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September 1, 2022

VIA E-Filing and E-Mail (Drudolf@nycourts.gov)
The Honorable Laurence L. Love
Justice of the Supreme Court, New York County
80 Centre Street, Room 122
New York, NY 10013

Re: *Nichols v. Hochul*, Index No. 154213/2022

Dear Justice Love:

We write to inform the Court of a submission in a related matter by a current majority of the Commissioners of the Independent Redistricting Commission (IRC). In *Hoffman v. N.Y. State Independent Redistricting Commission*, five Commissioners have taken the *same* position advanced by Petitioners here on the issue of the proper remedy for an invalidated district map; namely, that it is unconstitutional for the IRC to reconvene and submit a new map to the Legislature.[1] The Commissioners' submission is attached hereto as Exhibit A.

In *Hoffman*, ten New York voters filed a verified petition against the IRC seeking a mandamus order requiring the IRC to reconvene and submit a new Congressional map to the Legislature. *See* Amended Verified Petition for Writ of Mandamus, No. 904972-22 (Sup. Ct. Albany Cnty. Aug. 4, 2022) (NYSCEF No. 47). The action is still pending. The petition's requested remedy is the same that Respondents seek here with respect to the invalidated Assembly map.

A majority of the IRC has since moved to dismiss the petition, arguing that the requested remedy would be unconstitutional.[2] Just as Petitioners have argued here, the five IRC Commissioners argue that both Article III's plain text and the Court of Appeals' decision in *Harkenrider* foreclose the requested remedy. That is because, as the Commissioners likewise explain, a court-ordered map is the exclusive remedy provided for in Article III, and, further, Article III contains an immovable deadline of February 28, 2022, for the IRC to submit maps to the Legislature:

> The last date that the IRC could have possibly and lawfully submitted a second set of maps to the legislature was, under the explicit language of the Constitution,

[1] The five Commissioners are: Ross Brady, John Conway III, Lisa Harris, Charles Nesbitt, and Willis H. Stephens.

[2] Three members of the IRC did not join the motion to dismiss; rather, they submitted a verified answer indicating that they "do not oppose the relief identified in the first paragraph of Petitioners' prayer for relief as set forth in the Amended Petition." Verified Answer of Respondents David Imamura, Ivelisse Cuevas-Molina, & Elaine Frazier at 14, *Hoffman* (Aug. 26, 2022) (NYSCEF No. 105).

> February 28, 2022 (six months ago). This deadline, as the Court of Appeals emphatically noted, "has long since passed." *Harkenrider*, at *12. There is no provision in the Constitution that would allow for a post-hoc reconvening of the IRC for the purpose of doing that which could only have been constitutionally performed on or before February 28, 2022. . . .
>
> A court-ordered redistricting plan . . . is not only contemplated by the Constitution, it is the exclusive remedial action authorized by the Constitution for procedural or substantive violations in the redistricting process, such as, as here, the IRC's non-compliance with the mandate to timely submit a second set of plans upon the Legislature's rejection of its first set, or the Legislature's unauthorized and unilateral usurpation of the redistricting authority, or both.
>
> It should be noted that the arguments suggested by the instant Petition have already been thoroughly foreclosed not only by the plain language of the Constitution, but by no lesser authority than the Court of Appeals just a few months ago. . . .
>
> Referring in part to the plain directive in the Constitution for a court to order a reapportion plan as a remedy, the Court of Appeals explained that "this is not a scenario where the Constitution fails to provide specific guidance or is silent on the issue." *Harkenrider*, at *8 (internal citations and quotations omitted). The Court thus observed that: "[i]t is no surprise, then, that the Constitution dictates that the IRC-based process for redistricting established therein '*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.'" *Id.* (citing art III, §4(e) (emphasis added by the Court). . . .
>
> In other words, there is no going back to address a prior error through a process not permitted or provided by the Constitution, let alone where the exclusive constitutional process for correcting any such error has already taken place. Moreover, as the Court of Appeals recognized, "[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." *Harkenrider*, at *12.

See Ex. A, at 10–16.

The IRC majority's argument—identical to Petitioners'—underscores Petitioners' position that the appropriate remedy here is for the Court to oversee proceedings with a special master to adopt a

new Assembly map. A court-ordered map is the only avenue allowed by the plain text of Article III and the Court of Appeals' decision in *Harkenrider*.

Respectfully submitted,

Jim Walden

Jim Walden
Peter A. Devlin

Attorneys for Petitioners Paul Nichols and Gary Greenberg

cc: All Counsel (via e-filing and e-mail)

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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,

Index No.: 904972-22

Petitioners,

For an Order and Judgement 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 David Imamura; 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.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO ORDER TO SHOW CAUSE

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Attorneys for Respondents
Commissioner – Ross Brady
Commissioner – John Conway III
Commissioner – Lisa Harris
Commissioner – Charles Nesbitt
Commissioner – Willis H. Stephens

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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, Independent Redistricting Commissioner Willis H. Stephens, (collectively hereinafter the "Moving Respondents"), by their attorneys, Messina Perillo Hill LLP, hereby respectfully submit the within Memorandum of Law in Support of their Motion to Dismiss, brought pursuant to CPLR 3211(a)(1), (5), (7) and CPLR 7804(f), the Amended Petition and Proceeding as against said Moving Respondents, together with such other and further relief as the Court deems just and proper. The Memorandum of Law is also submitted in opposition to the Petitioners' Order to Show Cause.

PRELIMINARY STATEMENT

This Article 78 proceeding in the nature of a mandamus to compel has no valid basis in law. The sole relief it seeks is to compel the New York State Independent Redistricting Commission (the "IRC") to act without legal authority and in violation of the New York State Constitution. Specifically, the Petition imagines that it is legally permissible and logistically possible for the IRC and its members to advance a second set of proposed maps to the Legislature (sometime, at the earliest, after September 9, 2022, the return date of this Petition) despite the fact that the Constitution requires and only permits such act to take place on or before February 28, 2022—a date that passed some six months ago. There is simply no legal authority for this request, and, in fact, the remedy sought is wholly unconstitutional. Not only does the Petition seek to compel this plainly unconstitutional and impossible outcome, it does so brazenly after the Court of Appeals gave extensive treatment to the constitutional provisions at issue and thoroughly foreclosed the arguments suggested by this Petition.

The plain language of the Constitution provides that a court may order a redistricting plan in order to remedy a violation of law. NY Const. Art. III, §4(e). Such judicial intervention was required after a) the IRC was found to have not submitted a second set of maps as required by the Constitution and b) the Legislature unilaterally and without legal or constitutional authority seized control of the redistricting process and proceeded to enact into law a redistricting plan that was an egregious partisan gerrymander. The Petition only concerns itself with the first of these violations and largely glosses over the second. More importantly, the Petition fails to reckon with the fact that the Constitution sets forth a procedure for remedying such violations—and that is through judicial intervention and a court-ordered redistricting plan. And that remedy has already been undertaken and completed. Petitioners appear to disapprove of the existence of a judicial remedy, and perhaps even more so, to be displeased with certain of the results of the court-ordered redistricting plan (the Petition concerns only the congressional districts)—but this mandamus proceeding is hardly the venue for seeking an amendment to the Constitution or a different outcome to the redistricting process. The Petition should be denied and the proceeding should be dismissed.

BACKGROUND

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

In 2014, the New York State Constitution was amended with the passage of a set amendments addressed at eliminating partisan gerrymandering in the redistricting of election

districts. See N.Y. Const., Art. III, § 4(c)(5). Prior to said amendments, the State Legislature had exclusive control over the redistricting process. See Harkenrider v. Hochul, 2022 N.Y. Slip Op., 02833, 2022 WL 1236822, *1 (2022) ("In New York, prior to 2012, the process of drawing district lines was entirely within the purview of the legislature,[] subject to state and federal constitutional restraint and federal voting laws, as well as judicial review."). This control by the Legislature resulted in stalemates "often necessitating federal court involvement in the development of New York's congressional maps." Id. It also resulted in "allegations of partisan gerrymandering…." Id. The 2014 amendments changed "both the substantive standards governing the determination of district lines and the redistricting process" itself. Id., at *2

Pursuant to the 2014 amendments, the New York State Independent Redistricting Commission (the "IRC") was established to determine the district lines. See N.Y. Const., Art. III, §§ 4 & 5-b. The IRC is a bi-partisan commission, which consists of ten members appointed by the majority and minority leaders of the State Legislature, meeting the criteria set forth in the State Constitution. See id., at § 5-b(a)-(c). The IRC is obliged to undertake the initial drawing of a set of proposed redistricting maps within a constitutionally mandated timeline. Id. The proposed maps are then to be submitted to the Legislature for a vote, without amendment. Id. Should these initial maps be rejected, the IRC is to prepare a second set of maps, (once again within a constitutionally mandated timeline) for the Legislature to vote on, again without amendment. See N.Y. Const., Art. III, § 4. If this second set of maps is rejected, only then can the Legislature make amendments to the IRC's proposed maps. Id. If necessary, failures in the redistricting process are subject to redress through judicial intervention and a court-ordered process of preparing redistricting maps and plan. Id.

As a result of population change, New York State lost a congressional seat and other existing districts were "malapportioned" necessitating a redistricting. Harkenrider, 2022 WL 1236822, *2. As such, starting with the next redistricting cycle after the passage of the amendments (the 2020 cycle) the IRC was formed. The various commissioners were appointed, and the IRC commenced its work, holding the numerous (not less than 12) required public hearings through 2021. See N.Y. Const., Art. III, § 4 ("The independent redistricting commission shall conduct not less than one public hearing on proposals for the redistricting of congressional and state legislative districts in each of the following (i) cities: Albany, Buffalo, Syracuse, Rochester, and White Plains; and (ii) counties: Bronx, Kings, New York, Queens, Richmond, Nassau, and Suffolk.").

In December 2021 and January 2022, after the public hearings concluded, the IRC met and ultimately was unable to agree on a set of proposed maps. "According to members appointed by the minority party, after agreement had been reached on many of the district lines, the majority party delegation of the IRC declined to continue negotiations on a consensus map, insisting they would proceed with discussions only if further negotiations were based on their preferred redistricting maps." Harkenrider, 2022 WL 1236822, *2. The IRC was to submit the proposed redistricting plan (and the accompanying implementing legislation) on or before January 1, 2022, or as soon as practicable thereafter, but no later than January 15, 2022. See, N.Y. Const. Art. III, § 4(b).

Given its impasse, in early January 2022, the IRC submitted two sets of proposed redistricting plans to the Legislature (a set from each delegation) as per the Constitution. See id., and N.Y. Const., Art. III, § 5-b(g). These maps were rejected by the Legislature. Upon being notified of the rejection, the IRC was charged with preparing a second set of proposed plans for

legislative review within 15 days (specifically, on or before January 25). See, N.Y. Const. Art. III, § 4(b) ("If either house shall fail to approve the legislation implementing the first redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto, each house or the governor if he or she vetoes it, shall notify the commission that such legislation has been disapproved. Within fifteen days of such notification and in no case later than *February twenty-eighth,* the redistricting commission shall prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan.")(Emphasis added).

On January 24, 2022, the day before the 15-day deadline expired, and over a month before the IRC's February 28, 2022,deadline to complete the redistricting process, "the IRC announced that it was deadlocked and, as a result, would not present a second plan to the legislature." Harkenrider, 2022 WL 1236822, *2.

Within a week of the IRC's January 24, 2022 announcement, the Democratic controlled Legislature, without "consultation or participation by the minority Republican Party" prepared and enacted new redistricting maps. Id. On February 3, 2022, the New York State Governor signed this new redistricting legislation into law.

On the same day, February 3, 2022, various New York State voters commenced a proceeding under New York State Constitution Article III, § 5 and Unconsolidated Laws § 4221, Harkenrider v. Hochul, No. E2022-0116CV, in Steuben County,[1] alleging that the "process by which the 2022 maps were enacted was constitutionally defective because the IRC failed to submit a second redistricting plan as required….and, as such, the legislature lacked authority to compose and enact its own plan." Harkenrider, 2022 WL 1236822, *3. That proceeding also alleged that the congressional map was unconstitutionally gerrymandered because it "'packed' minority-party

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

voters into a select few districts and 'cracked' other pockets of those voters across multiple districts." Id.

After trial, "the Supreme Court declared the congressional, state senate and state assembly maps 'void' under the State Constitution" and that the congressional map "violated the constitutional prohibition on gerrymandering…." Id. An appeal followed, and a divided Appellate Division vacated the declaration that the senate and assembly maps were unconstitutional but otherwise affirmed and remitted. Id., at * 4. The parties thereafter cross appealed as of right to the Court of Appeals, resulting in a decision ultimately remitting the matter to the Supreme Court who, with the assistance of the special master, was directed to "adopt constitutional maps with all due haste." Id., at *13.

In Harkenrider, the Court of Appeals found that where a redistricting plan is void and unconstitutional, as was the case here, the State Constitution authorizes the judiciary to step in and "order the adoption of, or changes, to a redistricting plan." Id., at *12; and N.Y. Const., Art. III, § 4(e)("The process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article shall govern redistricting in this state except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law."). Specifically, the Court of Appeals held -- not that the IRC should propose new maps -- but that, "[w]here as here, legislative maps have been determined unenforceable, we are left in the same predicament as if no maps had been enacted. Prompt judicial intervention is both necessary and appropriate to guarantee the People's right to a free and fair election." Harkenrider, 2022 WL 1236822, *12.

At paragraph 14 of the Amended Petition, Petitioners misleadingly imply that the Court of Appeals determined that the only 2022 elections will occur under the court-ordered plan and

proceed to suggest, without any legal authority or basis whatsoever, that subsequent elections should occur under plans adopted through the IRC and the Legislature. As Petitioners well know, however, the Court of Appeals directed a course of action, in adherence with §4(e) of the Constitution, that required a court-order adoption of a redistricting plan to apply through the next decennial cycle.

The Petitioners herein did not seek to intervene in Harkenrider proceeding at any time. Petitioners did not commence this proceeding until June 28, 2022.

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

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

ARGUMENT

STANDARD OF REVIEW

In evaluating a motion to dismiss, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. See Goshen v. Mutual Life Ins. Co. of NY, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 (2002). However, bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference. See Ruffino v. New York City Tr. Auth., 55 A.D.3d 817, 818, 865 N.Y.S.2d 667, 668-69 (2d Dept 2008).

Article 78 motions to dismiss and "objections are appropriately afforded review similar in nature to that applied to defenses raised in a pre-answer motion to dismiss pursuant to CPLR 3211." Lally v. Johnson City Cent. Sch. Dist., 105 A.D.3d 1129, 1131, 962 N.Y.S.2d 508 (3d Dep't 2013). Mandamus to compel is an extraordinary remedy that is available only in limited circumstances. See Hene v. Egan, 206 A.D.3d 734, 735–36, 170 N.Y.S.3d 169, 171 (2d Dep't 2022) (citing County of Fulton v. State of New York, 76 N.Y.2d 675, 678, 564 N.E.2d 643; Klostermann v. Cuomo, 61 N.Y.2d 525, 463 N.E.2d 588). "[T]he remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion."

POINT I

THE PETITION FAILS TO STATE A CLAIM

The Amended Petition ("Petition") fails to state a claim upon which relief may be granted because it seeks to compel an action that is unconstitutional. In the lone prayer for relief, the Petition asks this Court to command the IRC to submit "a second round of proposed congressional districting plans for consideration by the Legislature" for use in "subsequent elections this decade." See Petition at p. 20. We are presently at the end of August 2022. The last date that the IRC could have possibly and lawfully submitted a second set of maps to the legislature was, under the explicit language of the Constitution, February 28, 2022 (six months ago). This deadline, as the Court of Appeals emphatically noted, "has long since passed." Harkenrider, at *12. There is no provision in the Constitution that would allow for a post-hoc reconvening of the IRC for the purpose of doing that which could only have been constitutionally performed on or before February 28, 2022. Thus, despite citing the IRC's non-compliance with a constitutional mandate as the basis for this

proceeding, Petitioners ask for a remedy that would itself violate the very same section of the Constitution.[2]

Petitioners here seek to compel the IRC to comply with a mandate to provide a second set of maps, but they refer only to a portion of the mandate (that the submission be made) while largely ignoring that the mandate required the maps to be submitted by an absolute deadline (no later than February 28, 2022). All of the dates in Article III, §4(b) regarding the submission of plans by the IRC, the section upon which this mandamus action relies, explicitly concern the year "two thousand twenty-two" and following subsequent decennial census in years "ending in two"; i.e., 2022, 2032, 2042 and so forth. Thus, the deadline was and is, immutably, February 28, 2022. The Constitution does not contemplate or permit a "do over" or re-setting of the deadline to some date other than or subsequent to February 28, 2022. This proceeding seeks to have the Court compel a course of action that reverts three phases back in the process that has already played out. There is no legal authority for such recourse in the Constitution (which, as discussed, below expressly sets forth the sole remedy). Here again, because the proceeding seeks to compel an action that is unconstitutional, it fails as a matter of law and must be dismissed.

The relief sought by the Petition fails for the additional but related reason that the Petition ignores that the Constitution expressly provides the singular and exclusive remedy for the very kind of violation that the Petitioners complain of herein. This is not a situation where a novel remedy needs to be fashioned because of an absence of authority. To the contrary, the Constitution

[2]See Council of City of New York v. Bloomberg, 6 N.Y.3d 380, 388 (2006) ("The theory the Council advocates would put the courts in the unacceptable position of directing an officer to violate his or her oath of office by enforcing an unconstitutional law, and would contradict the principle that 'mandamus is never granted for the purpose of compelling the performance of an unlawful act'") citing People ex rel. Sherwood v. State Bd. of Canvassers, 129 N.Y. 360, 370, 29 N.E. 345 [1891).

already addresses what must happen in the event of a violation. Moreover, here, that constitutionally prescribed remedial process has already taken place.

The New York State Constitution, Article III, § 4(e) unambiguously provides as follows:

> 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*.

N.Y. Const. Art III, §4(e) (emphasis added).

A court-ordered redistricting plan, thus, is not only contemplated by the Constitution, it is the exclusive remedial action authorized by the Constitution for procedural or substantive violations in the redistricting process, such as, as here, the IRC's non-compliance with the mandate to timely submit a second set of plans upon the Legislature's rejection of its first set, or the Legislature's unauthorized and unilateral usurpation of the redistricting authority, or both.[3] Here, in the face of such violations, that constitutional process was invoked in the context of Harkenrider and resulted, after review and remand by the Court of Appeals, in a court-ordered redistricting plan.

Implicitly, the Petitioner's sole prayer for relief is also a request to, for all purposes other than the 2022 election cycle, invalidate and replace the lawfully adopted redistricting plan that emerged from the Harkenrider proceeding. Here again, such relief is plainly unconstitutional. If the Constitution intended to provide that if judicial intervention were required to correct a violation of law, any resulting court-ordered redistricting plan would temporarily remain in place only for

[3]"Where, as here, legislative maps have been determined to be unenforceable, we are left in the same predicament as if no maps has been enacted." Harkenrider at *12.

so long as it took to correct the violation through non-judicial means, the Constitution would say as much. It does not.

It should be noted that the arguments suggested by the instant Petition have already been thoroughly foreclosed not only by the plain language of the Constitution, but by no lesser authority than the Court of Appeals just a few months ago. To begin with, the Court recognized that "the Constitution explicitly authorizes judicial oversight of remedial action in the wake of a determination of unconstitutionality" (Harkenrider, at *12) [4] This proceeding impermissibly seeks to replace the constitutionally authorized remedial course of action with an entirely *ultra vires* mechanism of the Petitioners' own invention. The Court of Appeals, however, has explained that it declined to engage or indulge in interpreting the state constitution through "interstitial and interpretive gloss" in a manner that "substantially alters the specific law-making regimen." Harkenrider at *6, quoting Matter of King v. Cuomo, 81 NY2d 247, 253 (1993). It is never appropriate to ask the courts to effectively draft legislation that does not exist, a prohibition that is all the more pronounced when it comes to the Constitution. And, to be sure, to attempt to do so by the incongruous and unavailing mechanism of an Article 78 mandamus provision is misplaced and misguided in the extreme.

Referring in part to the plain directive in the Constitution for a court to order a reapportion plan as a remedy, the Court of Appeals explained that "this is not a scenario where the Constitution fails to provide specific guidance or is silent on the issue" Harkenrider, at *8 (internal citations and quotations omitted). The Court thus observed that: "[i]t is no surprise, then, that the

[4]As the Court of Appeals recognized, New York's past redistricting efforts have often necessitated federal judicial intervention. Harkenrider at*1 (citing Favors v. Cuomo, 2012 WL 928223, at *1 (E.D.N.Y. Mar. 19, 2012); Rodriguez v. Pataki, 2002 WL 1058054 (S.D.N.Y. May 24, 2002); Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt, 796 F.Supp. 681 (E.D.N.Y.1992).

Constitution dictates that the IRC-based process for redistricting established therein '*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.'" Id. (citing art III, §4(e)(emphasis added by the Court). Indeed, the Court emphasized that by providing 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," the Constitution specifically provides for and authorizes a court-ordered redistricting plan as the exclusive remedy for the precise circumstances that exist herein. See Harkenrider, at *12, fn. 20.

In other words, there is no going back to address a prior error through a process not permitted or provided by the Constitution, let alone where the exclusive constitutional process for correcting any such error has already taken place. Moreover, as the Court of Appeals recognized, "[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." Harkenrider, at *12.

"[I]n any event, here, due to the procedural constitutional violations and the expiration of the outer February 28th constitutional deadline for IRC action, the legislature is incapable of unilaterally correcting the infirmity." Harkenrider, at *12, fn. 19. So too is the IRC incapable of engaging in a post-hoc corrective action. The IRC has no constitutional authority to submit a reapportionment plan after February 28, 2022, nor to do so after the constitutionally-authorized procedure for judicial adoption of a reapportionment plan already been executed and completed.

The petitioners in the Harkenrider proceeding asserted that the 2022 maps enacted by the legislature were constitutionally defective both because the IRC did not submit a second redistricting plan and because the legislature lacked authority to compose and enact its own plan.

Either or both of these violations triggered the exclusive remedial action set forth in the constitution—the court ordering of a redistricting plan. See N.Y. Const., Art III §4(e); Harkenrider, at *12 ("Where, as here, legislative maps have been determined to be unenforceable, we are left in the same predicament as if no maps has been enacted.").

By determining that there were such violations, the Supreme Court declared the legislature's congressional, senate, and assembly maps void (having also separately determined that they were unconstitutionally gerrymandered) and, following appellate review by the Appellate Division and Court of Appeals, the latter of which confirmed and upheld the Supreme Court's rulings, the exclusive remedial and sole remaining path under the Constitution to adopt a reapportionment plan was carried out and furthered by the Harkenrider Court. That plan has been adopted in full compliance with the Constitution (indeed, the very same section, Art. III, §4, that the Petitioners herein cite and rely upon, but only in self-serving half-measures). This proceeding is effectively an attempted end-run around Harkenrider and attempt to obtain a contrary result. It seeks to undo that which has already been vetted through the state's highest court and required by the plain language of the state constitution.

It is notable that in the final numbered paragraph of the Amended Petition, Petitioners offer the following conclusion: "The Court of Appeals was correct: The IRC failed to complete its mandatory duty to submit a second set of congressional plans to the Legislature for consideration." Am. Pet. at 65. Emblematic of the entire Petition, this offering tells only half (or perhaps less than half) the story. It tellingly omits reference to the fact that well before the February 28, 2022 deadline arrived, the Legislature unilaterally wrested redistricting authority to itself and proceeded to enact maps that were widely criticized for being egregious partisan gerrymanders and were deemed, for that reason, to be unconstitutional by the Court of Appeals. More importantly, it

completely fails to recognize that the Court of Appeals (the same one that Petitioners says was "correct"), determined that the Supreme Court, Steuben County, properly determined that, as a result of both the IRC's and Legislature's procedural constitutional violations, the authority prescribed by §4(e) thereof, a court-ordered redistricting plan was the exclusive remedy available under the Constitution.

POINT II

MANDAMUS RELIEF IS NOT APPROPRIATE OR AVAILABLE

Mandamus relief is not warranted or appropriate. As set forth above, the relief sought by this proceeding is unavailable because its seeks to compel an act that is not permitted by the express language of the Constitution. Nor may mandamus be used to compel an act that is impossible, impracticable, or to address an issue that has become moot. Because mandamus will not be granted to compel the performance of an act where compliance is impossible, or to compel a body or officer to perform an act that is not within his or her authority or for which no legal basis exists, it is not available to the Petitioners herein. See CPLR § 7803(1); and generally, CPLR §7801 et seq.

Mandamus to compel is "an extraordinary remedy that lies only to compel the performance of acts which are mandatory, not discretionary, and only when there is a clear legal right to the relief sought." Curry v. New York State Educ. Dept., 163 A.D.3d 1327, 1330 (3d Dep't 2018) citing Matter of Shaw v. King, 123 A.D.3d 1317, 1318-1319 (3d Dep't 2014)(internal quotation marks and citation omitted).

"Manifestly, mandamus does not lie to compel an official act for which no legal basis exists." Matter of Altamore v Barrios-Paoli, 90 N.Y.2d 378, 384-85 (1997) ("petitioners have

failed to allege any basis upon which the Director would have had the authority to extend the 7022 list beyond the scheduled May 25, 1995, expiration date"). Nor may mandamus compel an unconstitutional act. See Council of City of New York v Bloomberg, 6 N.Y.3d 380, 388 (2006)("The theory the Council advocates would put the courts in the unacceptable position of directing an officer to violate his or her oath of office by enforcing an unconstitutional law, and would contradict the principle that 'mandamus is never granted for the purpose of compelling the performance of an unlawful act'")(citing People ex rel. Sherwood v. State Bd. of Canvassers, 129 N.Y. 360, 370, 29 N.E. 345 [1891]).

Likewise, "Mandamus will not lie to compel a public official to perform a vain or useless or illegal act," Matter of Thorsen v. Nassau County Civ. Serv. Comm'n, 32 A.D.3d 1037, 1037-38 (2d Dep't 2006).

Furthermore, courts are precluded, "from considering questions which, although once live, have become moot by passage of time or change in circumstances." Matter of Jenkins v. Astorino, 121 A.D.3d 997, 999 (2d Dep't 2014) (citing Matter of Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714, 409 N.E.2d 876). In Jenkins, the court reasoned that "inasmuch as the 2012 budget expired and was superseded, the issues raised on this appeal have been rendered academic." See id.

The Petitioners' challenge is moot. Pursuant to the State Constitution the IRC is required to complete its redistricting role by February 28, 2022. It has no authority to proceed beyond that date. In Harkenrider, 2022 WL 1236822 the New York State Court of Appeals determined that: "the procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure" and, under the circumstances presented, the New York State Constitution required the judiciary "'order the adoption of, or change to, a redistricting plan,' in

the absence of a constitutionally viable legislative plan." Id., at *12; and see N.Y. Const. Art. III §4(e). The judiciary has done so.

Here, the Petition for a writ of Mandamus fails for all of the above reasons. It seeks to compel an unlawful and unconstitutional act; to compel Respondents to act in a manner for which they have no authority; to compel an act that is impossible and impracticable; to compel an act to address as issue that is moot and to which the Petitioners have no clear legal right.

Likewise, while acknowledging that the 2021 legislation that purported to fill "gaps" in the Constitution's redistricting procedure was struck down by the Court of Appeals, the Petition's frequent reference to that legislation seems to impermissibly urge this Court to act as if it hadn't been stricken. The 2021 legislation, however, was properly invalidated because it was a transparent attempt to achieve that which failed at the voting booth—when the People were asked to vote on a proposed constitutional amendment and declined to do so.

Although attempting to use an Article 78 mandamus proceeding as the vehicle, the goal and purpose of this litigation is more candidly revealed in paragraphs 51 through 56 of the Petition, where Petitioners critique the court-ordered maps and redistricting plan from Harkenrider. Petitioners, it appears, would prefer different maps. That wish or desire, however, is not a proper basis for this mandamus proceeding. Any perceived basis to seek review of the Harkenrider maps should have been sought in that court and in that proceeding, or some appeal directly therefrom.

As previously discussed, to the extent that this proceeding suggests that the court-ordered redistricting plan coming out of Harkenrider could merely serve as a placeholder until the redistricting process could be re-engaged from some interim point from its past proceedings, that suggestion has no basis in the law and is completely unconstitutional. As a result of the constitutional process by which the 2022 redistricting plan was required to be court-ordered, the

Harkenrider maps serve to define legislative districts through the next census (2030) and redistricting cycle. See Harkenrider, at *14 (Troutman, dissenting in Part) (describing application of the court-ordered maps for "the next ten years").

POINT III

THE PETITION IS UNTIMELY

The Petitioners' challenge must be dismissed as untimely. The limitations period applicable to a mandamus to compel proceeding is four months after the body in question has refused to act. See CPLR 217 & 8701 et seq. Here, the Amended Petitioner alleges that the IRC announced that it was deadlocked and would not be submitting a map on January 24, 2022. See Am. Pet. at paras. 37-39. This was well before its constitutional deadline of February 28, 2022. Upon this alleged declaration by the IRC, Petitioners made no demand that the NYSIRC prepare a proposed map. Nor did Petitioners seek judicial intervention at any time between January 24, 2022 and February 28, 2022, when it may have arguably been actionable and not yet moot—nor did they seek it any time within the four-month limitations period as calculated from January 24, 2022.

The Petition alleges that the IRC announced that it was deadlocked on January 24, 2022. The constitutional deadline for the IRC to submit a second set of maps was February 28, 2022. Any mandamus action seeking to compel the IRC to take certain actions could have been brought within that window of time. After February 28, 2022 passed, however, compliance with that constitutional provision became a temporal impossibility. In order for mandamus to have even been theoretically viable, it would have had to have been brought sometime between January 24,

2022, and February 28, 2022. After February 28, 2022, there was no authority or ability for the IRC to continue to act under the Constitution.

Moreover, the four-month statute of limitations applicable to this Mandamus claim would run from when Petitioner first knew or should have known that the act they would seek to compel was not going to happen. See CPLR 217. That date would have been January 24, 2022 when the IRC announced that it was deadlocked.

For these same reasons, in addition to being untimely under the applicable limitations period, this proceeding is also barred by laches – it is clear that the Petitioners were perfectly happy to ignore the NYSIRC if the Legislature's February 3, 2022 maps were upheld, rather than being set aside by the Court of Appeals. See League of Women Voters of New York State v. New York State Bd. of Elections, 206 A.D.3d 1227, 1229, 170 N.Y.S.3d 639, 641–42, leave to appeal denied, 38 N.Y.3d 909, 190 N.E.3d 570 (2022), reargument denied, 38 N.Y.3d 1120 (3rd Dep't 2022)("We agree with respondent that dismissal of the petition/complaint is required under the equitable doctrine of laches – a 'threshold procedural issue' that was raised as an objection in point of law in respondent's answer (Matter of Schulz v. State of New York, 81 N.Y.2d 336, 347, 599 N.Y.S.2d 469, 615 N.E.2d 953 [1993]; see CPLR 7804[f]; 404[a]). Laches is 'an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party'").

POINT IV

NO RELIEF IS AVAILABLE AS AGAINST THE INDIVIDUAL MOVING RESPONDENTS

The mandamus relief sought by the Petition cannot be deemed to apply to compel any one individual (i.e., one of the Moving Respondents herein) to take an action that can only be taken by the IRC as a whole, or at a minimum, by a quorum thereof.

CONCLUSION

For the Foregoing reasons, it is respectfully submitted that the within proceeding be dismissed in its entirety and that the Court grant Moving Respondents such other and further relief as the Court deems just and proper. In addition, if this motion to dismiss is denied, in whole or in part, Moving Respondents reserve the right to answer the Amended Petition. See CPLR 7804(f) & CPLR 3211(f).

Dated: August 26, 2022
Sayville, New York

Respectfully submitted,

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Certification of Compliance (Word Limit)

Timothy Hill hereby certifies that the Memorandum of Law complies with the applicable Rules of Court in that the Memorandum contains 5992 words.

_____Timothy Hill_____
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