To Be Argued By:
Jessica Ring Amunson
(Admitted Pro Hac Vice)
Time Requested: 10 Minutes

APL-2023-00121

Albany County Clerk's Index No. 904972-22
Appellate Division, Third Department Docket No. CV-22-2265

Court of Appeals

STATE OF NEW YORK

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

Petitioners-Respondents,

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

(Caption Continued on the Reverse)

BRIEF FOR RESPONDENTS-RESPONDENTS INDEPENDENT REDISTRICTING COMMISSION CHAIRPERSON KEN JENKINS, INDEPENDENT REDISTRICTING COMMISSIONER IVELISSE CUEVAS-MOLINA, AND INDEPENDENT REDISTRICTING COMMISSIONER ELAINE FRAZIER

Jessica Ring Amunson
(Admitted Pro Hac Vice)
Sam Hirsch
(Admitted Pro Hac Vice)
JENNER & BLOCK LLP
1099 New York Avenue, NW,
Suite 900
Washington, D.C. 20001
202-639-6000
jamunson@jenner.com
shirsch@jenner.com

Jacob D. Alderdice
Allison N. Douglis
JENNER & BLOCK LLP
1155 Avenue of the Americas
New York, New York 10036
212-891-1600
jalderdice@jenner.com
adouglis@jenner.com

Attorneys for Respondents-Respondents
Ken Jenkins, Ivelisse Cuevas-Molina and Elaine Frazier

Date Completed: October 20, 2023

against

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-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,

Respondents-Appellants,

and

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

Intervenors-Respondents-Appellants.

STATEMENT OF RELATED CASES

Pursuant to Court of Appeals Rule of Practice 500.13(a), the Jenkins Respondents state that they are not aware of any currently pending litigation related to this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Respondents-Respondents Independent Redistricting Commission Chairperson Ken Jenkins, Independent Redistricting Commissioner Ivelisse Cuevas-Molina, and Independent Redistricting Commissioner Elaine Frazier (the "Jenkins Respondents") are three of the members of the ten-person bipartisan Independent Redistricting Commission ("IRC"). The IRC was created by New York voters pursuant to 2014 amendments to the New York State Constitution, which, as this Court has previously recognized, were "carefully crafted to guarantee that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission that is constitutionally required to pursue consensus to draw district lines." *Harkenrider v. Hochul*, 38 N.Y.3d 494, 513–14 (2022). To date, New York voters have not yet received the benefit of that "guarantee[d]" right with respect to their congressional districts. The Third Department's order properly restores that right and should be affirmed for four interrelated reasons.

First, the Third Department's order effectuates the Constitution's mandate that the IRC redistricting process is the process that "*shall* govern redistricting in this state." *See* N.Y. Const. art. III, § 4(e) (emphasis added). This mandate is reinforced by a core principle in this Court's and the United States Supreme Court's precedent on redistricting; namely, that there is a preference for maps enacted through a state's legislative process over court-ordered maps whenever possible.

Second, contrary to arguments from the Harkenrider Intervenors-Respondents-Appellants (the "Harkenrider Intervenors") and the Brady Respondents-Appellants (the "Brady Respondents"), the Third Department's order is expressly authorized by Section 4(e) of Article III of the New York Constitution as a remedy for the undisputed violation of law at issue in this case—the failure of the IRC to submit a second congressional map proposal to the Legislature. *Third*, this Court's decision in *Harkenrider* does not mandate a contrary holding. That holding did not provide a remedy for the undisputed constitutional violation that occurred when the IRC failed to follow the constitutionally required procedures. Indeed, the IRC was not even a party to that proceeding. Petitioners-Respondents' requested relief is entirely consistent with *Harkenrider* and its recognition of the importance of the IRC procedures. *Fourth*, and finally, the Court should reject the policy arguments advanced by Appellants and the *amici* supporting their position. The Third Department's order directing the IRC to carry out its constitutional obligation does not amount to, nor would it incentivize, mid-decade redistricting or other gamesmanship. It is a lawful and appropriate judicial remedy for an undisputed violation of the New York Constitution, and would in fact discourage future deadlock of the IRC.

COUNTERSTATEMENT OF QUESTION PRESENTED

Question: Whether the Appellate Division correctly granted Petitioners their requested relief.

Answer: Yes.

COUNTERSTATEMENT OF THE CASE

I. The 2014 Constitutional Amendment Establishing the IRC

Following decades of "stalemates" over New York's redistricting process, "often necessitating federal court involvement in the development of New York's congressional maps," the people of New York voted for "historic reforms" to the Constitution in 2014. *See Harkenrider*, 38 N.Y.3d at 501–02. The 2014 amendments established the bipartisan IRC, charged the IRC with the obligation to prepare a redistricting plan for Senate, Assembly, and congressional districts, and set forth specific procedures for the IRC's submission of those plans to the Legislature. *Id.* at 503–04.

This "carefully structured process," *id.* at 501, provides for the appointment of ten members by a combination of majority and minority leaders in the Legislature and by the other members of the IRC, *see* N.Y. Const. art. III, § 5-b(a). The Constitution further provides that "[t]o the extent practicable, the members of the independent redistricting commission shall reflect the diversity of the residents of

this state with regard to race, ethnicity, gender, language, and geographic residence." *Id.* § 5-b(c).[1]

The Constitution provides that the IRC "shall" submit a set of redistricting plans to the Legislature and that the IRC procedures for map drawing and submission are "[t]he process . . . [that] 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(b), 4(e). Specifically, the Constitution requires the IRC to conduct at least twelve public hearings in specified cities and counties across the State, and to issue a set of draft redistricting plans at least thirty days before those public hearings commence and no later than September 15 of the year ending in one. *Id.* § 4(c)(6). Once the IRC is fully constituted, a minimum of seven members constitutes a quorum "for the transaction of any business or the exercise of any power of such commission," and there are particular voting thresholds for the approval of plans for submission to the Legislature. *Id.* § 5-b(f). The threshold required for the Legislature to approve the relevant plans varies based on whether there is unified or split control of the two houses of the Legislature. *Id.* The Constitution also provides that "[i]n the event that the

[1] As of both now and throughout 2021 and 2022, the ten members of the IRC reflect a strong diversity of race, ethnicity, language, gender, and geographic residence throughout New York. *See Commissioners*, N.Y. State Indep. Redistricting Comm'n, https://www.nyirc.gov/commissioners (last visited Oct. 19, 2023).

commission is unable to obtain seven votes to approve a redistricting plan . . . the commission shall submit to the legislature that redistricting plan and implementing legislation that garnered the highest number of votes in support of its approval by the commission with a record of the votes taken." *Id.* § 5-b(g).

The Constitution established that in the first instance, IRC submission of the plan or plans with the highest number of votes, and the accompanying implementing legislation, was to occur no later than January 15, 2022. *Id.* § 4(b). If the Legislature failed to approve the IRC's first plan or plans or the Governor vetoed that plan or plans, the IRC then was to submit a second set of redistricting plans and the necessary implementing legislation; in the first instance, this was to occur no later than February 28, 2022. *Id.* If that second set of plans and implementing legislation were once again rejected by the Legislature or vetoed, each house of the Legislature could then "introduce such implementing legislation with any amendments each house of the legislature deem[ed] necessary." *Id.*

II. The IRC's 2021-2022 Drafting Process

The IRC was charged with simultaneously drafting State Assembly, State Senate, and congressional maps for submission to the Legislature. As a result of the COVID-19 pandemic, the U.S. Census Bureau did not release the necessary redistricting data to states until August 2021, instead of the customary timeline of releasing data in March 2021. Upon receipt of this data, the IRC engaged in "months

of meetings, hearings, and legwork" prior to voting on plans to submit to the Legislature. (R. 275 [Am. Verified Pet. ¶ 35].)

As required by the Constitution, prior to undertaking the constitutionally required public hearings, the IRC released its first set of draft redistricting maps to the public on September 15, 2021.[2] Even before the release of those draft maps, however, the IRC voluntarily engaged in nine additional public listening sessions between July 20, 2021, and August 15, 2021.[3] The IRC then conducted the twelve public hearings required by Section 4(c)(6) of the Constitution and then held additional sessions that sought input from the Southern Tier, the North Country, and the State as a whole.[4]

In all, from the summer of 2021 through January 3, 2022, the IRC conducted not only the twelve constitutionally required public hearings, but also an additional twelve listening sessions throughout the State.[5] The IRC heard testimony from over 630 speakers, and received over 2,100 written submissions from New Yorkers concerned about their communities and how those communities would be

[2] *See* NYS Indep. Redistricting Comm'n, *IRC Meeting on September 15th, 2021*, YouTube (Sept. 15, 2021), https://www.youtube.com/watch?v=FAQtFNZW5cc.
[3] *See Meetings*, N.Y. State Indep. Redistricting Comm'n, https://www.nyirc.gov/meetings (last visited Oct. 19, 2023).
[4] *Id.*
[5] *See Public Meeting of NYSIRC*, N.Y. State Indep. Redistricting Comm'n (Jan. 3, 2022), https://totalwebcasting.com/view/?func=VOFF&id=nysirc&date=2022-01-03&seq=1.

represented through the drawing of district lines for State Assembly, State Senate, and Congress.[6]

The IRC then attempted to incorporate all of the information it received into draft redistricting plans. On January 3, 2022, as its initial proposal for congressional redistricting, the IRC voted to send "Plan A," which was approved by five Commissioners, and "Plan B," which was approved by the other five Commissioners, to the Legislature so that the Legislature could select the one it preferred. (R. 275 [Am. Verified Pet. ¶ 35]; R. 412 [Third Dep't Opinion at 3].) Notwithstanding the IRC's decision to submit two plans for the Legislature's consideration, the IRC had reached substantial agreement on the vast majority of congressional districts, as the two maps were highly similar.[7] Nonetheless, the Legislature rejected both plans, triggering the IRC's constitutional obligation to compose a second redistricting plan for the Legislature's review within fifteen days and in no event later than February 28, 2022.

---

[6] *See id.*

[7] *See Plans 2021/2022*, N.Y. State Indep. Redistricting Comm'n (Jan. 3, 2022), https://www.nyirc.gov/plans. The IRC's "Plan A" and "Plan B," which reflect the input the IRC heard during its months of public hearings, are far more similar to each other than either plan is to the remedial plan drawn by the special master and adopted by the court in Steuben County. *Compare Plan A Congress*, N.Y. State Indep. Redistricting Comm'n (Jan. 3, 2022), https://www.nyirc.gov/storage/plans/20220103/congress_planA.pdf; *Plan B Congress*, N.Y. State Indep. Redistricting Comm'n (Jan. 3, 2022), https://www.nyirc.gov/storage/plans/20220103/congress_planB.pdf, *with 2022 Congressional Maps*, N.Y. State Legis. Task Force on Demographic Rsch. & Reapportionment, https://latfor.state.ny.us/maps/?sec=2022_congress (updated June 2, 2022).

On January 24, 2022, then-Chairperson of the IRC David Imamura and Commissioners Frazier, Cuevas-Molina, John Flateau, and Eugene Benger released a public statement stating that they had repeatedly attempted to schedule a meeting of the entire IRC to vote on district lines for not only Congress, but also for the State Assembly and the State Senate, but the remaining Commissioners had refused to meet and therefore had denied the Commission a quorum to finish its work of sending a second set of plans to the Legislature. (R. 275–276 [Am. Verified Pet. ¶ 37; R. 359 [Imamura Aff. ¶ 6].) In turn, the Vice Chair of the IRC, Jack Martins, blamed Chairperson Imamura and Commissioners Frazier, Cuevas-Molina, Flateau, and Benger for what he claimed was a refusal to develop new proposals. (R. 275–276 [Am. Verified Pet. ¶ 37] (citing Joshua Solomon, *Independent Redistricting Commission Comes to a Likely Final Impasse*, Times-Union (Jan. 24, 2022), https://www.timesunion.com/state/article/Independent-Redistricting-Commission-comes-to-a-16800357.php).) Neither of these dueling statements purported to be on behalf of the IRC as a whole—nor could they have been, as seven Commissioners were needed to form a quorum. *See* N.Y. Const. art. III, § 5-b(f).

At the time of these public statements, the law provided that "if the commission does not vote on any redistricting plan or plans, for any reason . . . each house shall introduce such implementing legislation with any amendments each house deems necessary." (R. 267 [Am. Verified Pet. ¶ 8]; *see* R. 412 [Third Dep't

Opinion at 3].) Thus, pursuant to the statutory procedure in place at the time, the IRC's inability to convene a quorum to take a vote on submission of a second set of plans meant that the Legislature could adopt its own redistricting plans, and the Legislature then did so. (R. 276–77 [Am. Verified Pet. ¶ 40].) The Legislature enacted a set of State Assembly, State Senate, and congressional plans, and Governor Hochul signed those plans into law on February 3, 2022. *See Harkenrider*, 38 N.Y.3d at 504–05.

III. This Court's Decision in *Harkenrider v. Hochul*

Also on February 3, 2022, the Harkenrider Intervenors in this litigation filed a special proceeding in Steuben County Supreme Court under the Constitution and Unconsolidated Laws § 4221, permitting review of legislative apportionments. (R. 51–117 [*Harkenrider* Pet.].) The proceeding was brought against Governor Hochul, Lieutenant Governor and President of the Senate Brian A. Benjamin, Senate Majority Leader and President *Pro Tempore* of the Senate Andrea Stewart-Cousins, Speaker of the Assembly Carl E. Heastie, the New York State Board of Elections, and the New York State Legislative Task Force on Demographic Research and Reapportionment—but not against the IRC or any of its members. (R. 51 [*Harkenrider* Pet. at 1].)

The petition specifically sought a declaration that the 2022 congressional map "constitute[d] an unconstitutional map enacted without complying with the

mandatory constitutional procedures for redistricting in Article III, Section 4(b) of the New York Constitution"; that the 2022 congressional map, "apart and aside from procedural deficiencies," was an impermissible partisan and incumbency-favoring/disfavoring gerrymander; that "the prior congressional map, court-adopted after the 2010 decennial census, [was] the only validly enacted map [then] currently in existence, but [was] now unconstitutionally malapportioned, failing to comply with the mandatory constitutional requirements that each district contain an equal number of inhabitants"; and that "the 2012 congressional districts are unconstitutional in light of the population shifts identified in the 2020 census." (R. 115–116 [*Harkenrider* Pet. at 65–66].) The petition requested relief in the form of an injunction enjoining the respondents from conducting any elections, either under the 2012 congressional district lines or under the 2022 congressional district lines, and a court order adopting a new congressional map. (R. 116 [*Harkenrider* Pet. at 66].) The petition was later amended on February 8, 2022, but the respondents remained the same and the relief requested remained the same, albeit with certain elaboration. (*See* R. 118 [*Harkenrider* Am. Pet. at 1]; R. 198–199 [*Harkenrider* Am. Pet. at 81–82].)

Even though the petitioners in *Harkenrider* alleged that the 2022 plans were procedurally invalid because the Legislature lacked the power to adopt redistricting legislation before the IRC submitted a second set of proposed plans, their petition

did not name the IRC or any of its members as respondents, nor did it seek relief requiring the IRC or any of its members to remedy the procedural violation caused by the IRC's failure to submit a second set of proposed plans to the Legislature. The *Harkenrider* petitioners instead sought a set of court-ordered lines, and eschewed requesting relief in the form of requiring the IRC to submit a second set of proposals to the Legislature.

Supreme Court, Steuben County, initially held that the congressional, Senate, and Assembly maps were void under the Constitution due to the IRC procedural violation, and that the congressional map evidenced partisan gerrymandering. *See Harkenrider v. Hochul*, 76 Misc. 3d 171, 185–86, 190–91, 173 N.Y.S.3d 109 (Sup. Ct., Steuben Cnty. 2022). The Fourth Department reversed the holding that the maps were procedurally void, but held that the petitioners had established partisan gerrymandering with respect to the congressional map. *Harkenrider v. Hochul*, 204 A.D.3d 1366 (4th Dep't 2022). It held that under the Constitution, the Legislature must "have a full and reasonable opportunity to correct the law's legal infirmities," and gave the Legislature until April 30, 2022 to enact a constitutionally valid "replacement for the congressional map." *Id.* at 1375 (citing N.Y. Const. art. III, § 5).

The *Harkenrider* parties cross-appealed to this Court. *See Harkenrider*, 38 N.Y.3d at 508. In their supplemental letter briefing before this Court, the petitioners

in *Harkenrider* specifically requested "that this Court order the already-appointed Special Master to recommend remedial maps for both Congress and state Senate, so that constitutional maps can govern the 2022 elections." *See* Pet'rs' Suppl. Letter Br. 1, *Harkenrider v. Hochul*, No. APL-2022-00042 (N.Y. Apr. 23, 2022). They further argued that the Legislature was not capable of correcting the violation of the Constitution's procedural requirements, and so the Judiciary was required to step in to remedy the violation of law—such that "the only possible solution is for the courts to draw constitutional maps for the 2022 elections." *Id.* at 5. In turn, the legislative respondents argued that if this Court invalidated any part of the enacted congressional plan, the Legislature must be permitted to correct the infirmity in the first instance—and certain respondents argued that, given the impending 2022 election, any relief should be deferred until after the 2022 election. *See* Senate Majority Leader Andrea Stewart Cousins' Letter Br. 11–12, *Harkenrider v. Hochul*, No. APL-2022-00012 (N.Y. Apr. 23, 2022); Speaker of the Assembly Carl Heastie's Letter Br. 9–10, *Harkenrider v. Hochul*, No. APL-2022-00042 (N.Y. Apr. 23, 2022); Gov.'s and Lt. Gov's Letter Br. 2, *Harkenrider v. Hochul*, No. APL-2022-00042 (N.Y. Apr. 23, 2022).

In its April 27, 2022 decision, this Court invalidated the congressional and Senate maps enacted by the Legislature as procedurally unconstitutional, and further held that the congressional map was substantively unconstitutional because it had

been drawn with a partisan purpose. *Harkenrider*, 38 N.Y.3d at 521. This Court was thus faced with the question of how to remedy the procedural and substantive violations given that this "le[ft] the state without constitutional district lines for use in the 2022 primary and general elections." *Id*. The Court held that the unconstitutional maps should not remain in place for the then-rapidly approaching 2022 primary and general elections. *Id.* at 521–22. In determining the appropriate remedy, the Court observed that it must implement a remedy that would overcome the "logistical difficulties" involved with adopting new district lines so close to the date of the upcoming primary and general elections, and found that "[p]rompt judicial intervention" was "necessary and appropriate." *Id.* at 522. It ultimately determined that "[w]ith judicial supervision and the support of a neutral expert designated a special master, there [wa]s sufficient time for the adoption of new district lines" prior to the 2022 primary and general elections. *Id.* The Court further noted that the date for the primary elections would likely need to be postponed, and ordered the Steuben County Supreme Court to "swiftly develop a schedule to facilitate" those primary elections, in consultation with the Board of Elections, once new constitutional maps had been adopted for the 2022 election with the assistance of the special master. *Id.* at 522–23.

On remand, the Steuben County Supreme Court appointed as special master Jonathan Cervas, a Pennsylvania resident and postdoctoral fellow at Carnegie

Mellon University, who had never worked on redistricting in New York. (R. 231 [May 20, 2022 Report of the Special Master, *Harkenrider v. Hochul*, at 2].) What ensued was a truncated map-drawing process with limited public input. (R. 280 [Am. Verified Pet. ¶ 52]; *see also* Favors, Harris & Weisman *Amicus* Br. 13.) The Steuben County Supreme Court then adopted the special master's work as the "official approved 2022 Congressional map." (R. 229 [May 20, 2022 Order of Judge McAllister, *Harkenrider v. Hochul*, at 5].)

IV. History of These Proceedings

A. Supreme Court's Decision

Petitioners in this case first filed an Article 78 petition in Supreme Court, Albany County, seeking a writ of mandamus compelling the IRC and its individual Commissioners to "prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan" for congressional and state legislative election cycles following the 2022 election cycle. (R. 24–25 [Verified Pet. at 1–2] (quoting N.Y. Const art. III, § 4(b)); R. 42 [Verified Pet. at Prayer for Relief].) The Petition was amended on August 4, 2022, and limited its prayer for relief to request a writ of mandamus requiring the submission of a second round of proposed congressional redistricting plans. (R. 284 [Am. Verified Pet. at Prayer for Relief].) The Amended Petition alleged that the IRC failed to fulfill its

constitutional duty to submit a second set of proposed plans to the Legislature after the Legislature rejected the first set of congressional plans. (R. 275 [*Id.* ¶¶ 35–36].)

With respect to the individual IRC Commissioners, the Amended Petition was brought against eight Commissioners. Petitioners later sought leave to amend the Petition to include Dr. John Flateau, who was previously a member of the IRC and had been renominated following the filing of the Petition, and Eugene Benger, who at the time was a member of the IRC. (*See* R. 358–359 [Aff. of David Imamura ¶¶ 2–3]; Sup. Ct. Dkt. No. 149 at 2.) The trial court did not issue the requested order to show cause with respect to the motion. (Sup. Ct. Dkt. No. 156.)[8]

Respondents Imamura, Cuevas-Molina, and Frazier submitted a Verified Answer on August 26, 2022. (R. 298–314 [Verified Answer].) The Answer set forth the Jenkins Respondents' efforts to carry out their constitutional duty, including that Respondents demanded a meeting to vote on a second set of maps, other Commissioners refused to meet and denied the IRC a quorum, and the Jenkins Respondents "thereafter acted in accord with their understanding of the applicable constitutional and statutory procedures and their duties under the circumstances,

[8] Subsequently, Chairperson David Imamura, who was named as a party in the Amended Petition, resigned from the IRC and was replaced by Chairperson Ken Jenkins. This was reflected in a stipulation to substitute parties that was so-ordered by the trial court on December 7, 2022. (R. 398–400 [Stipulation and Order of Substitution].) Commissioner Yovan Collado was additionally appointed to replace Commissioner Eugene Benger. (*See* R. 359 [Aff. of David Imamura ¶ 2].)

which preceded any judicial interpretation of the relevant constitutional and statutory provisions." (R. 299 [Verified Answer ¶ 7]; *see also* R. 305 [Verified Answer ¶ 36]; R. 310 [Verified Answer ¶ 61].)

On September 2, 2022, Supreme Court granted the motion of the Harkenrider Intervenors to intervene as Respondents, and ordered the existing Petitioners and Respondents to serve any papers in opposition to the Harkenrider Intervenors' Motion to Dismiss. (R. 340 [Order to Show Cause at 2].) The Jenkins Respondents submitted a response noting several erroneous statements of fact in the Harkenrider Intervenors' Motion to Dismiss. (R. 353–57 [Response to Order to Show Cause].) The Jenkins Respondents refuted the Harkenrider Intervenors' contention that the IRC was "now-constitutionally-disabled" and "no longer has all ten constitutionally mandated commissioners," and explained that the IRC actually was fully constituted, including with two Commissioners who were appointed to replace those who resigned after the IRC submitted its maps to the Legislature in January 2022. (R. 353–54 [*Id.* at 1–2]). The response also rejected the assertion that the IRC was "lacking key staff" and would need to hire additional staff were the IRC ordered to reconvene, explaining that there are "no current staffing vacancies that would preclude the Commission from expeditiously undertaking the task of submitting a second round of proposed congressional districting plans for consideration by the Legislature." (R. 354 [*Id.* at 2].) Finally, the response rejected the premise that the

"IRC declared its decision to violate its constitutional duties on January 24, 2022," instead explaining that on January 24, 2022, Respondents Imamura, Frazier, and Cuevas-Molina and two of their fellow Commissioners had announced that they had repeatedly attempted to schedule a meeting to vote on proposed plans for State Assembly, State Senate, and Congress, and that the other Commissioners had refused. (*Id.*) The response appended a sworn affidavit from Mr. Imamura, who at the time served as IRC Chair. (R. 358–61 [Aff. of David Imamura].)

On September 12, 2022, Supreme Court issued an order granting the motions to dismiss the Amended Petition. Supreme Court held that the Constitution requires redistricting to take place "every ten years commencing in two thousand twenty-one"; in the court's view, this meant that "the Congressional maps approved by the Court . . . are in full force and effect, until redistricting takes place again following the 2030 federal census," and that "there is no authority for the IRC to issue a second redistricting plan after February 28, 2022, in advance of the federal census in 2030." (R. 18 [*Id.* at 11].) It also determined that "directing the IRC to submit a second plan would be futile"—despite no party raising this argument—given the IRC's purported "inherent inability to reach a consensus on a bipartisan plan." (R. 19 [*Id.* at 12].)

B. The Third Department's Decision

Petitioners-Respondents appealed to the Appellate Division, Third Department. (R. 1–2 [Notice of Appeal].) On appeal, no party defended Supreme

Court's futility determination. The Brady Respondents and the Harkenrider Intervenors advanced arguments similar to those they advance in this appeal. The Third Department held argument on June 8, 2023. (R. 410 [Third Department Opinion].)

On July 13, 2023, the Third Department reversed Supreme Court and held that Petitioners-Respondents were entitled to their requested relief. (R. 410–417.) The Third Department emphasized the role of the 2014 redistricting reforms, which were intended to "ensure that the drawing of legislative district lines in New York will be done by a bipartisan, independent body" and that New Yorkers would receive "a voice" in the redistricting process. (R. 414.) The Third Department acknowledged that "these goals were not met" in 2022, and so this litigation "seeks to 'vindicate the purpose' of the redistricting amendments." (*Id.*)

The Third Department then acknowledged and rejected arguments that this Court's decision in *Harkenrider v. Hochul* precluded the relief sought by Petitioners here. (R. 414–415.) Recognizing that the Constitution imposes a default duration for electoral maps of one decade (R. 415 (citing N.Y. Const. art. III, § 4(e))), the Third Department determined that this Court, by ordering court-imposed lines in *Harkenrider*, did not intend to displace the IRC processes provided for in the Constitution for the remainder of the decade. Specifically, the Third Department noted this Court's repeated emphasis 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." (*Id.* (quoting *Harkenrider*, 38 N.Y.3d at 513, 514) (emphasis in original).) It also noted that this Court repeatedly underscored the urgency of determining "constitutional district lines for use in the 2022 primary and general elections," *see Harkenrider*, 38 N.Y.3d at 521, given "the immediately pressing needs of the 2022 election" (R. 415). Finally, the Third Department noted that the Constitution limits judicial remedies to circumstances where a court is "*required* to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law," suggesting that this similarly supported that this Court did not intend to "divert the constitutional process beyond the then-imminent issue of the 2022 elections." (R. 415–416 (quoting N.Y. Const. art. III, § 4(e)) (quotation marks omitted) (emphasis in original).)

The Third Department ultimately determined that mandamus was available because the IRC has "an indisputable duty under the . . . Constitution to submit a second set of maps upon the rejection of its first set," and this duty is mandatory rather than discretionary. (R. 416.) In turn, the IRC's failure to perform that duty had not yet been remedied: the questions before this Court in *Harkenrider* did not address the IRC's duty to act, but rather "the Legislature's unconstitutional reaction to the IRC's failure to submit maps." (*Id.*) Because Petitioners-Respondents had a

clear legal right to the relief they sought, the Third Department granted the petition for mandamus and directed the IRC "to commence its duties forthwith." (R. 417.)[9]

C. Appeal to This Court

The Brady Respondents and the Harkenrider Intervenors (together, "Appellants") each noticed their appeals to this Court. (R. 404–406 [Harkenrider Notice of Appeal]; R. 407–409 [Brady Notice of Appeal].) This Court then entertained briefing about whether a stay was automatically in effect based on the Brady Respondents' appeal, whether a discretionary stay should go into effect if no automatic stay were in effect, and whether any stay precluded the IRC from taking steps to prepare for compliance with the Third Department's order. (*See generally* Dkt. No. 2023-00121.) The Court issued an order on September 19, 2023, holding that the Third Department's order was automatically stayed by virtue of the Brady Respondents' appeal, but that "the stay does not prohibit the IRC or its members from taking any actions." (Sept. 19, 2023 Decision List at 7.) On October 2, 2023, the Jenkins Respondents issued a statement inviting public input on congressional districting in advance of this Court's decision; they are continuing to receive such input, which is being made available to all IRC Commissioners and staff.

[9] The Third Department also rejected Appellants' argument that the petition was untimely. (R. 413–14.) Undersigned Respondents defer to Petitioners-Respondents' arguments on this point, but note that, *contra* Appellants' briefing, the "IRC" as a collective entity did not announce any decision not to comply with its obligations on January 24, 2022. *Compare supra* page 8, *with* Harkenrider Br. 1; Brady Br. 32.

V. The First Department's Decision in *Nichols v. Hochul* and the IRC's Parallel Drawing of Assembly Lines

On May 15, 2022, a separate group of voters commenced an Article 78 petition in the Supreme Court, New York County, seeking to invalidate the State Assembly lines as unconstitutional on the same procedural grounds addressed in *Harkenrider* with respect to the IRC's failure to submit a second set of redistricting plans to the Legislature. *See Nichols v. Hochul*, 76 Misc. 3d 379, 380, 173 N.Y.S.3d 829 (Sup. Ct., N.Y. Cnty. 2022). The First Department held in June 2022 that the Assembly map was invalid for the same procedural reasons addressed in *Harkenrider*, and remanded to the Supreme Court "for consideration of the proper means for redrawing the state assembly map, in accordance with [Section 5-b of the Constitution]." *Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep't 2022).

On remand, the trial court in *Nichols* held that the proper way to effectuate the First Department's order was to modify the deadlines set forth in the Constitution to permit the IRC to submit a new Assembly redistricting plan in the first instance. *See Nichols v. Hochul*, 77 Misc. 3d 245, 251–52, 177 N.Y.S.3d 424 (Sup. Ct., N.Y. Cnty. 2022). The court determined that such modification was consistent with the language in Section 5-b permitting the establishment of an IRC "*at any other time a court orders*." *Id.* at 252 (emphasis in original). The court also rejected an argument that "adherence to the IRC procedure would be futile." *Id.* at 253. The court further emphasized the importance of adhering to the Constitution's designated procedure

to have the IRC draw the Assembly districts given that there was sufficient time to do so before the next election (unlike in the initial *Harkenrider* litigation). *Id.* at 254–55.

On January 24, 2023, the First Department affirmed the trial court's decision. The First Department held that "[t]he Constitution does not mandate any particular remedial action when a violation of law has occurred," but "favors a legislative resolution when available." *Nichols v. Hochul*, 212 A.D.3d 529, 530–31 (1st Dep't), *appeal dismissed*, 39 N.Y.3d 1119 (2023). The court distinguished *Harkenrider* on the grounds that "the constitutional violation [there] could not be cured by a process involving the legislature and the IRC, given the time constraints created by the electoral calendar." *Id.* at 531.

Consistent with the Supreme Court's September 2022 order in that case, the IRC commenced the process of formulating and proposing an Assembly redistricting plan. At a public meeting on December 1, 2022, after unanimously electing a new Chair and Vice-Chair, the IRC unanimously voted to submit to the public a draft redistricting plan for the State Assembly using the 2020 census data.[10] In accordance with the deadlines established by the trial court's order, the IRC then received public

[10] *See Draft Assembly Plan*, N.Y. State Indep. Redistricting Comm'n (Dec. 1, 2022), https://www.nyirc.gov/assembly-plan; *Public Meeting of NYSIRC*, N.Y. State Indep. Redistricting Comm'n (Dec. 1, 2022), https://totalwebcasting.com/view/?func=VIEW&id=nysirc&date=2022-12-01&seq=1.

comment at twelve public hearings across the State.[11] On April 20, 2023, the IRC voted 9-1 to submit a proposed plan to the Legislature.[12] On April 24, 2023, the Legislature voted to approve the IRC's proposed plan and Governor Hochul then signed the new Assembly plan into law.[13]

ARGUMENT

The Court should affirm the Third Department's decision directing the IRC to commence its duty to submit a second set of congressional lines to the Legislature.

I. The New York Constitution Mandates that Redistricting Occur Through the IRC Process.

Article III, Section 4(e) sets forth a clear and unambiguous constitutional mandate: "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).

---

[11] *See Meetings*, *supra* note 3.

[12] *See Assembly Plan 2023*, N.Y. State Indep. Redistricting Comm'n (Apr. 20, 2023), https://www.nyirc.gov/assembly-plan-2023.

[13] *See* Dave Beaudoin, *New York Adopts Revised State Assembly Districts*, Ballotpedia News (Apr. 28, 2023), https://news.ballotpedia.org/2023/04/28/new-york-adopts-revised-state-assembly-districts/. This recent process further demonstrates why Supreme Court's futility finding was patently incorrect. Tellingly, neither Appellant seeks to revive that finding on appeal, although *amicus* the Lawyers Democracy Fund suggests without basis that the result of a renewed IRC process would be "likely partisan" redistricting. Lawyers Democracy Fund *Amicus* Br. 32.

In 2022, with the election process already underway, this Court found itself in a "predicament." *Harkenrider*, 38 N.Y.3d at 522. The congressional districting plans enacted by the Legislature had been "determined to be unenforceable," which left the Court in the same situation "as if no maps had been enacted" at all. 38 N.Y.3d at 522. The only map on the books was the existing congressional map adopted by a three-judge federal court in 2012. *See Favors v. Cuomo*, No. 11-cv-5632, 2012 WL 928223, at *2 (E.D.N.Y. Mar. 19, 2012). But, as of 2022, that map was severely malapportioned in violation of the one-person-one-vote doctrine and contained the wrong number of districts. (R. 115–116 [*Harkenrider* Pet. at Prayer for Relief].) With the 2022 election rapidly approaching, this Court therefore was "required to order the adoption of" a valid congressional districting plan for the 2022 elections in order to "remedy" the "violation of law," N.Y. Const. art. III, § 4(e), and thereby ensure that voters could go to the polls in 2022 in new districts drawn to reflect the 2020 Census data and comply with the one-person-one-vote principle.

To be clear, the Article III, Section 4(e) "remedy" that was "required" of the Court in *Harkenrider* was to put into place a valid map for the 2022 election to "guarantee the People's right to a free and fair election." 38 N.Y.3d at 522. But now, a different "remedy" is "required" to "guarantee" the People's right to "redistricting maps [that] have their origin in the collective and transparent work product of a bipartisan commission that is constitutionally required to pursue consensus to draw

district lines." *Id.* at 513–14. With the exigencies of the 2022 election cycle now over, it is time to return to the process that New York voters determined "*shall govern* redistricting in this state"—namely the IRC process. N.Y. Const. art. III, § 4(e) (emphasis added). This process was "carefully crafted" in the 2014 constitutional amendments "from the provisions detailing the composition of the IRC to those setting forth the voting metrics." *Harkenrider*, 38 N.Y.3d at 513–14. And there has as of yet been no remedy for the violation of law that injured New York voters when that process broke down. The Third Department's decision appropriately ordered that remedy and it should be affirmed.

The Jenkins Respondents do not dispute that they, along with the other members of the IRC, failed to carry out their constitutional obligation by not submitting a second congressional redistricting plan, and to this day have not fulfilled that obligation to New York voters. Indeed, it appears no party in this case disputes those facts. Accordingly, the Third Department's holding that the "IRC had an indisputable duty under the NY Constitution to submit a second set of maps upon the rejection of its first set," that "this duty is mandatory," and that it is "undisputed that the IRC failed to perform this duty" (R. 416), is plainly correct. And it follows pursuant to black-letter law of mandamus, which is available where public officials "failed to perform a duty enjoined by law," *New York Civil Liberties Union v. State*,

4 N.Y.3d 175, 184 (2005), that the Third Department's order directing the IRC to perform these constitutionally mandated duties was appropriate as well.

That there has been no remedy for the IRC's violations is plain from the procedural posture of *Harkenrider* itself. In that action, the petitioners sued the Legislature and the Governor for procedural violations (enacting a law without being authorized to do so) and substantive violations (enacting a law in violation of the prohibition on partisan gerrymandering), but the *Harkenrider* petitioners never sued the IRC or any of its members. Nor did the *Harkenrider* petitioners (nor any other party) seek to make the IRC a party. Thus, until the current mandamus action brought by Petitioners, the IRC has never been held to account for its failure to perform its constitutionally mandated and non-discretionary duty to "prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan." N.Y. Const. art. III, § 4(b).

Should there be any doubt regarding the constitutional language and its implications, a fundamental principle of law further supports enforcing a return to the process that New York voters determined "shall govern redistricting in this state." N.Y. Const. art. III, § 4(e). The U.S. Supreme Court and this Court have long recognized that the apportionment power is "generally legislative," and that courts should only intervene in redistricting "as a last resort." *In re Orans*, 15 N.Y.2d 339, 352 (1965); *see also Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (holding that it is

"appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan"). This Court's decision in *Harkenrider* to order the drawing of maps "[w]ith judicial supervision and the support of a neutral expert designated a special master," 38 N.Y.3d at 522, were the very definition of the "last resort," *Orans*, 15 N.Y.2d at 352, when it was appropriate for a court to step in because, given the timing of the election, it was not "practicable," *Wise*, 437 U.S. at 540, for the legislative process to play out.

In weighing the possibility of allowing the IRC process to go forward as compared to keeping a court-ordered map in place, the case law places a heavy thumb on the scale for the former. *See, e.g.*, *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 548 U.S. 399, 416 (2006) (affirming legislature's action "to replace a court-drawn plan with one of its own" because "to prefer a court-drawn plan to a legislature's replacement would be contrary to the ordinary and proper operation of the political process"). New Yorkers voted in 2014 that they should have a meaningful "voice in the redistricting process," *Harkenrider*, 38 N.Y.3d at 510, with line-drawers who "reflect the diversity of the residents of this state with regard to race, ethnicity, gender, language, and geographic residence," N.Y. Const. art. III, § 5-b(c), and who have held "public hearings throughout the state regarding

proposals for redistricting, ensuring transparency," *Harkenrider*, 38 N.Y.3d at 510 (citing N.Y. Const. art. III, § 4(c)). That choice should be respected.

The Appellate Division, First Department recently reached this very conclusion. As set forth above, the First Department addressed whether Supreme Court should have ordered the IRC, in September 2022, to propose new Assembly maps for the 2024 election cycle and thereafter in order to correct the prior procedural infirmity whereby the IRC never submitted a second set of maps to the Legislature. *See supra* pages 21–22. The First Department affirmed the lower court's order, holding that "the Constitution . . . favors a legislative resolution when available," and that given the timing of that litigation, it was "viable" to get an Assembly plan into place as contemplated by Article III, Section 5-b before the 2024 elections, whereas it had not been viable in *Harkenrider* due to the "time constraints created by the [2022] electoral calendar." *Nichols*, 212 A.D.3d at 530. In accordance with that order, the IRC carried out and completed the constitutional process exactly as New York voters had envisioned, relying on ample public input through a series of public hearings, reaching bipartisan consensus, and ultimately submitting to the Legislature a proposal that the Legislature adopted on a bipartisan basis.

II. The Third Department Appropriately Ordered the Correct Remedy for the Violation of Law at Issue Here.

The Third Department's holding as to the proper remedy (ordering the IRC to submit a second congressional redistricting map proposal to the Legislature) flows directly from the violation of law it found (the IRC's failure to submit a second congressional redistricting map proposal to the Legislature). Yet while neither the Appellants nor their *amici* dispute the Third Department's holding as to the violation, they take issue with the remedy, relying on a series of flawed, overly technical arguments. None of these arguments supports "leav[ing] petitioners with no remedy" here; to hold otherwise "would render meaningless the distinct constitutional command that the IRC create a second set of maps." *Hoffmann*, 217 A.D.3d at 61.

First, Appellants argue that the Third Department was not permitted to order this remedy because it would be impermissible "mid-decade redistricting" under the New York Constitution. *See, e.g.*, Harkenrider Br. 34–35; Brady Br. 18–19, 26. But the plain text of the Constitution refutes this reading. To be sure, Article III, Section 4 recognizes the default assumption that a redistricting plan generally should stay in place until the subsequent decennial census "unless modified pursuant to court order." N.Y. Const. art. III, § 4(e). But it likewise recognizes that there may be circumstances where "a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." *Id.* Thus a "court order" could

require changes to a redistricting plan at any point during the decade, but only where that "court order" is providing a "remedy" for a "violation of law." *Id.*

By way of a petition for mandamus, Petitioners have requested just such a "court order." *Id.* They seek to "remedy" the "violation of law" that arose from the breakdown of the IRC process by requiring the IRC to submit a second congressional redistricting proposal to the Legislature. *Id*. That undisputed "violation of law" in this case has not been remedied and there is nothing in the Constitution that requires New York voters to wait a decade to seek their remedy.

Second, in an attempt to circumvent the clear implications of Section 4(e)'s authorization for courts to order appropriate remedies for violations of law, Appellants argue that the word "modified" imposes some unspecified restriction on the extent of the permissible remedy. But the text of Section 4(e) does no such thing, nor would it be practical to read in such a requirement.[14] The Harkenrider Intervenors acknowledge that any modification to the maps "must . . . be tailored to address any legal infirmities in the 'adopt[ed]' map." Harkenrider Br. 37. But where

[14] If the drafters of Article III wanted to limit the extent of a court's modification of existing maps, they easily could have done so. For example, as this Court discussed in *Harkenrider*, the Redistricting Reform Act of 2012 placed a simple and straightforward limitation on the State Senate and Assembly's ability to amend a map submitted by the IRC, providing that "[a]ny amendments by the senate or assembly to a redistricting plan submitted by the [IRC] . . . shall not affect more than two percent of the population of any district contained in such plan." *Harkenrider*, 38 N.Y.3d at 510 (citations omitted) (alterations in original). It makes no sense to read a similar, though undefined, limitation into Section 4(e) simply due to the use of the word "modified."

the undisputed violation at issue in this case is the IRC's failure to complete its mandatory process, no remedy addresses the legal infirmity better than ordering the IRC to complete that process.[15]

Appellants cite no precedent applying their reading of "modified" to a redistricting case, let alone applying the New York Constitution this way. They rely principally on *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, a case precluding the Federal Communications Commission from undertaking a new, more expansive interpretation of the Communications Act of 1934. 512 U.S. 218, 221–223, 225 (1994). That case has no bearing on whether the bipartisan, democratic, and transparent redistricting process put in place by New Yorkers in 2014 should be completed for future election cycles, as ordered by the Third Department here. It certainly does not support Appellants' novel and impractical interpretation of the New York Constitution.

Third, Appellants claim that the IRC is barred from submitting a second congressional map proposal to the Legislature based on the following statement from the Court in *Harkenrider*: "The procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure. The deadline in

[15] The Harkenrider Intervenors suggest that in order for Section 4(e) to apply such that a court can act to remedy a violation of law, there must be a "legal infirmity with the Steuben County Supreme Court's map." Harkenrider Br. 38–39. But because New Yorkers have not received their guaranteed right to the mandatory redistricting process they enacted, there *is* a legal infirmity with the current map.

the Constitution for the IRC to submit a second set of maps has long since passed." 38 N.Y.3d at 523. Appellants argue that this statement precludes the relief ordered by the Third Department because the deadlines in Section 4(e) are supposedly set in stone, preventing courts from ordering the IRC process to begin again or any deviation from the February 28 outer deadline. Brady Br. 34; Harkenrider Br. 3, 46. But the plain text of the Constitution contradicts Appellants' argument.

Section 5-b(a) expressly provides that the IRC shall be established "[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*." N.Y. Const. art. III, § 5-b(a) (emphasis added). If the IRC process may be re-established "at any other time" pursuant to court order (as the Third Department ordered here), then plainly the presumptive deadlines in Section 4 can be altered. And Section 4(e) likewise generally authorizes courts to deviate from the procedures set forth for the IRC "to the extent that [the] court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." *Id.* § 4(e). That language too means that presumptive deadlines can be altered where required to remedy a violation of law.

In light of this clear constitutional language, it is unsurprising that both Appellate Division courts to consider the meaning of the *Harkenrider* Court's statement have rejected Appellants' argument. In *Nichols*, the First Department held

that the lower court's order directing the IRC process to resume was an appropriate remedy pursuant to Sections 5-b and 4(e), and that the *Harkenrider* Court's reference to the inability of the Legislature to cure the violations was made in the context of "the time constraints created by the electoral calendar." 212 A.D.3d at 531.[16] And the Third Department held that in light of the IRC's absence as a party in *Harkenrider*, "the fact that the deadline for the IRC's submission had passed influenced the practicalities of the remedy fashioned in *Harkenrider*" because "the only way to prepare valid maps for the 2022 election, at that time, was through judicial creation of those maps." (R. 417.) The Third Department thus appropriately recognized that "[t]o 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." (*Id.*)

III. This Court's Decision in *Harkenrider* Does Not Foreclose Relief.

Putting aside the clear mandates of the New York Constitution, Appellants argue throughout their briefing that this Court's decision in *Harkenrider* forecloses the relief requested by Petitioners-Respondents and ordered by the Third Department. *See* Harkenrider Br. 38–42; Brady Br. 21, 24–29. But Appellants'

[16] It makes no difference that at the time Supreme Court and the First Department ordered relief in *Nichols*, the map in place was one enacted by the Assembly in 2022. *Contra* Harkenrider Br. 51–52. As explained, Section 4(e) permits a remedy ordering the IRC to submit a second set of congressional lines. And *Nichols* squarely rejected that the Constitution's deadlines for initial IRC action preclude any further remedy requiring the IRC to act.

appeal to *stare decisis* depends on overreading *Harkenrider*. Instead, as set forth above and herein, the Third Department's order that the IRC process should be effectuated is entirely consistent with *Harkenrider*.

First, each set of Appellants incorrectly posits that the Court in *Harkenrider* already remedied the violation at issue in the present case when it directed the Steuben County Supreme Court to adopt a redistricting map pursuant to Section 4(e). Harkenrider Br. 38–39; Brady Br. 25–26. *Harkenrider* did, of course, order the adoption of a new redistricting plan because it was required to do so "as a remedy for a violation of law." N.Y. Const. art. III, § 4(e). But the violation of law at issue, as explained above, was the fact that the Legislature's set of district lines was void ab initio, and so the only lines in effect were the malapportioned lines from the 2010 redistricting cycle. *See supra* pages 9–13, 24–26. There is no tension between this Court's decision in *Harkenrider* providing a remedy for the malapportionment violation, and a new order providing a remedy for the IRC's constitutional violation by directing the IRC to re-commence its duties under Section 4(e) for future election cycles.

Nothing from this Court's opinion in *Harkenrider* suggests otherwise. Appellants argue that the Court's references to the IRC in the course of its decision meant that the Court was remedying the IRC's violation. *See* Harkenrider Br. 41; Brady Br. 24. For example, the Harkenrider Intervenors point to this Court's

statements about "the lack of compliance by the IRC and the legislature with the procedures set forth in the Constitution," *Harkenrider*, 38 N.Y.3d at 508–09, and recognition that "the IRC's fulfillment of its constitutional obligations was unquestionably intended to operate as a necessary precondition to, and limitation on, the legislature's exercise of its discretion in redistricting," *id.* at 514. *See* Harkenrider Br. 41. But, in context, these statements provided factual and legal context for this Court's decision specifically addressing whether "*the legislature's* enactment of the 2022 redistricting maps contravened the Constitution." *Harkenrider*, 38 N.Y.3d at 509 (emphasis added). That was the only question being resolved in that case; whether the IRC should complete the constitutional process was not before the Court because the IRC was not even a party to *Harkenrider*.

Although the Harkenrider Intervenors suggest this Court considered and rejected other alternatives to court-imposed lines, *see* Harkenrider Br. 43–47, this argument fails to account for the procedural posture of the *Harkenrider* litigation. As discussed above, the *Harkenrider* petition requested relief only against legislative and executive respondents, *not* the IRC. The IRC was not before the Court and neither side advocated for the redistricting process to be returned to the IRC at that juncture.[17] Nor, at that point, had anyone brought an action to compel the IRC to

[17] The Harkenrider Intervenors' brief focuses heavily on questions asked at oral argument about potential alternative remedies. *See* Harkenrider Br. 17–18. However, at oral argument *both sides*

comply with its duties, as this Court ultimately suggested would be a viable remedy. *See Harkenrider*, 38 N.Y.3d at 515 n.10 (rejecting possibility of IRC gamesmanship due to possibility of "judicial intervention in the form of a mandamus proceeding . . . to ensure the IRC process is completed as constitutionally intended"). Under those circumstances, it is understandable that this Court was focused on the need to fashion an expeditious remedy for voters in the 2022 election, but that decision did not foreclose a future action like this one.[18]

Nor would the remedy ordered in *Harkenrider* be an appropriate remedy for the violation in this case—the deprivation of voters' right to the IRC process they enacted through the 2014 redistricting amendments—with the proper respondents to fix this issue now present in the case. As discussed above, the Constitution mandates that the IRC submit maps that must be voted on by the Legislature. The plain text of Section 4(e) thus allows courts to order that relief notwithstanding the current maps, as a required remedy for a violation of law.[19]

---

were arguing to this Court that compelling the IRC to act was an unavailable remedy, and indeed, the IRC was not a party to the proceedings and not within this Court's jurisdiction at the time. *See* Oral Argument Transcript at 33, 40, 41, 46, *Harkenrider v. Hochul*, No. 60 (N.Y. Apr. 26, 2022), https://www.nycourts.gov/ctapps/arguments/2022/Apr22/Transcripts/042622-60-Oral%20Argument-Transcript.pdf.

[18] Indeed, as Judge Troutman noted in dissent, the *Harkenrider* maps "may" have governed until 2030, *see Harkenrider*, 38 N.Y.3d at 527 (Troutman, J., dissenting in part), unless a challenger actually brought a lawsuit to remedy the as-yet-unremedied violation.

[19] The Harkenrider Intervenors quote Section 4(e), but then provide their own spin on the provision, stating that it requires courts to adopt their own map if the mandated IRC process "fails," as if to suggest that the Steuben County special master's map was put in place to remedy the violation at issue in the present case. Harkenrider Br. 35. No such language appears in the

Second, Appellants and their *amici* argue at great length about this Court's presumptions as to the duration of the map created by the special master following the *Harkenrider* decision. In light of Article III, Section 4(e)'s limitation on judicial remedies—that courts should depart from the redistricting process only "to the extent . . . required"—and this Court's emphasis on the "guarantee" of the 2014 redistricting amendments, the Third Department reasonably "decline[d] to infer" that this Court intended to preclude relief for Petitioners here. (R. 415–16.) Appellants and their *amici* twist and deride this holding, calling it a "fabrication," Brady Br. 14, 16–17, and arguing it would be "simply preposterous to indulge the notion" that this Court "directed the adoption of maps with a hidden fuse that would explode and destroy the maps after the 2022 elections," League of Women Voters *Amicus* Br. 7. These objections are not only overstated in the extreme; they miss the point entirely.

To order the relief that it did, the Third Department did not need to find that this Court specifically contemplated that the maps put in place as a result of its decision would be in place only throughout the 2022 elections. As noted above, Section 4(e) authorizes courts to order that redistricting plans be modified at any point in the decade to remedy a violation of law. *See supra* page 32. With a distinct

---

Constitution. The IRC process is mandatory, and courts only intervene "to the extent . . . required" to remedy violations of law. N.Y. Const. art. III, § 4(e). The IRC's failures were not resolved in *Harkenrider*, and nothing in the Constitution prevents a court from ordering a remedy for the IRC's failures.

violation of law at issue in this case, the only question for the Third Department was whether this Court intended to *forbid* a distinct remedy tailored to that violation—here, the completion of the IRC process by the IRC. In *Harkenrider*, this Court was "required" to correct the malapportioned lines from the 2010s redistricting cycle (which were all that remained after the Legislature's 2022 enacted map was struck down), and made several references to the need to do so in sufficient time before the fast-approaching 2022 elections. *See, e.g.*, 38 N.Y.3d at 522 (discussing the need for Supreme Court to "swiftly develop a schedule to facilitate an August primary election, allowing time for the adoption of new constitutional maps"). The Third Department was correct to find that *Harkenrider* did not dictate the solution to the separate violation at issue in this case.

IV. Appellants' and *Amici*'s Policy Arguments Lack Merit.

Appellants and *amici* also advance policy arguments that they say support leaving the court-imposed lines in place. Not only are each of these points misguided, they obscure the fact that Appellants' desired outcome would generate worse incentives going forward.

The Court should reject efforts to paint the Third Department's ordered relief as problematic "mid-decade redistricting." *See* Harkenrider Br. 11–13; League of Women Voters *Amicus* Br. 15–18; Lawyers Democracy Fund *Amicus* Br. 23–27. As an initial matter, the Constitution specifically permits judicial relief for an

unremedied violation of law, which is precisely what the Third Department put into effect here. *See supra* pages 29–33. More generally, however, the ills Appellants and *amici* associate with mid-decade redistricting are precisely what the IRC process was designed to counteract. As this Court recognized, the IRC process was introduced after decades of "federal court involvement in the development of New York's congressional maps" and was meant to resolve concerns about politically motivated stalemates, partisan gerrymandering, and lack of transparency. *Harkenrider*, 38 N.Y.3d at 502–03. These problems are not solved by keeping lines drawn by an out-of-state, unaccountable special master in place for a decade.

Accordingly, Appellants' invocation of the Coretta Scott King Mid-Decade Redistricting Prohibition Act, presumed hyper-partisan intentions, and historical examples of parties newly coming to power and seizing control of the maps, Harkenrider Br. 12–13, are all utterly misplaced. For example, while Appellants cite *LULAC* for its description of the Texas Legislature voluntarily replacing a prior map when it had "no constitutional obligation to act," with the clear goal of gaining "partisan advantage," *LULAC*, 548 U.S. at 416–17 (citations omitted), the requested relief in this case creates the opposite scenario—the IRC would be completing its constitutional obligation, and is constitutionally required to act in a bipartisan, accountable, transparent manner.

Further, there is no merit to the suggestion that affirming the Third Department's decision will open the door to future gamesmanship or "annual" court challenges. *See* Harkenrider Br. 42–43; *see also* Lawyers Democracy Fund *Amicus* Br. 26–27. As the Third Department appropriately recognized, "the right to compel the IRC to submit a second set of redistricting maps will be exhausted once it has done so," and the door will be closed to future mid-decade challenges like this one. (R. 417 n.6 [Third Dep't Opinion].) In the briefing before this Court, this argument instead appears to be based on a convoluted string of hypotheticals—including the possibility that the Legislature would be "unable to adopt a new map" after the IRC submits a second set of lines; that the Legislature would override the IRC with a map that would "likely again fall in court as an unconstitutional partisan gerrymander"; and that this process would then repeat with a mandamus petition against the Legislature (notwithstanding that any deficiencies in a Legislature-drawn map would presumably be remedied in the first court challenge). *See* Harkenrider Br. 42–43. None of this speculation is substantiated. If anything, it is refuted by the IRC's recent experience in drafting a new set of Assembly lines in a cooperative, bipartisan manner. *See supra* page 22–23. What is more, the speculative harms are vastly at odds with Appellants' joint recognition that the IRC process was and is intended to be the primary tool to address partisan ills. *See* Harkenrider Br. 9 ("The People of New York forcefully rejected partisan gerrymandering in 2014 . . . .");

Brady Br. 4 ("In 2014, the New York State Constitution was amended with the passage of a set [of] amendments addressed at eliminating partisan gerrymandering in the redistricting of election districts.").

In any event, Appellants' and *amici*'s purported concerns about gamesmanship and partisan squabbling ignore that it is *denying* relief in this action that would most incentivize gamesmanship in the future. Appellants' preferred interpretation of the Constitution and the applicable redistricting deadlines would create an untenable incentive for Commission members in the minority party to deny the Commission a quorum and run out the clock on constitutional deadlines in order to ensure (or at least greatly increase the likelihood) that the redistricting process would pass into the hands of a court-appointed, single special master in the plaintiffs' preferred venue. This would vitiate the promise of the IRC as an institution that reflects the people of New York and works to aggregate their extensive input into the line-drawing process.

Overall, the Third Department's "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." (R. 417.) As that court recognized, "[t]he right to participate in the democratic process is the most essential right in our system of governance," and the "procedures governing the redistricting process . . . must be guarded as jealously as the right to vote itself." (*Id*.) The IRC is currently

fully constituted with all ten members, fully staffed, and fully resourced. The Jenkins Respondents respectfully submit that the IRC should "commence its duties forthwith," as the Third Department ordered, *id*., and thereby finally provide New York's voters with the right they were "guarantee[d]" in the 2014 redistricting amendments—congressional redistricting maps that "have their origin in the collective and transparent work product of a bipartisan commission that is constitutionally required to pursue consensus to draw district lines." *Harkenrider*, 38 N.Y.3d at 513–14.

CONCLUSION

For the above reasons, the Third Department should be affirmed. In the event the Court affirms, the Jenkins Respondents respectfully request that this Court set a deadline for submission by the IRC to the Legislature of a second congressional redistricting plan and the necessary implementing legislation for such plan.

Dated: October 20, 2023

Respectfully submitted,

JENNER & BLOCK LLP

Jessica Ring Amunson *(of the bars of the District of Columbia and the State of Maryland) by permission of the Court*
Sam Hirsch *(of the bars of the District of Columbia and the State of Maryland) by permission of the Court*
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
Telephone: (202) 639-6000
Facsimile: (202) 639-6066
jamunson@jenner.com
shirsch@jenner.com

Jacob D. Alderdice
Allison N. Douglis
1155 Avenue of the Americas
New York, NY 10036
Telephone: (212) 891-1600
Facsimile: (212) 891-1699
jalderdice@jenner.com
adouglis@jenner.com

Attorneys for Respondents-Respondents Independent Redistricting Commission Chairperson Ken Jenkins, Independent Redistricting Commissioner Ivelisse Cuevas-Molina, and Independent

Redistricting Commissioner Elaine Frazier

CERTIFICATE OF COMPLIANCE

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

A proportionally spaced typeface was used, as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by § 500.1(h) is 10,536.

Dated: October 20, 2023

Respectfully submitted,

JENNER & BLOCK LLP

Jessica Ring Amunson *(of the bars of the District of Columbia and the State of Maryland) by permission of the Court*
Sam Hirsch *(of the bars of the District of Columbia and the State of Maryland) by permission of the Court*

1099 New York Avenue, NW
Suite 900
Washington, DC 20001
Telephone: (202) 639-6000
Facsimile: (202) 639-6066
jamunson@jenner.com
shirsch@jenner.com

Jacob D. Alderdice
Allison N. Douglis
1155 Avenue of the Americas
New York, NY 10036
Telephone: (212) 891-1600
Facsimile: (212) 891-1699
jalderdice@jenner.com
adouglis@jenner.com

Attorneys for Respondents-Respondents Independent Redistricting Commission Chairperson Ken Jenkins, Independent Redistricting Commissioner Ivelisse Cuevas-Molina, and Independent Redistricting Commissioner Elaine Frazier