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

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)

REPLY BRIEF FOR RESPONDENTS-APPELLANTS

PERILLO HILL LLP
Lisa A. Perillo, Esq.
Timothy F. Hill, Esq.
Attorneys for Respondents-Appellants
285 West Main Street,
Suite 203
Sayville, New York 11782
(631) 582-9422
lperillo@perillohill.com
thill@perillohill.com

Date Completed: November 6, 2023

COUNSEL PRESS (800) 4-APPEAL • (325316)

– and –

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

Respondents,

– and –

TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, and MARIANNE VIOLANTE,

Intervenors-Respondents-Appellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

PRELIMINARY STATEMENT

Petitioners contend that the constitutional redistricting process ends with the Legislature either approving or rejecting the IRC proposal, and that, if it is the latter, with the Legislature executing the redistricting itself. But, while that describes how redistricting may be completed under the constitution, it of course ignores that the constitution, by the very same 2014 Amendments (the "Amendments") that Petitioners rely upon, also expressly provides that a court may order a redistricting plan. When such a judicial remedy is invoked under authority granted to courts under the first sentence of Section 4(e), which serves as a constitutional backstop for the redistricting process, such a court-ordered redistricting plan likewise becomes subject to the durational term provided for in the second sentence of §4(e)—i.e., until after the next census.

That form of *constitutional* redistricting, i.e., one culminating in a court-ordered redistricting plan, is what took place with respect to the congressional and senate districts for reasons well known to this Court. Petitioners would have it that this Court's careful and considered decision in *Harkenrider* was some form of a judicial ad lib, where the Court went off-script from the constitution, merely to perform a temporary triage on New York's district maps for the purposes of the 2022 elections. But this characterization is completely inaccurate. *Harkenrider* very plainly holds that *a court-ordered map is a constitutional map*—and, more

specifically, that the prescribed and thereafter executed method of creating the congressional map therein was and is constitutional. Accordingly, the current congressional district map, pursuant to the second sentence of §4(e), whose exception does not apply, shall remain in effect for the balance of this decennial census cycle.

The judiciary performed its constitutional role in *Harkenrider,* properly intervening (having been called upon in an appropriate and timely commenced action) when the Legislature could not help itself from acting self-interestedly and in direct conflict with the goals of the 2014 Amendments and enacted into law multifold unconstitutional maps. The facile theme that, when it comes to redistricting, courts are bad, and the Legislature is good is not compellingly advanced by the Respondents herein in view of how these branches of government performed, respectively, in the recent cycle. And, regardless of the extent to which the 2020 cycle fell short of realizing the ideals of the 2014 Amendments, the bottom line is that a *constitutional* product emerged. And there is no constitutional path for the IRC to perform the lone act that this mandamus proceeding seeks to compel.

This case, then, is a thinly veiled effort, and at times, there is no veil at all, to return unilateral and unchecked power to redistrict to the Legislature alone, or more accurately the majority delegations thereof (and thus to allow representatives

to choose their voters rather than the appropriate inverse thereof). This is exclusionary and anti-democratic. The People enacted the very Amendments Petitioners feign to vindicate specifically in order to provide a check on such abuse of power by the Legislature. The Amendments aspire to do so by establishing an IRC to initiate the process following a decennial census, to solicit public input, and to make recommendations to the Legislature. But, critically for the matter at bar, the Amendments likewise expressly include another *non*-legislative participant, the judiciary, in the constitutional redistricting process and indeed give it, in certain circumstances, final authority.

The courts' role in the Amendments, while limited and reserved, is crucial. Where properly invoked, the judicial role is a necessary and final protection in service of the Amendments' purposes. Thus, in New York, post-adoption of the 2014 Amendments, the judicial role should be recognized and respected as part of the process (because it explicitly is) and when the State's highest court rules on an issue of substantial public importance, there should be little room for attempting to peel back the precedential force of this Court's detailed decision and holding.

To be sure, resorting to the courts to perform redistricting is not the ideal, but neither is it a *per se* negative marker. Given all of the championing of the IRC's role, a legislatively drawn map that disregards and rejects all of the IRC proposals might also be said to be disfavored as counter to the spirit of the

Amendments—and yet that outcome is also expressly contemplated and authorized by the very same Amendments. *See* Art III, §4(e). What Respondents and the Third Department fail to recognize is that the Amendments expressly incorporate and allow for outcomes, whether in the form of a court-ordered map or a legislative map that rejects the IRC's proposals, that fall short of the apotheosis of a perfect plan. The end-product of the *Harkenrider* litigation was a redistricting plan that was adopted through a process expressly contemplated and authorized by the Amendments. And better than that, it was one that has the benefit of having been reviewed and endorsed by this our State's highest court in advance, before being remanded to the Supreme Court for implementation, which court thereafter performed its constitutional role in ordering a redistricting plan—an order from which no further appeal or request for modification was taken.

Not only is the judicial role in redistricting, and courts' authority to order a plan, expressly conferred by the Amendments, the role is in direct furtherance of the goals of the Amendments. The events of this redistricting cycle are fully illustrative of the court's crucial function in New York redistricting under the Amendments. The Legislature's enacted redistricting plans were widely regarded as egregious partisan gerrymanders. Thus, while one disqualifying feature of those plans was the procedural defect that they were issued before a second IRC proposal had been submitted, the practical reality is that, had the IRC submitted a second

proposal, the same Legislature would have been in position to enact the same aggressively gerrymandered plan. And if that were the case, it would fall to a court to strike such plans and order their lawful replacement. The court in such a case acts pursuant to and in furtherance of the Amendments and their ideals. And, indeed, this Court performed that role in *Harkenrider*.

POINT I

THE CONGRESSIONAL MAP IS NOT INTERIM

The Brady Respondents' opening brief catalogs the metamorphosed evolution of the Petitioners' position as it relates to the issue of the effective duration of the remedy ordered in Harkenrider, culminating in their outright declaration that the Harkenrider maps were merely interim for use in the 2022 election only—a position that went from having not been plead factually or asserted legally in their pleadings at all, to Petitioners' agnostic mention in an intervention motion that it was "not clear" whether the duration was for the remainder of the decade, and ultimately to Petitioners' argument that, as a matter of certain fact, the *Harkenrider* map was interim.[1] Respondents do not dispute this sequence of remarkably changed positions. However, in their present briefs, Respondents notably offer yet *another*

[1] At oral argument before the Third Department, counsel for the Petitioners offered that the "Court in *Harkenrider* drew a map under emergency circumstances for the 2022 election only," and that "all the indicia that we have from the lower court indicates that that map was put in place under emergency circumstances for the 2022 election to ensure that New York weren't voting under malapportioned districts." Argument at 2:40.

altered take—now suggesting that it does not matter if this Court imposed an interim remedy or not since, they argue, §4(e) allows a court to modify the current congressional map (and its default decade-long duration) pursuant to a court order calling for such modification. Pet Br. 18. This argument concerning §4(e) is erroneous. However, it is important not to speed past this notable pivot by Petitioners. For it was the very position that Respondents now by tacit half-measure attempt to back away from—that the Harkenrider remedy was intended to be and in fact was an interim plan for use in 2022 only—that single-handedly carried the day for Petitioners before the Appellate Division.

Petitioners succeeded in persuading the Third Department's majority that this Court's decision and the plan adopted by the Stueben Supreme Court was in fact solely to be applied to the 2022 election. *See Hoffmann.*, 217 A.D.3d at 53 (finding that Petitioners' arguments that "the court-ordered congressional map adopted in *Harkenrider* was merely an interim map for the purpose of the 2022 elections . . . are compelling.").

Of course, having made and prevailed upon this argument, Petitioners, seeking an affirmance of the Appellate Division opinion that adopted this conclusion as the lynchpin to its holding, should now be in the position of being prepared to tell this Court—which of course authored *Harkenrider*—that it said something that it did not say and issued a remedy that it did not issue. Tellingly, however, there is

exceedingly little defense by either Respondents of their prior position or of the Appellate Division's key finding regarding the so-called interim duration of the remedy authorized by this Court in *Harkenrider*, so much so that this prior argument, despite its prior primacy, now approaches the point that it should be deemed abandoned.

In its place, as noted, Respondents now retreat to the argument that the actual duration does not matter because a court may order a modification of an existing map at any time, citing §4(e). This itself is a concession that without aid of the argument that the *Harkenrider* remedy was interim and that the congressional districts thereby automatically expired on midnight following Election Day 2022, the court-ordered plan remains in effect pursuant to the default provision of the second sentence of §4(e). Respondents' fall-back argument that such default decade-long duration can be interrupted at any time by a court order calling for changes to a redistricting plan has no application to the matter at bar. Such application is fully foreclosed by the plain language of the constitution as cross-referenced by the face of the operative pleading herein—that is, while §4(e) (or §5-b for the matter) contemplate a circumstance wherein a court may order amendments to or modifications of an existing, adopted redistricting plan, this requires in the first instance an action that seeks such an order. This mandamus proceeding is not such an action. The Supreme Court, Albany County, obtained no more jurisdiction over

the IRC, let alone of the New York State Redistricting process, than was sought by the narrow writ in the Amended Petition. No part of that pleading falls within the ambit of the portion of §4(e) upon which Petitioners rely—i.e., it is not an action seeking a court order modifying "a reapportionment plan" or "the districts contained in such plan."

Petitioners' argument relies upon the exception to the default rule set forth in the second sentence of §4(e)—namely, the clause that provides that "a reapportionment plan" or "the districts contained in such plan" runs for the default decennial duration "unless modified pursuant to court order." See id. But this mandamus proceeding against only the IRC simply does not seek such an order. This special proceeding does not seek modification of the existing congressional districts. If all the relief sought and capable of being awarded by this mandamus proceeding were granted, the result would be the IRC making a second proposal to the Legislature. Aside from the myriad temporal impossibilities inherent in such a directive to compel said act, the critical point here is that such does not and cannot effectuate a "modification" of any kind of the existing congressional districts.[2]

[2] It is no minor wrinkle of the Amendments that they do not afford the IRC the power to actually perform redistricting and redraw lines; the IRC merely serves in an advisory role and makes recommendations. Indeed, recommendations that the Legislature is free, ultimately, to reject and ignore. To the extent that Respondents suggest some argument in the nature of the notion that the IRC proposal that is the lone subject of this mandamus proceeding is near enough to, or a partial step in the continuum of, the actual reapportionment and redrawing of congressional districts as the Legislature's authority to do so, that argument is a bridge, or a fudge, too far. If the IRC had final redistricting authority, New York would be in a different universe altogether as

Indeed, Respondents offer no meaningful response to this fully dispositive issue that is conclusively established a priori by what objectively is and simply *is not* contained with the four corners of the Amended Petition.

Because Petitioners did not bring a proceeding that in form or substance sought the relief authorized under §4(e), Petitioners have not placed before the court in this limited proceeding anything that could disturb the application of the default duration of the adopted and now existing congressional map under the second sentence of §4(e) (i.e., they "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").

Here, the Amended Petition in this single issue special proceeding, an Article 78 mandamus to compel, solely seeks to compel the IRC to undertake a specific act. It is not a challenge to the present congressional districts and includes no prayer for relief to invalidate the present districts or to modify or change the present districts. Second, there is nothing in the constitution that suggests seriatim judicial review—particularly, as here, where the prior court action provided a remedy for the very same violation or defect that is the subject of the subsequent proceeding.[3]

---

far as redistricting is concerned (indeed, constitutional amendments to accomplish this have been proposed and rejected). Accordingly, this significant distinction must be honored, and a limited special proceeding to compel a discrete act by the IRC cannot be characterized as one that orders the modification of a districts, a power the Amendments reserve to the Legislature (or the courts), which Legislature is not a party to this proceeding or subject of its mandamus relief.

[3] This does not mean that a court-ordered plan is blanketly immune from further judicial review. Just as a legislatively enacted plan could be challenged on its redistricting merits, so too could a

POINT II

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

This Court has already construed the plain meaning of Section 4(e) and of what the People approved when enacting the Amendments for purposes that are fully controlling herein. Rejecting the contention that a court-ordered map would be disfavored by the people, the majority held that "a court-ordered redistricting map ... is, in fact, exactly what the people have approved in the State Constitution as a remedy by declaring that the IRC 'process . . . shall govern . . . 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'" *Matter of Harkenrider v. Hochul*, 38 N.Y.3d 494, 523, n20 (2022), citing NY Const, art III, § 4 [e]).

This Court's express rejection of the exact argument that Petitioners duplicate here is notably without reference to or concern over any timing issues or election calendar exigencies. Rather, plain and simple, this Court held that a court-ordered plan is authorized by the constitution. This was not a makeshift rule of

---

judicial map alleged to be suffering from substantive infirmities be challenged and perhaps invalidated. But that simply is not the case these Petitioners have brought.

necessity made by this Court; it was simply an application of the constitution's plain language.

Section 4(e) provides:

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

The two sentences that comprise the totality of Article III, §4(e) each offer a general rule and then its respective exception. This is a formulation familiar to legal practitioners and elementary logicians. The first sentence, by its opening clause, provides that the procedures set forth in Sections 4, 5, and 5-b shall govern redistricting; that is, the general rule is that those procedures are the general rule and apply in all instance with the exception of that carved about by the following clause; the exception to the rule. The exception clause of the first sentence provides that the only time when such procedures will not apply is when a "a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." Thus, when a court issues such an order, i.e., a court-ordered redistricting plan, it is, by definition, not subject to or controlled by—and

need not employ—the ordinarily required procedures of Sections 4, 5, and 5-b (including the provisions of §4(b) requiring the IRC to submit a second recommendation following the Legislature's rejection of the first).

Accordingly, Respondents' frequent rejoinder and citation to §4(e), that these procedures "shall govern," notably often truncating and omitting the exception clause, are of no moment. When this Court decided *Harkenrider*, it was under and pursuant to the express authority conferred by the exception clause in the first sentence of §4(e). Accordingly, the lament that the *Harkenrider* remedy, which in any case is not the subject of any challenge brought by this proceeding, represented a court-ordered plan and did not involve the IRC fails to recognize that a §4(e) court order is not required, and indeed is not expected, to apply or mimic the procedures in the general rule. *Harkenrider* was a §4(e) case and provided a §4(e) remedy. That the remedy does not duplicate or "leaves unremedied" a procural requirement of the general rules, such as the IRC's mandatory obligations under §4(b), is perfectly consistent with and indeed authorized by the constitution since the plain language of the exception clause of the first sentence declares the a judicial remedy need not adhere to the requirements of §4(b). This is self-evident from the plain language of §4(e). And, this non-controversial construction sits at the center of this Court's fully controlling and very recent precedent in *Harkenrider*.

The second sentence of §4(e) also provides a general rule and its exception—the default rule being that an adopted redistricting plan remains "in force until the effective date of a plan based upon the subsequent federal decennial census," and the narrow exception to this duration default being when a court orders a modification of an existing adopted plan. Here, Respondents cannot argue that the instant proceeding asked or authorized the Albany Supreme Court where it was commenced (or the appeals courts thereafter) to modify the existing congressional districts established by *Harkenrider's* §4(e) remedy and which enjoy the default durational term of applying until the next decennial census. Simple reference to the face of the Amended Petition confirms that this proceeding does not seek and cannot result in an order modifying the congressional districts now if effect. Accordingly, the general rule of the second sentence of §4(e) applies such that the existing congressional districts shall remain in effect until a plan based on the subsequent decennial census. It is theoretically possible that a court could order the modification of the existing districts pursuant to the exception clause of the second sentence of §4(e), but this mandamus proceeding is not a case that seeks or presents that opportunity. This is true because, in the most basic sense, the pleading simply does not ask for such relief. Such relief is also foreclosed because the proceeding does not seek to invalidate or present any challenge to the substance

of the existing maps.[4] Here again, counsel for Petitioners confirmed at the Appellate Division that Petitioners were not challenging the *Harkenrider* plan.

The Jenkins Respondents' lead point offers that there is a preference for legislative maps over court-ordered ones. Petitioners likewise offer that decades of jurisprudence favor legislative redistricting over judicial. But that "preference" and the pre-Amendment cases that express such preference are, for reasons that ought to be glaringly obvious to the Respondents, fully outdated and are effectively abrogated by the Amendments. The animating force behind the 2014 Amendments was a desire by the People to eradicate or at least limit the Legislature's historical practice of redistricting in a self-interested manner rather than for the benefit of a vibrant democracy and an empowered electorate. And lest there be any question as to whether the perceived evil that the Amendments sought to address remains a real and present threat to democratic ideals in New York, one need only look to the veritable millisecond it to the Legislature, at the close of January 2022, and thereafter by the Governor, to enact into law a map of congressional districts that was, to a nearly unanimous chorus of observers from all stripes, objectively an egregious partisan gerrymander. This map had no origin in the IRC process, did not involve any public input, nor even any participation by the minority

[4] Here again, counsel for Petitioners confirmed at the Appellate Division that Petitioners were not challenging the *Harkenrider* plan. At 48:24.

delegations of elected representatives. And yet this non-IRC, gerrymandered product would have been entirely acceptable and indeed was strenuously advocated for by those that now align with the Petitioners herein.

The 2014 Amendments reflect that the People determined that the Legislature were no longer deserving of unilateral redistricting powers or the presumption as the preferred body to control the process. The Amendments did this by, inter alia, establishing the IRC's role in the formative parts of the redistricting process, but also by expressly reserving and codifying at the level of a constitutional conferral of power, the authority of the judiciary to remedy violations and adopt court-ordered plans.

The Jenkins Respondents suggest in conclusory fashion that the Petitioners' mandamus proceeding, and the mandamus order issued by the Third Department, are authorized by §4(e). It is appreciated that the Jenkins Respondents attempt to respond to Appellants' arguments in this regard, since this simple and fully dispositive issue has largely been dodged in all prior briefings on the Petitioners' side. The argument, however, utterly fails and is foreclosed by the plain language of §4(e).

The Jenkins Respondents state that Petitioners have requested a court order under Section 4(e) to adopt or change a redistricting plan as a remedy. This is demonstrably false. The Amended Petition seeks no such thing. And, this is not

merely a defect for failing to employ certain words—a mandamus proceeding could never seek such an order. This simple point is fully dispositive. Petitioners make the audacious assertion that this proceeding seeks something that is plainly not requested in the pleading—because they know they need this case to be something other than what it is so as to avoid the clearly applicable import of §4(e)'s second sentence confirming the decade-long duration of the existing congressional districts.

Similarly, and as proof of the former, the Third Department's terse directive, wherein it compels the IRC "to commence its duties," and which Petitioners indicate fully awarded them all the relief they sought by the proceeding, quite obviously and objectively does not "order the adoption of, or changes to, a redistricting plan" (to evade the application of the exception in the first sentence of §4(e), nor represent an order for the modification of the existing plan and districts (to invoke the exception of the second sentence of §4(e). The result of holding the scope of this limited mandamus proceeding up to the two rules and respective exceptions set forth in §4(e) is this—a) Petitioners cannot insist in this action on the strict enforcement of the general requirements of §4(b) because the proceeding does not seek an order to adopt or amend a redistricting plan[5], and because

[5] Indeed, in a self-contradictory posture, Petitioners, who in the first instance otherwise insist on adherence with the general rules (that the IRC must do what it says in §4(b) without exception),

Harkenrider was such a case and delivered a remedy not subject to those requirements, and b) the current congressional maps shall remain in effect for the decade because the proceeding does not seek a modification of the existing districts, nor even take as its subject these existing districts.

The Third Department's reasoning does not bring this mandamus proceeding within the ambit of §4(e) by making referencing Petitioners purported objective "to vindicate the purpose of the amendments." Because the Amendments provide for a judicial remedy that will be, by definition, distinct from and other than the requirements of the general rules, a remedy that comports with the first sentence of §4(e), inclusive of its exception, cannot be said to be in conflict with the Amendments. There cannot be a "spirit of the law" argument when the letter of the law is so clearly to the contrary.

A court-ordered redistricting map *is a constitutional map.*

Petitioners effectively ask this Court to accept that which it has already expressly rejected and ruled against. Petitioners rail against the fact that the current map is a court-ordered map, and that a court-ordered map is counter to the spirit of the Amendments. But this Court squarely rejected that argument in its footnote 20 in *Harkenrider*. It is abundantly clear that this Court appreciated the

---

but then themselves invoke the very same exception clause to say that it permits the deadlines in those same §4 general rules to be ignored.

important issue before it—whether a judicial map was a proper remedy—and that the significance of the decision they were making on that issue as it bore on what would determine the districts for the balance of the decade. If a remedial map were to be temporary or interim, this enormously consequential caveat and qualifier would have been made abundantly clear.

The Third Department characterized this Court's approval and endorsement of a court-ordered redistricting plan in *Harkenrider* as a "diverting" from "the constitutional redistricting process." But this suggests that the Third Department was operating under a misguided premise, as this could not be more counter-indicated by the plain language of the constitution or the holding of *Harkenrider*. Here again, this Court explicitly instructed that a "court-ordered redistricting plan" is "exactly" what the constitution provides for. This court did not temporarily step outside the bounds of the constitution to fashion a rule of necessity to address a emergency. Its decision was rooted in express constitutional authority. The judicial remedy of a court-ordered map is not a diversion from the constitutional process, it is an express part of the constitutional process.

Respondents continue the pattern of taking jabs at the Harkenrider remedy, both the process and the product. At some point, given the disclaimers and acknowledgments that this proceeding does not actually challenge the existing plan, and that the precise remedial measures employed to produce the existing plan

was explicitly endorsed by this Court as constitutional, the recurring critiques become offensive to the judicial process.

These ongoing critiques should be rejected and disregarded because a) they ignore and seek a contrary result from what this Court soundly held just a year ago, b) because any substantive critique of either how the court-ordered map came to be, or of the redistricting merits of the map that resulted, could have been challenged in Harkenrider itself or in an appeal therefrom, or in an appropriate and timely judicial action that had such substantive challenge to the court-drawn map as its subject.

Respondents' contention that *Harkenrider* remedy was a truncated process without public input. But this is both inaccurate and immaterial. It is immaterial because §4(e) provides that a court ordered plan will not be governed by the provisions that involve such input. It is inaccurate because public input was solicited and received, and because all of the IRC work product was available to the special master. This contention is, in addition, disingenuous, since these are the largely the same stakeholders that wanted the Legislature's enacted and invalidate plan—which involved no IRC input and no public input to become the law of the land.

Petitioners complain that the court-ordered map drawn by the special master lacked meaningful public input or participation. But, here again, this (incorrect)

argument has no place in this mandamus proceeding. The argument that the court-ordered map, or one prepared by a special master, is unconstitutional because it does not mimic the IRC requirements or processes is erroneous. The constitution expressly sets forth that a court-ordered plan is *not* governed by such requirements. *See* Section 4(e). Moreover, this Court recognized that there is no single prescribed method by which a court might order a redistricting plan to be formulated. This argument ignores this Court's holding that specifically endorsed as constitutional the court-ordered plan ultimately effectuated by the Steuben Supreme Court. It is not clear how Petitioners continue to resist what this Court already resolved in *Harkenrider*. Furthermore, the merits of the congressional districts in the *Harkenrider* map, substantively or procedurally, have not been placed before the court in this limited mandamus proceeding against the IRC. The Amended Petition did not seek to invalidate the *Harkenrider* congressional map, or to authorize the Legislature, not a party herein, to accept or do anything with any such proposal that the IRC might now make, or to modify the existing congressional map, or to define the duration of the remedy ordered in *Harkenrider*.

Nichols is distinguishable. *Nichols* expressly notes that this Court already instructed that there is not a single, or any, prescribed form of judicial remedy in the constitution. The Steuben Supreme Court, specifically addressing the congressional and senate maps, chose one method—which notably this Court fully

endorsed and upheld as constitutional in advance of its implementation—and the New York County Supreme Court, addressing the assembly map, chose another. That variance is acceptable under the foregoing recognition of the lack of a single prescribed form of remedy.

POINT III

THIS ARTICLE 78 MANDAMUS PROCEEDING IS TIME BARRED

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

An Article 78 "proceeding seeking mandamus to compel accrues even in absence of a final determination. Hence, the statute of limitations for such a proceeding runs not from the final determination but from the date upon which the agency refuses to act." *193 Realty LLC v. Rhea*, 2012 N.Y. Slip Op. 51865(U), ¶

6, 37 Misc. 3d 1203(A), 1203A, 964 N.Y.S.2d 61 (Sup. Ct., N.Y. Co. 2012) (*citing Ruskin Assocs., LLC v. State of N.Y. Div. of Hous. & Community Renewal*, 77 A.D.3d 401, 403, 908 N.Y.S.2d 392 [1st Dep't 2010]).

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

The determination became final and binding upon the expiration of the statutory deadline. *Matter of Bard Coll. V. Dutchess Co. Bd. of Elections*, 198 AD3d 1014, 1017 (2d Dep't 2021). The four-month period of limitations governing mandamus *to review* starts to run when the determination becomes final and binding. *Armstrong v. Centerville Fire Co.*, 83 N.Y.2d 937, 939

(1994). However, the date a determination becomes "final and binding" is *not* the applicable accrual date for a mandamus *to compel.* See *Armstrong v. Centerville Fire Co.*, 195 A.D.2d 723, 724 (3d Dep't 1993) ("If, as petitioner contends, he was wrongfully removed from respondent in that he was not provided with a hearing to which he was entitled, then this proceeding is in the nature of mandamus to compel and the Statute of Limitations begins to run from the date a demand for reinstatement was refused) citing *Matter of De Milio v Borghard,* 55 NY2d 216, 220.

Even if an alternative accrual theory was applied, the action is still time-bared. Applying *Bard College* here, the statutory deadline, i.e., the constitutional deadline, expired on January 25, 2022. And thus the four-month statute accrued and began to run on that date, January 25, 2022, and expired on May 25, 2022. This proceeding, commenced in late June is therefore undoubtedly time-barred. The constitutional deadline for the IRC to provide a second recommendation is not February 28, 2022. The additional clause "and in any case not later that February 28" is not an extension or relaxation of the strict 15-day deadline. The February 28 outer date exists to potentially *shorten* the 15-day period in the event that there are fewer than 15 days remaining before February 28 when the Leg issues its rejection of the first recommendation. That is, if the Legislature did not return its rejection of the first plan until sometime after

February 13, say for example Feb 20, the IRC would not have 15 days to submit a second plan but rather would have to do so no later than February 28. This is the only meaning of the "no later than February 28" clause. Any construction, that would regard February 28 as the actual deadline in the ordinary course and for all purposes render completely superfluous the 15-day deadline. Under canons of construction, such a construction cannot be accepted. And, indeed, in the specific circumstance of the 2020 decennial cycle, where the Legislature rejected on January 10, the one and only deadline became January 25, 15 days therefrom—and the contingency for a late rejection from the Legislature is not invoked or applicable. Accordingly, this proceeding is time-barred.

Dated: November 6, 2023
Sayville, New York

Respectfully submitted,
PERILLO HILL LLP

Timothy Hill

Timothy Hill
Lisa A. Perillo

285 West Main Street, Suite 203
Sayville, NY 11782
Ph: 631-582-9422

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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

Type. A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman
Point size: 14
Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, regulations, etc., is 6,003 words.

Dated: Sayville, New York
November 6, 2023