact is part and parcel of the Court of Appeals' finding of procedural constitutional infirmity infecting the 2022 maps.

In that same vein, from a conceptual point of view, simply put, the judicially adopted remedy in *Harkenrider* was authorized and, while perhaps not the only permissible remedy, and clearly not petitioners' preferred remedy, it repaired the procedural and substantive infirmities in a manner directly set forth in the NY

[7] We do, however, agree that the *manner* in which the Court of Appeals addressed the IRC's failure to submit a second redistricting map is not the remedy now requested by petitioners.

Constitution (NY Const, art III, § 4 [e]). Indeed, during oral argument the judges of the Court of Appeals asked many probing questions concerning the different remedies available and the dissenting judges proposed different legislative remedies. In fact, the utility of crafting a legislative remedy under NY Constitution, article III, § 5-b was discussed at length and served as part of the basis for Judge Troutman's dissent, which would have required the "[L]egislature to adopt either of the two plans that the IRC has already approved pursuant to [NY Constitution, article III, §] 5-b (g)" (*Matter of Harkenrider v Hochul*, 38 NY3d at 525 [Troutman, J., dissenting]). In this regard, NY Constitution, article III, § 5-b (a) permits the IRC to reconvene outside the every 10-year period when "a court orders that congressional . . . districts be amended" in response to a successful legal challenge to a map, such as reestablishing the IRC to amend a map to address a violation of the Voting Rights Act due to the failure to include a minority district (*see generally Thornburg v Gingles*, 478 US 30 [1986]). Although this provision is not applicable to the instant proceeding because it was not utilized by petitioners as a basis for relief, and, more significantly, because petitioners are seeking a new map rather than an amended one, the significance of the Court of Appeals' attention to this provision in *Harkenrider* is only to demonstrate that it did specifically contemplate reestablishing the IRC.

The foregoing leads us to our ultimate conclusion that petitioners are not entitled to the extraordinary remedy of mandamus. As discussed above, the Court of Appeals was presented with alternative remedies in *Harkenrider*, including that posed by petitioners, and elected to have a special master establish a redistricting plan to be implemented by court order. To that end, from a mandamus perspective, the issue is not whether petitioners' requested relief is ever constitutionally available, but rather whether same may be mandated in the aftermath of a judicial redistricting. It is our view that the judicial remedy cured the IRC's failure to act by lawfully establishing a redistricting plan for the ordinary duration, leaving no uncured violation of law and thus foreclosing mandamus. Although it is not unreasonable for petitioners to wish for a different remedy, this bald desire falls well short of the standard required to mount a successful mandamus proceeding. To wit, "[a] writ of mandamus is an extraordinary remedy that is available only in limited circumstances" (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018] [internal quotation marks and citations omitted], *cert denied* ___ US ___, 139 S Ct 2651 [2019]; *see Matter of Hussain v Lynch*, 215 AD3d 121, 125-126 [3d Dept 2023]). A petitioner seeking mandamus to compel "must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757

[1991]; *accord Matter of Mental Hygiene Legal Serv., Third Jud. Dept. v Delaney*, 38 NY3d 1076, 1096 [2022, Rivera, J., dissenting]). "The duty must be positive, not discretionary, and the right to its performance must be so clear as not to admit of reasonable doubt or controversy" (*Matter of Burr v Voorhis*, 229 NY 382, 387 [1920]; *see Matter of Thornton v Saugerties Cent. Sch. Dist.*, 145 AD3d 1138, 1140 [3d Dept 2016], *lv denied* 29 NY3d 902 [2017]).

Therefore, in light of our opinion that the court-ordered congressional map is final and in place until after the 2030 census, as well as our opinion that the Court of Appeals has already addressed the IRC's refusal to submit a second set of redistricting maps to the Legislature, we do not believe that, presently, the IRC is duty bound to perform *any* act until after the next census, let alone a ministerial act. Consequently, because a valid court-ordered congressional map has been established and remains in place, it is our opinion that petitioners did not satisfy their burden of demonstrating a clear legal right to compel the IRC to propose a second redistricting plan for consideration by the Legislature (*see generally Matter of League of Women Voters of N.Y. State v New York State Bd. of Elections*, 206 AD3d 1227, 1230-1231 [3d Dept 2022], *lv denied* 38 NY3d 909 [2022]; *Matter of Barone v Dufficy*, 186 AD3d 1358, 1360 [2d Dept 2020]; *Matter of Ethington v County of Schoharie*, 173 AD3d 1504, 1505 [3d Dept 2019]; *Matter of Thornton v Saugerties Cent. Sch. Dist.*, 145 AD3d at 1141; *compare Matter of Eidt v City of Long Beach*, 62 AD3d 793, 795 [2d Dept 2009]). Accordingly, as petitioners are not entitled to the extraordinary remedy of mandamus, Supreme Court did not err in dismissing the petition on this basis.

There is likely no disagreement that a properly conducted and constitutionally mandated legislative redistricting process with the bipartisan involvement of the IRC would have, at least in theory, been preferable to resorting to litigation and judicially drawn maps. However, since the IRC failed in this regard, 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. Although we agree with petitioners that the court-ordered congressional map is not perfect, and that such flaws may raise legitimate concerns, if these concerns are substantial, they can be challenged. However, and aside from our opinion that mandamus is legally unavailable, the goals of the 2014 constitutional amendments have in fact been met by way of the operation of the constitutional safety valve resulting in maps that appear competitive. This is, after all, the *raison d'etre* behind the 2014 constitutional amendments, which nobly tried to address gerrymandering for what it is – cheating. We have great faith that our independent judicial branch of government will continue to remedy constitutional violations, which

has already been done here, and, at the same time, steadfastly enforce the rule of law. In conclusion, we say let the legislative process roll once again – but this time in conformity with the 2014 constitutional amendments – after the 2030 census.

Egan Jr., J., concurs.

ORDERED that the judgment is reversed, on the law, without costs, and petition granted.

ENTER:

Robert D. Mayberger
Clerk of the Court

Exhibit B

ELIAS LAW GROUP

250 Massachusetts Ave NW, Suite 400 | Washington, DC 20001

July 24, 2023

VIA E-MAIL

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Re: *Hoffmann, et al. v. New York State Independent Redistricting Commission, et al.*, Case No. CV-22-2265, New York Supreme Court, Appellate Division, Third Department

Dear Counsel:

As you are aware, the Appellate Division reversed the judgment of the Albany County Supreme Court and granted the Amended Verified Petition for Writ of Mandamus in the above-referenced litigation. That Petition sought an order "commanding the New York State Independent Redistricting Commission and its commissioners to . . . submit[] a second round of proposed congressional districting plans for consideration by the Legislature, in order to ensure that a lawful plan is in place immediately following the 2022 elections and can be used for subsequent elections this decade." **The Appellate Division further "direct[ed] the IRC to commence its duties forthwith."**

A copy of that Opinion and Order, along with Notice of Entry served on July 14, 2023, is attached here for your reference.

Over a week has passed since the Appellate Division's Opinion and Order was entered. The decision has not been appealed, and no stay has been entered. Yet, the IRC has not made the public aware of any steps it has taken in that time to "commence[] its duties," despite the Appellate Division's instruction that it do so "forthwith."

On or before July 26, 2023, please confirm that your clients will comply with the Appellate Division's Order and describe the immediate steps your clients are taking to do so.

To the extent necessary, Petitioners will take all appropriate action to enforce the relief granted by the Court.

Sincerely,

Aria C. Branch
Counsel to Petitioners

cc:
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT

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-Appellants,

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 Ross Brady; Independent Redistricting Commissioner John Conway III; Independent Redistricting Commissioner Ivelisse Cuevas-Molina; Independent Redistricting Commissioner Elaine Frazier; Independent Redistricting Commissioner Lisa Harris; Independent Redistricting Commissioner Charles Nesbitt; and Independent Redistricting Commissioner Willis H. Stephens,

Respondents-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,

Intervenor-Respondents.

A.D. No. CV-22-2265

NOTICE OF ENTRY OF CORRECTED OPINION AND ORDER

PLEASE TAKE NOTICE that the annexed document is a true and correct copy of the Opinion and Order entered in this action in the Office of the Clerk of the Supreme Court of the

State of New York, Appellate Division, Third Judicial Department, on July 13, 2023, as corrected on July 14, 2023. *See* NYSCEF Doc. Nos. 80, 81.

Dated: July 14, 2023

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To: Counsel of record (via NYSCEF)

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 13, 2023 CV-22-2265

In the Matter of ANTHONY S. HOFFMANN et al.,
Appellants,
v
NEW YORK STATE INDEPENDENT REDISTRICTING COMMISSION et al.,
Respondents.

OPINION AND ORDER

Calendar Date: June 8, 2023

Before: Garry, P.J., Egan Jr., Pritzker, Reynolds Fitzgerald and McShan, JJ.

Elias Law Group, LLP, Washington, DC (*Aria C. Branch* of counsel, admitted pro hac vice), for appellants.

Jenner & Block LLP, Washington, DC (*Jessica Ring Amunson* of counsel, admitted pro hac vice), for Ken Jenkins and others, respondents.

Perillo Hill, LLP, Sayville (*Timothy F. Hill* of counsel), for Ross Brady and others, respondents.

Troutman Pepper Hamilton Sanders LLP, New York City (*Misha Tseytlin* of counsel), for Timothy Harkenrider and others, intervenors.

Letitia James, Attorney General, New York City (*Andrea W. Trento* of counsel), for the Governor and another, amici curiae.

Covington & Burling LLP, New York City (*P. Benjamin Duke* of counsel), for Scottie Coads and others, amici curiae.

Garry, P.J.

Appeal from a judgment of the Supreme Court (Peter A. Lynch, J.), entered September 14, 2022 in Albany County, which, in a proceeding pursuant to CPLR article 78, granted certain respondents' motions to dismiss the amended petition.

This CPLR article 78 proceeding involves the same factual circumstances as those that gave rise to *Matter of Harkenrider v Hochul* (38 NY3d 494 [2022]). Given the import of that prior proceeding to the mandamus relief sought here, those circumstances merit a rather lengthy discussion. Every 10 years, following each federal census, reapportionment of the senate, assembly and congressional districts in New York must be undertaken (*see* NY Const, art III, § 4). The power to draw those district lines was historically reserved to the Legislature, and, "[p]articularly with respect to congressional maps, exclusive legislative control has repeatedly resulted in stalemates, with opposing political parties unable to reach consensus on district lines" (*Matter of Harkenrider v Hochul*, 38 NY3d at 502). "[I]n response to criticism of [that] scourge of hyper-partisanship" (*id.* at 514), the People of the State of New York amended the NY Constitution in 2014 to reform the redistricting process, both procedurally and substantively, ushering in "a new era of bipartisanship and transparency" (*id.* at 503). This reform established respondent Independent Redistricting Commission (hereinafter the IRC) to draft the electoral maps. Most basically, the 2014 constitutional amendments charge the IRC with the obligation to prepare a redistricting plan and submit that plan, with appropriate implementing legislation, to the Legislature for a vote without amendment (*see* NY Const, art III, §§ 4 [b]; 5-b [a]). If that first plan is rejected, the IRC is required to prepare a second plan and the necessary implementing legislation that, again, would be subject to a vote by the Legislature without amendment (*see* NY Const, art III, § 4 [b]). Only upon rejection of that second plan may the Legislature, under the constitutional procedure, "amend[ ]" the maps drawn by the IRC (NY Const, art III, § 4 [b]). Any such legislative amendments are then statutorily limited to those that would affect no more than two percent of the population in any district (*see* L 2012, ch 17, § 3).

The 2020 federal census provided the first opportunity for the IRC to carry out its constitutionally-mandated duties. In the midst of that redistricting cycle, however, the Legislature attempted to amend the constitutional procedure and authorize itself to introduce redistricting legislation "[i]f . . . the [IRC] fails to vote on a redistricting plan and implementing legislation by the required deadline" (2021 NY Senate-Assembly Concurrent Resolution S515, A1916). Voters rejected that proposed amendment. Thereafter, in 2021, the Legislature enacted similar modifications to the constitutional

redistricting process by statute (*see* L 2021, ch 633). The IRC submitted its first redistricting plan to the Legislature on January 3, 2022 – before its January 15, 2022 deadline to do so (*see* NY Const, art III, § 4 [b]). Because the IRC had reached an impasse, it submitted the two maps that had garnered equal IRC support (*see* NY Const, art III, § 5-b [g]). On January 10, 2022, the Legislature rejected both of those maps, triggering the IRC's constitutional obligation to prepare and submit a second redistricting plan within 15 days and "in no case later than February [28, 2022]" (NY Const, art III, § 4 [b]). The IRC became deadlocked, and, on January 24, 2022, it announced that it would not be submitting a second redistricting plan to the Legislature. Shortly thereafter, the Legislature, invoking its 2021 legislation, composed new senate, assembly and congressional maps, which were signed into law on February 3, 2022.

The litigation in *Harkenrider* commenced immediately. The petitioners in that case argued, as relevant here, that the Legislature's 2022 enactment of congressional and senate maps was in contravention of the constitutional process (*Matter of Harkenrider v Hochul*, 38 NY3d at 505).[1] Ultimately, the Court of Appeals agreed that the enactment was procedurally unconstitutional (*id.* at 508-517).[2] To remedy that procedural violation, the Court concluded that "judicial oversight [wa]s required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election" (*id.* at 502). It then "endorse[d] the procedure directed by Supreme Court [(McAllister, J.)] to 'order the adoption of . . . a redistricting plan' (NY Const, art III, § 4 [e]) with the assistance of a neutral expert, designated a special master, following submissions from the parties, the [L]egislature, and any interested stakeholders who wish to be heard" (*Matter of Harkenrider v Hochul*, 38 NY3d at 523). Supreme Court complied with that directive, and, after a public hearing and receipt of substantial public comment, the court certified the congressional and senate maps prepared by a special master as "the official approved 2022 [c]ongressional map and the 2022 [s]tate [s]enate map" (*Matter of Harkenrider v Hochul*, 2022 NY Slip Op 31471[U], *4 [Sup Ct, Steuben County 2022]).

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[1] The assembly map was not challenged in *Harkenrider* (*Matter of Harkenrider v Hochul*, 38 NY3d at 521 n 15). That map was the subject of subsequent litigation (*Matter of Nichols v Hochul*, 212 AD3d 529 [1st Dept 2023], *appeal dismissed* 39 NY3d 1119 [2023]).

[2] It further held that the 2022 congressional and senate maps were unconstitutionally gerrymandered in favor of the majority party (*Matter of Harkenrider v Hochul*, 38 NY3d at 518-520).

The court subsequently made minor revisions to those maps and ordered that the maps, as modified, are "the final enacted redistricting maps" (*Matter of Harkenrider v Hochul*, Sup Ct, Steuben County, June 2, 2022, McAllister, J., index No. E2022-0116CV, NYSCEF doc. No. 696).

Petitioners thereafter commenced this CPLR article 78 proceeding to compel the IRC "to prepare and submit to the [L]egislature a second redistricting plan and the necessary implementing legislation for such plan . . . in order to ensure a lawful plan is in place . . . for subsequent elections this decade" (quotation marks omitted).[3] Certain IRC commissioners answered indicating that they did not oppose the relief sought by petitioners. Other commissioners, along with the *Harkenrider* petitioners – who are intervenors here – moved to dismiss the proceeding, foremost arguing that the redistricting process based upon the 2020 federal census is complete and that the congressional map generated by that process governs all elections until the redistricting process begins anew following the 2030 federal census. Supreme Court (Lynch, J.) agreed, dismissing the petition, and petitioners appeal.[4]

Initially, we reject the alternative ground for affirmance that this proceeding is untimely. The 2021 legislation in effect at the time of the IRC's failure to submit a second redistricting plan to the Legislature provided that, "[i]f the [IRC] does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan, the [IRC] shall submit to the [L]egislature all plans in its possession, both completed and in draft form, and the data upon which such plans are based," and that each house must then "introduce such implementing legislation with any amendments each house deems necessary" (*see* L 2021, ch 633, § 1). In this CPLR article 78 proceeding, petitioners seek strict compliance with the constitutionally enshrined IRC

[3] Petitioners originally sought relief with respect to both the congressional and senate maps, but their amended pleading pertains to the congressional map only.

[4] This Court granted two applications for leave to file amici curiae briefs: one by the Governor and the Attorney General and one by several voters, including the Civil Engagement Chair of the New York State Conference of the National Association for the Advancement of Colored People and two of the plaintiffs from *Favors v Cuomo* (2012 WL 928223, 2012 US Dist LEXIS 36910 [ED NY 2012]), litigation that challenged the Legislature's redistricting process following the 2010 federal census and resulted in a federal court ordering the adoption of a 2012 judicially-drafted congressional redistricting plan. The amici support granting the relief requested by petitioners.

procedure, which does not tolerate a nonvote. Thus, that claim accrued when the 2021 legislation was deemed unconstitutional to the extent that it permitted the Legislature "to avoid a central requirement of the reform amendments" (*Matter of Harkenrider v Hochul*, 38 NY3d at 517), a determination first made by Supreme Court (McAllister, J.) on March 31, 2022. Petitioners commenced this proceeding on June 28, 2022, well within the period in which to do so (*see* CPLR 217 [1]).

In support of their claim for mandamus relief, petitioners argue that, under the plain language of the NY Constitution, the IRC has a nondiscretionary duty to submit a second set of redistricting plans to the Legislature if its first set of plans is rejected by legislative vote. Petitioners assert that *Harkenrider* exclusively addressed the Legislature's constitutional violations and, thus, did not remedy the IRC's failure to perform that duty. They further claim that, because the court-ordered congressional map adopted in *Harkenrider* was merely an interim map for the purpose of the 2022 elections, they have a clear legal right to the performance of that duty.

Against the backdrop of the 2014 redistricting reforms, these arguments are compelling. As the sponsors explained, the reforms were intended "to achieve a fair and readily transparent process" and "ensure that the drawing of legislative district lines in New York will be done by a bipartisan, independent body" (Assembly Mem in Support, 2012 NY Senate-Assembly Concurrent Resolution S6698, A9526; Senate Introducer's Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). The carefully crafted constitutional process was further meant to enable, "[f]or the first time, both the majority and minority parties in the [L]egislature [to] have an equal role in the process of drawing lines" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). "Just as important, the enactment of the constitutional amendment" was intended to "give the voters of New York a voice in the adoption of this new process and[,] by enshrining it in the constitution, ensure that the process will not be changed without due considerations" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). These "far-reaching" constitutional reforms were anticipated to "set the standard for independent redistricting throughout the United States" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). Instead, the reforms were thwarted, and these goals were not met. As petitioners' counsel repeatedly asserted at oral argument, this proceeding seeks to "vindicate the purpose" of the redistricting amendments.

In addition to evaluating the various constitutional provisions cited to by the parties, we 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. We are necessarily limited in our ability to infer such intention in this delicate and highly charged matter of significant public concern. As certain respondents, and the dissent here, assert, there is a clear default duration for electoral maps provided for in the NY Constitution: "[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 decennial census taken in a year ending in zero unless modified pursuant to court order" (NY Const, art III, § 4 [e]).

Petitioners urge that the Court of Appeals was endeavoring simply to expediently provide a remedy for the immediately pressing needs of the 2022 election, pointing to various phrases within the *Harkenrider* decision. Indeed, the Court succinctly stated at the outset of its decision that the maps being ordered would be "for use in the 2022 election" (*Matter of Harkenrider v Hochul*, 38 NY3d at 502). It is repeated later that the state was left "without constitutional district lines for use in the 2022 primary and general elections" (*id.* at 521). Underscoring the urgency, there is then considerable discussion of the need to move the 2022 primaries (*id.* at 522-523). Ultimately, the subject map was certified as the "*2022* [c]ongressional map" (*Matter of Harkenrider v Hochul*, 2022 NY Slip Op 31471[U] at *4 [emphasis added]); this could equally refer to the year in which the map was adopted, effective or limited to. Most persuasively, throughout its decision, the Court continuously emphasized that the 2014 amendments "were carefully crafted to *guarantee*," or "*ensure*," "that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission" (*Matter of Harkenrider v Hochul*, 38 NY3d at 513, 514 [emphasis added]). It is apparent that, due to the then-fast-approaching 2022 election cycle, there was a reason to forgo the overarching intent of the amendments. The majority in *Harkenrider* concluded by acknowledging the guiding principle that the NY Constitution is "the will of the people of this state" and that it intended to adhere to that will in disposing of the matter before it (*id.* at 524). We too must be guided by the overarching policy of the constitutional provision: broad engagement in a transparent redistricting process.

Crucially, the same provision giving the 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.

Mandamus to compel lies where an administrative body has failed to perform a duty enjoined upon it by law, the performance of said duty is ministerial and mandatory, rather than discretionary, and there is a clear right to the relief sought (*see New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]; *Matter of Hussain v Lynch*, 215 AD3d 121, 125-126 [3d Dept 2023]). Discretionary acts involve the exercise of judgment that may produce different and acceptable results (*see Tango v Tulevech*, 61 NY2d 34, 41 [1983]; *see also Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018], *cert denied* ___ US ___, 139 S Ct 2651 [2019]).

The IRC had an indisputable duty under the NY Constitution to submit a second set of maps upon the rejection of its first set (*see* NY Const, art III, § 4 [b]). The language of NY Constitution, article III, § 4 makes clear that this duty is mandatory, not discretionary. It is undisputed that the IRC failed to perform this duty. Further, we agree with petitioners that *Harkenrider* left unremedied the IRC's failure to perform its duty to submit a second set of maps. There were two questions posed before the Court of Appeals in *Harkenrider*, neither of which addressed the IRC's duty (*Matter of Harkenrider v Hochul*, 38 NY3d at 501-502). The challenge brought and the remedy granted were directed at the Legislature's unconstitutional reaction to the IRC's failure to submit maps, rather than the IRC's failure in the first instance (*see id.* at 505-506; *Matter of Harkenrider v Hochul*, 76 Misc 3d 171, 173 [Sup Ct, Steuben County 2022], *mod* 204 AD3d 1366 [4th Dept 2022], *affd* 38 NY3d 494 [2022]). *Harkenrider* addresses the IRC's inaction solely by way of factual background, and the IRC's discrete failure to perform its

constitutional duty was left unaddressed until this proceeding.[5] Indeed, the fact that the deadline for the IRC's submission had passed influenced the practicalities of the remedy fashioned in *Harkenrider*; the only way to prepare valid maps for the 2022 election, at that time, was through judicial creation of those maps (*see Matter of Harkenrider v Hochul*, 38 NY3d at 523). To hold today that the passing of the deadline leaves petitioners with no remedy would render meaningless the distinct constitutional command that the IRC create a second set of maps.

In light of the foregoing, petitioners have demonstrated a clear legal right to the relief sought. This determination honors the constitutional enactments as the means of providing a robust, fair and equitable procedure for the determination of voting districts in New York.[6] The right to participate in the democratic process is the most essential right in our system of governance. The procedures governing the redistricting process, all too easily abused by those who would seek to minimize the voters' voice and entrench themselves in the seats of power, must be guarded as jealously as the right to vote itself; in granting this petition, we return the matter to its constitutional design.[7] Accordingly, we direct the IRC to commence its duties forthwith.

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[5] It follows that this proceeding does not constitute a collateral attack on that determination; we are merely addressing a discrete and previously unaddressed issue in a proceeding brought by different parties.

[6] We disagree with Supreme Court's characterization of petitioner's relief as "provid[ing] a path to an annual redistricting process," as the right to compel the IRC to submit a second set of redistricting maps will be exhausted once it has done so. We further note that the IRC's inability to reach consensus was subsequently overcome relative to the assembly maps (*see generally* New York Independent Redistricting Commission, *NYIRC Assembly 2023*, available at https://www.nyirc.gov/storage/plans/20230420/assembly_plan.pdf [last accessed July 6, 2023]).

[7] Our dissenting colleagues cite to a publication by the Brennan Center for Justice analyzing the most recent redistricting cycle nationwide (*see* Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, Brennan Center for Justice [Aug. 11, 2022], available at https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction [last accessed July 6, 2023]). We are happy to note that this analysis reveals that the highest percentage of competitive districts emerge from court-drawn maps and, unsurprisingly, that one-party control results in a much smaller percentage of competitive districts (*see* Li &

Reynolds Fitzgerald and McShan, JJ., concur.

Pritzker, J. (dissenting).

We respectfully dissent because, initially, we find the proceeding untimely and would affirm on this alternate ground. In addition, substantively and contrary to the majority's conclusions, it is our opinion that the Court of Appeals in *Matter of Harkenrider v Hochul* (38 NY3d 494 [2022]) remedied the refusal of respondent Independent Redistricting Commission (hereinafter the IRC) to perform its duty, and, further, that the court-ordered congressional map is not interim but, rather, final and otherwise in force until after the 2030 census. Since the map is final, there is no longer a ministerial duty for the IRC to perform and therefore mandamus cannot lie. Moreover, public policy and the spirit of the 2014 constitutional amendments do not support the notion that the IRC should get a mandamus mulligan. Significantly, the judicial redistricting plan has been found to be competitive – although perhaps too competitive for some (*see* Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, Brennan Center for Justice [Aug. 11, 2022], available at https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction [last accessed July 6, 2023] [noting that, in New York, under the court-ordered redistricting maps, "almost one in five seats are competitive, [which is] the highest percentage in the country for a large state"]). For these reasons, we would affirm Supreme Court's dismissal of the petition.

First, we turn our attention to the issue of timeliness. For purposes of a mandamus proceeding, pursuant to CPLR 217 (1), "a proceeding against a body or officer must be commenced within four months . . . after the respondent's refusal, upon the demand of the petitioner or the person whom he [or she] represents, to perform its duty" (*see Matter of EZ Props., LLC v City of Plattsburgh*, 128 AD3d 1212, 1215 [3d Dept 2015]). As relevant here, "[a] petitioner . . . may not delay in making a demand in order to indefinitely postpone the time within which to institute the proceeding. The petitioner must make his or her demand within a reasonable time after the right to make it occurs, or

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Leaverton). It further bears noting that the analysis concludes that, "[i]f Americans hope to reverse the long-term decline of competitive districts, reforms to create fairer, more independent map-drawing processes will be essential" (Li & Leaverton). This was the aim of the 2012-2014 Legislature, and we find that it created a path to be followed *now*, rather than waiting until the next decade.

after the petitioner knows or should know of the facts which give him or her a clear right to relief, or else, the petitioner's claim can be barred by the doctrine of laches. The term laches, as used in connection with *the requirement* of the making of a prompt demand in mandamus proceedings, refers solely to the unexcused lapse of time and does not refer to the equitable doctrine of laches" (*Matter of Granto v City of Niagara Falls*, 148 AD3d 1694, 1695 [4th Dept 2017] [internal quotation marks, brackets and citations omitted; emphasis added]; *see Matter of Sheerin v New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 NY2d 488, 495-496 [1979]). "Th[is] reasonable time requirement for a prompt demand should be measured by CPLR 217 (1)'s four-month limitations period, and thus, a demand should be made no more than four months after the right to make the demand arises" (*Matter of Zupa v Zoning Bd. of Appeals of Town of Southold*, 64 AD3d 723, 725 [2d Dept 2009] [citations omitted]). In certain instances, the commencement of a proceeding pursuant to CPLR article 78 constitutes a demand (*see Matter of Butkowski v Kiefer*, 140 AD3d 1755, 1756 [4th Dept 2016]; *Matter of Gopaul v New York City Employees' Retirement Sys.*, 122 AD3d 848, 849 [2d Dept 2014]).

Here, we must determine when it was reasonable for petitioners to demand that the IRC act and, therefore, when the statute of limitations accrued. As to the relevant time frame, on January 3, 2022, the IRC submitted the two plans to the Legislature that were rejected on January 10, 2022. Thereafter, the IRC was unable to come to a consensus regarding a second proposal and, on January 24, 2022, announced that it would not be submitting a second proposal. The Legislature began to draft its own plan, which was enacted on February 3, 2022. The *Harkenrider* proceeding was commenced that same day. On May 20, 2022, Supreme Court (McAllister, J.) issued the final order therein establishing the new state senate and congressional districts. On June 28, 2022, petitioners commenced the instant proceeding seeking to compel the IRC to submit a second proposed congressional redistricting plan to the Legislature. In our view, under black letter mandamus jurisprudence, it was no later than January 24, 2022 that "petitioner[s] kn[ew] or should [have] know[n] of the facts which [gave them] a clear right to relief" (*Matter of Granto v City of Niagara Falls*, 148 AD3d at 1695 [internal quotation marks and citation omitted]). However, petitioners did not make a demand until June 28, 2022, when they commenced this proceeding, over a month past the running of the four-month statute of limitations set forth in CPLR 217 (1). As such, "petitioner[s] unreasonably delayed in making the demand and . . . this proceeding is barred by laches" (*Matter of Densmore v Altmar-Parish-Williamstown Cent. School Dist.*, 265 AD2d 838, 839 [4th Dept 1999], *lv denied* 94 NY2d 758 [2000]; *see Matter of Granto v City of Niagara Falls*, 148 AD3d at 1696; *Matter of van Tol v City of Buffalo*, 107 AD3d 1626, 1627 [4th Dept 2013]; *Matter of Schwartz v Morgenthau*, 23 AD3d 231, 233 [1st Dept

2005], *affd* 7 NY3d 427 [2006]; *compare Matter of Speis v Penfield Cent. Schs.*, 114 AD3d 1181, 1183 [4th Dept 2014]; *Matter of Selective Ins. Co. of Am. v State of N.Y. Workers' Compensation Bd.*, 102 AD3d 72, 76-77 [3d Dept 2012]).[1]

Briefly, we reject the alternate theories that have been advanced in this case as to when the statute of limitations accrued. First, it is true that NY Constitution, article III, § 4 (b) provides that, if the initial redistricting plan is rejected by the Legislature, the IRC, "[w]ithin [15] days of such notification and in no case later than February [28th], . . . shall prepare and submit . . . a second redistricting plan."[2] Here, however, this February 28 date has no relevance or application inasmuch as, on January 24, the IRC announced that it would not submit a second plan. Moreover, the 15-day period to act after legislative rejection ended on January 25. Additionally, when the Legislature passed its own redistricting plan on February 3, the IRC *lost its ability* to *on its own* propose a second redistricting plan to the Legislature. As such, the February 28 date is a red herring. Further, we disagree with the majority's assertion that the statute of limitations did not accrue until the gap-filling legislation of 2021 was declared unconstitutional.[3] To that end, the gap-filling legislation purported to allow 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, ch 633, § 1). Significantly, this legislation did not excuse the IRC from "its constitutional obligations" to propose a second plan, which is precisely what petitioners, and the majority, claim is the "the

[1] Certainly, the unreasonableness of petitioners' delay in commencing this action is evident given that the *Harkenrider* petitioners' filing of a 67-page, 226-paragraph petition on February 3, 2022, just over one week after the IRC announced it would not be submitting a second redistricting plan and the same day the Legislature enacted its own plan. Indeed, from a laches point of view, it is reasonable to conclude that the delay was due to petitioners having favored the gerrymandered legislative maps, rather than the failure of the IRC to act.

[2] The plain language of this section establishes that the IRC has 15 days to prepare a second plan. The February 28 deadline does not extend this time frame, but rather is the final date for preparation of a second plan, even if that date does not provide the IRC with 15 days to prepare a second plan.

[3] Although the majority does not discuss and explicitly reject the timeliness analysis of Supreme Court (Lynch, J.), its analysis implicitly does so. We are also unpersuaded by the court's timeliness analysis.

procedural violation at issue in this case." However, this harm would exist even if the gap-filling legislation was found constitutional because this legislation caused the same injury asserted in this mandamus proceeding, usurping the role of the IRC and enacting maps prior to the IRC offering a second plan. Thus, even if the gap-filling legislation had been found constitutional, it would have no bearing whatsoever on petitioners' assertion that the IRC failed to perform its constitutionally mandated duty by neglecting to submit a second congressional map, which triggered the mandamus relief requested herein and set the accrual date.[4] As unlikely as it sounds, the gap-filling legislation should simply have led petitioners to be aligned with the *Harkenrider* petitioners, at least as to the need for IRC action *before* a final map is drawn by the Legislature.

Moving to the merits, even if the proceeding was timely, we would still affirm Supreme Court's dismissal of the petition based upon substantive infirmities. At the outset, we reject petitioners' contention, with which the majority agrees, that the court-ordered congressional map is interim – in place only for the purpose of the 2022 elections – rather than in place until after the 2030 census. Indeed, determination of this issue is crucial as the mandamus relief sought is hard-tethered to the duration of the relief ordered in *Harkenrider*. To that end, we disagree with the majority's position that the Court of Appeals, in *Harkenrider*, left us "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." To the contrary, the plain language of the NY Constitution provides the duration in clear terms. "The process for redistricting congressional and state legislative districts [established by NY Constitution, article III, §§ 4, 5 and 5-b] 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 decennial census taken in a year ending in zero unless modified pursuant to court order" (NY Const, art III, § 4 [e]). The Court of Appeals directly cited to, and thereby incorporated, this section when discussing and approving the judicially drawn maps ordered by Supreme Court; "[t]hus, we endorse the procedure directed by Supreme Court to 'order the adoption of . . . a redistricting plan' " (*Matter of Harkenrider v Hochul*, 38 NY3d at 523, quoting NY Const, art III, § 4 [e]). Notably, there is no caveat nor limitation as to duration and, as such, it is our opinion that the Constitution requires that such court-ordered maps remain

[4] In fact, the Court of Appeals noted in *Harkenrider* that mandamus could be one of the avenues of a voter aggrieved by IRC inaction (38 NY3d at 515 n 10). Of course, the proceeding would need to be timely (*see* CPLR 217 [1]).

in place until after the next census (*see* NY Const, art III, § 4 [e]). More to the point, the courts *could have* – yet did not – expressly order that the plan adopted in *Harkenrider* be interim and only remain in place until the IRC took action and implemented a legislative plan that met constitutional requirements following the 2022 election (*see e.g. Ely v Klahr*, 403 US 108, 110-111 [1971]; *Honig v Board of Supervisors of Rensselaer County*, 24 NY2d 861, 862 [1969]).

From a common sense point of view, we find the meaning clear and it is implausible to assert that any of the members of the Court of Appeals would leave the voters to grapple with an issue of this magnitude.[5] Moreover, this view is also supported by Judge Troutman's reasoned dissent, wherein she raised the concern that the plan "may" be in place "for the next 10 years" (*Matter of Harkenrider v Hochul*, 38 NY3d at 527 [Troutman, J., dissenting]).[6] Further, if it were an interim order, presumably there would be a directive that the IRC reconvene and the constititutionally mandated redistricting

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[5] We are also unpersuaded that it can be gleaned from the decisions in *Harkenrider* that the court-ordered congressional map only be used for the 2022 election cycle (*see Matter of Harkenrider v Hochul*, 38 NY3d 494; *Matter of Harkenrider v Hochul*, 204 AD3d 1366 [4th Dept 2022]; *Matter of Harkenrider v Hochul*, 76 Misc 3d 171 [Sup Ct, Steuben County 2022]). Although these decisions refer generally to the "2022 election" and the "2022 maps" (*see id.*), these references are not determinative, but rather are references to the next scheduled election for which the court-ordered maps would of course apply. Moreover, as pointed out by the majority, Supreme Court, after minor revisions to the maps were made, ordered that they are "the final enacted redistricting maps" (*Matter of Harkenrider v Hochul*, Sup Ct, Steuben County, June 2, 2022, McAllister, J., index No. E2022-0116CV, NYSCEF doc. No. 696).

[6] Judge Troutman's use of the word "may" does not imply that the plan endorsed by the Court of Appeals is interim. Although the default duration for the redistricting maps is 10 years (*see* NY Const, art III, § 4 [e]), the duration is subject to other potentially successful challenges during the 10-year period, such as federal litigation under the Voting Rights Act (42 USC § 1973). Additionally, had the majority intended the plan to be interim, surely Judge Troutman's colleagues would have explained this to her and presumably clarified this issue in the majority decision, allaying her concerns in this regard and alleviating the need to dissent on this point. In other words, if the plan were interim, there would be no need to be concerned with a 10-year term – nor would there be much ado arising from a one-year sunsetting order.

process begin anew after the one-year period. Indeed, it is well "recognize[d] that a congressional districting plan will usually be in effect for at least 10 years and five congressional elections" (*Kirkpatrick v Preisler*, 394 US 526, 533 [1969]), much as there is a strong public policy in favor of the finality of elections (*see generally Matter of Lichtman v Board of Elections of Nassau County*, 27 NY2d 62, 66 [1970]). So too should there be a strong public policy in favor of the finality of the establishment of electoral districts, as "[l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system" (*Reynolds v Sims*, 377 US 533, 583 [1964]).

Next, we disagree with the majority's conclusion that the remedy in *Harkenrider* failed to address the IRC's refusal to submit a second set of redistricting maps to the Legislature.[7] To the contrary, it is our opinion that the Court of Appeals quite clearly considered and addressed the IRC's constitutional violation, specifically its refusal to act, which is the precise injury alleged herein. The majority decision in *Harkenrider* rejected the State respondents' request for a chance to repair the legislation at issue and explained that "[t]he 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*" (*Matter of Harkenrider v Hochul*, 38 NY3d at 523 [emphasis added]). As such, the Court of Appeals, in considering a legislative fix, rejected same in part because, in their view, it was too late for the IRC to act. Further, the Court framed one of the petitioners' arguments, with which the Court agreed, as an assertion "that, *in light of the lack of compliance by the IRC* and the [L]egislature with the procedures set forth in the Constitution, the [L]egislature's enactment of the 2022 redistricting maps contravened the Constitution" (*Matter of Harkenrider v Hochul*, 38 NY3d at 508-509 [emphasis added]). Thus, the failure of the IRC to act, which is the limited subject of the instant mandamus proceeding, was considered and in fact is part and parcel of the Court of Appeals' finding of procedural constitutional infirmity infecting the 2022 maps.

In that same vein, from a conceptual point of view, simply put, the judicially adopted remedy in *Harkenrider* was authorized and, while perhaps not the only permissible remedy, and clearly not petitioners' preferred remedy, it repaired the procedural and substantive infirmities in a manner directly set forth in the NY

[7] We do, however, agree that the *manner* in which the Court of Appeals addressed the IRC's failure to submit a second redistricting map is not the remedy now requested by petitioners.

Constitution (NY Const, art III, § 4 [e]). Indeed, during oral argument the judges of the Court of Appeals asked many probing questions concerning the different remedies available and the dissenting judges proposed different legislative remedies. In fact, the utility of crafting a legislative remedy under NY Constitution, article III, § 5-b was discussed at length and served as part of the basis for Judge Troutman's dissent, which would have required the "[L]egislature to adopt either of the two plans that the IRC has already approved pursuant to [NY Constitution, article III, §] 5-b (g)" (*Matter of Harkenrider v Hochul*, 38 NY3d at 525 [Troutman, J., dissenting]). In this regard, NY Constitution, article III, § 5-b (a) permits the IRC to reconvene outside the every 10-year period when "a court orders that congressional . . . districts be amended" in response to a successful legal challenge to a map, such as reestablishing the IRC to amend a map to address a violation of the Voting Rights Act due to the failure to include a minority district (*see generally Thornburg v Gingles*, 478 US 30 [1986]). Although this provision is not applicable to the instant proceeding because it was not utilized by petitioners as a basis for relief, and, more significantly, because petitioners are seeking a new map rather than an amended one, the significance of the Court of Appeals' attention to this provision in *Harkenrider* is only to demonstrate that it did specifically contemplate reestablishing the IRC.

The foregoing leads us to our ultimate conclusion that petitioners are not entitled to the extraordinary remedy of mandamus. As discussed above, the Court of Appeals was presented with alternative remedies in *Harkenrider*, including that posed by petitioners, and elected to have a special master establish a redistricting plan to be implemented by court order. To that end, from a mandamus perspective, the issue is not whether petitioners' requested relief is ever constitutionally available, but rather whether same may be mandated in the aftermath of a judicial redistricting. It is our view that the judicial remedy cured the IRC's failure to act by lawfully establishing a redistricting plan for the ordinary duration, leaving no uncured violation of law and thus foreclosing mandamus. Although it is not unreasonable for petitioners to wish for a different remedy, this bald desire falls well short of the standard required to mount a successful mandamus proceeding. To wit, "[a] writ of mandamus is an extraordinary remedy that is available only in limited circumstances" (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018] [internal quotation marks and citations omitted], *cert denied* ___ US ___, 139 S Ct 2651 [2019]; *see Matter of Hussain v Lynch*, 215 AD3d 121, 125-126 [3d Dept 2023]). A petitioner seeking mandamus to compel "must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757

[1991]; *accord Matter of Mental Hygiene Legal Serv., Third Jud. Dept. v Delaney*, 38 NY3d 1076, 1096 [2022, Rivera, J., dissenting]). "The duty must be positive, not discretionary, and the right to its performance must be so clear as not to admit of reasonable doubt or controversy" (*Matter of Burr v Voorhis*, 229 NY 382, 387 [1920]; *see Matter of Thornton v Saugerties Cent. Sch. Dist.*, 145 AD3d 1138, 1140 [3d Dept 2016], *lv denied* 29 NY3d 902 [2017]).

Therefore, in light of our opinion that the court-ordered congressional map is final and in place until after the 2030 census, as well as our opinion that the Court of Appeals has already addressed the IRC's refusal to submit a second set of redistricting maps to the Legislature, we do not believe that, presently, the IRC is duty bound to perform *any* act until after the next census, let alone a ministerial act. Consequently, because a valid court-ordered congressional map has been established and remains in place, it is our opinion that petitioners did not satisfy their burden of demonstrating a clear legal right to compel the IRC to propose a second redistricting plan for consideration by the Legislature (*see generally Matter of League of Women Voters of N.Y. State v New York State Bd. of Elections*, 206 AD3d 1227, 1230-1231 [3d Dept 2022], *lv denied* 38 NY3d 909 [2022]; *Matter of Barone v Dufficy*, 186 AD3d 1358, 1360 [2d Dept 2020]; *Matter of Ethington v County of Schoharie*, 173 AD3d 1504, 1505 [3d Dept 2019]; *Matter of Thornton v Saugerties Cent. Sch. Dist.*, 145 AD3d at 1141; *compare Matter of Eidt v City of Long Beach*, 62 AD3d 793, 795 [2d Dept 2009]). Accordingly, as petitioners are not entitled to the extraordinary remedy of mandamus, Supreme Court did not err in dismissing the petition on this basis.

There is likely no disagreement that a properly conducted and constitutionally mandated legislative redistricting process with the bipartisan involvement of the IRC would have, at least in theory, been preferable to resorting to litigation and judicially drawn maps. However, since the IRC failed in this regard, 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. Although we agree with petitioners that the court-ordered congressional map is not perfect, and that such flaws may raise legitimate concerns, if these concerns are substantial, they can be challenged. However, and aside from our opinion that mandamus is legally unavailable, the goals of the 2014 constitutional amendments have in fact been met by way of the operation of the constitutional safety valve resulting in maps that appear competitive. This is, after all, the *raison d'etre* behind the 2014 constitutional amendments, which nobly tried to address gerrymandering for what it is – cheating. We have great faith that our independent judicial branch of government will continue to remedy constitutional violations, which

has already been done here, and, at the same time, steadfastly enforce the rule of law. In conclusion, we say let the legislative process roll once again – but this time in conformity with the 2014 constitutional amendments – after the 2030 census.

Egan Jr., J., concurs.

ORDERED that the judgment is reversed, on the law, without costs, and petition granted.

ENTER:

Robert D. Mayberger
Clerk of the Court

Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

----------X

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,

-against-

The New York State Independent Redistricting Commission; Independent Redistricting Commission Chairperson Ken Jenkins; Independent Redistricting Commissioner Ross Brady; Independent Redistricting Commissioner John Conway III; Independent Redistricting Commissioner Ivelisse Cuevas-Molina; Independent Redistricting Commissioner Elaine Frazier; Independent Redistricting Commissioner Lisa Harris; Independent Redistricting Commissioner Charles Nesbitt; and Independent Redistricting Commissioner Willis H. Stephens,

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.

----------X

Index No. 904972-22

Appellate Division Docket No. CV-22-2265

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Intervenors-Respondents 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, hereby appeal to the Court of Appeals of the State of New York from the annexed Appellate Division, Third Department's corrected Opinion And Order, App. Div.

NYSCEF No.81, decided and entered on July 13, 2023 (corrected version entered on July 14, 2023). This appeal is taken from every part of the Order that aggrieves Intervenors-Respondents and is appealable by them.

DATED: Albany, New York
July 25, 2023

TROUTMAN PEPPER HAMILTON SANDERS LLP

By: _____

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EXHIBIT A

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 13, 2023 CV-22-2265

In the Matter of ANTHONY S. HOFFMANN et al.,
Appellants,
v
NEW YORK STATE INDEPENDENT REDISTRICTING COMMISSION et al.,
Respondents.

OPINION AND ORDER

Calendar Date: June 8, 2023

Before: Garry, P.J., Egan Jr., Pritzker, Reynolds Fitzgerald and McShan, JJ.

Elias Law Group, LLP, Washington, DC (*Aria C. Branch* of counsel, admitted pro hac vice), for appellants.

Jenner & Block LLP, Washington, DC (*Jessica Ring Amunson* of counsel, admitted pro hac vice), for Ken Jenkins and others, respondents.

Perillo Hill, LLP, Sayville (*Timothy F. Hill* of counsel), for Ross Brady and others, respondents.

Troutman Pepper Hamilton Sanders LLP, New York City (*Misha Tseytlin* of counsel), for Timothy Harkenrider and others, intervenors.

Letitia James, Attorney General, New York City (*Andrea W. Trento* of counsel), for the Governor and another, amici curiae.

Covington & Burling LLP, New York City (*P. Benjamin Duke* of counsel), for Scottie Coads and others, amici curiae.

Garry, P.J.

Appeal from a judgment of the Supreme Court (Peter A. Lynch, J.), entered September 14, 2022 in Albany County, which, in a proceeding pursuant to CPLR article 78, granted certain respondents' motions to dismiss the amended petition.

This CPLR article 78 proceeding involves the same factual circumstances as those that gave rise to *Matter of Harkenrider v Hochul* (38 NY3d 494 [2022]). Given the import of that prior proceeding to the mandamus relief sought here, those circumstances merit a rather lengthy discussion. Every 10 years, following each federal census, reapportionment of the senate, assembly and congressional districts in New York must be undertaken (*see* NY Const, art III, § 4). The power to draw those district lines was historically reserved to the Legislature, and, "[p]articularly with respect to congressional maps, exclusive legislative control has repeatedly resulted in stalemates, with opposing political parties unable to reach consensus on district lines" (*Matter of Harkenrider v Hochul*, 38 NY3d at 502). "[I]n response to criticism of [that] scourge of hyper-partisanship" (*id.* at 514), the People of the State of New York amended the NY Constitution in 2014 to reform the redistricting process, both procedurally and substantively, ushering in "a new era of bipartisanship and transparency" (*id.* at 503). This reform established respondent Independent Redistricting Commission (hereinafter the IRC) to draft the electoral maps. Most basically, the 2014 constitutional amendments charge the IRC with the obligation to prepare a redistricting plan and submit that plan, with appropriate implementing legislation, to the Legislature for a vote without amendment (*see* NY Const, art III, §§ 4 [b]; 5-b [a]). If that first plan is rejected, the IRC is required to prepare a second plan and the necessary implementing legislation that, again, would be subject to a vote by the Legislature without amendment (*see* NY Const, art III, § 4 [b]). Only upon rejection of that second plan may the Legislature, under the constitutional procedure, "amend[ ]" the maps drawn by the IRC (NY Const, art III, § 4 [b]). Any such legislative amendments are then statutorily limited to those that would affect no more than two percent of the population in any district (*see* L 2012, ch 17, § 3).

The 2020 federal census provided the first opportunity for the IRC to carry out its constitutionally-mandated duties. In the midst of that redistricting cycle, however, the Legislature attempted to amend the constitutional procedure and authorize itself to introduce redistricting legislation "[i]f . . . the [IRC] fails to vote on a redistricting plan and implementing legislation by the required deadline" (2021 NY Senate-Assembly Concurrent Resolution S515, A1916). Voters rejected that proposed amendment. Thereafter, in 2021, the Legislature enacted similar modifications to the constitutional

redistricting process by statute (*see* L 2021, ch 633). The IRC submitted its first redistricting plan to the Legislature on January 3, 2022 – before its January 15, 2022 deadline to do so (*see* NY Const, art III, § 4 [b]). Because the IRC had reached an impasse, it submitted the two maps that had garnered equal IRC support (*see* NY Const, art III, § 5-b [g]). On January 10, 2022, the Legislature rejected both of those maps, triggering the IRC's constitutional obligation to prepare and submit a second redistricting plan within 15 days and "in no case later than February [28, 2022]" (NY Const, art III, § 4 [b]). The IRC became deadlocked, and, on January 24, 2022, it announced that it would not be submitting a second redistricting plan to the Legislature. Shortly thereafter, the Legislature, invoking its 2021 legislation, composed new senate, assembly and congressional maps, which were signed into law on February 3, 2022.

The litigation in *Harkenrider* commenced immediately. The petitioners in that case argued, as relevant here, that the Legislature's 2022 enactment of congressional and senate maps was in contravention of the constitutional process (*Matter of Harkenrider v Hochul*, 38 NY3d at 505).[1] Ultimately, the Court of Appeals agreed that the enactment was procedurally unconstitutional (*id.* at 508-517).[2] To remedy that procedural violation, the Court concluded that "judicial oversight [wa]s required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election" (*id.* at 502). It then "endorse[d] the procedure directed by Supreme Court [(McAllister, J.)] to 'order the adoption of . . . a redistricting plan' (NY Const, art III, § 4 [e]) with the assistance of a neutral expert, designated a special master, following submissions from the parties, the [L]egislature, and any interested stakeholders who wish to be heard" (*Matter of Harkenrider v Hochul*, 38 NY3d at 523). Supreme Court complied with that directive, and, after a public hearing and receipt of substantial public comment, the court certified the congressional and senate maps prepared by a special master as "the official approved 2022 [c]ongressional map and the 2022 [s]tate [s]enate map" (*Matter of Harkenrider v Hochul*, 2022 NY Slip Op 31471[U], *4 [Sup Ct, Steuben County 2022]).

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[1] The assembly map was not challenged in *Harkenrider* (*Matter of Harkenrider v Hochul*, 38 NY3d at 521 n 15). That map was the subject of subsequent litigation (*Matter of Nichols v Hochul*, 212 AD3d 529 [1st Dept 2023], *appeal dismissed* 39 NY3d 1119 [2023]).

[2] It further held that the 2022 congressional and senate maps were unconstitutionally gerrymandered in favor of the majority party (*Matter of Harkenrider v Hochul*, 38 NY3d at 518-520).

The court subsequently made minor revisions to those maps and ordered that the maps, as modified, are "the final enacted redistricting maps" (*Matter of Harkenrider v Hochul*, Sup Ct, Steuben County, June 2, 2022, McAllister, J., index No. E2022-0116CV, NYSCEF doc. No. 696).

Petitioners thereafter commenced this CPLR article 78 proceeding to compel the IRC "to prepare and submit to the [L]egislature a second redistricting plan and the necessary implementing legislation for such plan . . . in order to ensure a lawful plan is in place . . . for subsequent elections this decade" (quotation marks omitted).[3] Certain IRC commissioners answered indicating that they did not oppose the relief sought by petitioners. Other commissioners, along with the *Harkenrider* petitioners – who are intervenors here – moved to dismiss the proceeding, foremost arguing that the redistricting process based upon the 2020 federal census is complete and that the congressional map generated by that process governs all elections until the redistricting process begins anew following the 2030 federal census. Supreme Court (Lynch, J.) agreed, dismissing the petition, and petitioners appeal.[4]

Initially, we reject the alternative ground for affirmance that this proceeding is untimely. The 2021 legislation in effect at the time of the IRC's failure to submit a second redistricting plan to the Legislature provided that, "[i]f the [IRC] does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan, the [IRC] shall submit to the [L]egislature all plans in its possession, both completed and in draft form, and the data upon which such plans are based," and that each house must then "introduce such implementing legislation with any amendments each house deems necessary" (*see* L 2021, ch 633, § 1). In this CPLR article 78 proceeding, petitioners seek strict compliance with the constitutionally enshrined IRC

[3] Petitioners originally sought relief with respect to both the congressional and senate maps, but their amended pleading pertains to the congressional map only.

[4] This Court granted two applications for leave to file amici curiae briefs: one by the Governor and the Attorney General and one by several voters, including the Civil Engagement Chair of the New York State Conference of the National Association for the Advancement of Colored People and two of the plaintiffs from *Favors v Cuomo* (2012 WL 928223, 2012 US Dist LEXIS 36910 [ED NY 2012]), litigation that challenged the Legislature's redistricting process following the 2010 federal census and resulted in a federal court ordering the adoption of a 2012 judicially-drafted congressional redistricting plan. The amici support granting the relief requested by petitioners.

procedure, which does not tolerate a nonvote. Thus, that claim accrued when the 2021 legislation was deemed unconstitutional to the extent that it permitted the Legislature "to avoid a central requirement of the reform amendments" (*Matter of Harkenrider v Hochul*, 38 NY3d at 517), a determination first made by Supreme Court (McAllister, J.) on March 31, 2022. Petitioners commenced this proceeding on June 28, 2022, well within the period in which to do so (*see* CPLR 217 [1]).

In support of their claim for mandamus relief, petitioners argue that, under the plain language of the NY Constitution, the IRC has a nondiscretionary duty to submit a second set of redistricting plans to the Legislature if its first set of plans is rejected by legislative vote. Petitioners assert that *Harkenrider* exclusively addressed the Legislature's constitutional violations and, thus, did not remedy the IRC's failure to perform that duty. They further claim that, because the court-ordered congressional map adopted in *Harkenrider* was merely an interim map for the purpose of the 2022 elections, they have a clear legal right to the performance of that duty.

Against the backdrop of the 2014 redistricting reforms, these arguments are compelling. As the sponsors explained, the reforms were intended "to achieve a fair and readily transparent process" and "ensure that the drawing of legislative district lines in New York will be done by a bipartisan, independent body" (Assembly Mem in Support, 2012 NY Senate-Assembly Concurrent Resolution S6698, A9526; Senate Introducer's Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). The carefully crafted constitutional process was further meant to enable, "[f]or the first time, both the majority and minority parties in the [L]egislature [to] have an equal role in the process of drawing lines" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). "Just as important, the enactment of the constitutional amendment" was intended to "give the voters of New York a voice in the adoption of this new process and[,] by enshrining it in the constitution, ensure that the process will not be changed without due considerations" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). These "far-reaching" constitutional reforms were anticipated to "set the standard for independent redistricting throughout the United States" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). Instead, the reforms were thwarted, and these goals were not met. As petitioners' counsel repeatedly asserted at oral argument, this proceeding seeks to "vindicate the purpose" of the redistricting amendments.

In addition to evaluating the various constitutional provisions cited to by the parties, we 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. We are necessarily limited in our ability to infer such intention in this delicate and highly charged matter of significant public concern. As certain respondents, and the dissent here, assert, there is a clear default duration for electoral maps provided for in the NY Constitution: "[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 decennial census taken in a year ending in zero unless modified pursuant to court order" (NY Const, art III, § 4 [e]).

Petitioners urge that the Court of Appeals was endeavoring simply to expediently provide a remedy for the immediately pressing needs of the 2022 election, pointing to various phrases within the *Harkenrider* decision. Indeed, the Court succinctly stated at the outset of its decision that the maps being ordered would be "for use in the 2022 election" (*Matter of Harkenrider v Hochul*, 38 NY3d at 502). It is repeated later that the state was left "without constitutional district lines for use in the 2022 primary and general elections" (*id.* at 521). Underscoring the urgency, there is then considerable discussion of the need to move the 2022 primaries (*id.* at 522-523). Ultimately, the subject map was certified as the "*2022* [c]ongressional map" (*Matter of Harkenrider v Hochul*, 2022 NY Slip Op 31471[U] at *4 [emphasis added]); this could equally refer to the year in which the map was adopted, effective or limited to. Most persuasively, throughout its decision, the Court continuously emphasized that the 2014 amendments "were carefully crafted to *guarantee*," or "*ensure*," "that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission" (*Matter of Harkenrider v Hochul*, 38 NY3d at 513, 514 [emphasis added]). It is apparent that, due to the then-fast-approaching 2022 election cycle, there was a reason to forgo the overarching intent of the amendments. The majority in *Harkenrider* concluded by acknowledging the guiding principle that the NY Constitution is "the will of the people of this state" and that it intended to adhere to that will in disposing of the matter before it (*id.* at 524). We too must be guided by the overarching policy of the constitutional provision: broad engagement in a transparent redistricting process.

Crucially, the same provision giving the 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.

Mandamus to compel lies where an administrative body has failed to perform a duty enjoined upon it by law, the performance of said duty is ministerial and mandatory, rather than discretionary, and there is a clear right to the relief sought (*see New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]; *Matter of Hussain v Lynch*, 215 AD3d 121, 125-126 [3d Dept 2023]). Discretionary acts involve the exercise of judgment that may produce different and acceptable results (*see Tango v Tulevech*, 61 NY2d 34, 41 [1983]; *see also Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018], *cert denied* ___ US ___, 139 S Ct 2651 [2019]).

The IRC had an indisputable duty under the NY Constitution to submit a second set of maps upon the rejection of its first set (*see* NY Const, art III, § 4 [b]). The language of NY Constitution, article III, § 4 makes clear that this duty is mandatory, not discretionary. It is undisputed that the IRC failed to perform this duty. Further, we agree with petitioners that *Harkenrider* left unremedied the IRC's failure to perform its duty to submit a second set of maps. There were two questions posed before the Court of Appeals in *Harkenrider*, neither of which addressed the IRC's duty (*Matter of Harkenrider v Hochul*, 38 NY3d at 501-502). The challenge brought and the remedy granted were directed at the Legislature's unconstitutional reaction to the IRC's failure to submit maps, rather than the IRC's failure in the first instance (*see id.* at 505-506; *Matter of Harkenrider v Hochul*, 76 Misc 3d 171, 173 [Sup Ct, Steuben County 2022], *mod* 204 AD3d 1366 [4th Dept 2022], *affd* 38 NY3d 494 [2022]). *Harkenrider* addresses the IRC's inaction solely by way of factual background, and the IRC's discrete failure to perform its

constitutional duty was left unaddressed until this proceeding.[5] Indeed, the fact that the deadline for the IRC's submission had passed influenced the practicalities of the remedy fashioned in *Harkenrider*; the only way to prepare valid maps for the 2022 election, at that time, was through judicial creation of those maps (*see Matter of Harkenrider v Hochul*, 38 NY3d at 523). To hold today that the passing of the deadline leaves petitioners with no remedy would render meaningless the distinct constitutional command that the IRC create a second set of maps.

In light of the foregoing, petitioners have demonstrated a clear legal right to the relief sought. This determination honors the constitutional enactments as the means of providing a robust, fair and equitable procedure for the determination of voting districts in New York.[6] The right to participate in the democratic process is the most essential right in our system of governance. The procedures governing the redistricting process, all too easily abused by those who would seek to minimize the voters' voice and entrench themselves in the seats of power, must be guarded as jealously as the right to vote itself; in granting this petition, we return the matter to its constitutional design.[7] Accordingly, we direct the IRC to commence its duties forthwith.

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[5] It follows that this proceeding does not constitute a collateral attack on that determination; we are merely addressing a discrete and previously unaddressed issue in a proceeding brought by different parties.

[6] We disagree with Supreme Court's characterization of petitioner's relief as "provid[ing] a path to an annual redistricting process," as the right to compel the IRC to submit a second set of redistricting maps will be exhausted once it has done so. We further note that the IRC's inability to reach consensus was subsequently overcome relative to the assembly maps (*see generally* New York Independent Redistricting Commission, *NYIRC Assembly 2023*, available at https://www.nyirc.gov/storage/plans/20230420/assembly_plan.pdf [last accessed July 6, 2023]).

[7] Our dissenting colleagues cite to a publication by the Brennan Center for Justice analyzing the most recent redistricting cycle nationwide (*see* Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, Brennan Center for Justice [Aug. 11, 2022], available at https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction [last accessed July 6, 2023]). We are happy to note that this analysis reveals that the highest percentage of competitive districts emerge from court-drawn maps and, unsurprisingly, that one-party control results in a much smaller percentage of competitive districts (*see* Li &

Reynolds Fitzgerald and McShan, JJ., concur.

Pritzker, J. (dissenting).

We respectfully dissent because, initially, we find the proceeding untimely and would affirm on this alternate ground. In addition, substantively and contrary to the majority's conclusions, it is our opinion that the Court of Appeals in *Matter of Harkenrider v Hochul* (38 NY3d 494 [2022]) remedied the refusal of respondent Independent Redistricting Commission (hereinafter the IRC) to perform its duty, and, further, that the court-ordered congressional map is not interim but, rather, final and otherwise in force until after the 2030 census. Since the map is final, there is no longer a ministerial duty for the IRC to perform and therefore mandamus cannot lie. Moreover, public policy and the spirit of the 2014 constitutional amendments do not support the notion that the IRC should get a mandamus mulligan. Significantly, the judicial redistricting plan has been found to be competitive – although perhaps too competitive for some (*see* Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, Brennan Center for Justice [Aug. 11, 2022], available at https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction [last accessed July 6, 2023] [noting that, in New York, under the court-ordered redistricting maps, "almost one in five seats are competitive, [which is] the highest percentage in the country for a large state"]). For these reasons, we would affirm Supreme Court's dismissal of the petition.

First, we turn our attention to the issue of timeliness. For purposes of a mandamus proceeding, pursuant to CPLR 217 (1), "a proceeding against a body or officer must be commenced within four months . . . after the respondent's refusal, upon the demand of the petitioner or the person whom he [or she] represents, to perform its duty" (*see Matter of EZ Props., LLC v City of Plattsburgh*, 128 AD3d 1212, 1215 [3d Dept 2015]). As relevant here, "[a] petitioner . . . may not delay in making a demand in order to indefinitely postpone the time within which to institute the proceeding. The petitioner must make his or her demand within a reasonable time after the right to make it occurs, or

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Leaverton). It further bears noting that the analysis concludes that, "[i]f Americans hope to reverse the long-term decline of competitive districts, reforms to create fairer, more independent map-drawing processes will be essential" (Li & Leaverton). This was the aim of the 2012-2014 Legislature, and we find that it created a path to be followed *now*, rather than waiting until the next decade.

after the petitioner knows or should know of the facts which give him or her a clear right to relief, or else, the petitioner's claim can be barred by the doctrine of laches. The term laches, as used in connection with *the requirement* of the making of a prompt demand in mandamus proceedings, refers solely to the unexcused lapse of time and does not refer to the equitable doctrine of laches" (*Matter of Granto v City of Niagara Falls*, 148 AD3d 1694, 1695 [4th Dept 2017] [internal quotation marks, brackets and citations omitted; emphasis added]; *see Matter of Sheerin v New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 NY2d 488, 495-496 [1979]). "Th[is] reasonable time requirement for a prompt demand should be measured by CPLR 217 (1)'s four-month limitations period, and thus, a demand should be made no more than four months after the right to make the demand arises" (*Matter of Zupa v Zoning Bd. of Appeals of Town of Southold*, 64 AD3d 723, 725 [2d Dept 2009] [citations omitted]). In certain instances, the commencement of a proceeding pursuant to CPLR article 78 constitutes a demand (*see Matter of Butkowski v Kiefer*, 140 AD3d 1755, 1756 [4th Dept 2016]; *Matter of Gopaul v New York City Employees' Retirement Sys.*, 122 AD3d 848, 849 [2d Dept 2014]).

Here, we must determine when it was reasonable for petitioners to demand that the IRC act and, therefore, when the statute of limitations accrued. As to the relevant time frame, on January 3, 2022, the IRC submitted the two plans to the Legislature that were rejected on January 10, 2022. Thereafter, the IRC was unable to come to a consensus regarding a second proposal and, on January 24, 2022, announced that it would not be submitting a second proposal. The Legislature began to draft its own plan, which was enacted on February 3, 2022. The *Harkenrider* proceeding was commenced that same day. On May 20, 2022, Supreme Court (McAllister, J.) issued the final order therein establishing the new state senate and congressional districts. On June 28, 2022, petitioners commenced the instant proceeding seeking to compel the IRC to submit a second proposed congressional redistricting plan to the Legislature. In our view, under black letter mandamus jurisprudence, it was no later than January 24, 2022 that "petitioner[s] kn[ew] or should [have] know[n] of the facts which [gave them] a clear right to relief" (*Matter of Granto v City of Niagara Falls*, 148 AD3d at 1695 [internal quotation marks and citation omitted]). However, petitioners did not make a demand until June 28, 2022, when they commenced this proceeding, over a month past the running of the four-month statute of limitations set forth in CPLR 217 (1). As such, "petitioner[s] unreasonably delayed in making the demand and . . . this proceeding is barred by laches" (*Matter of Densmore v Altmar-Parish-Williamstown Cent. School Dist.*, 265 AD2d 838, 839 [4th Dept 1999], *lv denied* 94 NY2d 758 [2000]; *see Matter of Granto v City of Niagara Falls*, 148 AD3d at 1696; *Matter of van Tol v City of Buffalo*, 107 AD3d 1626, 1627 [4th Dept 2013]; *Matter of Schwartz v Morgenthau*, 23 AD3d 231, 233 [1st Dept

2005], *affd* 7 NY3d 427 [2006]; *compare Matter of Speis v Penfield Cent. Schs.*, 114 AD3d 1181, 1183 [4th Dept 2014]; *Matter of Selective Ins. Co. of Am. v State of N.Y. Workers' Compensation Bd.*, 102 AD3d 72, 76-77 [3d Dept 2012]).[1]

Briefly, we reject the alternate theories that have been advanced in this case as to when the statute of limitations accrued. First, it is true that NY Constitution, article III, § 4 (b) provides that, if the initial redistricting plan is rejected by the Legislature, the IRC, "[w]ithin [15] days of such notification and in no case later than February [28th], . . . shall prepare and submit . . . a second redistricting plan."[2] Here, however, this February 28 date has no relevance or application inasmuch as, on January 24, the IRC announced that it would not submit a second plan. Moreover, the 15-day period to act after legislative rejection ended on January 25. Additionally, when the Legislature passed its own redistricting plan on February 3, the IRC *lost its ability* to *on its own* propose a second redistricting plan to the Legislature. As such, the February 28 date is a red herring. Further, we disagree with the majority's assertion that the statute of limitations did not accrue until the gap-filling legislation of 2021 was declared unconstitutional.[3] To that end, the gap-filling legislation purported to allow 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, ch 633, § 1). Significantly, this legislation did not excuse the IRC from "its constitutional obligations" to propose a second plan, which is precisely what petitioners, and the majority, claim is the "the

[1] Certainly, the unreasonableness of petitioners' delay in commencing this action is evident given that the *Harkenrider* petitioners' filing of a 67-page, 226-paragraph petition on February 3, 2022, just over one week after the IRC announced it would not be submitting a second redistricting plan and the same day the Legislature enacted its own plan. Indeed, from a laches point of view, it is reasonable to conclude that the delay was due to petitioners having favored the gerrymandered legislative maps, rather than the failure of the IRC to act.

[2] The plain language of this section establishes that the IRC has 15 days to prepare a second plan. The February 28 deadline does not extend this time frame, but rather is the final date for preparation of a second plan, even if that date does not provide the IRC with 15 days to prepare a second plan.

[3] Although the majority does not discuss and explicitly reject the timeliness analysis of Supreme Court (Lynch, J.), its analysis implicitly does so. We are also unpersuaded by the court's timeliness analysis.

procedural violation at issue in this case." However, this harm would exist even if the gap-filling legislation was found constitutional because this legislation caused the same injury asserted in this mandamus proceeding, usurping the role of the IRC and enacting maps prior to the IRC offering a second plan. Thus, even if the gap-filling legislation had been found constitutional, it would have no bearing whatsoever on petitioners' assertion that the IRC failed to perform its constitutionally mandated duty by neglecting to submit a second congressional map, which triggered the mandamus relief requested herein and set the accrual date.[4] As unlikely as it sounds, the gap-filling legislation should simply have led petitioners to be aligned with the *Harkenrider* petitioners, at least as to the need for IRC action *before* a final map is drawn by the Legislature.

Moving to the merits, even if the proceeding was timely, we would still affirm Supreme Court's dismissal of the petition based upon substantive infirmities. At the outset, we reject petitioners' contention, with which the majority agrees, that the court-ordered congressional map is interim – in place only for the purpose of the 2022 elections – rather than in place until after the 2030 census. Indeed, determination of this issue is crucial as the mandamus relief sought is hard-tethered to the duration of the relief ordered in *Harkenrider*. To that end, we disagree with the majority's position that the Court of Appeals, in *Harkenrider*, left us "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." To the contrary, the plain language of the NY Constitution provides the duration in clear terms. "The process for redistricting congressional and state legislative districts [established by NY Constitution, article III, §§ 4, 5 and 5-b] 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 decennial census taken in a year ending in zero unless modified pursuant to court order" (NY Const, art III, § 4 [e]). The Court of Appeals directly cited to, and thereby incorporated, this section when discussing and approving the judicially drawn maps ordered by Supreme Court; "[t]hus, we endorse the procedure directed by Supreme Court to 'order the adoption of . . . a redistricting plan' " (*Matter of Harkenrider v Hochul*, 38 NY3d at 523, quoting NY Const, art III, § 4 [e]). Notably, there is no caveat nor limitation as to duration and, as such, it is our opinion that the Constitution requires that such court-ordered maps remain

[4] In fact, the Court of Appeals noted in *Harkenrider* that mandamus could be one of the avenues of a voter aggrieved by IRC inaction (38 NY3d at 515 n 10). Of course, the proceeding would need to be timely (*see* CPLR 217 [1]).

in place until after the next census (*see* NY Const, art III, § 4 [e]). More to the point, the courts *could have* – yet did not – expressly order that the plan adopted in *Harkenrider* be interim and only remain in place until the IRC took action and implemented a legislative plan that met constitutional requirements following the 2022 election (*see e.g. Ely v Klahr*, 403 US 108, 110-111 [1971]; *Honig v Board of Supervisors of Rensselaer County*, 24 NY2d 861, 862 [1969]).

From a common sense point of view, we find the meaning clear and it is implausible to assert that any of the members of the Court of Appeals would leave the voters to grapple with an issue of this magnitude.[5] Moreover, this view is also supported by Judge Troutman's reasoned dissent, wherein she raised the concern that the plan "may" be in place "for the next 10 years" (*Matter of Harkenrider v Hochul*, 38 NY3d at 527 [Troutman, J., dissenting]).[6] Further, if it were an interim order, presumably there would be a directive that the IRC reconvene and the constititutionally mandated redistricting

[5] We are also unpersuaded that it can be gleaned from the decisions in *Harkenrider* that the court-ordered congressional map only be used for the 2022 election cycle (*see Matter of Harkenrider v Hochul*, 38 NY3d 494; *Matter of Harkenrider v Hochul*, 204 AD3d 1366 [4th Dept 2022]; *Matter of Harkenrider v Hochul*, 76 Misc 3d 171 [Sup Ct, Steuben County 2022]). Although these decisions refer generally to the "2022 election" and the "2022 maps" (*see id.*), these references are not determinative, but rather are references to the next scheduled election for which the court-ordered maps would of course apply. Moreover, as pointed out by the majority, Supreme Court, after minor revisions to the maps were made, ordered that they are "the final enacted redistricting maps" (*Matter of Harkenrider v Hochul*, Sup Ct, Steuben County, June 2, 2022, McAllister, J., index No. E2022-0116CV, NYSCEF doc. No. 696).

[6] Judge Troutman's use of the word "may" does not imply that the plan endorsed by the Court of Appeals is interim. Although the default duration for the redistricting maps is 10 years (*see* NY Const, art III, § 4 [e]), the duration is subject to other potentially successful challenges during the 10-year period, such as federal litigation under the Voting Rights Act (42 USC § 1973). Additionally, had the majority intended the plan to be interim, surely Judge Troutman's colleagues would have explained this to her and presumably clarified this issue in the majority decision, allaying her concerns in this regard and alleviating the need to dissent on this point. In other words, if the plan were interim, there would be no need to be concerned with a 10-year term – nor would there be much ado arising from a one-year sunsetting order.

process begin anew after the one-year period. Indeed, it is well "recognize[d] that a congressional districting plan will usually be in effect for at least 10 years and five congressional elections" (*Kirkpatrick v Preisler*, 394 US 526, 533 [1969]), much as there is a strong public policy in favor of the finality of elections (*see generally Matter of Lichtman v Board of Elections of Nassau County*, 27 NY2d 62, 66 [1970]). So too should there be a strong public policy in favor of the finality of the establishment of electoral districts, as "[l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system" (*Reynolds v Sims*, 377 US 533, 583 [1964]).

Next, we disagree with the majority's conclusion that the remedy in *Harkenrider* failed to address the IRC's refusal to submit a second set of redistricting maps to the Legislature.[7] To the contrary, it is our opinion that the Court of Appeals quite clearly considered and addressed the IRC's constitutional violation, specifically its refusal to act, which is the precise injury alleged herein. The majority decision in *Harkenrider* rejected the State respondents' request for a chance to repair the legislation at issue and explained that "[t]he 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*" (*Matter of Harkenrider v Hochul*, 38 NY3d at 523 [emphasis added]). As such, the Court of Appeals, in considering a legislative fix, rejected same in part because, in their view, it was too late for the IRC to act. Further, the Court framed one of the petitioners' arguments, with which the Court agreed, as an assertion "that, *in light of the lack of compliance by the IRC* and the [L]egislature with the procedures set forth in the Constitution, the [L]egislature's enactment of the 2022 redistricting maps contravened the Constitution" (*Matter of Harkenrider v Hochul*, 38 NY3d at 508-509 [emphasis added]). Thus, the failure of the IRC to act, which is the limited subject of the instant mandamus proceeding, was considered and in fact is part and parcel of the Court of Appeals' finding of procedural constitutional infirmity infecting the 2022 maps.

In that same vein, from a conceptual point of view, simply put, the judicially adopted remedy in *Harkenrider* was authorized and, while perhaps not the only permissible remedy, and clearly not petitioners' preferred remedy, it repaired the procedural and substantive infirmities in a manner directly set forth in the NY

[7] We do, however, agree that the *manner* in which the Court of Appeals addressed the IRC's failure to submit a second redistricting map is not the remedy now requested by petitioners.

Constitution (NY Const, art III, § 4 [e]). Indeed, during oral argument the judges of the Court of Appeals asked many probing questions concerning the different remedies available and the dissenting judges proposed different legislative remedies. In fact, the utility of crafting a legislative remedy under NY Constitution, article III, § 5-b was discussed at length and served as part of the basis for Judge Troutman's dissent, which would have required the "[L]egislature to adopt either of the two plans that the IRC has already approved pursuant to [NY Constitution, article III, §] 5-b (g)" (*Matter of Harkenrider v Hochul*, 38 NY3d at 525 [Troutman, J., dissenting]). In this regard, NY Constitution, article III, § 5-b (a) permits the IRC to reconvene outside the every 10-year period when "a court orders that congressional . . . districts be amended" in response to a successful legal challenge to a map, such as reestablishing the IRC to amend a map to address a violation of the Voting Rights Act due to the failure to include a minority district (*see generally Thornburg v Gingles*, 478 US 30 [1986]). Although this provision is not applicable to the instant proceeding because it was not utilized by petitioners as a basis for relief, and, more significantly, because petitioners are seeking a new map rather than an amended one, the significance of the Court of Appeals' attention to this provision in *Harkenrider* is only to demonstrate that it did specifically contemplate reestablishing the IRC.

The foregoing leads us to our ultimate conclusion that petitioners are not entitled to the extraordinary remedy of mandamus. As discussed above, the Court of Appeals was presented with alternative remedies in *Harkenrider*, including that posed by petitioners, and elected to have a special master establish a redistricting plan to be implemented by court order. To that end, from a mandamus perspective, the issue is not whether petitioners' requested relief is ever constitutionally available, but rather whether same may be mandated in the aftermath of a judicial redistricting. It is our view that the judicial remedy cured the IRC's failure to act by lawfully establishing a redistricting plan for the ordinary duration, leaving no uncured violation of law and thus foreclosing mandamus. Although it is not unreasonable for petitioners to wish for a different remedy, this bald desire falls well short of the standard required to mount a successful mandamus proceeding. To wit, "[a] writ of mandamus is an extraordinary remedy that is available only in limited circumstances" (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018] [internal quotation marks and citations omitted], *cert denied* ___ US ___, 139 S Ct 2651 [2019]; *see Matter of Hussain v Lynch*, 215 AD3d 121, 125-126 [3d Dept 2023]). A petitioner seeking mandamus to compel "must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757

[1991]; *accord Matter of Mental Hygiene Legal Serv., Third Jud. Dept. v Delaney*, 38 NY3d 1076, 1096 [2022, Rivera, J., dissenting]). "The duty must be positive, not discretionary, and the right to its performance must be so clear as not to admit of reasonable doubt or controversy" (*Matter of Burr v Voorhis*, 229 NY 382, 387 [1920]; *see Matter of Thornton v Saugerties Cent. Sch. Dist.*, 145 AD3d 1138, 1140 [3d Dept 2016], *lv denied* 29 NY3d 902 [2017]).

Therefore, in light of our opinion that the court-ordered congressional map is final and in place until after the 2030 census, as well as our opinion that the Court of Appeals has already addressed the IRC's refusal to submit a second set of redistricting maps to the Legislature, we do not believe that, presently, the IRC is duty bound to perform *any* act until after the next census, let alone a ministerial act. Consequently, because a valid court-ordered congressional map has been established and remains in place, it is our opinion that petitioners did not satisfy their burden of demonstrating a clear legal right to compel the IRC to propose a second redistricting plan for consideration by the Legislature (*see generally Matter of League of Women Voters of N.Y. State v New York State Bd. of Elections*, 206 AD3d 1227, 1230-1231 [3d Dept 2022], *lv denied* 38 NY3d 909 [2022]; *Matter of Barone v Duffy*, 186 AD3d 1358, 1360 [2d Dept 2020]; *Matter of Ethington v County of Schoharie*, 173 AD3d 1504, 1505 [3d Dept 2019]; *Matter of Thornton v Saugerties Cent. Sch. Dist.*, 145 AD3d at 1141; *compare Matter of Eidt v City of Long Beach*, 62 AD3d 793, 795 [2d Dept 2009]). Accordingly, as petitioners are not entitled to the extraordinary remedy of mandamus, Supreme Court did not err in dismissing the petition on this basis.

There is likely no disagreement that a properly conducted and constitutionally mandated legislative redistricting process with the bipartisan involvement of the IRC would have, at least in theory, been preferable to resorting to litigation and judicially drawn maps. However, since the IRC failed in this regard, 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. Although we agree with petitioners that the court-ordered congressional map is not perfect, and that such flaws may raise legitimate concerns, if these concerns are substantial, they can be challenged. However, and aside from our opinion that mandamus is legally unavailable, the goals of the 2014 constitutional amendments have in fact been met by way of the operation of the constitutional safety valve resulting in maps that appear competitive. This is, after all, the *raison d'etre* behind the 2014 constitutional amendments, which nobly tried to address gerrymandering for what it is – cheating. We have great faith that our independent judicial branch of government will continue to remedy constitutional violations, which

has already been done here, and, at the same time, steadfastly enforce the rule of law. In conclusion, we say let the legislative process roll once again – but this time in conformity with the 2014 constitutional amendments – after the 2030 census.

Egan Jr., J., concurs.

ORDERED that the judgment is reversed, on the law, without costs, and petition granted.

ENTER:

Robert D. Mayberger
Clerk of the Court

Exhibit D

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of Anthony S. Hoffmann, Marco Carrion, Courtney Gibbons, Lauren Foley, Mary Kain, Kevin Meggett, Clinton Miller, Seth Pearce, Verity Van Tassel Richards, and Nancy Van Tassel,

Petitioners,

- against -

New York State Independent Redistricting Commission; Independent Redistricting Commission Chairperson Ken Jenkins; Independent Redistricting Commissioner Ross Brady; Independent Redistricting Commissioner John Conway III; Independent Redistricting Commissioner Ivelisse Cuevas-Molina; Independent Redistricting Commissioner Elaine Frazier; Independent Redistricting Commissioner Lisa Harris; Independent Redistricting Commissioner Charles Nesbitt; and Independent Redistricting Commissioner Willis H. Stephens,

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,

Intervenor-Respondents.

NOTICE OF APPEAL

Index No. 904972-22 (Albany)

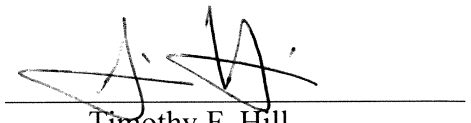
Third Department Docket No. CV-22-2265

PLEASE TAKE NOTICE that Respondents 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, hereby appeal to the

Court of Appeals of the State of New York from the corrected Opinion and Order of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, decided and entered on July 13, 2023, (corrected Opinion and Order entered on July 14, 2023 as NYSCEF Doc. No. 81 of the Appellate Division Docket CV-22-2265), and from each and every part thereof.

Dated: Sayville, New York
July 25, 2023

PERILLO HILL LLP

By: 

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State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 13, 2023 CV-22-2265

In the Matter of ANTHONY S. HOFFMANN et al.,
Appellants,
v
NEW YORK STATE INDEPENDENT REDISTRICTING COMMISSION et al.,
Respondents.

OPINION AND ORDER

Calendar Date: June 8, 2023

Before: Garry, P.J., Egan Jr., Pritzker, Reynolds Fitzgerald and McShan, JJ.

Elias Law Group, LLP, Washington, DC (*Aria C. Branch* of counsel, admitted pro hac vice), for appellants.

Jenner & Block LLP, Washington, DC (*Jessica Ring Amunson* of counsel, admitted pro hac vice), for Ken Jenkins and others, respondents.

Perillo Hill, LLP, Sayville (*Timothy F. Hill* of counsel), for Ross Brady and others, respondents.

Troutman Pepper Hamilton Sanders LLP, New York City (*Misha Tseytlin* of counsel), for Timothy Harkenrider and others, intervenors.

Letitia James, Attorney General, New York City (*Andrea W. Trento* of counsel), for the Governor and another, amici curiae.

Covington & Burling LLP, New York City (*P. Benjamin Duke* of counsel), for Scottie Coads and others, amici curiae.

Garry, P.J.

Appeal from a judgment of the Supreme Court (Peter A. Lynch, J.), entered September 14, 2022 in Albany County, which, in a proceeding pursuant to CPLR article 78, granted certain respondents' motions to dismiss the amended petition.

This CPLR article 78 proceeding involves the same factual circumstances as those that gave rise to *Matter of Harkenrider v Hochul* (38 NY3d 494 [2022]). Given the import of that prior proceeding to the mandamus relief sought here, those circumstances merit a rather lengthy discussion. Every 10 years, following each federal census, reapportionment of the senate, assembly and congressional districts in New York must be undertaken (*see* NY Const, art III, § 4). The power to draw those district lines was historically reserved to the Legislature, and, "[p]articularly with respect to congressional maps, exclusive legislative control has repeatedly resulted in stalemates, with opposing political parties unable to reach consensus on district lines" (*Matter of Harkenrider v Hochul*, 38 NY3d at 502). "[I]n response to criticism of [that] scourge of hyper-partisanship" (*id.* at 514), the People of the State of New York amended the NY Constitution in 2014 to reform the redistricting process, both procedurally and substantively, ushering in "a new era of bipartisanship and transparency" (*id.* at 503). This reform established respondent Independent Redistricting Commission (hereinafter the IRC) to draft the electoral maps. Most basically, the 2014 constitutional amendments charge the IRC with the obligation to prepare a redistricting plan and submit that plan, with appropriate implementing legislation, to the Legislature for a vote without amendment (*see* NY Const, art III, §§ 4 [b]; 5-b [a]). If that first plan is rejected, the IRC is required to prepare a second plan and the necessary implementing legislation that, again, would be subject to a vote by the Legislature without amendment (*see* NY Const, art III, § 4 [b]). Only upon rejection of that second plan may the Legislature, under the constitutional procedure, "amend[ ]" the maps drawn by the IRC (NY Const, art III, § 4 [b]). Any such legislative amendments are then statutorily limited to those that would affect no more than two percent of the population in any district (*see* L 2012, ch 17, § 3).

The 2020 federal census provided the first opportunity for the IRC to carry out its constitutionally-mandated duties. In the midst of that redistricting cycle, however, the Legislature attempted to amend the constitutional procedure and authorize itself to introduce redistricting legislation "[i]f . . . the [IRC] fails to vote on a redistricting plan and implementing legislation by the required deadline" (2021 NY Senate-Assembly Concurrent Resolution S515, A1916). Voters rejected that proposed amendment. Thereafter, in 2021, the Legislature enacted similar modifications to the constitutional

redistricting process by statute (*see* L 2021, ch 633). The IRC submitted its first redistricting plan to the Legislature on January 3, 2022 – before its January 15, 2022 deadline to do so (*see* NY Const, art III, § 4 [b]). Because the IRC had reached an impasse, it submitted the two maps that had garnered equal IRC support (*see* NY Const, art III, § 5-b [g]). On January 10, 2022, the Legislature rejected both of those maps, triggering the IRC's constitutional obligation to prepare and submit a second redistricting plan within 15 days and "in no case later than February [28, 2022]" (NY Const, art III, § 4 [b]). The IRC became deadlocked, and, on January 24, 2022, it announced that it would not be submitting a second redistricting plan to the Legislature. Shortly thereafter, the Legislature, invoking its 2021 legislation, composed new senate, assembly and congressional maps, which were signed into law on February 3, 2022.

The litigation in *Harkenrider* commenced immediately. The petitioners in that case argued, as relevant here, that the Legislature's 2022 enactment of congressional and senate maps was in contravention of the constitutional process (*Matter of Harkenrider v Hochul*, 38 NY3d at 505).[1] Ultimately, the Court of Appeals agreed that the enactment was procedurally unconstitutional (*id.* at 508-517).[2] To remedy that procedural violation, the Court concluded that "judicial oversight [wa]s required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election" (*id.* at 502). It then "endorse[d] the procedure directed by Supreme Court [(McAllister, J.)] to 'order the adoption of . . . a redistricting plan' (NY Const, art III, § 4 [e]) with the assistance of a neutral expert, designated a special master, following submissions from the parties, the [L]egislature, and any interested stakeholders who wish to be heard" (*Matter of Harkenrider v Hochul*, 38 NY3d at 523). Supreme Court complied with that directive, and, after a public hearing and receipt of substantial public comment, the court certified the congressional and senate maps prepared by a special master as "the official approved 2022 [c]ongressional map and the 2022 [s]tate [s]enate map" (*Matter of Harkenrider v Hochul*, 2022 NY Slip Op 31471[U], *4 [Sup Ct, Steuben County 2022]).

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[1] The assembly map was not challenged in *Harkenrider* (*Matter of Harkenrider v Hochul*, 38 NY3d at 521 n 15). That map was the subject of subsequent litigation (*Matter of Nichols v Hochul*, 212 AD3d 529 [1st Dept 2023], *appeal dismissed* 39 NY3d 1119 [2023]).

[2] It further held that the 2022 congressional and senate maps were unconstitutionally gerrymandered in favor of the majority party (*Matter of Harkenrider v Hochul*, 38 NY3d at 518-520).

The court subsequently made minor revisions to those maps and ordered that the maps, as modified, are "the final enacted redistricting maps" (*Matter of Harkenrider v Hochul*, Sup Ct, Steuben County, June 2, 2022, McAllister, J., index No. E2022-0116CV, NYSCEF doc. No. 696).

Petitioners thereafter commenced this CPLR article 78 proceeding to compel the IRC "to prepare and submit to the [L]egislature a second redistricting plan and the necessary implementing legislation for such plan . . . in order to ensure a lawful plan is in place . . . for subsequent elections this decade" (quotation marks omitted).[3] Certain IRC commissioners answered indicating that they did not oppose the relief sought by petitioners. Other commissioners, along with the *Harkenrider* petitioners – who are intervenors here – moved to dismiss the proceeding, foremost arguing that the redistricting process based upon the 2020 federal census is complete and that the congressional map generated by that process governs all elections until the redistricting process begins anew following the 2030 federal census. Supreme Court (Lynch, J.) agreed, dismissing the petition, and petitioners appeal.[4]

Initially, we reject the alternative ground for affirmance that this proceeding is untimely. The 2021 legislation in effect at the time of the IRC's failure to submit a second redistricting plan to the Legislature provided that, "[i]f the [IRC] does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan, the [IRC] shall submit to the [L]egislature all plans in its possession, both completed and in draft form, and the data upon which such plans are based," and that each house must then "introduce such implementing legislation with any amendments each house deems necessary" (*see* L 2021, ch 633, § 1). In this CPLR article 78 proceeding, petitioners seek strict compliance with the constitutionally enshrined IRC

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[3] Petitioners originally sought relief with respect to both the congressional and senate maps, but their amended pleading pertains to the congressional map only.

[4] This Court granted two applications for leave to file amici curiae briefs: one by the Governor and the Attorney General and one by several voters, including the Civil Engagement Chair of the New York State Conference of the National Association for the Advancement of Colored People and two of the plaintiffs from *Favors v Cuomo* (2012 WL 928223, 2012 US Dist LEXIS 36910 [ED NY 2012]), litigation that challenged the Legislature's redistricting process following the 2010 federal census and resulted in a federal court ordering the adoption of a 2012 judicially-drafted congressional redistricting plan. The amici support granting the relief requested by petitioners.

procedure, which does not tolerate a nonvote. Thus, that claim accrued when the 2021 legislation was deemed unconstitutional to the extent that it permitted the Legislature "to avoid a central requirement of the reform amendments" (*Matter of Harkenrider v Hochul*, 38 NY3d at 517), a determination first made by Supreme Court (McAllister, J.) on March 31, 2022. Petitioners commenced this proceeding on June 28, 2022, well within the period in which to do so (*see* CPLR 217 [1]).

In support of their claim for mandamus relief, petitioners argue that, under the plain language of the NY Constitution, the IRC has a nondiscretionary duty to submit a second set of redistricting plans to the Legislature if its first set of plans is rejected by legislative vote. Petitioners assert that *Harkenrider* exclusively addressed the Legislature's constitutional violations and, thus, did not remedy the IRC's failure to perform that duty. They further claim that, because the court-ordered congressional map adopted in *Harkenrider* was merely an interim map for the purpose of the 2022 elections, they have a clear legal right to the performance of that duty.

Against the backdrop of the 2014 redistricting reforms, these arguments are compelling. As the sponsors explained, the reforms were intended "to achieve a fair and readily transparent process" and "ensure that the drawing of legislative district lines in New York will be done by a bipartisan, independent body" (Assembly Mem in Support, 2012 NY Senate-Assembly Concurrent Resolution S6698, A9526; Senate Introducer's Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). The carefully crafted constitutional process was further meant to enable, "[f]or the first time, both the majority and minority parties in the [L]egislature [to] have an equal role in the process of drawing lines" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). "Just as important, the enactment of the constitutional amendment" was intended to "give the voters of New York a voice in the adoption of this new process and[,] by enshrining it in the constitution, ensure that the process will not be changed without due considerations" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). These "far-reaching" constitutional reforms were anticipated to "set the standard for independent redistricting throughout the United States" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). Instead, the reforms were thwarted, and these goals were not met. As petitioners' counsel repeatedly asserted at oral argument, this proceeding seeks to "vindicate the purpose" of the redistricting amendments.

In addition to evaluating the various constitutional provisions cited to by the parties, we 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. We are necessarily limited in our ability to infer such intention in this delicate and highly charged matter of significant public concern. As certain respondents, and the dissent here, assert, there is a clear default duration for electoral maps provided for in the NY Constitution: "[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 decennial census taken in a year ending in zero unless modified pursuant to court order" (NY Const, art III, § 4 [e]).

Petitioners urge that the Court of Appeals was endeavoring simply to expediently provide a remedy for the immediately pressing needs of the 2022 election, pointing to various phrases within the *Harkenrider* decision. Indeed, the Court succinctly stated at the outset of its decision that the maps being ordered would be "for use in the 2022 election" (*Matter of Harkenrider v Hochul*, 38 NY3d at 502). It is repeated later that the state was left "without constitutional district lines for use in the 2022 primary and general elections" (*id.* at 521). Underscoring the urgency, there is then considerable discussion of the need to move the 2022 primaries (*id.* at 522-523). Ultimately, the subject map was certified as the "*2022* [c]ongressional map" (*Matter of Harkenrider v Hochul*, 2022 NY Slip Op 31471[U] at *4 [emphasis added]); this could equally refer to the year in which the map was adopted, effective or limited to. Most persuasively, throughout its decision, the Court continuously emphasized that the 2014 amendments "were carefully crafted to *guarantee*," or "*ensure*," "that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission" (*Matter of Harkenrider v Hochul*, 38 NY3d at 513, 514 [emphasis added]). It is apparent that, due to the then-fast-approaching 2022 election cycle, there was a reason to forgo the overarching intent of the amendments. The majority in *Harkenrider* concluded by acknowledging the guiding principle that the NY Constitution is "the will of the people of this state" and that it intended to adhere to that will in disposing of the matter before it (*id.* at 524). We too must be guided by the overarching policy of the constitutional provision: broad engagement in a transparent redistricting process.

Crucially, the same provision giving the 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.

Mandamus to compel lies where an administrative body has failed to perform a duty enjoined upon it by law, the performance of said duty is ministerial and mandatory, rather than discretionary, and there is a clear right to the relief sought (*see New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]; *Matter of Hussain v Lynch*, 215 AD3d 121, 125-126 [3d Dept 2023]). Discretionary acts involve the exercise of judgment that may produce different and acceptable results (*see Tango v Tulevech*, 61 NY2d 34, 41 [1983]; *see also Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018], *cert denied* ___ US ___, 139 S Ct 2651 [2019]).

The IRC had an indisputable duty under the NY Constitution to submit a second set of maps upon the rejection of its first set (*see* NY Const, art III, § 4 [b]). The language of NY Constitution, article III, § 4 makes clear that this duty is mandatory, not discretionary. It is undisputed that the IRC failed to perform this duty. Further, we agree with petitioners that *Harkenrider* left unremedied the IRC's failure to perform its duty to submit a second set of maps. There were two questions posed before the Court of Appeals in *Harkenrider*, neither of which addressed the IRC's duty (*Matter of Harkenrider v Hochul*, 38 NY3d at 501-502). The challenge brought and the remedy granted were directed at the Legislature's unconstitutional reaction to the IRC's failure to submit maps, rather than the IRC's failure in the first instance (*see id.* at 505-506; *Matter of Harkenrider v Hochul*, 76 Misc 3d 171, 173 [Sup Ct, Steuben County 2022], *mod* 204 AD3d 1366 [4th Dept 2022], *affd* 38 NY3d 494 [2022]). *Harkenrider* addresses the IRC's inaction solely by way of factual background, and the IRC's discrete failure to perform its

constitutional duty was left unaddressed until this proceeding.[5] Indeed, the fact that the deadline for the IRC's submission had passed influenced the practicalities of the remedy fashioned in *Harkenrider*; the only way to prepare valid maps for the 2022 election, at that time, was through judicial creation of those maps (*see Matter of Harkenrider v Hochul*, 38 NY3d at 523). To hold today that the passing of the deadline leaves petitioners with no remedy would render meaningless the distinct constitutional command that the IRC create a second set of maps.

In light of the foregoing, petitioners have demonstrated a clear legal right to the relief sought. This determination honors the constitutional enactments as the means of providing a robust, fair and equitable procedure for the determination of voting districts in New York.[6] The right to participate in the democratic process is the most essential right in our system of governance. The procedures governing the redistricting process, all too easily abused by those who would seek to minimize the voters' voice and entrench themselves in the seats of power, must be guarded as jealously as the right to vote itself; in granting this petition, we return the matter to its constitutional design.[7] Accordingly, we direct the IRC to commence its duties forthwith.

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[5] It follows that this proceeding does not constitute a collateral attack on that determination; we are merely addressing a discrete and previously unaddressed issue in a proceeding brought by different parties.

[6] We disagree with Supreme Court's characterization of petitioner's relief as "provid[ing] a path to an annual redistricting process," as the right to compel the IRC to submit a second set of redistricting maps will be exhausted once it has done so. We further note that the IRC's inability to reach consensus was subsequently overcome relative to the assembly maps (*see generally* New York Independent Redistricting Commission, *NYIRC Assembly 2023*, available at https://www.nyirc.gov/storage/plans/20230420/assembly_plan.pdf [last accessed July 6, 2023]).

[7] Our dissenting colleagues cite to a publication by the Brennan Center for Justice analyzing the most recent redistricting cycle nationwide (*see* Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, Brennan Center for Justice [Aug. 11, 2022], available at https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction [last accessed July 6, 2023]). We are happy to note that this analysis reveals that the highest percentage of competitive districts emerge from court-drawn maps and, unsurprisingly, that one-party control results in a much smaller percentage of competitive districts (*see* Li &

Reynolds Fitzgerald and McShan, JJ., concur.

Pritzker, J. (dissenting).

We respectfully dissent because, initially, we find the proceeding untimely and would affirm on this alternate ground. In addition, substantively and contrary to the majority's conclusions, it is our opinion that the Court of Appeals in *Matter of Harkenrider v Hochul* (38 NY3d 494 [2022]) remedied the refusal of respondent Independent Redistricting Commission (hereinafter the IRC) to perform its duty, and, further, that the court-ordered congressional map is not interim but, rather, final and otherwise in force until after the 2030 census. Since the map is final, there is no longer a ministerial duty for the IRC to perform and therefore mandamus cannot lie. Moreover, public policy and the spirit of the 2014 constitutional amendments do not support the notion that the IRC should get a mandamus mulligan. Significantly, the judicial redistricting plan has been found to be competitive – although perhaps too competitive for some (*see* Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, Brennan Center for Justice [Aug. 11, 2022], available at https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction [last accessed July 6, 2023] [noting that, in New York, under the court-ordered redistricting maps, "almost one in five seats are competitive, [which is] the highest percentage in the country for a large state"]). For these reasons, we would affirm Supreme Court's dismissal of the petition.

First, we turn our attention to the issue of timeliness. For purposes of a mandamus proceeding, pursuant to CPLR 217 (1), "a proceeding against a body or officer must be commenced within four months . . . after the respondent's refusal, upon the demand of the petitioner or the person whom he [or she] represents, to perform its duty" (*see Matter of EZ Props., LLC v City of Plattsburgh*, 128 AD3d 1212, 1215 [3d Dept 2015]). As relevant here, "[a] petitioner . . . may not delay in making a demand in order to indefinitely postpone the time within which to institute the proceeding. The petitioner must make his or her demand within a reasonable time after the right to make it occurs, or

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Leaverton). It further bears noting that the analysis concludes that, "[i]f Americans hope to reverse the long-term decline of competitive districts, reforms to create fairer, more independent map-drawing processes will be essential" (Li & Leaverton). This was the aim of the 2012-2014 Legislature, and we find that it created a path to be followed *now*, rather than waiting until the next decade.

after the petitioner knows or should know of the facts which give him or her a clear right to relief, or else, the petitioner's claim can be barred by the doctrine of laches. The term laches, as used in connection with *the requirement* of the making of a prompt demand in mandamus proceedings, refers solely to the unexcused lapse of time and does not refer to the equitable doctrine of laches" (*Matter of Granto v City of Niagara Falls*, 148 AD3d 1694, 1695 [4th Dept 2017] [internal quotation marks, brackets and citations omitted; emphasis added]; *see Matter of Sheerin v New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 NY2d 488, 495-496 [1979]). "Th[is] reasonable time requirement for a prompt demand should be measured by CPLR 217 (1)'s four-month limitations period, and thus, a demand should be made no more than four months after the right to make the demand arises" (*Matter of Zupa v Zoning Bd. of Appeals of Town of Southold*, 64 AD3d 723, 725 [2d Dept 2009] [citations omitted]). In certain instances, the commencement of a proceeding pursuant to CPLR article 78 constitutes a demand (*see Matter of Butkowski v Kiefer*, 140 AD3d 1755, 1756 [4th Dept 2016]; *Matter of Gopaul v New York City Employees' Retirement Sys.*, 122 AD3d 848, 849 [2d Dept 2014]).

Here, we must determine when it was reasonable for petitioners to demand that the IRC act and, therefore, when the statute of limitations accrued. As to the relevant time frame, on January 3, 2022, the IRC submitted the two plans to the Legislature that were rejected on January 10, 2022. Thereafter, the IRC was unable to come to a consensus regarding a second proposal and, on January 24, 2022, announced that it would not be submitting a second proposal. The Legislature began to draft its own plan, which was enacted on February 3, 2022. The *Harkenrider* proceeding was commenced that same day. On May 20, 2022, Supreme Court (McAllister, J.) issued the final order therein establishing the new state senate and congressional districts. On June 28, 2022, petitioners commenced the instant proceeding seeking to compel the IRC to submit a second proposed congressional redistricting plan to the Legislature. In our view, under black letter mandamus jurisprudence, it was no later than January 24, 2022 that "petitioner[s] kn[ew] or should [have] know[n] of the facts which [gave them] a clear right to relief" (*Matter of Granto v City of Niagara Falls*, 148 AD3d at 1695 [internal quotation marks and citation omitted]). However, petitioners did not make a demand until June 28, 2022, when they commenced this proceeding, over a month past the running of the four-month statute of limitations set forth in CPLR 217 (1). As such, "petitioner[s] unreasonably delayed in making the demand and . . . this proceeding is barred by laches" (*Matter of Densmore v Altmar-Parish-Williamstown Cent. School Dist.*, 265 AD2d 838, 839 [4th Dept 1999], *lv denied* 94 NY2d 758 [2000]; *see Matter of Granto v City of Niagara Falls*, 148 AD3d at 1696; *Matter of van Tol v City of Buffalo*, 107 AD3d 1626, 1627 [4th Dept 2013]; *Matter of Schwartz v Morgenthau*, 23 AD3d 231, 233 [1st Dept

2005], *affd* 7 NY3d 427 [2006]; *compare Matter of Speis v Penfield Cent. Schs.*, 114 AD3d 1181, 1183 [4th Dept 2014]; *Matter of Selective Ins. Co. of Am. v State of N.Y. Workers' Compensation Bd.*, 102 AD3d 72, 76-77 [3d Dept 2012]).[1]

Briefly, we reject the alternate theories that have been advanced in this case as to when the statute of limitations accrued. First, it is true that NY Constitution, article III, § 4 (b) provides that, if the initial redistricting plan is rejected by the Legislature, the IRC, "[w]ithin [15] days of such notification and in no case later than February [28th], . . . shall prepare and submit . . . a second redistricting plan."[2] Here, however, this February 28 date has no relevance or application inasmuch as, on January 24, the IRC announced that it would not submit a second plan. Moreover, the 15-day period to act after legislative rejection ended on January 25. Additionally, when the Legislature passed its own redistricting plan on February 3, the IRC *lost its ability* to *on its own* propose a second redistricting plan to the Legislature. As such, the February 28 date is a red herring. Further, we disagree with the majority's assertion that the statute of limitations did not accrue until the gap-filling legislation of 2021 was declared unconstitutional.[3] To that end, the gap-filling legislation purported to allow 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, ch 633, § 1). Significantly, this legislation did not excuse the IRC from "its constitutional obligations" to propose a second plan, which is precisely what petitioners, and the majority, claim is the "the

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[1] Certainly, the unreasonableness of petitioners' delay in commencing this action is evident given that the *Harkenrider* petitioners' filing of a 67-page, 226-paragraph petition on February 3, 2022, just over one week after the IRC announced it would not be submitting a second redistricting plan and the same day the Legislature enacted its own plan. Indeed, from a laches point of view, it is reasonable to conclude that the delay was due to petitioners having favored the gerrymandered legislative maps, rather than the failure of the IRC to act.

[2] The plain language of this section establishes that the IRC has 15 days to prepare a second plan. The February 28 deadline does not extend this time frame, but rather is the final date for preparation of a second plan, even if that date does not provide the IRC with 15 days to prepare a second plan.

[3] Although the majority does not discuss and explicitly reject the timeliness analysis of Supreme Court (Lynch, J.), its analysis implicitly does so. We are also unpersuaded by the court's timeliness analysis.

procedural violation at issue in this case." However, this harm would exist even if the gap-filling legislation was found constitutional because this legislation caused the same injury asserted in this mandamus proceeding, usurping the role of the IRC and enacting maps prior to the IRC offering a second plan. Thus, even if the gap-filling legislation had been found constitutional, it would have no bearing whatsoever on petitioners' assertion that the IRC failed to perform its constitutionally mandated duty by neglecting to submit a second congressional map, which triggered the mandamus relief requested herein and set the accrual date.[4] As unlikely as it sounds, the gap-filling legislation should simply have led petitioners to be aligned with the *Harkenrider* petitioners, at least as to the need for IRC action *before* a final map is drawn by the Legislature.

Moving to the merits, even if the proceeding was timely, we would still affirm Supreme Court's dismissal of the petition based upon substantive infirmities. At the outset, we reject petitioners' contention, with which the majority agrees, that the court-ordered congressional map is interim – in place only for the purpose of the 2022 elections – rather than in place until after the 2030 census. Indeed, determination of this issue is crucial as the mandamus relief sought is hard-tethered to the duration of the relief ordered in *Harkenrider*. To that end, we disagree with the majority's position that the Court of Appeals, in *Harkenrider*, left us "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." To the contrary, the plain language of the NY Constitution provides the duration in clear terms. "The process for redistricting congressional and state legislative districts [established by NY Constitution, article III, §§ 4, 5 and 5-b] 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 decennial census taken in a year ending in zero unless modified pursuant to court order" (NY Const, art III, § 4 [e]). The Court of Appeals directly cited to, and thereby incorporated, this section when discussing and approving the judicially drawn maps ordered by Supreme Court; "[t]hus, we endorse the procedure directed by Supreme Court to 'order the adoption of . . . a redistricting plan' " (*Matter of Harkenrider v Hochul*, 38 NY3d at 523, quoting NY Const, art III, § 4 [e]). Notably, there is no caveat nor limitation as to duration and, as such, it is our opinion that the Constitution requires that such court-ordered maps remain

[4] In fact, the Court of Appeals noted in *Harkenrider* that mandamus could be one of the avenues of a voter aggrieved by IRC inaction (38 NY3d at 515 n 10). Of course, the proceeding would need to be timely (*see* CPLR 217 [1]).

in place until after the next census (*see* NY Const, art III, § 4 [e]). More to the point, the courts *could have* – yet did not – expressly order that the plan adopted in *Harkenrider* be interim and only remain in place until the IRC took action and implemented a legislative plan that met constitutional requirements following the 2022 election (*see e.g. Ely v Klahr*, 403 US 108, 110-111 [1971]; *Honig v Board of Supervisors of Rensselaer County*, 24 NY2d 861, 862 [1969]).

From a common sense point of view, we find the meaning clear and it is implausible to assert that any of the members of the Court of Appeals would leave the voters to grapple with an issue of this magnitude.[5] Moreover, this view is also supported by Judge Troutman's reasoned dissent, wherein she raised the concern that the plan "may" be in place "for the next 10 years" (*Matter of Harkenrider v Hochul*, 38 NY3d at 527 [Troutman, J., dissenting]).[6] Further, if it were an interim order, presumably there would be a directive that the IRC reconvene and the constititutionally mandated redistricting

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[5] We are also unpersuaded that it can be gleaned from the decisions in *Harkenrider* that the court-ordered congressional map only be used for the 2022 election cycle (*see Matter of Harkenrider v Hochul*, 38 NY3d 494; *Matter of Harkenrider v Hochul*, 204 AD3d 1366 [4th Dept 2022]; *Matter of Harkenrider v Hochul*, 76 Misc 3d 171 [Sup Ct, Steuben County 2022]). Although these decisions refer generally to the "2022 election" and the "2022 maps" (*see id.*), these references are not determinative, but rather are references to the next scheduled election for which the court-ordered maps would of course apply. Moreover, as pointed out by the majority, Supreme Court, after minor revisions to the maps were made, ordered that they are "the final enacted redistricting maps" (*Matter of Harkenrider v Hochul*, Sup Ct, Steuben County, June 2, 2022, McAllister, J., index No. E2022-0116CV, NYSCEF doc. No. 696).

[6] Judge Troutman's use of the word "may" does not imply that the plan endorsed by the Court of Appeals is interim. Although the default duration for the redistricting maps is 10 years (*see* NY Const, art III, § 4 [e]), the duration is subject to other potentially successful challenges during the 10-year period, such as federal litigation under the Voting Rights Act (42 USC § 1973). Additionally, had the majority intended the plan to be interim, surely Judge Troutman's colleagues would have explained this to her and presumably clarified this issue in the majority decision, allaying her concerns in this regard and alleviating the need to dissent on this point. In other words, if the plan were interim, there would be no need to be concerned with a 10-year term – nor would there be much ado arising from a one-year sunsetting order.

process begin anew after the one-year period. Indeed, it is well "recognize[d] that a congressional districting plan will usually be in effect for at least 10 years and five congressional elections" (*Kirkpatrick v Preisler*, 394 US 526, 533 [1969]), much as there is a strong public policy in favor of the finality of elections (*see generally Matter of Lichtman v Board of Elections of Nassau County*, 27 NY2d 62, 66 [1970]). So too should there be a strong public policy in favor of the finality of the establishment of electoral districts, as "[l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system" (*Reynolds v Sims*, 377 US 533, 583 [1964]).

Next, we disagree with the majority's conclusion that the remedy in *Harkenrider* failed to address the IRC's refusal to submit a second set of redistricting maps to the Legislature.[7] To the contrary, it is our opinion that the Court of Appeals quite clearly considered and addressed the IRC's constitutional violation, specifically its refusal to act, which is the precise injury alleged herein. The majority decision in *Harkenrider* rejected the State respondents' request for a chance to repair the legislation at issue and explained that "[t]he 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*" (*Matter of Harkenrider v Hochul*, 38 NY3d at 523 [emphasis added]). As such, the Court of Appeals, in considering a legislative fix, rejected same in part because, in their view, it was too late for the IRC to act. Further, the Court framed one of the petitioners' arguments, with which the Court agreed, as an assertion "that, *in light of the lack of compliance by the IRC* and the [L]egislature with the procedures set forth in the Constitution, the [L]egislature's enactment of the 2022 redistricting maps contravened the Constitution" (*Matter of Harkenrider v Hochul*, 38 NY3d at 508-509 [emphasis added]). Thus, the failure of the IRC to act, which is the limited subject of the instant mandamus proceeding, was considered and in fact is part and parcel of the Court of Appeals' finding of procedural constitutional infirmity infecting the 2022 maps.

In that same vein, from a conceptual point of view, simply put, the judicially adopted remedy in *Harkenrider* was authorized and, while perhaps not the only permissible remedy, and clearly not petitioners' preferred remedy, it repaired the procedural and substantive infirmities in a manner directly set forth in the NY

[7] We do, however, agree that the *manner* in which the Court of Appeals addressed the IRC's failure to submit a second redistricting map is not the remedy now requested by petitioners.

Constitution (NY Const, art III, § 4 [e]). Indeed, during oral argument the judges of the Court of Appeals asked many probing questions concerning the different remedies available and the dissenting judges proposed different legislative remedies. In fact, the utility of crafting a legislative remedy under NY Constitution, article III, § 5-b was discussed at length and served as part of the basis for Judge Troutman's dissent, which would have required the "[L]egislature to adopt either of the two plans that the IRC has already approved pursuant to [NY Constitution, article III, §] 5-b (g)" (*Matter of Harkenrider v Hochul*, 38 NY3d at 525 [Troutman, J., dissenting]). In this regard, NY Constitution, article III, § 5-b (a) permits the IRC to reconvene outside the every 10-year period when "a court orders that congressional . . . districts be amended" in response to a successful legal challenge to a map, such as reestablishing the IRC to amend a map to address a violation of the Voting Rights Act due to the failure to include a minority district (*see generally Thornburg v Gingles*, 478 US 30 [1986]). Although this provision is not applicable to the instant proceeding because it was not utilized by petitioners as a basis for relief, and, more significantly, because petitioners are seeking a new map rather than an amended one, the significance of the Court of Appeals' attention to this provision in *Harkenrider* is only to demonstrate that it did specifically contemplate reestablishing the IRC.

The foregoing leads us to our ultimate conclusion that petitioners are not entitled to the extraordinary remedy of mandamus. As discussed above, the Court of Appeals was presented with alternative remedies in *Harkenrider*, including that posed by petitioners, and elected to have a special master establish a redistricting plan to be implemented by court order. To that end, from a mandamus perspective, the issue is not whether petitioners' requested relief is ever constitutionally available, but rather whether same may be mandated in the aftermath of a judicial redistricting. It is our view that the judicial remedy cured the IRC's failure to act by lawfully establishing a redistricting plan for the ordinary duration, leaving no uncured violation of law and thus foreclosing mandamus. Although it is not unreasonable for petitioners to wish for a different remedy, this bald desire falls well short of the standard required to mount a successful mandamus proceeding. To wit, "[a] writ of mandamus is an extraordinary remedy that is available only in limited circumstances" (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018] [internal quotation marks and citations omitted], *cert denied* ___ US ___, 139 S Ct 2651 [2019]; *see Matter of Hussain v Lynch*, 215 AD3d 121, 125-126 [3d Dept 2023]). A petitioner seeking mandamus to compel "must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757

[1991]; *accord Matter of Mental Hygiene Legal Serv., Third Jud. Dept. v Delaney*, 38 NY3d 1076, 1096 [2022, Rivera, J., dissenting]). "The duty must be positive, not discretionary, and the right to its performance must be so clear as not to admit of reasonable doubt or controversy" (*Matter of Burr v Voorhis*, 229 NY 382, 387 [1920]; *see Matter of Thornton v Saugerties Cent. Sch. Dist.*, 145 AD3d 1138, 1140 [3d Dept 2016], *lv denied* 29 NY3d 902 [2017]).

Therefore, in light of our opinion that the court-ordered congressional map is final and in place until after the 2030 census, as well as our opinion that the Court of Appeals has already addressed the IRC's refusal to submit a second set of redistricting maps to the Legislature, we do not believe that, presently, the IRC is duty bound to perform *any* act until after the next census, let alone a ministerial act. Consequently, because a valid court-ordered congressional map has been established and remains in place, it is our opinion that petitioners did not satisfy their burden of demonstrating a clear legal right to compel the IRC to propose a second redistricting plan for consideration by the Legislature (*see generally Matter of League of Women Voters of N.Y. State v New York State Bd. of Elections*, 206 AD3d 1227, 1230-1231 [3d Dept 2022], *lv denied* 38 NY3d 909 [2022]; *Matter of Barone v Duffy*, 186 AD3d 1358, 1360 [2d Dept 2020]; *Matter of Ethington v County of Schoharie*, 173 AD3d 1504, 1505 [3d Dept 2019]; *Matter of Thornton v Saugerties Cent. Sch. Dist.*, 145 AD3d at 1141; *compare Matter of Eidt v City of Long Beach*, 62 AD3d 793, 795 [2d Dept 2009]). Accordingly, as petitioners are not entitled to the extraordinary remedy of mandamus, Supreme Court did not err in dismissing the petition on this basis.

There is likely no disagreement that a properly conducted and constitutionally mandated legislative redistricting process with the bipartisan involvement of the IRC would have, at least in theory, been preferable to resorting to litigation and judicially drawn maps. However, since the IRC failed in this regard, 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. Although we agree with petitioners that the court-ordered congressional map is not perfect, and that such flaws may raise legitimate concerns, if these concerns are substantial, they can be challenged. However, and aside from our opinion that mandamus is legally unavailable, the goals of the 2014 constitutional amendments have in fact been met by way of the operation of the constitutional safety valve resulting in maps that appear competitive. This is, after all, the *raison d'etre* behind the 2014 constitutional amendments, which nobly tried to address gerrymandering for what it is – cheating. We have great faith that our independent judicial branch of government will continue to remedy constitutional violations, which

has already been done here, and, at the same time, steadfastly enforce the rule of law. In conclusion, we say let the legislative process roll once again – but this time in conformity with the 2014 constitutional amendments – after the 2030 census.

Egan Jr., J., concurs.

ORDERED that the judgment is reversed, on the law, without costs, and petition granted.

ENTER:

Robert D. Mayberger
Clerk of the Court

Exhibit E

PERILLO HILL

July 26, 2023

Aria C. Branch, Esq.
Elias Law Group LLP
250 Massachusetts Avenue NW, Suite 400
Washington D.C. 20001

Re: *Matter of Hoffman, et al v. NYSIRC, et al*

Dear Ms. Branch,

We are in receipt of your correspondence dated July 24, 2023. As concerns the issues raised therein, please note that this office served a Notice of Appeal on behalf of those Commissioners that we represent yesterday, July 25, 2023, noticing an appeal as of right from the Opinion and Order of the Appellate Division. Such service effectuates a stay pursuant to CPLR §5519(a)(1).

Thank you.

Regards,

Timothy Hill
Timothy Hill

cc: Jessica Ring Amunson, Esq.
Misha Tseytlin, Esq.
J. Peluso, Esq.

Exhibit F

Jessica Ring Amunson
Tel 202 639-6023
jamunson@jenner.com

July 26, 2023

VIA EMAIL

Aria C. Branch, Esq.
Elias Law Group
Suite 400
250 Massachusetts Avenue, NW
Washington, DC 20001

Re: *Hoffmann, et al. v. New York State Independent Redistricting Commission, et al.*,
Case No. CV-22-2265, New York Supreme Court, Appellate Division, Third Department

Dear Ms. Branch:

Thank you for your letter of July 24, 2023. Per your request, this is to confirm that my clients intend to comply with the Third Department's Order. As you are aware, Commissioners Nesbitt, Brady, Conway, Harris, and Stephens filed a notice of appeal on July 25, 2023, and have taken the position that the filing of that notice of appeal results in an automatic stay of the Third Department's Order to the Independent Redistricting Commission to "commence its duties forthwith." The intervenors have likewise filed a notice of appeal.

Nonetheless, while the appeal is pending before the Court of Appeals, my clients intend to take all steps legally permitted to ensure they are fully prepared to submit a second round of proposed congressional district lines for consideration by the Legislature. My clients are particularly mindful of the Third Department's findings that redistricting by the Independent Redistricting Commission is the "means of providing a robust, fair and equitable procedure for the determination of voting districts in New York" and that the "right to participate in the democratic process is the most essential right in our system of governance." My clients are determined to ensure that those goals are realized in this process.

Please let me know if you have any further questions. Thank you.

Sincerely,

Jessica Ring Amunson

cc: Misha Tseytlin, Counsel for Harkenrider Intervenors
Timothy Hill, Counsel for Commissioners Nesbitt, Brady, Conway, Harris, and Stephens

Exhibit G

From:	Aria Branch
To:	Timothy Hill; Amunson, Jessica Ring
Cc:	Rich Medina; Aaron Mukerjee; Jonathan Hawley; James Peluso; misha.tseytlin@troutman.com; Lisa Perillo
Subject:	RE: Hoffmann, et al. v. New York State Independent Redistricting Commission, et al.
Date:	Monday, July 31, 2023 12:30:48 PM

Dear Counsel:

Thank you for your responses to my July 24 letter. I understand, based on those responses, that the Brady Respondents believe that their filing of a Notice of Appeal on July 25 "effectuates a stay pursuant to CPLR § 5519(a)(1)." The Jenkins Respondents indicated that, notwithstanding the pending appeal, they "intend to take all steps legally permitted to ensure they are fully prepared to submit a second round of proposed congressional district lines for consideration by the Legislature."

I write to seek clarification as to whether the Commission intends to take any steps to comply with the Third Department's order while the appeal remains pending.

In particular, please indicate whether your clients will take steps to inform the public of the Third Department's order; schedule and attend any IRC meetings to discuss the process for drafting and submitting plans to the Legislature; or begin the process of drafting redistricting plans. If so, please provide an approximate date by which your clients will begin and/or complete such action(s).

To be clear, Petitioners do not believe that any stay—to the extent it exists—would preclude the Commission from taking steps to comply with the Third Department's order.

Please respond by 5 p.m. on Wednesday, August 2. If the Commission does not intend to act, Petitioners may be forced to file a motion on this issue.

Regards,

Aria C. Branch
Partner
Elias Law Group LLP
250 Massachusetts Avenue NW, Suite 400
Washington DC 20001
202-968-4518

CONFIDENTIAL: This email may contain privileged or confidential information and is for the sole use of the intended recipient(s). Any unauthorized use or disclosure of this communication is prohibited. If you believe that you have received this email in error, please notify the sender immediately and delete it from your system.

From: Timothy Hill <thill@perillohill.com>
Sent: Wednesday, July 26, 2023 9:35 AM
To: Aria Branch <abranch@elias.law>; Amunson, Jessica Ring <JAmunson@jenner.com>
Cc: Rich Medina <rmedina@elias.law>; Aaron Mukerjee <amukerjee@elias.law>; Jonathan Hawley <jhawley@elias.law>; James Peluso <JPeluso@dblawny.com>; misha.tseytlin@troutman.com; Lisa Perillo <lperillo@perillohill.com>
Subject: RE: Hoffmann, et al. v. New York State Independent Redistricting Commission, et al.

Dear Counsel,

Pleas see the attached correspondence regarding the above matter.

Thank you,
Tim

Timothy Hill
Perillo Hill LLP
285 West Main Street, Suite 203
Sayville, New York 11782
631.582.9422

From: Aria Branch <abranch@elias.law>
Sent: Monday, July 24, 2023 10:31 AM
To: Amunson, Jessica Ring <JAmunson@jenner.com>; Timothy Hill <thill@perillohill.com>
Cc: Rich Medina <rmedina@elias.law>; Aaron Mukerjee <amukerjee@elias.law>; Jonathan Hawley <jhawley@elias.law>; James Peluso <JPeluso@dblawny.com>; misha.tseytlin@troutman.com; mcgearyd@nyirc.gov; blattk@nycirc.gov
Subject: Hoffmann, et al. v. New York State Independent Redistricting Commission, et al.

Dear Counsel:

Please see the attached correspondence regarding the above-referenced litigation.

Regards,
Aria

Aria C. Branch
Partner
Elias Law Group LLP
250 Massachusetts Avenue NW, Suite 400
Washington DC 20001
202-968-4518

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Exhibit H

From:	Lisa Perillo
To:	Aria Branch
Cc:	Rich Medina; Aaron Mukerjee; Jonathan Hawley; James Peluso; misha.tseytlin@troutman.com; Amunson, Jessica Ring; Timothy Hill
Subject:	RE: Hoffmann, et al. v. New York State Independent Redistricting Commission, et al.
Date:	Wednesday, August 2, 2023 3:06:24 PM

Dear Aria,

In response to your email below, we are not aware of any IRC activities by the commissioners that would not be subject to the stay.

Yours,

Lisa

Please note that Messina Perillo Hill LLP is now Perillo Hill LLP.

Lisa A. Perillo, Esq.
Perillo Hill LLP
285 West Main Street, Suite 203
Sayville, New York 11782
631.582.9422
www.perillohill.com

This email (including any attachments) may contain information that is private, confidential, exempt from disclosure or protected by attorney-client or other privilege. If you have received this e-mail in error please notify the sender immediately by reply e-mail so that the sender's records can be corrected and please delete the email (and any attachments) from your system without copying, distributing or disseminating same.
Thank you.

From: Aria Branch <abranch@elias.law>
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I write to seek clarification as to whether the Commission intends to take any steps to comply with the Third Department's order while the appeal remains pending.

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Regards,

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Partner
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Subject: RE: Hoffmann, et al. v. New York State Independent Redistricting Commission, et al.

Dear Counsel,

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Thank you,
Tim

Timothy Hill
Perillo Hill LLP
285 West Main Street, Suite 203
Sayville, New York 11782
631.582.9422

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Cc: Rich Medina <rmedina@elias.law>; Aaron Mukerjee <amukerjee@elias.law>; Jonathan Hawley <jhawley@elias.law>; James Peluso <JPeluso@dblawny.com>; misha.tseytlin@troutman.com; mcgearyd@nyirc.gov; blattk@nycirc.gov
Subject: Hoffmann, et al. v. New York State Independent Redistricting Commission, et al.

Dear Counsel:

Please see the attached correspondence regarding the above-referenced litigation.

Regards,
Aria

Aria C. Branch
Partner
Elias Law Group LLP
250 Massachusetts Avenue NW, Suite 400
Washington DC 20001
202-968-4518

CONFIDENTIAL: This email may contain privileged or confidential information and is for the sole use of the intended recipient(s). Any unauthorized use or disclosure of this communication is prohibited. If you believe that you have received this email in error, please notify the sender immediately and delete it from your system.

Exhibit I

From: Amunson, Jessica Ring
To: Lisa Perillo; Aria Branch
Cc: Rich Medina; Aaron Mukerjee; Jonathan Hawley; James Peluso; misha.tseytlin@troutman.com; Timothy Hill
Subject: RE: Hoffmann, et al. v. New York State Independent Redistricting Commission, et al.
Date: Wednesday, August 2, 2023 5:03:44 PM

Aria:

As you have seen, Commissioners Nesbitt, Brady, Conway, Harris, and Stephens have taken the position that any activity by the full Commission is subject to a stay while the case is pending before the Court of Appeals. In light of this position and in response to your inquiry about whether the Commission will meet, the full Commission will not be able to meet given that the Chair is precluded from calling a meeting without the consent of at least six other Commissioners. As I previously reported, my clients are determined to ensure that redistricting by the Independent Redistricting Commission is the "means of providing a robust, fair and equitable procedure for the determination of voting districts in New York" and agree that the "right to participate in the democratic process is the most essential right in our system of governance," as the Third Department held. My clients are determined to see those goals realized in this process.

Thank you.

Jessie

From: Lisa Perillo <lperillo@perillohill.com>
Sent: Wednesday, August 2, 2023 3:04 PM
To: Aria Branch <abranch@elias.law>
Cc: Rich Medina <rmedina@elias.law>; Aaron Mukerjee <amukerjee@elias.law>; Jonathan Hawley <jhawley@elias.law>; James Peluso <JPeluso@dblawny.com>; misha.tseytlin@troutman.com; Amunson, Jessica Ring <JAmunson@jenner.com>; Timothy Hill <thill@perillohill.com>
Subject: RE: Hoffmann, et al. v. New York State Independent Redistricting Commission, et al.

External Email - Do Not Click Links or Attachments Unless You Know They Are Safe
Dear Aria,

In response to your email below, we are not aware of any IRC activities by the commissioners that would not be subject to the stay.

Yours,

Lisa

Please note that Messina Perillo Hill LLP is now Perillo Hill LLP.

Lisa A. Perillo, Esq.
Perillo Hill LLP
285 West Main Street, Suite 203
Sayville, New York 11782
631.582.9422
www.perillohill.com

This email (including any attachments) may contain information that is private, confidential, exempt from disclosure or protected by attorney-client or other privilege. If you have received this e-mail in error please notify the sender immediately by reply e-mail so that the sender's records can be corrected and please delete the email (and any attachments) from your system without copying, distributing or disseminating same.
Thank you.

From: Aria Branch <abranch@elias.law>
Sent: Monday, July 31, 2023 12:31 PM
To: Timothy Hill <thill@perillohill.com>; Amunson, Jessica Ring <JAmunson@jenner.com>
Cc: Rich Medina <rmedina@elias.law>; Aaron Mukerjee <amukerjee@elias.law>; Jonathan Hawley <jhawley@elias.law>; James Peluso <JPeluso@dblawny.com>; misha.tseytlin@troutman.com; Lisa Perillo <lperillo@perillohill.com>
Subject: RE: Hoffmann, et al. v. New York State Independent Redistricting Commission, et al.

Dear Counsel:

Thank you for your responses to my July 24 letter. I understand, based on those responses, that the Brady Respondents believe that their filing of a Notice of Appeal on July 25 "effectuates a stay pursuant to CPLR § 5519(a)(1)." The Jenkins Respondents indicated that, notwithstanding the pending appeal, they "intend to take all steps legally permitted to ensure they are fully prepared to submit a second round of proposed congressional district lines for consideration by the Legislature."

I write to seek clarification as to whether the Commission intends to take any steps to comply with the Third Department's order while the appeal remains pending.

In particular, please indicate whether your clients will take steps to inform the public of the Third Department's order; schedule and attend any IRC meetings to discuss the process for drafting and submitting plans to the Legislature; or begin the process of drafting redistricting plans. If so, please provide an approximate date by which your clients will begin and/or complete such action(s).

To be clear, Petitioners do not believe that any stay—to the extent it exists—would preclude the Commission from taking steps to comply with the Third Department's order.

Please respond by 5 p.m. on Wednesday, August 2. If the Commission does not intend to act, Petitioners may be forced to file a motion on this issue.

Regards,

Aria C. Branch
Partner
Elias Law Group LLP
250 Massachusetts Avenue NW, Suite 400
Washington DC 20001
202-968-4518

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From: Timothy Hill <thill@perillohill.com>
Sent: Wednesday, July 26, 2023 9:35 AM
To: Aria Branch <abranch@elias.law>; Amunson, Jessica Ring <JAmunson@jenner.com>
Cc: Rich Medina <rmedina@elias.law>; Aaron Mukerjee <amukerjee@elias.law>; Jonathan Hawley <jhawley@elias.law>; James Peluso <JPeluso@dblawny.com>; misha.tseytlin@troutman.com; Lisa Perillo <lperillo@perillohill.com>
Subject: RE: Hoffmann, et al. v. New York State Independent Redistricting Commission, et al.

Dear Counsel,

Pleas see the attached correspondence regarding the above matter.

Thank you,
Tim

Timothy Hill
Perillo Hill LLP
285 West Main Street, Suite 203
Sayville, New York 11782
631.582.9422

From: Aria Branch <abranch@elias.law>
Sent: Monday, July 24, 2023 10:31 AM
To: Amunson, Jessica Ring <JAmunson@jenner.com>; Timothy Hill <thill@perillohill.com>
Cc: Rich Medina <rmedina@elias.law>; Aaron Mukerjee <amukerjee@elias.law>; Jonathan Hawley <jhawley@elias.law>; James Peluso <JPeluso@dblawny.com>; misha.tseytlin@troutman.com;

mcgearyd@nyirc.gov; blattk@nycirc.gov
Subject: Hoffmann, et al. v. New York State Independent Redistricting Commission, et al.

Dear Counsel:

Please see the attached correspondence regarding the above-referenced litigation.

Regards,
Aria

Aria C. Branch
Partner
Elias Law Group LLP
250 Massachusetts Avenue NW, Suite 400
Washington DC 20001
202-968-4518

CONFIDENTIAL: This email may contain privileged or confidential information and is for the sole use of the intended recipient(s). Any unauthorized use or disclosure of this communication is prohibited. If you believe that you have received this email in error, please notify the sender immediately and delete it from your system.

Jessica Ring Amunson

Jenner & Block LLP
1099 New York Avenue, N.W.
Suite 900, Washington, DC 20001-4412 | jenner.com
+1 202 639 6023 | TEL
+1 312 237 6373 | MOBILE
+1 202 661 4993 | FAX
JAmunson@jenner.com
Download V-Card | View Biography

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Exhibit J

State of New York
Court of Appeals

Lisa LeCours
Chief Clerk and
Legal Counsel to the Court

Clerk's Office
20 Eagle Street
Albany, New York 12207-1095

August 8, 2023

Perillo Hill LLP
Attn: Timothy F. Hill, Esq.
285 West Main Street, Suite 203
Sayville, NY 11782

Dreyer Boyajian LLP
Attn: James R. Peluso, Esq.
75 Columbia Street
Albany, NY 12210-2708

Troutman Pepper Hamilton Sanders LLP
Attn: Misha Tseytlin, Esq.
875 Third Avenue
New York, NY 10022

Jenner & Block LLP
Attn: Jacob David Alderdice, Esq.
1155 Avenue of Americas
New York, NY 10036

New York State Independent Redistricting Commission
302A Washington Avenue Extension
Albany, NY 12203

Re: Matter of Hoffman v IRC
APL-2023-00121

Dear Counselors:

This letter acknowledges receipt and administrative review of appellants' preliminary appeal statements. The appeal will proceed in the normal course of briefing and argument. The briefing schedule set forth below will not be extended. Petitioners-respondents' request for a calendar preference and appellants' opposition is noted. It is anticipated that the appeal will be calendared for argument during the November session. Given the briefing schedule and anticipated argument date, motions seeking amicus relief related to this appeal must be made returnable no later than the due date for the opening brief of the party whose position they support.

Briefing Schedule for Appeal

Appellants' briefs and record material shall be served and filed by September 18, 2023. Failure to comply with this due date or such due date as extended pursuant to section 500.15 of the Court of Appeals Rules of Practice (the Rules) shall subject the appellant to dismissal of the appeal (*see* section 500.16 [a] of the Rules). Appellants shall remit the fee required by section 500.3 of the Rules (currently $315.00 in the form of an attorney's check, certified check, cashier's check or money order payable to "State of New York, Court of Appeals").

Respondents' briefs and any supplementary record material shall be served and filed by October 23, 2023. Failure to comply with this due date or such due date as extended pursuant to section 500.15 of the Rules shall subject the respondent to preclusion (*see* section 500.16 [b] of the Rules).

Appellants may serve and file reply briefs by November 6, 2023.

Parties are expected to comply with the service and filing dates stated above. "Filed" means receipt of the paper document by the Clerk's Office. The procedure for requesting an extension, which requires a showing of good cause, is set forth in section 500.15 of the Rules.

Covers and Contents of Filed Documents

Parties should review and comply with all of the general requirements in section 500.1 of the Rules (e.g., no plastic covers, no sharp metal fasteners, affidavit of service stapled to inside back cover of document labeled "original"), as well as the specific requirements for filings in normal course appeals in sections 500.12, 500.13 and 500.14 of the Rules. Please note the word and page limits for all briefs (*see* section 500.13 [c] of the Rules).

In addition, all filed documents shall display on their covers the letter-number combination listed under the subject line of this letter. Parties also are reminded that citations in briefs to testimony, affidavits, jury charges or exhibits shall be to such material provided to the Court in appellant's record or appendix or in respondent's supplementary appendix, if filed (*see* section 500.14 of the Rules). The Clerk's Office encourages the filing of any appendix as a separately bound submission.

In preparing briefs and record material, counsel should take careful note of the requirements concerning confidential and sensitive information, and possible sealing or redaction responsibilities (*see* enclosed notice).

Digital Filing Requirements

Parties also are required to submit digital versions of each paper filing (see sections 500.2, 500.12[h] and 500.14[g] of the Rules) by uploading them to the Court of Appeals Public Access and Search System (Court-PASS) accessed through the Court's web site (www.courts.state.ny.us/ctapps). A document containing the Technical Specifications and Instructions for Submission of Briefs and Record Material in Digital Format (including Naming Conventions) is enclosed and is available on the Court's web site.

For Court-PASS, parties to this appeal will use **APL-2023-00121** as the Login Number. Attorneys admitted to practice in New York State must also enter their attorney registration number and password from their New York Unified Court System's Attorney Online Service Account. Attorneys who do not have such an account may create one through a link on Court-PASS. Filers who are not registered New York attorneys must call the Clerk's Office at one of the phone numbers below to obtain guest login credentials.

For uploading purposes, appellants' digital briefs shall have the following file names: **HoffmanvNYSIRC-app-Brady-brf.pdf** and **HoffmanvNYSIRC-app-Harkenrider -brf.pdf**. Appellants also shall follow the PDF file naming conventions with respect to the digital submission of record material. All digital record material shall be submitted in separate files. Respondents' digital briefs shall have the following file names: **HoffmanvNYSIRC-res-Hoffman-brf.pdf, HoffmanvNYSIRC-res-Jenkins-brf.pdf,** and **HoffmanvNYSIRC-res-NYSIRC-brf. pdf**. Appellants' reply briefs, if any, shall have the following file names: **HoffmanvNYSIRC-app-Brady-replybrf.pdf** and **HoffmanvNYSIRC-app-Harkenrider-replybrf.pdf**.

Counsel are reminded of their obligation to ensure that the contents of the digital submissions are identical to those filed in hard copy, with the exception that the digital version need not contain an original signature (see section 12 of the enclosed Technical Specifications and Instructions for Submission of Briefs and Record Material in Digital Format).

When uploading digital versions of filed documents, counsel will be required to fill out an attestation form regarding confidential and/or sensitive information. A copy of such form may be viewed in the Court-PASS area of the Court's web site.

Counsel should review the enclosed "Checklist for Normal Course Appeal Filings" before filing and uploading a brief and/or record material.

Argument Scheduling and Parties' Continuing Responsibilities

Requests for argument time must be indicated on the cover of the party's brief. Unless otherwise permitted by the Court upon advance written notice, counsel may request no more than 30 minutes of oral argument time. The Court considers these requests in setting the actual argument times in each appeal.

Generally, counsel of record will be advised of the scheduled argument date at least one month in advance. Approximately two weeks before the scheduled argument date, the Clerk's Office will send to counsel of record a Notice to Counsel, the Court's Day Calendar with assigned argument times, and information on obtaining the Court's decision in the case.

Pursuant to section 500.6 of the Rules, the parties must keep the Clerk's Office apprised of all developments affecting this appeal, including: contemplated and actual settlements; circumstances or facts that could render the matter moot; pertinent developments in applicable law, statutes and regulations; and changes in the status of ongoing related proceedings, if any, at an administrative agency, Supreme Court, the Appellate Division or any other court.

Questions may be directed to Margaret Wood at 518-455-7702 or Edward Ohanian at 518-455-7701.

Very truly yours,

Lisa LeCours

LL/EJO/mht
Enclosure

Exhibit K

2022 WL 16830092 (N.Y.A.D. 2 Dept.), 2022 N.Y. Slip Op. 74123(U)

This motion is uncorrected and is not subject to publication in the Official Reports.

League of Women Voters of the Mid-Hudson Region, et al., petitioners-respondents,
v.
Dutchess County Board of Elections, et al., respondents, Eric J. Haight, etc., respondent-appellant.

MOTION DECISION
Supreme Court, Appellate Division,
Second Department, New York
2022-08942, 53491/2022
November 7, 2022

VALERIE BRATHWAITE NELSON, J.P., ROBERT J. MILLER, JOSEPH J. MALTESE, LILLIAN WAN, JJ.
DECISION & ORDER ON MOTION

Appeal from an order and judgment (one paper) of the Supreme Court, Dutchess County, dated November 3, 2022.

Motion by the petitioners-respondents to confirm that no automatic stay of the order and judgment is in effect pursuant to CPLR 5519(a)(1) or, in the alternative, to vacate any automatic stay of the order and judgment pursuant to CPLR 5519(a)(1).

Upon the papers filed in support of the motion and the papers filed in opposition and in relation thereto, it is

ORDERED that the branch of the motion which is to confirm that no automatic stay of the order and judgment is in effect pursuant to CPLR 5519(a)(1), is granted; and it is further,

ORDERED that the motion is otherwise denied as academic.

BRATHWAITE NELSON, J.P., MILLER, MALTESE and WAN, JJ., concur.

ENTER:

Maria T. Fasulo

Clerk of the Court

Copr. (C) 2023, Secretary of State, State of New York

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

LEAGUE OF WOMEN VOTERS OF THE MID-HUDSON REGION, TANEISHA MEANS, and MAGDALENA SHARFF,

Petitioners/Plaintiffs-Appellees-Movants,

-against-

ERIK HAIGHT, in his capacity as Commissioner of the Dutchess County Board of Elections,

Respondent/Defendant-Appellant,

-and-

THE DUTCHESS COUNTY BOARD OF ELECTIONS, and HANNAH BLACK, in the capacity as Commissioner of the Dutchess County Board of Elections,

Respondents/Defendants.

~~Appellate Division Case No.~~

Supreme Court, Dutchess County Index No. 2022-53491

ORDER TO SHOW CAUSE ~~WITH INTERIM RELIEF~~

AD No.: 2022-_____

Upon the annexed affirmation of Richard A. Medina, sworn to on November 5, 2022, ~~with exhibits, pursuant to C.P.L.R. § 5519(c),~~ and the papers annexed thereto,

LET respondents ~~appear and~~ show cause before ~~at a term of~~ the Appellate Division, Second Department, ~~to be held~~ at the courthouse thereof at 45 Monroe Place, Brooklyn, New York 11201, on the 7th of November 2022 (the "Return Date"), at 9:00 a.m. of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered (1) vacating any automatic stay imposed pursuant to C.P.L.R. § 5519(a) pending appeal of the order of Supreme Court, Dutchess County, dated November 3, 2022 (NYSCEF Doc. No. 21) in the above-captioned matter, or in the alternative, (2) confirming that there is no such automatic stay in place. Sufficient reason appearing therefore, it is

ORDERED pending the hearing and determination of this motion, any automatic stay of Supreme Court's November 3 Order is VACATED in its entirety, and Respondents-Defendants in the above-captioned matter are ORDERED to comply with the aforementioned November 3 Order by (1) designating the Aula at Ely Hall as an additional poll site for voters registered on the campus of Vassar College; (2) directing BOE staff to move forward with the necessary preparations to establish such an additional poll site, and (3) publicizing the additional poll site to all affected voters, explaining that they may vote *either* at the additional poll site *or* at the original designated site for the election district in which they reside.

Proposed interim relief stricken

LW
A.J.A.D.

IT IS FURTHER ORDERED that, pursuant to CPLR 308(5) and given the impracticability of personal service on all Respondents/Defendants under CPLR 308(1), (2), and (4), electronic service of a copy of this Order to Show Cause, together with the papers upon which it is granted, upon Respondents-Defendants by email to their counsel of record and to the official government email addresses of the Board of Elections' two Commissioners shall be deemed good and sufficient service thereof.

LW
A.J.A.D.

on or before November 6, 2022,

IT IS FURTHER ORDERED that any requirement that the affidavits of service be filed with the Clerk of the Court be extended to the return date of this motion, and such affidavits shall be filed with the Clerk on the return date, and that because of the impracticability of personal service, pursuant to CPLR 308(5), substituted service need not be preceded by due diligence attempt(s) at personal delivery upon Respondents/Defendants, and for the same reason, the ten day completion of service provision is not in effect.

LW
A.J.A.D.

ENTER:

Lillian Wan

HON. LILLIAN WAN
ASSOCIATE JUSTICE
APPELLATE DIVISION - SECOND DEPARTMENT

Dated: Brooklyn, New York
November 5, 2022

Motions are deemed submitted on the return date. Oral argument is not permitted (see 22 NYCRR 1250.4[a][7], [a][8]).

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

LEAGUE OF WOMEN VOTERS OF THE MID-HUDSON REGION, TANEISHA MEANS, and MAGDALENA SHARFF,

Petitioners/Plaintiffs-Appellees-Movants,

-against-

ERIK HAIGHT, in his capacity as Commissioner of the Dutchess County Board of Elections,

Respondent/Defendant-Appellant.

-and-

THE DUTCHESS COUNTY BOARD OF ELECTIONS, and HANNAH BLACK, in the capacity as Commissioner of the Dutchess County Board of Elections,

Respondents/Defendants.

Appellate Division Case No.

Supreme Court, Dutchess County Index No. 2022-53491

AFFIRMATION OF RICHARD A. MEDINA IN SUPPORT OF ORDER TO SHOW CAUSE TO VACATE STAY

Richard Alexander Medina, an attorney admitted to practice law before the Courts of the State of New York, and not a party to the within action, affirms the following to be true under the penalties of perjury under CPLR § 2106:

1. I am an attorney for the Petitioners/Plaintiffs-Respondents ("Petitioners") in this proceeding, and as such I am fully familiar with the facts and circumstances contained herein.

2. I submit this affirmation in support of the Petitioners' request for an order to show cause why an order should not be entered vacating any automatic stay of Supreme Court's decision, order, and judgment under CPLR 5519(a), or confirming that there is no such stay in place.

3. A copy of the November 3, 2022 decision, order, and judgment of the Supreme Court is attached hereto as Exhibit A.

FACTUAL AND PROCEDURAL BACKGROUND

4. This is a hybrid special proceeding under CPLR Article 78 and declaratory judgment action under CPLR § 3001. It seeks to compel the Dutchess County Board of Elections (the "Board") to designate a polling location on the campus of Vassar College pursuant to Election Law § 4-104 [5-a] (the "College Polling Place Law"), which provides: "Whenever a contiguous property of a college or university contains three hundred or more registrants who are registered to vote at any address on such contiguous property, the polling place designated for such registrants shall be on such contiguous property or at a nearby location recommended by the college or university and agreed to by the board of elections." The Board has not been able to designate such a location because one of the Board's two members, Commissioner Erik Haight, refuses to cooperate in doing so. He has not offered any legal or factual justification for his refusal to allow the Board to comply with the College Polling Place Law.

5. The College Polling Place Law took effect on July 8, 2022. *See* Part O of Chapter 55 of the Laws of 2022.

6. As explained in the Verified Petition (NYSCEF Doc. No. 3), there are over 1,000 voters registered to vote in the State of New York at residential addresses located on the Vassar College campus. Notwithstanding that fact, the Board has failed to designate and provide for a polling place on the Vassar College campus as required by the College Polling Place Law. A true and correct copy of the Verified Petition is attached hereto as Exhibit B.

7. Commissioner Erik Haight has resisted the attempts of Vassar College officials to designate a polling location for Vassar College voters, while Commissioner Hannah Black has supported such attempts.

8. In August 2022, Wesley Dixon, special assistant to the president of Vassar College, sent an email to the Dutchess County Board of Elections in which he requested a polling site for voters at Vassar College and provided a location on campus that could be used as a polling place. (NYSCEF Doc. No. 7. Ex. 4-B).

9. On September 15, 2022, Commissioner Black emailed Commissioner Haight proposing a public meeting to address the possibility of a poll site at Vassar. Commissioner Haight responded that holding such a meeting would be "premature." *Id.*

10. On October 5, 2022, Mr. Dixon again followed up. (NYSCEF Doc. No. 7, Ex. 4-E). No action was taken.

11. On October 25, 2022, a coalition of non-profits and student organizations sent a letter to, *inter alia*, the Commissioners of the Dutchess County Board of Elections (the "Demand Letter") (NYSCEF Doc. No. 7). The letter demanded that County leadership insist that Commissioner Haight either (a) agree to a suitable polling location selected by Vassar College or (b) demonstrate at a public hearing that another location either on campus or nearby would be more suitable, by the end of the week, *i.e.*, Friday, October 29, 2022. Demand Letter at 6.

12. To allow the Board to comply with the law without the expense of public and judicial resources required by litigation, Plaintiffs gave the Board until October 29, as provided in the letter, to designate a polling place on the Vassar College campus before bringing this litigation. The Board was allowed a full and fair opportunity to comply with the plain requirements of the College Polling Place Law and has failed to do so.

13. Petitioners, the League of Women Voters of the Mid-Hudson Region and two voters who reside on Vassar's campus, Professor Taneisha Means and Magdalena Sharff, sought a writ of mandamus against the Board, compelling the designation of a polling site on the Vassar

College campus in accordance with the College Polling Place Law. The Petition was brought on by Order to Show Cause on November 1, 2022 (the "Order to Show Cause"). A true and correct copy of the signed Order to Show Cause, is attached hereto as Exhibit C.

14. The Order to Show Cause (1) set a hearing for November 3 at 2:00 p.m., with personal appearances required; (2) ordered that serving a copy of the Order to Show Cause and associated papers by email to the official government email addresses of the Board of Elections' two Commissioners by no later than November 2 at 10:00 a.m. shall be deemed good and sufficient service; and (3) ordered Respondents-Defendants to file any written opposition by November 2 at 3:00 p.m.

15. As directed by the Order to Show Cause, Petitioners served the Order to Show Cause, the Verified Petition, and associated papers upon Commissioner Haight by email before 10:00 a.m. on November 2.

16. Supreme Court held a hearing on November 3 on Petitioners' requested relief. Commissioner Haight appeared at that hearing at the appointed time, at 2:00 p.m. He announced his presence on the record and explained that his attorney was running late. The Court then recessed to allow time for Commissioner Haight's counsel to appear. Commissioner Haight exited the courtroom but left personal belongings behind.

17. Commissioner Haight's counsel arrived at approximately 2:30 p.m. When asked if Commissioner Haight would be joining the hearing, his counsel answered that he would not. Counsel explained there was a "service issue," and he did not want Petitioners to "cure" the issue by personally serving Commissioner Haight in court. Counsel indicated that Commissioner Haight would appear in the courtroom only if the Court ordered that Commissioner Haight could not be personally served.

18. Commissioner Haight never returned to the courtroom.

19. At the hearing, counsel for Commissioner Haight attempted to serve a notice of motion to dismiss this Article 78 proceeding. The Court informed counsel that the Order to Show Cause set a deadline of November 2 at 3:00 p.m. for any responsive papers and that the motion was therefore untimely.[1] Commissioner Haight's counsel nonetheless made an oral application to dismiss the Petition on several grounds, including (1) lack of service, (2) laches, (3), failure to state a claim, and (4) failure to join a necessary party. Commissioner Haight's counsel never disputed that the College Polling Place Law requires the designation of a polling place on or near the campus of Vassar College.

20. Supreme Court denied that oral application, specifically observing that, due to the exigency of this matter, the Court had previously determined that email service was the most appropriate and expedient method of service. The Court further observed that Commissioner Haight had appeared on the record at the hearing and that his counsel fully participated in the hearing.

21. The Court granted the Verified Petition in its entirety, concluding that "[t]he plain language of Election Law § 4-104[5-a] which includes the word 'shall' (as opposed to 'may' or 'should') specifically mandates the designation of a voting polling place on a college or university campus where, as here, the petitioner demonstrated that the college or university campus contains three hundred or more registrants to vote at an address on such college or university campus." (the "November 3 Order," NYSCEF No. 21, attached as Exhibit A).

22. At or around 9:31 PM on November 3, Wesley Dixon, Special Assistant to the President of Vassar College, sent an email to both Commissioners of the Board of Elections

[1] In contrast, the court noted that Commissioner Black *did* file a timely answer.

reiterating Vassar's willingness to host a polling location on campus, and describing the site that Vassar reserved for this purpose—the Aula at Ely Hall. Mr. Dixon offered to host the Board of Elections for a site visit at the Aula at 3:00 p.m. on November 4. A true and correct copy of Mr. Dixon's affidavit, attaching this correspondence, is attached as Exhibit D.

23. Upon information and belief, the site visit took place as planned at 3:00 p.m. on November 4, with Commissioner Black as well as Republican Board of Elections staff attending. Commissioner Haight did not attend. Commissioner Black confirmed that the Aula satisfies all requirements for a polling location.

24. Just before 5:00 p.m. on November 4, 2022, Petitioners received notice via NYSCEF that Commissioner Haight had noticed an appeal from Supreme Court's November 3 Order. The Notice of Appeal and supporting documents were uploaded to NYSCEF by a court user, and as of this filing is still listed as "pending." (NYSCEF Doc. No. 29). The attached affidavit of service indicates that Petitioners were served with the Notice of Appeal via mail. A true and correct copy of the Notice of Appeal with attachments, including the affidavit of service, is attached hereto as Exhibit E.

25. Attached hereto as Exhibit F is, upon information and belief, a true and correct copy of Commissioner Black's email correspondence with Commissioner Haight detailing her efforts to comply with this Court's November 3 Order.

26. At 8:01 PM on November 4, Commissioner Haight finally responded to Commissioner Black regarding her proposal for the Vassar poll site. Incredibly, Commissioner Haight claimed that Commissioner Black's suggestions were "premature" and that her proposal had unspecified "gaps." *See* Exhibit F.

27. Yesterday evening at approximately 9:05 p.m., Commissioner Haight emailed Commissioner Black concerning parking at the Aula. *See* Exhibit F. Commissioner Haight's email wrongly says: "The court didn't authorize Vassar as a satellite location but rather **the** poll site for those election districts," suggesting that *all* voters from the three election districts that touch Vassar's campus must vote at the Vassar poll site. (emphasis added).

28. On Saturday November 5, at 9:43 AM, Commissioner Haight emailed Commissioner Black again, suggesting that establishing a polling place at Vassar under the Court's order would entail closing existing polling sites. *Id.*

29. Commissioner Haight is incorrect. The November 3 Order granted the Verified Petition in its entirety. The Verified Petition specifically sought an order compelling Respondents "(a) to designate and operate **a** polling place to be used on the day of the general election on November 8, 2022 on the campus of Vassar College;" and (b) "to assign all voters **registered at a residential address on the Vassar College campus** to that on-campus polling place." (emphasis added).

30. Accordingly, Petitioners earlier today sought an emergency order from Supreme Court clarifying its November 3, Order (*see* NYSCEF nos. 30-34). That application is currently pending as of this filing.

31. I have made a good faith effort to contact Respondents. Specifically, I emailed Mr. Jensen, counsel for Commissioner Haight, copying all counsel of record, this morning at 9:02 a.m. In that email, I requested that Mr. Jensen, by 10:00 a.m.: (1) confirm that Commissioner Haight will comply with Justice D'Alessio's order by designating the Aula at Ely Hall as an additional poll site for voters registered on Vassar's campus and directing BOE staff to move forward with

the necessary preparations, as requested by Commissioner Black, or (2) explain his basis for refusing to do so.

32. As of the time of this filing, Mr. Jensen has not responded to my 9:02 a.m. email.

33. Nor has Commissioner Haight offered any explanation for his unilateral decision to ignore the November 3 Order. In his 9:43 a.m. November 5 email to Commissioner Black, Commissioner Haight vaguely referenced "The pending appeal and stay on the order." Exhibit F.

34. Petitioners therefore surmise that Commissioner Haight, or his counsel, has taken the unspoken position that the November 3 Order is automatically stayed under CPLR 5519(a)(1) by virtue of his eleventh-hour notice of appeal. That section provides that an order is automatically stayed upon service of a notice of appeal where the appellant "is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state."

ARGUMENT

35. Commissioner Haight is wrong. He is not an "the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state," and his filing of a notice of appeal therefore does not trigger an automatic stay. But even if it did, this Court should vacate any such automatic stay and compel Commissioner Haight to comply with Supreme Court's order.

36. Accordingly, Petitioners hereby move this Court for an order (1) confirming that there is, in fact, no automatic stay in place or, in the alternative, (2) vacating any automatic stay that might be in place. In order to ensure that Commissioner Haight complies with his statutory duty and Vassar College has a polling location in time for the November 8 election as required by New York law, Petitioners request that this Court do so immediately.

There is no Automatic Stay in Place

37. There is no automatic stay in place under CPLR 5519(a)(1). The text of that provision limits the automatic stay to the following categories of appellants: (1) the state, (2) any political subdivision of the state, (3) any officer of the state, (4) any officer of any political subdivision of the state, (5) any agency of the state, or (6) any agency of any political subdivision of the state. When interpreting a statute, "[g]enerally, courts look first to the statutory text, which is the clearest indicator of legislative intent." *People ex rel. Negron v. Superintendent, Woodborne Corr. Facility*, 36 N.Y.3d 32, 36 (2020) (quotations omitted).

38. Plainly, Commissioner Haight is not "the state." Nor is he "a political subdivision." Nor is he an "agency." Nor is he an officer of the state or of a political subdivision of the state.[2] He is instead an officer of the Dutchess County Board of Elections.

39. The Board of Elections can only act by majority vote of its two Commissioners. *See* N.Y. Elec. Law § 3-212 [2]. Commissioner Haight cannot unilaterally block the Board of Elections from complying with a clear court order that directs the Board to discharge its mandatory duty under the Election Law. That would allow a single commissioner to effectively hijack the Board, forcing it into noncompliance with a court order and a clear statute.

40. There is therefore no automatic stay in place and this Court should enter an order confirming as much.

The Court Should Vacate any Automatic Stay

[2] *See, e.g.* N.Y. Elec. Law § 17-204 [4] ("'Political subdivision' means a geographic area of representation created for the provision of government services, including, but not limited to, a county, city, town, village, school district, or any other district organized pursuant to state or local law.") N.Y. Exec. Law § 331 [3] ("'Political subdivision' means a city or town with a population in excess of fifty thousand, and every county not wholly included within a city, and any combination of the foregoing having at least one common boundary.").

41. Even if there *is* an automatic stay in place—and this Court should reject that argument for the reasons stated above—this Court should vacate the stay and compel Commissioner Haight to comply with the November 3 Order. This Court, in its discretion, may vacate an automatic stay upon a showing of "a reasonable probability of ultimate success in the action, as well as the prospect of irreparable harm." *DeLury v. City of New York*, 48 A.D.2d 405, 405 (1st Dep't 1975).

42. Both factors are met here. Commissioner Haight's appeal is meritless. He has, to date, failed to offer any credible legal or factual basis for his opposition to the proposed poll site. And Petitioners, along with hundreds of Vassar College voters, will suffer immediate, irreparable harm if this Court does not act promptly. Commissioner Haight should not be allowed to claim the advantage of an automatic stay by filing an eleventh-hour appeal at the close of business and thereby claim victory by effectively mooting Supreme Court's order granting Petitioners' requested relief.

43. On the merits, Supreme Court correctly found that mandamus lies in this case. A writ of mandamus is available where a government "body or officer failed to perform a duty enjoined upon it by law." CPLR § 7803(1). It has long been established that mandamus lies in an action to compel election commissioners to perform ministerial acts. *E.g. Matter of Mansfield v. Epstein*, 5 N.Y.2d 70, 73 (1958). "The use of the verb 'shall' throughout the pertinent provisions illustrates the mandatory nature of the duties contained therein." *Nat. Res. Def. Council, Inc. v. N.Y.C. Dep't of Sanitation*, 83 N.Y.2d 215, 220 (1994). And an action may be brought under Article 78 to "compel acts that officials are duty-bound to perform" by such mandatory statutory language. *Id*. at 221.

44. Section 4-104 of the Election Law is written in mandatory terms. In Section 4-104, the legislature commands: "Every board of elections ***shall*** . . . designate the polling places in each election district." N.Y. Elec. Law § 4-104 [1] (emphasis added). And § 4-104 [5-a] commands: "Whenever a contiguous property of a college or university contains three hundred or more registrants who are registered to vote at any address on such contiguous property, the polling place designated for such registrants ***shall*** be on such contiguous property or at a nearby location recommended by the college or university and agreed to by the board of elections." (emphasis added).

45. Respondents therefore *must* designate a polling place for individuals registered to vote on Vassar's campus that is either (1) "on such contiguous property" (i.e., on campus), or (2) "at a nearby location recommended by the college or university and agreed to by the board of elections." N.Y. Elec. Law § 4-104 [5-a].

46. The New York State Board of Elections released specific guidance on this issue entitled, "Guidance on College Pollsite Designation 2022" that states the following:

> Because election districts have not been redrawn to conform to the rule college campuses cannot generally be divided between election districts, boards should at least assign election districts to a poll site on the relevant college campus (or nearby location recommended by the college and approved by the board of elections) when an existing election district meets two criteria:
>
> > 1) the election district includes contiguous college property, **and**
> > 2) there are three hundred or more registrants in the election district with an address on such college property;

This guidance was entered into evidence by Mr. Haight's counsel at the November 3 hearing. A true and correct copy of the Guidance is attached hereto as Exhibit G.

47. Despite repeated requests from Vassar College, Commissioner Black, and community stakeholders, Commissioner Haight has, without explanation, failed to discharge this mandatory, nondiscretionary duty.

48. Indeed, to date, Commissioner Haight has never offered any legal or policy rationale for his continued opposition to designating a polling place on Vassar's campus.

49. The arguments made in support of Commissioner Haight's oral application for dismissal of the Verified Petition, which are the only arguments he is entitled to press on appeal, have no merit. Specifically, Commissioner Haight argued the following defenses at the hearing of this matter: (1) insufficient service; (2) failure to state a claim; (3) laches; and (4) failure to join a necessary party (Vassar College). None of these arguments stand up to scrutiny—and none dispute the requirements of the College Polling Place Law.

50. *First*, Commissioner Haight was properly served in accordance with the Order to Show Cause entered by Supreme Court. Further, the undersigned made a good faith effort to contact Commissioner Haight regarding this matter *before* filing on November 1 by emailing copies of the Verified Petition, proposed Order to Show Cause, and supporting papers to both Commissioners of the Board of Elections, at the email addresses published on the website of the Dutchess County Board of Elections.

51. In time-sensitive Election Law matters, courts routinely authorize alternative and expedited methods of service—including email service—in accordance with the Election Law, the CPLR, and controlling case law. *See, e.g.*, *Aarons v. Bd. of Elections in the City of N.Y.*, Index No. 507128/20, 2020 WL 2789911, at *2 (N.Y. Sup. Ct., May 29, 2020) ("The order to show cause provided for same day service on the Board via email, which was effectuated by Petitioner."); *McGrath v. New Yorkers Together*, 55 Misc. 3d 204, 206-07 (N.Y. Sup. Ct. 2016) ("Justice Dillon

directed that copies of the order to show cause, together with all of the ancillary papers upon which the order was granted, be served upon respondents in person, or alternatively, at the option of petitioner, served upon any party herein by electronic transmission on or before the close of business on November 7, 2016 at an email address or fax number maintained by such respondents.").

52. Indeed, the Saratoga County Supreme Court recently entered an Order to Show Cause allowing for alternative service via email in an Election Law matter *in which Commissioner Haight was himself a plaintiff*. *Amedure v. State of New York*, Saratoga County Index No. 20222145, Order to Show Cause, Doc. No. 6 (Sup. Ct. Oct. 6, 2022) ("at the option of the Petitioners, same may be served by electronic transmission thereof to the said Defendant-Respondents at an email or fax number maintained for such purposes.").

53. Further, Commissioner Haight personally appeared at the hearing in this matter and his counsel participated fully. "A defendant may waive the issue of lack of personal jurisdiction by appearing in an action, either formally or informally, without raising the defense of lack of personal jurisdiction in an answer or pre-answer motion to dismiss." *Eastern Sav. Bank, FSB v. Campbell*, 167 A.d.3d 712, 714 (2d Dep't 2018). Here, despite having undisputed actual notice of this action, Commissioner Haight failed to file either an answer or a pre-answer motion to dismiss. His personal appearance in court, on the record, at the hearing in this matter, and his counsel's active participation in the hearing, precludes him from claiming he lacked actual notice of these proceedings.

54. *Second*, this is the paradigmatic case for mandamus. The College Polling Place Law plainly imposes a mandatory, non-discretionary duty upon the Board to designate a polling place on the Vassar College Campus (or, if requested by Vassar College, nearby). Commissioner Haight

argued below that, because the statute allows for some discretion in determining precisely *where* the on-campus polling place must be placed, mandamus cannot lie. But the College Polling Place Law imposes a nondiscretionary duty to designate a polling place *somewhere* on (or near) campus. It is well-established that it is the "function of mandamus to compel acts that officials are duty-bound to perform, *regardless of whether they may exercise their discretion in doing s*o." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 540 (1984) (emphasis added). The Court of Appeals has clearly distinguished "those acts the exercise of which is discretionary from those acts which are *mandatory but are executed through means that are discretionary*." *Id.* at 539 (emphasis added). This case involves the latter.

55. *Third*, this action cannot be barred by the equitable doctrine of laches because Commissioner Haight made no showing of prejudice, and because Commissioner Haight is himself the cause of delay in bringing this matter to the Court.

56. Laches is "an equitable doctrine which bars the enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to a party." *Skrodelis v. Norbergs*, 272 A.D.2d 316, 316 (2d Dep't 2000). "The mere lapse of time without a showing of prejudice will not sustain a defense of laches." *Id.* Laches is a fact-intensive affirmative defense, on which Commissioner Haight bears the burden of proof. *E.g. Dwyer v. Mazzola*, 171 A.D.2d 726, 727 (2d Dep't 1986). In particular, courts must "examine and explore the nature and subject matter of the particular controversy, its context and the reliance and prejudicial impact on defendants and others materially affected." *Matter of Schulz v. State of New York*, 81 N.Y.2d 336, 347 (N.Y. 1993).

57. Here, Commissioner Haight has made no attempt at a showing of prejudice. The record is replete with unrebutted sworn testimony from Commissioner Black and Vassar College

officials that, even at this late date, the Board can still take the steps necessary to establish a polling site on Vassar's campus. Indeed, Commissioner Haight presented no evidence at all in this matter. Although he could have testified at the November 3 hearing to rebut Commissioner Black's testimony, he chose not to—apparently in an attempt to evade further service of process.

58. Further, Petitioners brought this action only after Commissioner Haight rebuffed multiple good faith attempts to persuade him to comply with his mandatory statutory duties. Despite repeated overtures—and later, demands—Commissioner Haight has at each turn responded with delay tactics. He rejected Commissioner Black's proposal for a public meeting, over a month *after* the statutory deadline for designating a polling place, as "premature." Incredibly, as recently as November 4—*four days before the election and one day after Supreme Court's order*—Commissioner Haight again rejected Commissioner Black's plan for establishing a polling site at Vassar as "premature." If there has been any delay in this matter, it is laid squarely at the feet of Commissioner Haight.

59. *Finally*, Commissioner Haight's argument that Vassar College is a "necessary party" is meritless. Vassar College is not a necessary party because its participation is not necessary to afford full relief to Petitioners and Vassar will not be inequitably affected by a judgment in favor of Petitioners. *See* CPLR 1001(a) (defining necessary parties as "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action."). The record shows that Vassar would like to host a polling location and has made a satisfactory space available to that end. The only barrier to their doing so is Commissioner Haight's refusal to abide by the law.

60. Commissioner Haight's appeal is therefore meritless.

61. Moreover, if Commissioner Haight is allowed to further shirk his responsibilities under the plain language of the College Polling Place Law, Petitioners, along with the entire Vassar College community, will face immediate irreparable harm. This Court must act immediately to ensure that the voting rights of hundreds of Vassar students, plus faculty and staff, are not erased by Commissioner Haight's intransigence.

62. The prospect of irreparable injury is severe. The "predictable effect of government action," i.e., failing to provide student voters access to an on-campus polling site as required by state law, is that some voters will be deterred from voting altogether. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2566 (2019). Petitioners are merely a few of the Vassar College voters who risk irreparable harm in the form of disenfranchisement if they are unable to access a convenient polling place on election day. Courts routinely find that disenfranchisement is irreparable harm. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (noting that student applicants "would certainly suffer irreparable harm if their right to vote were impinged upon").

63. For similar reasons, the balance of equities also tips in Petitioners' favor. "The right of suffrage is one of the most valuable and sacred rights which the Constitution has conferred upon the citizen of the state." *People ex rel. Stapleton v. Bell*, 119 N.Y. 175, 178 (1889). It "shall be given the highest respect, especially by our courts, and shall not be compromised, or allowed to be diminished." *Held v. Hall*, 190 Misc.2d 444, 459 (Sup. Ct. Westchester Co. 2002) (internal citations omitted) (noting where a preliminary injunction involves the disenfranchisement of voters, "the equities might weigh" in favor of upholding the right to vote). Vassar College students and faculty, particularly those who lack access to automobiles, will face substantial barriers to

voting without the on-campus (or near-campus) voting location guaranteed to them by statute. Undoubtedly, some will be disenfranchised altogether.

64. On the other side of the ledger, Commissioner Haight cannot credibly claim an interest in continuing to ignore clear provisions of the Election Law. To date, Commissioner Haight has not offered *any* rationale—legal, policy, or otherwise—for his opposition to the placement of a polling site on Vassar's campus.

65. Commissioner Haight is, once again, trying to run out the clock. This Court should not allow him to do so.

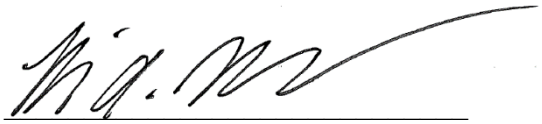
66. Because time is of the essence, Petitioners also request leave to effect service of a copy of the annexed Order to Show Cause, together with a copy of the papers upon which it is granted, upon Respondent as indicated in the accompanying Order to Show Cause: by email to the official government email addresses of the Board's two commissioners, and by email to their counsel.

67. As discussed above, in time-sensitive matters related to the administration of elections under the Election Law, courts routinely authorize alternative and expedited methods of service in accordance with the Election Law, the CPLR, and controlling case law.

68. I have emailed copies of these papers to counsel of record for both Commissioners of the Board of Elections, and to the Commissioners themselves at the email addresses published on the website of the Dutchess County Board of Elections. *See* Dutchess County Board of Elections, https://elections.dutchessny.gov/ (last accessed November 5, 2022).

WHEREFORE, it is respectfully requested that this Court entertain this emergency Order to Show Cause, and grant the relief sought herein.

Dated: November 5, 2022



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Supreme Court of the State of New York
Appellate Division: Second Judicial Department

LEAGUE OF WOMEN VOTERS OF THE MID- HUDSON REGION, TANEISHA MEANS, and MAGDALENA SHARFF, Petitioners-Plaintiffs, -against- THE DUTCHESS COUNTY BOARD OF ELECTIONS, ERIK J. HAIGHT in his capacity as Commissioner of the Dutchess County Board of Elections, and HANNAH BLACK in her capacity as Commissioner of the Dutchess County Board of Elections Respondents-Defendants.	**Notice of Cross-Motion** Appellate Division Docket No.: 2022-_____

Please take notice that upon the annexed affirmation of David D. Jensen, dated November 7, 2022, the Appendix, and all papers submitted in this case, the undersigned will move this court, at the courthouse thereof, located at 45 Monroe Place, Brooklyn, New York, 11201, on the 7th day of November, 2022, at 9:00 o'clock in the forenoon of that date, or as soon thereafter as counsel may be heard, for an order:

1. staying enforcement of the Decision, Judgment, and Order of the Supreme Court (D'Alessio, J.S.C.) dated November 3, 2022 pursuant to CPLR § 5519(c) and/or the inherent authority of the Court; and

2. granting such other and further relief as to the court may seem just and equitable.

Dated: Beacon, New York
November 7, 2022

/s/ David D. Jensen

David D. Jensen
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Supreme Court of the State of New York
Appellate Division: Second Judicial Department

LEAGUE OF WOMEN VOTERS OF THE MID- HUDSON REGION, TANEISHA MEANS, and MAGDALENA SHARFF,

Petitioners-Plaintiffs,

-against-

THE DUTCHESS COUNTY BOARD OF ELECTIONS, ERIK J. HAIGHT in his capacity as Commissioner of the Dutchess County Board of Elections, HANNAH BLACK in her capacity as Commissioner of the Dutchess County Board of Elections,

Respondents-Defendants.

Affirmation of David D. Jensen, Esq.

Appellate Division Docket No.: 2022-_____

DAVID D. JENSEN, an attorney being duly licensed to practice before the Courts of the State of New York, hereby affirms the following under the penalties of perjury:

1. I am an attorney practicing via David Jensen PLLC, a professional limited liability company organized under New York law. I represent Commissioner Erik Haight of the Dutchess County Board of Elections, who is the Appellant here and a Respondent-Defendant in the court below. I submit this Affirmation in opposition to the motion of Petitioners-Plaintiffs to lift a stay of enforcement, sought by order to show cause. Furthermore, and to the extent a cross-motion is necessary,

I submit this Affirmation in support of Commissioner Haight's cross-motion to stay enforcement of the decision, order and judgment of the court below pending a decision on the merits from this Court.

Introduction and Summary

2. This Affirmation shows that a stay is necessary to preserve the status quo and prevent irreparable injury for several reasons, which generally center on Petitioners' delay in commencing their proceeding. Appellant is entitled to reversal on the merits because Petitioners never served him with process in accordance with CPLR § 308—the apparent result of commencing the proceeding without time to properly secure service of process. Due to this delay, Appellant is also entitled to reversal on the basis of laches. And, Vassar College, the proposed location of the new polling place(s), is plainly a necessary party—presumably omitted because of the need to rush the case forward as quickly as possible. And setting all that aside, it is abundantly clear that the petition states no claim of mandamus, for the action at issue is not ministerial, but instead requires the weighing and selection of competing policy choices.

3. What may be more pertinent—at this juncture—is that the lower court's mandatory, status quo-altering injunction is causing irreparable injury in the form of voter confusion *right now*. According to Petitioners and Commissioner Black it was impossible to designate a new polling place after the morning of November 4, 2022. Now, less than 24 hours before the election, the new polling place(s) still has not been selected and no one living in the three election districts at issue knows where they are supposed to vote tomorrow. The only thing that will restore the status quo is a stay of the lower court's order, which will result in the election being back on-track for tomorrow—as it was scheduled until November 3, 2022.

4. The essential considerations governing the issuance of a stay—on the facts and circumstances presented here—are the merits of the appeal and the need to prevent irreparable injury. While the caselaw addressing stays under CPLR § 5519(c) is "sparse," a relatively recent Supreme Court decision points concludes that "the court's discretion is the guide and it will be influenced by any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party.'" *Schaffer v. VSB Bancorp, Inc.*, 68

Misc. 3d 827, 834, 129 N.Y.S.3d 252 (Supr. Ct., Richmond Co. 2020) (quotations and alteration omitted); *cf. In re Terrence K.*, 135 A.D.2d 857, 857, 522 N.Y.S.2d 949 (2d Dep't 1987) (stay "may properly be denied where it is clearly shown that there is no merit to the appeal") (citations omitted). Decisions from this Court tie the Court's power to stay—whether pursuant to CPLR § 5519(c) or pursuant to its inherent authority—to the need "to maintain the status quo during the pendency of the appeal." *See Terrence K.*, 135 A.D.2d at 857; *see also Schwartz v. N.Y. City Housing Auth.*, 219 A.D.2d 47, 48, 641 N.Y.S.2d 885 (2d Dep't 1996) (citations omitted). A preliminary injunction, which is in some respects analogous, familiarly requires: "(1) a probability of success on the merits, (2) a danger of irreparable injury in the absence of an injunction, and (3) a balance of the equities in the movant's favor." *Grassfield v. JUPT, Inc.*, 208 A.D.3d 1219, 174 N.Y.S.3d 458 (2d Dep't 2022) (quotation and citations omitted).

Polling Place Requirements

5. The Election Law directs boards of election to designate polling places "by March fifteenth, of each year," and it provides that designations are "effective for one year thereafter." Election Law § 4-

104(1). Election boards must notify all voters of their polling places between 65 and 70 days before the date of the primary election. *See id.* § 4-117(1). If a designated polling place "is subsequently found to be unsuitable or unsafe or should circumstances arise that make a designated polling place unsuitable or unsafe," then a board of elections can "select an alternative meeting place." *See id.* § 4-104(1). However, and significantly, it a board does this, then "it must, at least five days before the next election or day for registration, send by mail a written notice to each registered voter notifying him of the changed location of such polling place." *Id.* § 4-104(2). If this is "not possible," then a board "must provide for an alternative form of notice to be given to voters at the location of the previous polling place." *Id.* Obviously, now—the day before the election—it is not possible to comply.

6. The Election Law provides a number of considerations that a board of elections should address when establishing polling places. Polling place locations should, "whenever practicable, . . . be situated on the main or ground floor," and must be "of sufficient area to admit and comfortably accommodate voters." *Id.* at § 4-104(6). Polling places must comply with Americans with Disabilities Act ("ADA") requirements. *Id.*

§ 4-104(1-a). In that connection, boards must conduct access surveys and keep them on file. *See id.* § 4-104(1-a), (1-b). Beyond that, polling places should "whenever possible" be "situated directly on a public transportation route." *Id.* § 4-104(6-a). Furthermore, a board of elections should select tax exempt buildings "whenever possible," and the Election Law expressly authorizes the use of religious buildings. *Id.* § 4-104(3). An additional restriction is that a polling place must be located either in the election district or "in a contiguous district." *Id.* § 4-104(4).

7. The Election Law provides that the board or body controlling "a publicly owned or leased building, other than a public school building . . . must make available a room or rooms" that are suitable, but it allows the board or body to "file[] a written request for cancellation of such designation" within 30 days of the designation, which a board of elections may (but need not) grant. *See id.* § 4-104(3). Beyond this, a person who "owns or operates" a designated polling place can seek a judicial order vacating the polling place determination. *See id.* § 16-115. Finally, the Election Law provides a cause of action by which a board of elections can compel an unwilling polling place to be made available. *See id.*

8. The legislature recently amended the Election Law to provide that when a contiguous college or university has 300 or more registered voters on campus, "the polling place designated for such registrants shall be on such contiguous property or at a nearby location recommended by the college or university and agreed to by the board of elections." *Id.* § 4-104(5-a); *see* 2022 N.Y. Laws ch. 55, Part O, § 1. The legislation also directs election boundary districts to conform to college and university grounds, but this does not become effective until January 1, 2023, creating some problems in the short term. *See* 2022 N.Y. Laws ch. 55, Part O, §§ 2-3.

The Merit of this Appeal is Overwhelming

9. Appellant asserted four defenses to the court below: lack of personal jurisdiction; laches; failure to state a claim for mandamus; and failure to join a necessary party. (Appx213-17) Any one of these defenses, standing alone, would mandate reversal. However, the court below addressed only one—lack of jurisdiction. (Appx253-54) The court below refused to accept Appellant's motion papers, although they were provided to the other parties at the hearing. (Appx212, 252) Appellant

filed his motion papers the following day, at the same time he filed his Notice of Appeal. (Appx141-53)

10. The Court Lacked Personal Jurisdiction. "Pursuant to CPLR 304 a special proceeding is commenced and *jurisdiction acquired* by service of a notice of petition or order to show cause." *Bell v. State University of New York at Stony Brook*, 185 A.D.2d 925, 925, 587 N.Y.S.2d 388 (2d Dept 1992) (emphasis in source). Service of process in accordance with CPLR § 308 is a mandatory prerequisite to a court's assertion of jurisdiction. *See, e.g., Machia v. Russo*, 67 N.Y.2d 592, 594-95, 505 N.Y.S.2d 591 (1986). "Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court." *Id.* at 595 (citations omitted). Here, Petitioners purported to serve Appellant "by emailing" the petition, order to show cause and other papers to Appellant. (Appx106) Petitioners did not serve Appellant by any other means. (Appx106)

11. CPLR § 308 authorizes a plaintiff to serve process in person or by leaving the process with "a person of suitable age and discretion" at the individual's address. *See* CPLR § 308(1)-(2). Furthermore, if a plaintiff cannot "with due diligence" make service in one of these two

manners, then the plaintiff can effect "nail and mail" service by leaving the papers at the individual's address and mailing them in accordance with the statute. *See id.* § 308(4). Finally, CPLR 308 allows for service "in such manner as the court, upon motion without notice, directs, if service is impracticable under" these other three provisions." *Id.* § 308(5).

12. In order to serve process under CPLR § 308(5), Petitioners would have needed to show that, notwithstanding their diligence, they had been unable to effect service pursuant to CPLR 308(1), (2) or (4). *See Kozel v. Kozel*, 161 A.D.3d 700, 701, 78 N.Y.S.3d 68 (1st Dep't 2018); *Snyder v. Alternate Energy Inc.*, 19 Misc. 3d 954, 959, 857 N.Y.S.2d 442 (Supr. Ct., New York Co. 2008). For example, in *Hollow v Hollow*, 193 Misc 2d 691, 747 N.Y.S.2d 704 (Supr. Ct., Oswego County 2002), the court authorized service by email in a case where the respondent husband was in a compound in Saudi Arabia, which had refused to allow a process server to enter, and the husband's employer also would not accept service. *See id.* at 692. At an absolute minimum, Petitioners would have needed to demonstrate that service using a traditional method would be "futile." *See Liebeskind v. Liebeskind*, 86 A.D.2d 207,

210, 449 N.Y.S.2d 226 (1st Dep't 1982), *aff'd*, 58 N.Y.2d 858, 460 N.Y.S.2d 526 (1983).

13. Neither the Verified Petition nor Petitioners' affirmation in support of the order to show cause make any attempt to demonstrate that service under CPLR § 308(1), (2) and (4) would be impracticable. (Appx1-11, 16-22) Furthermore, the Order to Show Cause reflects no such finding. (Appx94-96) Thus, while a court *can* order "personal service pursuant to CPLR 308 other than personal delivery pursuant to CPLR 308(1)," *Koyachman v. Paige Management & Consulting, LLC*, 121 A.D.3d 951, 951, 995 N.Y.S.2d 115 (2d Dep't 2014), the court below did not do so here, nor would there have been any basis for the court below to have done so.

14. The court below denied Appellant's motion to dismiss on the rationale that "given the exigency of the proceeding and the time constraints raised in the papers, the Court gained that the most expedient method of service was via e-mail and finds no prejudice resulting therefrom." (Appx253-54) The court further "note[d] that Commissioner Haight was present in court today, noted his appearance

on the record and his Counsel was present and participated in all of the proceedings." (Appx254)

15. This was plainly wrong. The requirements of CPLR § 308 apply to proceedings that concern the Election Law and the conduct of elections, notwithstanding that such proceedings often present exigencies and are often initiated by means of orders to show cause. *See, e.g., See Hennesy v. DiCarlo*, 21 A.D.3d 505, 506, 800 N.Y.S.2d 576 (2d Dep't 2005) (order to show cause directing personal service and service by mail did not dispense with requirement of "due diligence" to use "nail-and-mail" service under CPLR § 308(2)); *see also McGreevy v. Simon*, 220 A.D.2d 713, 713-14, 633 N.Y.S.2d 177 (2d Dep't 1995) (two attempts at service was not "due diligence" so as to permit nail-and-mail service of order to show cause). There is no basis for judicially amending CPLR § 308(5) to dispense with the need to find, "upon motion," that "service is impractible under" one of the other permitted means.

16. Furthermore, Appellant's appearance at the beginning of the order to show cause hearing, while waiting for his counsel to arrive from the airport, did not waive this jurisdictional defect. (Appx203-05)

To the contrary, a personal jurisdiction defense "is waived if a party moves on any of the grounds set forth in subdivision (a) [of CPLR § 3211] without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading." CPLR § 3211(e). Furthermore, a party's appearance is not "equivalent to personal service . . .[if] an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in the answer." *Id.* § 320(b). Here, Appellant's first substantive statement to the court below, at the beginning of the order to show cause hearing, was that "we have a motion to dismiss. It is among other things, jurisdictional grounds, one of which, the first and foremost which is failure to effect service and process in accordance with CPLR 308." (Appx205) Thus, Appellant indisputably did not waive his defense to service of process. And, "[w]hen the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents." *Raschel v. Rish*, 69 N.Y.2d 694, 697, 512 N.Y.S.2d 22 (1986) (citing *Macchia*, 67 N.Y.2d 592; *McDonald v. Ames Supply Co.*, 22 N.Y.2d 111, 115, 291 N.Y.S.2d 328 (1986)).

17. This consideration, standing alone, mandates reversal of the decision below.

18. Laches Also Mandates Dismissal of this Proceeding. "The doctrine of laches is an equitable doctrine which bars the enforcement of a right where there has been an unreasonable and inexcusable delay that results in prejudice to a party." *Skrodelis v. Norbergs*, 272 A.D.2d 316, 316, 707 N.Y.S.2d 197 (2d Dep't 2000) (citations omitted). The "prejudice" can lie in "showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay." *Id.* at 317 (citations omitted).

19. This Court has previously recognized that last-minute changes to polling places pose substantial risks of irreparable harm. In *Krowe v. Westchester County Board of Elections*, 155 A.D.3d 672, 63 N.Y.S.3d 509 (2d Dep't 2017), "the Board made the determination to relocate the polling place less than three weeks before the election based only on a general advisement by an unnamed Town official that construction would be performed at the Town Hall on the day of the election," *see id.* at 673. Seven days prior to the election (on October 31, 2017), the lower court denied a preliminary injunction against the

change, and five days prior to the election (on November 2, 2017), this Court reversed the lower court's order. *See id.* In finding a preliminary injunction to be appropriate, the Court ruled that "irreparable harm would result if the polling place were relocated, particularly at this late date, and that the balance of equities" was in favor of preliminary equitable relief. *See id.*

20. Two recent decisions from the Third Department are instructive on the application of laches to the facts presented here. In *League of Women Voters of New York State v. New York State Board of Elections*, 206 A.D.3d 1227, 170 N.Y.S.3d 639 (3d Dep't 2022), the petitioner had waited 16 days after the act complained of to seek relief (on May 20), and the relief they sought concerned the primary election to be held about five weeks later (on June 28), *see id.* at 1228-29. The Third Department concluded that "dismissal of the petition/complaint is required under the equitable doctrine of laches." *Id.* at 1229. The petitioner had delayed "unduly," and that "delay results in significant and immeasurable prejudice to voters and candidates for assembly and innumerable other offices." *Id.* at 1229-30.

21. In the second case, *Amedure v. State*, No. CV-22-1955, 2022 WL 16568516 (3d Dep't Nov. 1, 2022), the petitioners had commenced their constitutional challenge on September 29, "nine months after [the statute at issue] was enacted," and about five weeks before the election, *id.* at *3; *see Amedure v. State*, No. 2022-2145, 2022 WL 14731190, *1 (Supr. Ct., Saratoga Co. Oct. 21, 2022). The Third Department found that laches mandated dismissal of the petition, observing that "granting petitioners the requested relief during an ongoing election would be extremely disruptive and profoundly destabilizing and prejudicial to candidates, voters and the State and local Boards of Elections." *Amedure*, 2022 WL 16568516 at *4 (citing *League of Women Voters*, 206 A.D.3d at 1230; *Quinn v. Cuomo*, 183 A.D.3d 928, 931, 125 N.Y.S.3d 120 (2d Dep't 2020)).

22. A final instructive case is *Corso v. Albany County Bd. of Elections*, 90 A.D.2d 637, 456 N.Y.S.2d 206 (3d Dep't 1982), where the Third Department disagreed with the trial court that certain municipalities had been necessary parties, but nevertheless declined to reach the merits of the petition because it was "unable to determine with certainty whether the requested relief is feasible or even possible

considering the few days remaining before the election," *id.* at 638. The court also observed that "the existing polling places are located relatively close to the campus," and accordingly, that it did not appear that any "voter will be disenfranchised if the relief sought herein is not granted." *Id.*

23. Here, Petitioners' claimed grievance is that the Dutchess County Board of Elections "did not designate a polling place on the Vassar College campus prior to August 1, 2022." (Appx4) This means that Petitioners' claim was cognizable on August 1, 2022—a full two months before they filed their petition on November 1, 2022. But what's more significant is that this filing date was a mere seven days prior to the election that is at issue. If five weeks before the election was cutting it too close in *League of Women Voters* and *Amedure*, and three weeks was cutting it too close in *Krowe*, then surely *one week*—the amount of lead-time here—threatens irreparable injury in a way that could only be justified by the gravest extremes, like the literal destruction of a polling place.

24. Appellant raised this issue at the order to show cause hearing, and Petitioners and Commissioner Black addressed it,

including the *Amedure* decision. (Appx214-15, 218-19, 221-22) However, the Supreme Court did not address laches in its ruling. (Appx252-54)

25. Notably, the difficulties experienced in trying to carry out the lower court's ruling are themselves illustrative of the interests that the laches rule serves in the first place. There is no reason to risk these kinds of issues—particularly with something as important as the franchise of voting—when Petitioners could, and should, have brought their case two months ago.

26. The Verified Petition Fails to State a Claim for Mandamus. The Election Law does not provide any cause of action for the Petitioners, as discussed previously. Rather, Petitioners rely on the common law writ of mandamus, now codified in CPLR Article 78. (Appx7-8) However, relief in the form of mandamus is available where "the duty sought to be enjoined is performance of an act commanded to be performed by law and involving no exercise of discretion." *Hamptons Hospital & Medical Center, Inc. v. Moore*, 52 N.Y.2d 88, 96, 436 N.Y.S.2d 239 (1981). Indeed, most agency "decisions do not lend themselves to consideration on their merits under the provisions for mandamus to review, because they concern rational choices among

competing policy considerations and are thus not amenable to analysis under the 'arbitrary and capricious' standard." *New York City Health & Hospitals Corp. v. McBarnette*, 84 N.Y.2d 194, 204-05, 616 N.Y.S.2d 1 (1994); *see also De Milio v. Borghard*, 55 N.Y.2d 216, 220, 448 N.Y.S.2d 441 (1982) ("the aggrievement does not arise from the final determination but from the refusal of the body or officer to act or to perform a duty enjoined by law" (quotation omitted)).

27. Appellant raised this argument in the court below, and Petitioners likewise addressed it. (Appx215-16, 219-21) Furthermore, at the hearing Commissioner Black testified that, among the various potential polling places Vassar College had identified, "[t]here was definitely one that stood out more than the others," which was the Villard Room. (Appx243) The Villard Room is the only specific location the Verified Petition identifies. (Appx5)

28. In reaching her conclusion that the Villard Room was the best polling place, Commissioner Black testified that she considered various "criteria," including "American [with] Disabilities Act requirements, as far as parking goes, getting into the building itself, getting into the area where they would be voting." (Appx243-44) She

testified further that "[w]e absolutely need a certain number of outlets for our poll pads and our machines as well and a certain, a good space size to have the flow of voter traffic as well considered." (Appx244) When asked to identify the next best alternative, Commissioner Black testified that "[o]nly the Villard room was really considered on my behalf, because they had stated that that was the number one through a phone call." (Appx245) Notwithstanding this, the court below did not address this issue. (Appx252-54)

29. Notably, events following the issuance of the decision, order and judgment at issue serve to highlight the extent to which the selection of polling places is a discretionary decision that is outside the scope of mandamus. On November 5, 2020—two days after the court below's ruling, and three days before the election—Petitioners filed an order to show cause seeking to "clarify[]" the courts previous order by designating "the Aula at Ely Hall . . . as an additional polling place," to the apparent exclusion of the Villard Hall. (Appx166-67)

30. Petitioners Failed to Join Vassar College, a Necessary Party. "Necessary parties are those 'who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or

who might be inequitably affected by a judgment in the action.'" *Morgan v. de Blasio*, 29 N.Y.3d 559, 560, 60 N.Y.S.3d 106 (2017) (quoting CPLR 1001(a)). The failure to join a necessary party requires dismissal. *See Quis v. Putnam County Bd. of Elections*, 22 A.D.3d 585, 586, 802 N.Y.S.2d 709, (2d Dep't 2005).

31. The statute at issue here requires the participation of the affected college or university. *See* Election Law § 4-104(5-A). Furthermore, the relief sought by Petitioners could inequitably affect Vassar College because it would, pertinently, require them to make space available for a polling place and accommodate the attendant traffic. Thus, Vassar College is a necessary party, and the failure to include Vassar College as a party is yet another ground that mandates dismissal of the Petition.

32. Appellant raised this issue in the court below, and the other parties addressed it. (Appx216, 220-25) Among other things, Petitioners pointed to witnesses and affidavits showing their understanding of Vassar College's views and actions with respect to the location of a polling place. (Appx30, 37, 220-21, 225, 243-45) But, other issues aside, this shows only Vassar College is a party that ought to be included to

accord complete relief to the parties, as well as that it could be inequitably affected by a judgment in the proceeding. Notwithstanding this, the court below did not address this issue. (Appx252-54)

A Stay is Needed to Preserve the Status Quo and Prevent Irreparable Injury

33. The Court Below Issued a Mandatory Injunction that Changes the Status Quo. The trial court "grant[ed] the petition in its entirety," reasoning that Election Law § 4-104(5-A) "specifically mandates the designation of a voting polling place on a college or university campus . . ." (emphasis omitted). (Appx161, 254) The petition had sought an order that, pertinently, directed the respondents "to designate and operate a polling place . . . on the campus of Vassar College" and to "assign all voters registered at a residential address on the Vassar College campus to that on-campus polling place" and "publicize the new on-campus polling place and assignments." (Appx10)

34. The court's order was a mandatory injunction that commanded the parties to perform certain actions, vis-à-vis prohibiting the parties from taking certain actions. *See State v. Town of Haverstraw*, 219 A.D.2d 64, 65-66, 641 N.Y.S.2d 879 (2d Dep't 1996). Mandatory injunctions "usually result in a change in the status quo"

because they "command[] the performance of some affirmative act." *Id.* at 65. And that is certainly the case here. Prior to the ruling of the court below, the Board of Elections had designated polling places for all of the voters in the three election districts at issue, and further, it had sent them the statutory notices that advised them of their polling places. After the ruling of the court below, and as things stand right now—literally the day before the election—no one knows where they are supposed to vote. However, a stay of the decision below would resolve the status quo pretty much instantly: Everyone would vote at the designated polling places that the Board of Elections previously advised them to use.

35. It is Impossible to Designate a New Polling Place the Day Before the Election. Before the court below, the Petitioners relied on an affidavit from Commissioner Black to represent that "the last possible time that the Board of Elections could implement an on-campus poll site at Vassar College for the November 8, 2022 general election is the morning of November 4, 2022." (Appx6) Commissioner Black, in an affidavit submitted by Petitioners, likewise testified that "[t]he last possible time that we can implement an on-campus poll site at Vassar

College for the November 8, 2022 general election is the morning of November 4, 2022." (Appx31) Commissioner Black testified that the necessary preparations would "include[] assigning all voters who are registered to vote at a residential address on the Vassar College campus to the on-campus poll site," as well as "program[ming] three electronic poll books to reflect the proper ballots for those election districts." (Appx31) Commissioner Black's further suggested that "[w]e *could* continue to maintain the polling places off-campus that currently serve both[1] Vassar election districts and voters off campus as well to ensure minimal disruption" (emphasis added). (Appx31)

36. However, actually designating a polling place in the immediate runup to an election proved more difficult. Petitioners looked at potential polling places on the Vassar campus not on the morning of November 4, 2022, but rather, beginning at 3:00 p.m. in the afternoon. (Appx170, 197) The only specific location the Verified Petition identified was the Villard Room, and this was also the location that Commissioner Black had testified was the most appropriate location on campus. (Appx5, 243, 245) But, by Saturday, November 5, 2022, the Villard

[1] There are actually three election districts included in Vassar's grounds. (Appx234)

Room was no longer desirable, and further, it also wasn't clear whether some or all of the designated polling places were to move to Vassar's campus. Thus, Petitioners found themselves forced to file an emergency motion with the court below, seeking an order "clarifying" the court's previous order. (Appx166-67) Specifically, Petitioners now sought an order that specifically directed on additional polling place, and at the Aula at Ely Hall, rather than the Villard Room. (Appx166-67)

37. As of the time of this affirmation, Petitioners' motion for clarification remains pending. Less than 24 hours before the date of the election, voters in three election districts do not know where to vote.

Conclusion

38. The decision below was plainly wrong on its merits. But what's more, it was also a plainly improvident exercise of discretion—a conclusion borne out by the fact that it has now, the day before the election, become all but impossible to comply with. Rather than leaving the voters in these three election districts wondering where they should vote tomorrow, the lower court's decision should be stayed.

Dated: Beacon, New York
November 7, 2022

/s/ David D. Jensen

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NEW YORK STATE SUPREME COURT
APPELLATE DIVISION: SECOND DEPARTMENT

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League of Women Voters of the Mid-Hudson Valley, Taneisha Means, Magadalena Sharff,

Petitioners-Appellees,

-against-

Dutchess County Board of Elections & Hannah Black, in the capacity as Commissioner of the Dutchess County Board of Elections,

Respondents,

-and-

Erik Haight, in his capacity as Commissioner of the Dutchess County Board of Elections,

Respondent-Appellant.

Appellate Division—
Second Department
Case No.

Supreme Court, Dutchess County Index No. 2022-53491

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RESPONDENT HANNAH BLACK'S MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR, IN EFFECT, A DECLARATION THAT THERE IS NO AUTOMATIC STAY PURSUANT TO CPLR 5519(a) OR IN THE ALTERNATIVE, VACATING THE AUTOMATIC STAY PURSUANT TO CPLR 5519(c)

Michael Treybich, Esq.
Attorney for Respondent
Hannah Black, Commissioner of
Dutchess County Board of Elections
272 Mill Street
Poughkeepsie, NY 12601

Dated: November 7, 2022

I. PRELIMINARY STATEMENT

This memorandum of law is submitted in support of the Petitioners' motion which seeks, in effect, a declaration that there is no automatic stay pursuant to CPLR 5519(a), or in the alternative, for an order vacating the automatic stay pursuant to CPLR 5519(c).

In permitting the question of whether there is an automatic stay to remain unresolved, the Court may have inadvertently permitted Commissioner Haight to violate the law, disenfranchising precisely those voters who the law was designed to protect, and seemingly with impunity.

The appropriate resolution here, is to declare that Commissioner Haight's notice of appeal did not trigger an automatic stay because Commissioner Haight lacks the capacity to have pursued this appeal unilaterally, let alone unilaterally stay the effect of an order against the Dutchess County Board of Elections as a whole. Here, Commissioner Haight decided on his own – without even a vote of the commissioners – that the Dutchess County Board of Elections would not comply with a court order to site a polling site on the Vassar College campus on the day of the November 8, 2022 election.

II. STATEMENT OF FACTS, BACKGROUND LAW AND PROCEDURAL HISTORY[1]

The Petitioners – Respondents, are the League of Women Voters, as well as two voters who are registered to vote from the campus of Vassar College.

Respondent Black is one of the two Commissioners of Respondent Dutchess County Board of Elections. (Black Affd. ¶4)

Appellant Haight is the other Commissioner of Respondent Dutchess County Board of Elections. (Black Affd. ¶4)

Pursuant to Election Law §3-200(2), "[e]ach board shall consist of two election commissioners". (*see also,* Graziano v. County of Albany, 3 NY3d 475 [2004])

"All actions of the board shall require a majority vote of the commissioners". (Election Law §3-212[2])

A majority vote of two commissioners requires both commissioners agreeing.

On the afternoon of November 1, 2022, prior to filing the petition with the Dutchess County Clerk, counsel for the Petitioners sent the documents for which he stated his intention to file later that day. (Black Affd. ¶6)

[1] References to "Black Affd.", "Quail Affd.", and "Treybich Affm." followed by numbers are to the corresponding paragraph numbers in the Affidavit of Hannah Black sworn to on November 6, 2022, Affirmation of Brian Quail dated November 5, 2022, and the Affirmation of Michael Treybich dated November 6, 2022.

The two commissioner split on what to do regarding that information, and as a result, the Dutchess County Attorney recused herself from representing the Dutchess County Board of Elections, and gave consent to Commissioner Haight to hire private counsel on November 1, 2022 at 3:02pm. (Black Affd. ¶7)

On November 2, 2022 at 9:41am, counsel for the Petitioners sent a set of the papers that had been filed, including the executed order to show cause in the special proceeding, by Email to both Commissioners of Elections and to Dutchess County Attorney Caroline Blackburn. (Black Affd. ¶9)

Commissioner Black actually received such Email and it appeared to be addressed to Commissioner Haight and County Attorney Blackburn at their correct respective E-mail addresses as well. (Black Affd. ¶9)

The November 1, 2022 order to show cause required that any written opposition was due by November 2, 2022 by no later than 3:00pm. (NYSCEF Document Number 10)[2]

Respondent Hannah Black filed an answer to the petition on November 2, 2022 at 2:50pm. (NYSCEF Document Number 16); (Black Affd. ¶11); (Treybich Affm. ¶6)

[2] Pursuant to CPLR 2214(c), references to exhibits that have been previously electronically filed with the Court are made by reference to the NYSCEF document number. Further, for the convenience of the Court, I have added a hyperlink which is linked to the cited document's location on the NYSCEF website, and which may be accessed by clicking on the underlined word.

On Wednesday, November 2, 2022 at 4:30pm, the parties hereto appeared virtually via Microsoft Teams for a conference with Angela DiBasi, Esq., Justice D'Alessio's Principal Court Attorney. Commissioner Haight and his counsel both appeared at the conference. (NYSCEF Document Number 11)[3]; (Black Affd. ¶12); (Treybich Affm. ¶7)

On November 3, 2022 at 2pm, the parties appeared for a hearing before Justice D'Alessio on the petition. (Black Affd. ¶13); (Treybich Affm. ¶8)

At the hearing, Justice D'Alessio asked each person to note their appearance on the record. Each person present did so, including Commissioner Haight, who identified himself and then stated that his attorney was on his way. Justice D'Alessio then stated that we would break to give Commissioner Haight's attorney the opportunity to arrive. (Black Affd. ¶14); (Treybich Affm. ¶¶9, 10)

The proceedings resumed at approximately 2:30pm, when Commissioner Haight's attorney appeared on the record, but Commissioner Haight had disappeared, leaving several of his personal things on the table, and he did not return. (Black Affd. ¶15); (Treybich Affm. ¶12)

Commissioner Haight's attorney then made an oral application to dismiss the petition on several grounds, and attempted to hand up a written motion that he had

[3] The Court Notice states 4:00pm, however the conference time was changed to 4:30pm.

not electronically filed with NYSCEF and oral argument was held. (Treybich Affm. ¶¶13-14)

After argument of Commissioner Haight's motion, the Court took the testimony of Commissioner Hannah Black, who testified under oath, and was subjected to cross-examination by Commissioner Haight's attorney. (Black Affd. ¶16); (Treybich Affm. ¶15)

Commissioner Black testified as to the Board of Election's communications with Vassar College vis a vis their proposed poll site, the ability of the Board of Elections to have a poll site ready for the upcoming election, and she authenticated and testified as to a list of the registered voters registered from the Vassar College Campus. (Black Affd. ¶16)

Commissioner Black did not and does not have reason to believe that Commissioner Haight could not have similarly provided testimony, had he been present. (Black Affd. ¶18)

Commissioner Haight did not return to testify, nor did his counsel call a witness. (Treybich Affm. ¶16)

Upon the completion of Commissioner Black's testimony, the Court recessed. (Treybich Affm. ¶17)

During that recess, for the first time, a copy of Commissioner Haight's motion papers were handed to Commissioner Black's counsel, who reviewed the papers and

noticed, among other issues, is that the motion did not contain either an affidavit or an affirmation of anyone. (Treybich Affm. ¶¶17-20)

When the Court returned from recess, and prior to rendering its decision, order and judgment, counsel for Commissioner Black stated on the record that the motion had just been handed to him, and after requesting time to make additional arguments against the motion, the Court stated that would not be necessary. (Treybich Affm. ¶21)

At approximately 4:30pm, the Court then denied Commissioner Haight's motion and granted the Petition in its entirety. (Black Affd. ¶19); (Treybich Affm. ¶22)

The Court directed counsel to wait for a copy of the decision. (Treybich Affm. ¶23)

Commissioner Haight's attorney then left the courtroom. (Treybich Affm. ¶24)

Following the November 3, 2022 decision and order of the Honorable Christie D'Alessio, JSC, Commissioner Black has attempted to comply with such order. (Black Affd. ¶20)

At 9:47 a.m., on Friday, November 4, 2022, Commissioner Haight wrote an E-mail to Commissioner Black stating that he would be "eager to comply" with the

order of Supreme Court, Dutchess County handed down by Judge D'Alessio. (NYSCEF Document Number 33, bottom of page 7); (Black Affd. ¶22)

At approximately 3 p.m. on Friday, November 4, 2022, Jess Ptasknick, a Democratic staff member of the Dutchess County Board of Elections, and John Tkazyik, a Republican staff member of the Dutchess County Board of Elections, participated in a site visit on the Vassar College campus with staff from Vassar College for the purpose of finding a suitable polling place. Commissioner Black was also present during this site visit. Among other Vassar College officials, they were accompanied on their site visit by Wesley Dixon, special assistant to the president of Vassar College, who has been the primary contact in finding a poll site on the Vassar College campus. One location that was viewed is a space known as the Aula in Ely Hall, which Vassar College officials stated was available for use as a polling place on the day of the November 8, 2022 general election. (Black Affd. ¶23)

At 4:41 p.m., Commissioner Black e-mailed Commissioner Haight to express the need for the Board of Elections to move forward with bi-partisan teams of staff to program poll pads and voting machines in preparation for implementing the polling place on the Vassar College campus. she wrote: "To move forward on the Vassar College campus site- Jen, Tim, Shannon and Eli can get together the items for the Vassar poll site tomorrow. This would include burning the machine cards and

keys, testing the machines, programming the poll pads, and getting together the other ancillary equipment (cones, signs, booths). Ca[n] we move forward with this plan? Hannah Black." (NYSCEF Document Number 33, bottom of page 4); (Black Affd. ¶24)

At 8:01 p.m., Commissioner Haight wrote back. The entirety of his message stated: "That's likely to be premature and also an incomplete plan. Please fill in the gaps. Thank you, Erik." (NYSCEF Document Number 33, middle of page 4); (Black Affd. ¶25)

At 8:10 p.m., Commissioner Black wrote back to Commissioner Haight, "Can you explain why the plan is both premature and incomplete? Can you suggest gaps to fill in?" (Exhibit F to Petitioners' motion, top of page 2 of exhibit, page 63 of 84 of file); (Black Affd. ¶26)

At 5:04p.m. also on Friday, November 4, 2022, Commissioner Black E-mailed Commissioner Haight proposing the Aula as a suitable site for a polling place on the Vassar College campus. (NYSCEF Document Number 33, top of page 3); (Black Affd. ¶27)

Commissioner Haight responded that night at 9:05pm solely with a question: "Are you certain there's enough parking? I'm expecting 1,800 voters throughout the course of the day on Tuesday. The court didn't authorize Vassar as a satellite location

but rather the poll site for those election districts." (NYSCEF Document Number 33, middle of page 2); (Black Affd. ¶28)

Commissioner Haight has never proposed an alternative site at Vassar College. (Black Affd. ¶29)

Commissioner Haight's sole objection seems to be parking, which is not made in good faith. (Black Affd. ¶30)

The campus of Vassar College is divided into and forms a part of 3 separate election districts. Town of Poughkeepsie Ward 6, EDs 2, 3 and 4. (Black Affd. ¶31)

Currently, the sole poll site for EDs 3 and 4 is the Dutchess County Wastewater treatment facility on Raymond Avenue which does not have any dedicated parking for voters whatsoever, beyond what a voter could locate on the street. (Black Affd. ¶32)

Currently, the sole poll site for ED 2 is at the Poughkeepsie United Methodist Church on New Hackensack Road, which does have ample parking, however, that poll site is shared with Ward 6, ED 1 and 7's 1705 voters. (Black Affd. ¶33)

By complying with the law, and opening a poll site on the campus of Vassar College, the 1,100 voters who are registered from that Campus will not require parking in order to vote. Therefore, Commissioner Haight's objection vis a vis the parking situation for the proposed poll site is not made in good faith. (Black Affd. ¶34)

Further, Commissioner Haight's sole query with reference to the number of voters is similarly not made in good faith. (Black Affd. ¶35)

The three election districts have a total of 2,565 voters of which 1,100 are registered from Vassar College campus. (Black Affd. ¶36)

As of November 5, 2022, 226 of those voters have early voted, 698 absentee ballots have been sent by the Dutchess County Board of Elections, and 447 absentee ballots have been received by the Dutchess County Board of Elections. (Black Affd. ¶37)

Therefore at least 673 voters have already cast their ballots from the three affected ED's, leaving only 1,892 voters who have not yet voted, with an additional 251 absentee ballots outstanding. (Black Affd. ¶38)

For Commissioner Haight's prediction of 1,800 voters casting their ballots from those three elections districts coming to pass, that means if not a single other absentee ballot is returned, that in excess of 95% of the remaining electorate will come out to vote on election day, which greatly exceeds what is actually expected viz a viz turnout. (Black Affd. ¶¶39-40)

Vassar College has recommended sites that could be used as polling places on its campus over a month ago. Commissioner Black has made repeated efforts to have a polling place designated on the Vassar campus. Commissioner Haight has not agreed to have a poll site on the Vassar College. (Black Affd. ¶41)

It is the understanding of Commissioner Black that Vassar College has remained ready, willing, and able to implement a polling place on campus throughout the year. (Black Affd. ¶42)

As this point, due to Commissioner Haight's intransigence, it is not possible to implement an additional poll site upon the Vassar College Campus. (Black Affd. ¶43)

Due to the Board of Election's requirement that all absentee ballots received before election day be canvassed by the day preceding the election, all of our machine technicians who would otherwise be required to program the poll pads and machines will be engaged in counting absentee ballots to comply with the law. (Black Affd. ¶44)

Commissioner Black has requested that Commissioner Haight agree to have the machine technicians program the poll pads and machines over the weekend, so that if the Appellate Division vacates the stay, if any, then we would be able to comply with the Court's order. (NYSCEF Document Number 33, bottom of page 4); (Black Affd. ¶45)

Commissioner Haight has refused and has not proffered any suggestions to ensure compliance. (NYSCEF Document Number 33, middle of page 4); (Black Affd. ¶46)

The sole suggestion made by Commissioner Haight is to shut down the existing poll sites for those EDs which is not permitted at this point and was not required by the Court order and would likely result in more confusion than simply opening an additional site at Vassar College campus would have. (Black Affd. ¶47)

Further, the Election Law does not require this. (Black Affd. ¶48); (*see also*, Quail Affm.)

Indeed, Election Law § 4-104 (5) (d) provides "Notwithstanding any other provision of this section, ***polling places*** designated ***for any one such district*** that will be utilizing any voting machine or system certified for use in New York…may be the polling place of any other contiguous district or districts, provided the voting system used in such polling place produces separate and distinct vote totals for each election district voting in such polling place…" (emphasis added). For example, In the City of Auburn, the Cayuga County Board of Elections currently voters ***in all of the City's eighteen election districts*** are allowed to vote at all of the city's four polling places and the elections using ballot on demand printers to print the correct ballots for each voter. (*See* Quail Aff ¶ 5); (City of Auburn, *Voter Election Day and Early Voting Information 2022*, https://www.auburnny.gov/home/news/voter-election-day-and-early-voting-information-2022 - "Election Day Poll Sites in the City of Auburn - NEW - for 2022 you can cast your ballot at any poll site location.").

Further, the State Board of Elections concluded vis a vis the City of Auburn that the Election Law does not prohibit an election district from having more than one polling place. (Quail Aff ¶ 6-7.)

Furthermore, Dutchess County has had multiple poll sites for election districts with respect to court orders to put a polling place on the Bard campus—over Commissioner Haight's repeated resistance—which arrangement was affirmed by this Court. (Bard College v. Dutchess County Board of Elections, 198 AD3d 1014 [2d Dept. 2021])

If the Board of Elections has been required to open an additional poll site, such would have been temporary for this year only, as the second section of Part O of Chapter 55 of the Laws of 2022, relating to election district boundaries, and which takes effect January 1, 2023, will require, in drawing the boundaries, that they not be shared with areas outside of the campus. (Black Affd. ¶49)

Finally, Commissioner Black did not give her consent to the initiation of this appeal. (Black Affd. ¶50)

Commissioner Haight filed the instant appeal by delivery, in person to the Dutchess County Clerk, and on Friday, November 4, 2022 at approximately 4:55pm, clerk staff uploaded the notice of appeal. (NYSCEF Document Number 29)

The notice of appeal contains four grounds for appeal, that:

> "1) The purposed service of papers on Appellant by Email was defective and the Supreme Court lacked jurisdiction;

> 2) The doctrine of laches mandated dismissal of this proceeding due to its filing on November 1, 2022, one week prior to the election at issue;
> 3) The Petition failed to state a claim for mandamus because the act complained of (the selection and designation of polling places) is not a ministerial action; and
> 4) A necessary party (Vassar College, which owns the property at issue) was not joined."

(NYSCEF Document Number 29, page 5, "issues" section)

The Petitioners served a motion by emergency order to show cause for a declaration that there is no stay, or in the alternative, that the automatic stay be lifted on Saturday, November 5, 2022 at 4:12pm.

The parties appeared by counsel for a telephonic argument before Deputy Clerk Darrell M. Joseph at 5:00pm, who following oral argument, directed that papers be filed by Email delivery to him no later than 9:00am on Monday morning.

III. ARGUMENT

The Petitioners' motion seeks, in effect, a declaration that there is no automatic stay of enforcement of the November 3, 2022 order of the Dutchess County Supreme Court, or in the alternative, that such automatic stay be lifted.

A. Appellant Commissioner Haight Lacks the Requisite Capacity to Have Initiated or to Pursue this Appeal

As a threshold matter, Appellant Haight lacks capacity to have initiated this appeal, thus, there was never an automatic stay.

In order for a party to have the authority to bring a suit before the court, it must have capacity. “Capacity concerns a litigant’s power to appear and bring its grievance before the courts,” (Graziano v. County of Albany, 3 N.Y.3d 475, 479 [2004])

The functions of an election commissioner are firstly to assist the other election commissioner in the administration of their board of elections, and secondly to protect the equal representation rights of her or his political party. (Graziano, 3 NY3d at 480). Only when the commissioner is acting to safeguard the political interests of their party do they have the authority to bring a suit unilaterally in their capacity as commissioner. Id.

“‘Capacity to sue is a threshold matter allied with, but conceptually distinct from, the question of standing. As a general matter, capacity concerns a litigant's power to appear and bring its grievance before the court’. Capacity to sue can be derived from an express statutory grant, as in the case of a business corporation or unincorporated association, or can be inferred, even in the absence of statutory authority, where the power to sue and be sued is a necessary incident of the party's responsibilities. Where there is no statutory authority to sue, and such authority is not necessarily implied from the entity’s other powers, however, there is no capacity, and a petition or complaint must be dismissed”. (internal citations omitted); (Village of Chestnut Ridge v. Town of Ramapo, 45 AD3d 74, 81 [2d Dept. 2007])

"Being artificial creatures of statute, [governmental] entities have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate". (internal citations omitted); (Id.)

While the Dutchess County Board of Elections has the capacity to pursue the present appeal pursuant to Election Law, such capacity is predicated on authorization by majority vote of its commissioners pursuant to Election Law § 3-212(2).

Where a matter relates to the administration of a board of elections as a whole and has no bearing on a commissioner's role as the protector of a political party's interest, this Court has held that commissioners have no authority to take unilateral action on behalf of the board of elections as a whole – such action must first be approved by majority vote of the commissioners. (County of Nassau v. State, 100 AD3d 1052, 1054 [3d Dept. 2012]; In re Cox v. Spoth and Erie Cnty. Bd. of Elections, 165 A.D.3d 1648, 1649 [4th Dept. 2018]); (*See also*, In re Scannapieco v. Riley, 132 A.D.3d 705 [2d Dept. 2015])

A proceeding raising issues affecting board of elections administration, unrelated to party representational rights is an "action" which requires approval by majority vote of the commissioners to be commenced, and an appeal is such an "action". (County of Nassau, 100 AD3d at 1054 – "We find that DeGrace lacks the capacity to unilaterally maintain the instant appeal. Election Law §3-212[2] requires

that all actions of local boards of elections be approved by a majority vote of the commissioners. As the claims in this proceeding raise issues affecting the NCBOE as a whole, as opposed to those alleging a political imbalance on the NCBOE or otherwise relating to the representational rights of the political parties thereon, the pursuit of the instant appeal is an "action" of the NCBOE requiring approval of a majority of the commissioners".)

The designation of polling places undoubtedly concerns the commissioners' functions as administrators of the affairs of the Dutchess County Board of Elections as a whole.

Appellant Haight has not established nor even alleged on this appeal how this matter relates to a political party's representational rights. Appellant Haight initiated this appeal without the consent of his fellow commissioner (Black Affd. ¶50), and so fails to meet the requirements of Election Law § 3-212(2). As a consequence, Appellant Haight lacked and continues to lack the capacity necessary to bring this matter before the Appellate Division.[4]

[4] This Respondent previously made similar arguments against this Appellant, and this Court found that by asserting cross-claims against the Appellant in the matter below, that such capacity argument was waived. (*see,* Bard College v. Dutchess County Board of Elections, 198 A.D.3d 1014, 1016 [2d Dept. 2021]). No claims were asserted by this Respondent in the matter below.

Therefore, the Appellant lacks capacity to pursue this appeal in any manner, and thus, it lacks merit, and the Court should declare that the automatic stay pursuant to CPLR 5519(1) does not and did not apply in this matter.

To find that such automatic stay applies would violate the statutory and constitutional scheme requiring both commissioners to consent to an action of the local board of elections, by allowing one such commissioner to unilaterally block a court order which effects administration of such board as a whole, and does not address party imbalance or otherwise relate to the representational rights of the political parties thereon.

IV. Conclusion

For all of the reasons set forth herein, it is respectfully submitted that Petitioners' motion should be granted, and because the Appellant lacked capacity to initiate this appeal, the Court should declare that there is no stay of enforcement of the November 3, 2022 decision, order, and judgment of the Supreme Court, Dutchess County, together with such other relief as the Court deems proper.

Dated: Dutchess County, New York
November 7, 2022

Michael Treybich, Esq.
Treybich Law, P.C.
Attorneys for the Respondent
Hannah Black, Commissioner of Elections
272 Mill Street
Poughkeepsie, NY 12601
(845) 554-5295

NEW YORK STATE SUPREME COURT
APPELLATE DIVISION: SECOND DEPARTMENT

- x

League of Women Voters of the Mid-Hudson Valley, Taneisha Means, Magadalena Sharff,

Petitioners-Appellees,

-against-

Dutchess County Board of Elections & Hannah Black, in the capacity as Commissioner of the Dutchess County Board of Elections,

Respondents,

-and-

Erik Haight, in his capacity as Commissioner of the Dutchess County Board of Elections,

Respondent-Appellant.

Appellate Division—
Second Department
Case No.

- x

AFFIRMATION OF MICHAEL TREYBICH

Michael Treybich, Esq., an attorney duly admitted to practice law in the State of New York affirms under the penalty of perjury:

1. I am the principal attorney of Treybich Law, P.C., the attorneys of record for the Respondent Hannah Black in the above-captioned appeal and I am fully familiar with the facts and circumstances stated herein, said knowledge being based upon my personal knowledge and observations, as well as a review of the file maintained by this office.

2. I make this affirmation in support of the Petitioners' motion to declare that there is no automatic stay, or in the alternative, to lift the automatic stay.

3. I was retained by Commissioner Black to represent her in the below special proceeding on the morning of November 1, 2022.

4. On November 2, 2022 at 9:41am, it appears that counsel for the Petitioners served the signed order to show cause upon the Respondents by delivery to the official government Email addresses of the two commissioners of the Dutchess County Board of Elections as well as the Dutchess County Attorney.

5. That order to show cause required that any written opposition was due by November 2, 2022 by no later than 3:00pm.

6. I prepared and filed an answer on behalf of my client on November 2, 2022 at 2:50pm. (NYSCEF Document Number 16)[1]

7. On Wednesday, November 2, 2022 at 4:30pm, we appeared virtually via Microsoft Teams for a conference with Angela DiBasi, Esq., Justice D'Alessio's Principal Court Attorney. Commissioner Haight and his counsel both appeared at the conference.

8. On November 3, 2022 at 2pm, we appeared for a hearing before Justice D'Alessio on the petition.

9. Each person present, including myself, Commissioner Hannah Black, Attorneys Richard Medina and Justin Baxenberg for the Petitioners, Dutchess County Attorney Caroline Blackburn, and Commissioner Erik Haight noted their appearances for the record.

10. In addition to noting his appearance, Commissioner Haight also requested time for his attorney to appear, who was then on his way. Commissioner Haight made no other statements.

[1] Pursuant to CPLR 2214(c), references to exhibits that have been previously electronically filed with the Court are made by reference to the NYSCEF document number. Further, for the convenience of the Court, I have added a hyperlink which is linked to the cited document's location on the NYSCEF website, and which may be accessed by clicking on the underlined word.

11. Justice D'Alessio directed that we would take a half hour break to give Commissioner Haight's attorney the opportunity to arrive.

12. We resumed the proceedings at approximately 2:30pm, when Commissioner Haight's attorney appeared on the record, but Commissioner Haight had disappeared, leaving several of his personal things on the table, and he did not return.

13. Commissioner Haight's attorney then made an oral application to dismiss the petition on several grounds, and attempted to hand up a written motion that he had not electronically filed with NYSCEF.

14. Instead, we argued what was presented orally.

15. After argument of Commissioner Haight's motion, the Court took testimony of my client, Commissioner Hannah Black, who was subjected to cross-examination by Commissioner Haight's attorney.

16. Commissioner Haight did not return to testify, nor did his counsel call a witness.

17. Upon the completion of Commissioner Black's testimony, the Court recessed.

18. At this point, for the first time, a copy of Commissioner Haight's motion papers were handed to undersigned counsel.

19. I took this opportunity to review the papers.

20. The most glaring issue, is that the motion did not contain either an affidavit or an affirmation of anyone, and consisted solely of a memorandum of law and notice of motion.

21. When the Court returned from recess, and prior to rendering its decision, order and judgment, I stated on the record that I had been handed the motion, and after requesting time to make additional arguments against the motion, the Court stated that would not be necessary.

22. The Court then denied Commissioner Haight's motion and granted the Petition in its entirety.

23. The Court directed counsel to wait for a copy of the decision.

24. Commissioner Haight's attorney then left the courtroom.

25. The Petitioners' motion should be granted in its entirety.

Dated: Dutchess County, New York
November 6, 2022

Michael Treybich

NEW YORK STATE SUPREME COURT
APPELLATE DIVISION: SECOND DEPARTMENT

- x

League of Women Voters of the Mid-Hudson Valley, Taneisha Means, Magadalena Sharff,

Petitioners-Appellees,

-against-

Dutchess County Board of Elections & Hannah Black, in the capacity as Commissioner of the Dutchess County Board of Elections,

Respondents,

-and-

Erik Haight, in his capacity as Commissioner of the Dutchess County Board of Elections,

Respondent-Appellant.

Appellate Division—
Second Department
Case No.

- x

AFFIDAVIT OF HANNAH BLACK

I, Hannah Black, being duly sworn, say:

1. I am over 18 years old and a citizen of the United States.

2. I am a Respondent in this Appeal, and I am one of two commissioners of Respondent the Dutchess County Board of Elections.

3. I make this affidavit in support of the Petitioners' motion for an order declaring that there is no automatic stay, or in the alternative, to lift the automatic stay.

4. Respondent-Appellant Erik Haight is the Republican Commissioner of the Dutchess County Board of Elections, having been recommended by the Dutchess County Republican Committee and appointed by the Republican caucus of the Dutchess County

Legislature. I am the Democratic Commissioner of the Dutchess County Board of Elections, having been recommended by the Dutchess County Democratic Committee and appointed by the Democratic caucus of the Dutchess County Legislature.

5. As an elections commissioner, it is my responsibility to ensure that eligible voters in Dutchess County have the access to the franchise guaranteed by the constitutions and laws of New York State and of the United States.

6. On the afternoon of November 1, 2022, and apparently prior to filing the petition with the Dutchess County Clerk, counsel for the Petitioners sent the documents for which he stated his intention to file later that day.

7. Commissioner Haight and I split on what to do regarding that information, and as a result, the Dutchess County Attorney recused herself from representing the Board of Elections, and gave consent to Commissioner Haight to hire private counsel on November 1, 2022 at 3:02pm.

8. I immediately contacted and retained private counsel as well.

9. On November 2, 2022 at 9:41am, counsel for the Petitioners sent a set of the papers that had been filed, including the executed order to show cause in the special proceeding, by Email to me, Commissioner Haight and Dutchess County Attorney Caroline Blackburn. I actually received such Email and it appeared to be addressed to Commissioner Haight and County Attorney Blackburn at their correct respective E-mail addresses as well.

10. That order to show cause required that any written opposition was due by November 2, 2022 by no later than 3:00pm.

11. My counsel filed my proposed answer on November 2, 2022 at 2:50pm. (NYSCEF Document Number 16)[1]

[1] Pursuant to CPLR 2214(c), references to exhibits that have been previously electronically filed with the Court are made by reference to the NYSCEF document number. Further, for the convenience of the Court, I have added a

12. On Wednesday, November 2, 2022 at 4:30pm, we appeared virtually via Microsoft Teams for a conference with Angela DiBasi, Esq., Justice D'Alessio's Principal Court Attorney. Commissioner Haight and his counsel both appeared at the conference.

13. On November 3, 2022 at 2pm, we appeared for a hearing before Justice D'Alessio on the petition.

14. Justice D'Alessio asked each person to note their appearance on the record. Each of us did so, including Commissioner Haight, who identified himself and then stated that his attorney was on his way. Justice D'Alessio then stated that we would break to give Commissioner Haight's attorney the opportunity to arrive.

15. We resumed the proceedings at approximately 2:30pm, when Commissioner Haight's attorney appeared on the record, but Commissioner Haight had disappeared, leaving several of his personal things on the table, and he did not return.

16. Instead, I testified under oath, and answered questions about the Board of Election's communications with Vassar College viz a viz their proposed poll site, the ability of the Board of Elections to have a poll site ready for the upcoming election, and I authenticated and testified as to a list of the registered voters registered from the Vassar College Campus.

17. I was also cross-examined by Commissioner Haight's attorney.

18. I have no reason to believe that Commissioner Haight could not have similarly provided testimony, had he been present.

19. At approximately 4:30pm on November 3, 2022, the Supreme Court, Dutchess County granted the petition of the Petitioners-Appellees in the above-captioned special proceeding

hyperlink which is linked to the cited document's location on the NYSCEF website, and which may be accessed by clicking on the underlined word.

in its entirety and ordered the Dutchess County Board of Elections to designate and operate an election day polling place on the campus of Vassar College.

20. Following the November 3, 2022 decision and order of the Honorable Christie D'Alessio, JSC, I attempted to comply with such order.

21. I have reviewed the copy of the Email exchanges between myself and Commissioner Haight which is annexed to the Petitioners Motion as Exhibit F and contained as NYSCEF Document Number 33 in the records of the Dutchess County Clerk, and such exchanges are a true and correct copy of same.

22. At 9:47 a.m., on Friday, November 4, 2022, Commissioner Haight wrote an E-mail stating that he would be "eager to comply" with the order of Supreme Court, Dutchess County handed down by Judge D'Alessio. It is my understanding that a copy of Commissioner Haight's e-mail is filed on the electronic docket for this case in Supreme Court, Dutchess County. (NYSCEF Document Number 33, bottom of page 7)

23. At approximately 3 p.m. on Friday, November 4, 2022, Jess Ptasknick, a Democratic staff member of the Dutchess County Board of Elections, and John Tkazyik, a Republican staff member of the Dutchess County Board of Elections, participated in a site visit on the Vassar College campus with staff from Vassar College for the purpose of finding a suitable polling place. I was also present during this site visit. Among other Vassar College officials, we were accompanied on our site visit by Wesley Dixon, special assistant to the president of Vassar College, who has been our primary contact in finding a poll site on the Vassar College campus. One location that we viewed is a space known as the Aula in Ely Hall, which Vassar College officials stated was available for use as a polling place on the day of the November 8, 2022 general election.

24. At 4:41 p.m., I e-mailed Commissioner Haight to express the need for us to move forward with bi-partisan teams of staff to program poll pads and voting machines in preparation for implementing the polling place on the Vassar College campus. I wrote: "To move forward on the Vassar College campus site- Jen, Tim, Shannon and Eli can get together the items for the Vassar poll site tomorrow. This would include burning the machine cards and keys, testing the machines, programming the poll pads, and getting together the other ancillary equipment (cones, signs, booths). Ca[n] we move forward with this plan? Hannah Black." (NYSCEF Document Number 33, bottom of page 4)

25. At 8:01 p.m., Commissioner Haight wrote back. The entirety of his message stated: "That's likely to be premature and also an incomplete plan. Please fill in the gaps. Thank you, Erik." (NYSCEF Document Number 33, middle of page 4)

26. At 8:10 p.m., I wrote back to Commissioner Haight, "Can you explain why the plan is both premature and incomplete? Can you suggest gaps to fill in?" (Exhibit F to Petitioners' motion, top of page 2 of exhibit, page 63 of 84 of file)

27. At 5:04p.m. also on Friday, November 4, 2022, I E-mailed Commissioner Haight proposing the Aula as a suitable site for a polling place on the Vassar College campus. (NYSCEF Document Number 33, top of page 3)

28. Commissioner Haight responded at 9:05pm solely with a question: "Are you certain there's enough parking? I'm expecting 1,800 voters throughout the course of the day on Tuesday. The court didn't authorize Vassar as a satellite location but rather the poll site for those election districts." (NYSCEF Document Number 33, middle of page 2)

29. Commissioner Haight has never proposed an alternative site at Vassar College.

30. Commissioner Haight's sole objection seems to be parking, which is not made in good faith.

31. The campus of Vassar College is divided into and forms a part of 3 separate election districts. Town of Poughkeepsie Ward 6, EDs 2, 3 and 4.

32. Currently, the sole poll site for EDs 3 and 4 is the Dutchess County Wastewater treatment facility on Raymond Avenue which does not have any dedicated parking for voters whatsoever, beyond what a voter could locate on the street.

33. Currently, the sole poll site for ED 2 is at the Poughkeepsie United Methodist Church on New Hackensack Road, which does have ample parking, however, that poll site is shared with Ward 6, ED 1 and 7's 1705 voters.

34. By complying with the law, and opening a poll site on the campus of Vassar College, the 1,100 voters who are registered from that Campus will not require parking in order to vote. Therefore, Commissioner Haight's objection viz a viz the parking situation for the proposed poll site, is not made in good faith.

35. Further, Commissioner Haight's sole query with reference to the number of voters is similarly not made in good faith.

36. The three election districts have a total of 2,565 voters of which 1,100 are registered from Vassar College campus.

37. As of the day before this affidavit (our systems are updated each evening and today is the final day of early voting), 226 of those voters have early voted, 698 absentee ballots have been sent by the Dutchess County Board of Elections, and 447 absentee ballots have been received by the Dutchess County Board of Elections.

38. Therefore at least 673 voters have already cast their ballots from the three affected ED's, leaving only 1,892 voters who have not yet voted, with an additional 251 absentee ballots outstanding.

39. For Commissioner Haight's prediction of 1,800 voters casting their ballots from those three elections districts coming to pass, that means if not a single other absentee ballot is returned, that in excess of 95% of the remaining electorate will come out to vote on election day.

40. On average, in Dutchess County, in non-presidential, gubernatorial years, we typically have approximately 60% voter turnout, four years ago, in 2018, for example, the turnout county-wide was approximately 62%.

41. Vassar College has recommended sites that could be used as polling places on its campus over a month ago. I have made repeated efforts to have a polling place designated on the Vassar campus. Commissioner Haight has not agreed to have a poll site on the Vassar College.

42. It is my understanding that Vassar College has remained ready, willing, and able to implement a polling place on campus throughout the year.

43. As this point, due to Commissioner Haight's intransigence, it is not possible to implement an additional poll site upon the Vassar College Campus.

44. Due to the Board of Election's requirement that all absentee ballots received before election day be canvassed by the day preceding the election, all of our machine technicians who would otherwise be required to program the poll pads and machines will be engaged in counting absentee ballots to comply with the law.

45. I have requested that Commissioner Haight agree to have the machine technicians program the poll pads and machines over the weekend, so that if the Appellate Division vacates

the stay, if any, then we would be able to comply with the Court's order. (NYSCEF Document Number 33, bottom of page 4)

46. Commissioner Haight has refused and has not proffered any suggestions to ensure compliance. (NYSCEF Document Number 33, middle of page 4)

47. The sole suggestion made by Commissioner Haight is to shut down the existing poll sites for those EDs which is not permitted at this point and was not required by the Court order and would likely result in more confusion than simply opening an additional site at Vassar College campus would have.

48. Further, there is no part of the election law that I have been made aware of that requires that an election district can only be served by one poll site. In fact, this Court last year in an action brought against the Dutchess County Board of Elections by petitioners from Bard College, affirmed a decision of the Supreme Court, Dutchess County which ordered that two poll sites be made available in one particular election district. (*see*, Decision and Order in Matter of Bard College, etc., et al., v. Dutchess County Board of Elections, et al, Appellate Division, Second Department Docket Nos. 2021-07433 and 2021-07434.

49. Finally, if we had been required to open an additional poll site, such would have been temporary for this year only, as the second section of Part O of Chapter 55 of the Laws of 2022, relating to election district boundaries, and which takes effect January 1, 2023, will require, in drawing the boundaries, that they not be shared with areas outside of the campus.

50. I have not consented to this appeal.

51. Thus, the Appellate Division should declare that there was no stay as Commissioner Haight lacks capacity to bind the administration of the Board of Elections unilaterally.

Hannah Black

Sworn to before me this
6th day of November, 2022

NOTARY PUBLIC

PERRY M. GROSSMAN
NOTARY PUBLIC-STATE OF NEW YORK
No. 02GR6440807
QUALIFIED IN BRONX COUNTY
COMMISSION EXPIRES 09/12/20__

This remote notarial act involved the use of communication technology

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

LEAGUE OF WOMEN VOTERS OF THE MID-HUDSON REGION, TANEISHA MEANS, and MAGDALENA SHARFF,

Petitioners-Plaintiffs,

-against-

THE DUTCHESS COUNTY BOARD OF ELECTIONS, ERIK J. HAIGHT in his capacity as Commissioner of the Dutchess County Board of Elections, and HANNAH BLACK, in the capacity as Commissioner of the Dutchess County Board of Elections,

Respondents-Defendants.

Index No. 2022-53491

AFFIRMATION OF BRIAN L. QUAIL

BRIAN L. QUAIL, being admitted to the practice of law in New York with an office in the County and City of Albany, New York do hereby affirm pursuant to the CPLR under penalty of perjury:

1. I am the Democratic Co-Counsel to the New York State Board of Elections. I have been employed by the New York State Board of Elections since 2014 and before that served as an Elections Commissioner for the County of Schenectady and before that as a Counsel to the Election Law Committee in the New York State Assembly. I have qualified as an expert in New York's Election Law in a proceeding before United States District Court, Northern District, New York. This affirmation expresses facts known to me based on personal knowledge and as to opinions expressed, they are my own.

2. Under New York law a single election district can have more than one polling place.

3. Election Law 4-104 (5) provides "[n]otwithstanding any other provision of this section, polling places designated for any one such district that will be utilizing any voting machine

or system certified for use in New York…may be the polling place for any other contiguous district or districts…"

4. The election district embracing Bard college has had two polling places for some time, and this has been known to the New York State Board of Elections and not objected to.

5. More saliently, this year the County of Cayuga Board of Elections consolidated multiple election districts in the City of Auburn and assigned all election districts in the city to all four polling locations in the city. In other words, an Auburn City voter can vote on Election Day at any of four separate sites. See https://auburnpub.com/news/local/reminder-on-election-day-auburn-residents-can-vote-at-any-city-polling-site/article_ddc5aaae-1a9a-5f62-b677-49991889a5b7.html

6. This arrangement was known to—and not objected to by—the New York State Board of Elections.

7. Notably, for early voting sites, New York law requires any voter to be able to vote at any early voting site absent an agreement of commissioners to the contrary. See Election Law 8-600 (3) (requiring as a general proposition that "[a]ny voter may vote at any polling place for early voting…in the county…"). This clearly demonstrates multiple polling sites for a single election district is permissible under New York law.

8. The order of the court below commanded that a poll site be designated on the campus of Vassar College (in clear conformity with relevant law). The order did not require the cancellation of prior poll site designations. In sum, the action required by the court below is the designation of a poll site on the campus and that can be done in conformity with existing law without closing other sites previously designated.

Affirmed this 5th day of November 2022

_Brian L Quail

Brian Quail

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On August 11, 2023

deponent served the within: **NOTICE OF MOTION TO VACAE STAY PENDING APPEAL**

upon:

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the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on the 11th day of August 2023

MARIANNA BUFFOLINO
Notary Public State of New York
No. 01BU6285846
Qualified in Nassau County
Commission Expires July 15, 2025

Job# 323178