To be Argued by:
ARIA C. BRANCH
(Time Requested: 20 Minutes)

New York Supreme Court

Appellate Division—Third Department

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

Petitioners-Appellants,

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

– against –

THE NEW YORK STATE INDEPENDENT REDISTRICTING COMMISSION, INDEPENDENT REDISTRICTING COMMISSION CHAIRPERSON KEN JENKINS, INDEPENDENT REDISTRICTING COMMISSIONER ROSS BRADY, INDEPENDENT REDISTRICTING COMMISSIONER JOHN CONWAY III, INDEPENDENT REDISTRICTING COMMISSIONER IVELISSE CUEVAS-MOLINA, INDEPENDENT REDISTRICTING COMMISSIONER ELAINE FRAZIER, INDEPENDENT REDISTRICTING COMMISSIONER LISA HARRIS, INDEPENDENT REDISTRICTING COMMISSIONER CHARLES NESBITT, and INDEPENDENT REDISTRICTING COMMISSIONER WILLIS H. STEPHENS,

Respondents-Respondents,

(For Continuation of Caption, See Inside Cover)

Docket No.: CV-22-2265

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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Albany County Clerk's Index No. 904972-22

– 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.

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As the Court of Appeals explained in *Harkenrider v. Hochul*, "procedural requirements matter" because "they safeguard substantive rights." 38 N.Y.3d 494, 512 n.9 (2022). When the redistricting process required by the New York Constitution is disrupted by IRC inaction, "judicial intervention in the form of a mandamus proceeding" is "among the many courses of action available to ensure the IRC process is completed as constitutionally intended." *Id.* at 515 n.10. Here, using the very mechanism contemplated by the *Harkenrider* Court, Petitioners seek to mandate compliance with the procedural requirements of the Redistricting Amendments to safeguard the substantive rights of themselves and all New Yorkers.

Contrary to the assertions made by the Republican Commissioners and Intervenors (together, "Respondents"), nothing in *Harkenrider* forecloses the relief Petitioners seek. The *Harkenrider* petitioners (Intervenors here) claimed that, because the redistricting maps enacted by the Legislature in 2022 were drawn without legal authority and therefore void, the previous decade's congressional map was the only valid map in existence, and its districts were malapportioned in violation of the one-person, one-vote requirement. The *Harkenrider* litigation thus remedied that malapportionment, but the IRC's procedural violation was not and has never been redressed. Moreover, *Harkenrider* did not mandate that the resulting judicially adopted congressional map remain in place for the full decade; indeed, it

was clear that it was exercising "judicial oversight . . . to facilitate the expeditious creation of constitutionally conforming maps *for use in the 2022 election*." *Id.* at 502 (emphasis added). And the basic fact that this is a congressional redistricting case does not make it a collateral attack on *Harkenrider*, which dealt with different issues and to which Petitioners were not parties.

Nor do the Redistricting Amendments bar Petitioners' mandamus action. Quite the opposite: Petitioners seek an order reestablishing the IRC to remedy a violation of law, which the constitutional text specifically contemplates. That allowance is logical and necessary to fulfill the Redistricting Amendments' purpose, which was to disincentivize the very political gamesmanship that has nevertheless dominated New York's most recent round of redistricting. If the IRC could simply disregard its constitutional obligations, creating a vacuum in which litigants would be incentivized to rush to a court of their choosing to secure judicially drawn maps that would remain in place for the ensuing decade, then it would—as the *Harkenrider* Court feared—"encourage partisans involved in the IRC process to avoid consensus" and "render the constitutional IRC process inconsequential." *Id.* at 517. That result would be at odds with both the text and purpose of the Redistricting Amendments.

Finally, this action is timely. Until the Court of Appeals ruled that the Legislature's 2021 gap-filling legislation—under which it enacted its new maps—

was unconstitutional and struck down those maps as a result, there was no basis to move for the remedy that Petitioners now seek. Respondents would have this Court conclude that Petitioners should have predicted the *Harkenrider* result and moved prophetically in advance of that ruling. But that decision was not a foregone conclusion—indeed, to reach it, the Court of Appeals *overruled* the Fourth Department. And, under basic legal principles, legislation is in effect until it is expressly invalidated by an authoritative court. Because Petitioners commenced this action well in advance of the statute-of-limitations period following this triggering event, there is no equitable bar to relief.

In sum, Petitioners' mandamus suit is consistent with (and, indeed, seeks relief contemplated by) both the *Harkenrider* decision and the Redistricting Amendments, and neither statute nor equitable principles bar relief. Respondents' arguments to the contrary are without merit, and Supreme Court's dismissal of the action should be reversed.

I. ***Harkenrider*** **neither addressed nor remedied the IRC's failure to fulfill its constitutional duties.**

Respondents' principal argument is that *Harkenrider* already remedied the constitutional violation that Petitioners seek to redress. But this contention relies on mischaracterizations of both the *Harkenrider* decision and Petitioners' claim here.

In *Harkenrider*, Intervenors *did not seek* to remedy the constitutional violation caused by the IRC's failure to fulfill its constitutional obligations. As their amended

petition before the Steuben County Supreme Court demonstrates, they sought to address the violation of the one-person, one-vote requirement caused by the state's failure to redistrict prior to the 2022 midterm elections:

> [T]he Legislature had no authority to enact new maps because the Legislature did not follow the *exclusive* process for enacting replacement maps that the People enshrined through the 2014 amendments, meaning that the Senate map and congressional map are entirely void. Accordingly, the only validly enacted or adopted maps are those that the Legislature and courts adopted for New York after the 2010 decennial census. But the prior congressional map . . . is now unconstitutionally malapportioned after the 2020 census and does not have the correct number of seats.

R. 121–22.

Consistent with this theory, Intervenors sought a remedy for "Unconstitutional Malapportionment." R. 192–94. Although Intervenors' first cause of action was ostensibly raised under the New York Constitution—"Failure To Follow Constitutional And Statutory Procedures For Redistricting," R. 190—that claim was *not* directed at the IRC's failure to comply with its constitutional duties (or otherwise duplicative of Petitioners' claim here). Instead, it was directed at *the Legislature's* adopted maps and demanded that *the judiciary*—not the Legislature or the IRC—engage in any remedial map-drawing. *See* R. 192 ("Since the Legislature had and has no constitutional authority to draw congressional or state Senate districts given the IRC's failure to follow the exclusive, constitutionally mandated procedures, this Court cannot give the Legislature another opportunity to draw

curative districts. . . . Thus, this Court should draw its own maps for Congress and state Senate prior to the upcoming deadlines for candidates to gain access to the ballot[.]"). The IRC's unconstitutional abdication was only an incidental detail in Intervenors' causes of action. And they clearly did not seek, as Petitioners do here, to order the IRC to resume its efforts consistent with the Redistricting Amendments. *See* R. 198–99.

The Steuben County Supreme Court ultimately agreed that the Legislature's redistricting maps were not consistent with the constitutional redistricting process and thus "void *ab initio*," and that the prior decade's maps—the only valid maps in existence—were malapportioned and could not be used in the 2022 midterms. R. 217–18. The Court of Appeals later reached the same conclusion, holding that the legislatively enacted maps were procedurally unconstitutional, which "le[ft] the state without constitutional district lines for use in the 2022 primary and general elections." *Harkenrider*, 38 N.Y.3d at 521. As a remedy for the malapportionment of the prior decade's map, it ordered that the Steuben County Supreme Court "adopt constitutional maps with all due haste." *Id.* at 524.[1]

[1] Respondents make much of the fact that Petitioners did not appeal the congressional map that the Steuben County Supreme Court ultimately adopted in *Harkenrider*. *See* Intervenors' Br. 20–21, 54; Republican Comm'rs' Br. 4. But Petitioners were not parties to that litigation. To the contrary, five of the Petitioners in this action moved to intervene in *Harkenrider* to defend their interests—and their request was denied. *See* Order, *Harkenrider v. Hochul*, No. 22-00506 (4th Dep't

Striking down the Legislature's unconstitutionally adopted maps and redressing the consequent malapportionment *did not remedy* the procedural violation at issue in this case—the IRC's failure to complete its constitutional obligations. Here, Petitioners have alleged that "as a direct result of the IRC's refusal to carry out its constitutional duty, New York voters, including Petitioners . . . have yet to vindicate their rights under the Redistricting Amendments." R. 268–69. Separate and apart from whether New Yorkers cast ballots under properly apportioned maps in 2022 given that the legislatively enacted maps were void ab initio, the "procedural requirement" that the IRC submit a second set of redistricting maps to the Legislature for consideration was not at issue in *Harkenrider*, 38 N.Y.3d at 512 n.9—nor was a remedy for the IRC's failure to fulfill that requirement ordered or even sought.

II. The current congressional map does not need to be in place for the rest of the decade.

Neither *Harkenrider* nor the Redistricting Amendments require that the court-drawn map that remedied last year's malapportionment remain in place for the entire decade.

Apr. 14, 2022), Doc. No. 41. In any event, an appeal of that map would not have remedied the IRC's constitutional violation at issue in this litigation.

A. *Harkenrider* does not require that the court-drawn map remain in place for the next decade.

The Court of Appeals' *Harkenrider* decision does not require that the court-drawn congressional map be in place for the full decade. Indeed, the Court indicated from the outset that it was providing a limited remedy to cure the immediate malapportionment problem, stating that "judicial oversight is required to facilitate the expeditious creation of constitutionally conforming maps *for use in the 2022 election*." 38 N.Y.3d at 502 (emphasis added). Respondents' arguments to the contrary rely almost entirely on a single excerpt from Judge Troutman's *dissenting* opinion. *See* Intervenors' Br. 52, 56; Republican Comm'rs' Br. 14. But far from stating the affirmative opinion of the majority on this issue, Judge Troutman merely noted her disagreement with the Court's remedy because it "*may* ultimately subject the citizens of this State, for the next 10 years, to an electoral map created by an unelected individual, with no apparent ties to this State, whom our citizens never envisioned having such a profound effect on their democracy." *Harkenrider*, 38 N.Y.3d at 527 (Troutman, J., dissenting) (emphasis added).[2]

[2] No less misleading is Respondents' reliance on statements made by counsel for the State Assembly in the separate *Nichols* litigation, which purportedly demonstrates that "all parties involved understood the full-decade applicability of the Steuben County Supreme Court's congressional map." Intervenors' Br. 52; *see also* Republican Comm'rs' 14–15. Those statements are not the law and have no bearing on what the *Harkenrider* Court actually held.

Intervenors also put far too much weight on the term "final" in the Steuben County Supreme Court's order making "minor revisions" to the 2022 redistricting maps. *See* Intervenors' Br. 19, 21, 51, 56. The Steuben County Supreme Court's initial order adopting "the official approved *2022* Congressional map" indicated that the map would only be in place for the 2022 midterm elections. R. 225–29 (emphasis added). At the very least, it did not directly address whether the map would be in place beyond the 2022 midterms. That the court's subsequent order used the term "final" is better understood as meaning that the slightly revised maps adopted in that later order supplanted the original maps that the court had initially adopted; in other words, that those maps were the "final enacted redistricting maps" adopted by the Steuben County Supreme Court. Decision & Order at 1, *Harkenrider v. Hochul*, No. E2022-0116CV (Steuben Cnty. Sup. Ct. June 2, 2022), Doc. No. 696. It does not follow that the revised congressional map was meant to remain in place for the entire decade.

B. The Redistricting Amendments contemplate court-ordered changes to adopted maps.

Nothing in the New York Constitution transforms the interim malapportionment remedy adopted in *Harkenrider* into a permanent map governing New York's congressional elections for the entire decade. To the contrary, the Redistricting Amendments explicitly contemplate that, following "[t]he process for redistricting congressional and state legislative districts established by this section

and sections five and five-b of this article," a court might be 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). It further allows for the possibility that redistricting maps otherwise in place for the full decade can be "modified pursuant to court order." *Id.*

Intervenors appear not to appreciate that Petitioners' mandamus action fits squarely into that constitutional text. Intervenors acknowledge that, once maps are adopted "either by the Legislature or by the courts under the procedure for initial review," those maps "are presumed to 'be in force until the effective date of a plan based upon the subsequent federal decennial census,' with the only exception being a 'modifi[cation]' to remedy 'a violation of the law.'" Intervenors' Br. 26 (alteration in original) (quoting N.Y. Const. art. III, § 4(e)). But that exception applies here: Petitioners seek a court order modifying the current congressional map to remedy a violation of law—the IRC's failure to fulfill its constitutional obligations. Far from being inconsistent with the constitutional text, Petitioners' suit is expressly allowed by it.

The Republican Commissioners run with Intervenors' unjustifiably limited view of the Redistricting Amendments' remedial provisions and reach a logical extreme. They assert that Section 4(e) creates a "one-way valve" for remedying violations of law in redistricting: An initial court-ordered map "represent[s] the completion of the constitutional process," after which no further modification or

review is possible. Republican Comm'rs' Br. 6; *see also id.* at 15 (asserting that *Harkenrider* "was the constitutional remedy for the congressional map" and thus that "this constitutional remedy [] already r[an] through to its constitutional completion in the form of a Section 4(e) court-ordered map").[3] But the New York Constitution plainly allows for judicial action to modify redistricting maps when needed to remedy violations of law—and imposes no limit on the numbers of actions that can be litigated or remedial maps that can be adopted. *See* N.Y. Const. art. III, § 4(e).[4]

III. The Redistricting Amendments do not limit the available remedy to only a court-drawn map.

Intervenors' argument that a judicially adopted map is the exclusive remedy for a failure of the constitutional redistricting process is premised on both an

[3] A more appropriate shorthand for their position might be the "one-shot theory" or "one-bite-at-the-apple theory," since it is premised on their belief that the New York Constitution contemplates only a single remedial action to cure infirmities in redistricting maps. This theory, incidentally, is in apparent tension with their alternative theory that a court-drawn redistricting map could be challenged and redrawn based on "substantive infirmities." Republican Comm'rs' Br. 3–4.

[4] Intervenors also seem to misunderstand the import of caselaw from other states. *See* Intervenors' Br. 40–41. Petitioners cited these decisions in their opening brief merely to demonstrate that reading the New York Constitution to allow for a legislative redistricting solution following a court-ordered impasse map would be entirely consistent with the practice in other states. Or, put another way, reading Section 4(e) to entirely foreclose an IRC-led remedy following a court-drawn impasse map would not only be a strained reading of the New York Constitution, but would also be out of step with how courts in other states have viewed their role in the context of malapportionment litigation.

incomplete reading of the Redistricting Amendments and a misunderstanding of the *Harkenrider* decision.

A. An IRC remedy is consistent with the Redistricting Amendments.

Intervenors overlook that the relief Petitioners seek in this action is wholly consistent with the Redistricting Amendments.

As discussed above, *see supra* Part I.B, Section 4(e) expressly contemplates judicial action, even after a redistricting map is adopted:

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

N.Y. Const. art. III, § 4(e). The Redistricting Amendments provide additional guidance as to what such judicial redress might entail: "On or before February first of each year ending with a zero *and at any other time a court orders that congressional or state legislative districts be amended*, an independent redistricting commission shall be established to determine the district lines for congressional and state legislative offices." *Id.* art. III, § 5-b(a). Here, Petitioners allege "a violation of law"—namely, the IRC's failure to fulfill its constitutional redistricting obligations—and seek reestablishment of the IRC to remedy this violation consistent

with Section 5-b(a). The fact that the constitutional text explicitly contemplates *re*establishment of the IRC belies Intervenors' assertion that "the IRC's authority . . . expired . . . at the absolute latest on February 28, 2022." Intervenors' Br. 36–37.

Intervenors' insistence that Section 5-b(a) does not allow Petitioners' requested relief is premised on an overly crabbed reading of the constitutional text. They draw an apparent distinction between "*amend[ing]*" a map and calling upon the IRC to reinitiate the redistricting process and thus produce a *new* map. *Id.* at 37 (quoting N.Y. Const. art. III, § 5-b(a)). But Petitioners do indeed seek to *amend* the current congressional map—by replacing it with a map drawn pursuant to the proper constitutional procedure. Such a result is consistent with any cognizable definition of the term "amend," which contemplates both small *or* (in this case) large changes "to rectify or make right." *Amend*, *Black's Law Dictionary* (11th ed. 2019).[5] Intervenors provide no authority for their arbitrarily restricted definition of the term "amend[]"—an interpretation that would unjustifiably exclude Petitioners' requested relief. *Cf. Harkenrider*, 38 N.Y.3d at 509 ("construing the language of the

[5] *See also Amend*, *Black's Law Dictionary* (11th ed. 2019) (defining "amend" as "[t]o correct or make *usu.*"—but not *exclusively*—"small changes to (something written or spoken); to rectify or make right"; or "[t]o change the wording of; specif., to formally alter (a statute, constitution, motion, etc.) by striking out, inserting, or *substituting* words" (emphases added)); *Amend*, Merriam-Webster, https://www.merriam-webster.com/dictionary/amend (last visited Apr. 3, 2023) (defining "amend" as "to put right" or "to change or modify (something) for the better," without quantitative qualification).

Constitution" requires "giv[ing] to the language used its ordinary meaning"); *see also infra* Part IV (noting that First Department concluded that adoption of new State Assembly map constituted amendment of existing district lines).

B. *Harkenrider* did not foreclose an IRC remedy.

While Intervenors interpret the constitutional text too narrowly, they simultaneously read the *Harkenrider* opinion too expansively. Seizing on selective language from that decision, Intervenors suggest that the "procedural unconstitutionality" that forms the basis of Petitioners' mandamus suit is "'incapable of a legislative cure' because '[t]he deadline in the Constitution for the IRC to submit a second set of maps has long since passed.'" Intervenors' Br. 36 (alteration in original) (quoting *Harkenrider*, 38 N.Y.3d at 523). From this language, Intervenors conclude that the IRC process is now permanently foreclosed, leaving only the possibility of judicial remediation. But again, this conclusion is clearly at odds with the plain text of the Redistricting Amendments, which contemplate reestablishment of the IRC—even after the February 28 deadline—to remedy violations of law.

Moreover, Intervenors ignore the limited context of the *Harkenrider* Court's discussion of the IRC's deadlines. The language on which Intervenors rely appears in the section of the opinion discussing whether "*the legislature* must be provided a 'full and reasonable opportunity to correct . . . legal infirmities.'" 38 N.Y.3d at 523 (alteration in original) (emphasis added) (quoting N.Y. Const. art. III, § 5). The

Court of Appeals responded in the negative: "The 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." *Id.* (emphasis added); *see also id.* at 523 n.19 ("[D]ue 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." (emphasis added)). Simply put, *Harkenrider*'s consideration of the IRC's deadlines implicated whether *the Legislature* could remedy the procedural violation consistent with the Redistricting Amendments, not whether *the IRC* could do the same.

The *Harkenrider* Court's conclusion on this point is unsurprising, given its concurrent determinations that (1) the Legislature could not proactively adopt maps absent preceding IRC action and (2) the imminence of the 2022 midterms foreclosed all but the most expeditious remediation. *See Nichols v. Hochul*, 212 A.D.3d 529, 531 (1st Dep't 2023) (explaining that, "[i]n *Harkenrider*, the constitutional violation could not be cured by a process involving the legislature and the IRC, given the time constraints created by the electoral calendar"). It does not follow, as Intervenors insist, that *any* IRC recourse—which would vindicate the "procedural requirements" that "safeguard substantive rights," *Harkenrider*, 38 N.Y.3d at 512 n.9—is now

unavailable. Indeed, such a result would be at odds with the availability of further IRC action under Section 5-b.

Indeed, as noted, the possibility of mandamus action was expressly contemplated by the Court of Appeals. In response to concerns that IRC "members could potentially derail the redistricting process by refusing to participate"—which is to say, *precisely* what happened last year—the *Harkenrider* Court identified "judicial intervention in the form of a mandamus proceeding" as "among the many courses of action available to ensure the IRC process is completed as constitutionally intended." *Id.* at 515 n.10. Intervenors try to downplay this discussion of mandamus, explaining that "the Court was discussing the various mechanisms by which litigants could challenge 'gamesmanship by minority members' of the IRC." Intervenors' Br. 41. Quite: Using the legal tool of mandamus to compel the IRC to forego any additional gamesmanship-inspired inaction and thus fulfill its otherwise-abdicated constitutional duties is exactly what Petitioners' suit aims to do.[6]

[6] Intervenors also suggest that the *Harkenrider* majority's rejection of Judge Troutman's proposed alternative remedy places future IRC action beyond the remedial pale. *See, e.g.*, Intervenors' Br. 37. But, as the *Harkenrider* majority noted, Judge Troutman "craft[ed] a remedy that is neither consistent with the constitutional text nor requested by any of the parties to this proceeding"—to wit, "that the legislature should be directed to adopt one of the two plans submitted by the IRC and already rejected by the legislature." 38 N.Y.3d at 523 n.20. That is *not* the relief Petitioners seek in this action. They ask that the IRC be required to complete its constitutionally mandated obligations—a remedy *consistent* with the Redistricting Amendments.

IV. The First Department correctly recognized the merit of Petitioners' requested relief in *Nichols*.

Subsequent to the filing of Petitioners' opening brief, the First Department endorsed the very relief they seek here in parallel litigation involving the State Assembly map—confirming Petitioners' arguments regarding the constitutional availability of further IRC action.

The First Department's January 24 opinion in *Nichols* succinctly recounted the relevant background:

> In a prior decision, this Court declared that the February 2022 New York State Assembly map was invalid due to procedural infirmities [citing *Harkenrider*]. We remanded to [the New York County] Supreme Court for consideration of the proper means of redrawing the Assembly map in accordance with [Section] 5-b. Consistent with our prior order, Supreme Court then ordered that the Assembly map be redrawn through the IRC process set forth in [Article III] and set deadlines for the IRC to prepare maps, as the deadlines contained in [Section] 4(b) had passed.

212 A.D.3d at 530 (citations omitted); *see also* Pet'rs' Br. 19–21 (describing *Nichols* litigation). The First Department ultimately "endorse[d] the procedures adopted by the [New York County] court, f[ound] that they constitute appropriate remedial measures for a constitutional violation, and f[ound] that the remedy is consistent with the procedures set forth in the Constitution." *Nichols*, 212 A.D.3d at 530.

Notably—and in contrast to Intervenors' artificially narrow interpretation of "amended" discussed above, *see supra* Part III.A—the First Department concluded that the adoption of a new map to cure the constitutional infirmities caused by the

IRC's inaction triggered the reestablishment of the IRC as contemplated by Section 5-b. *See Nichols*, 212 A.D. at 530 ("[Section] 5-b requires that an IRC be established to determine district lines, including in cases such as this, where a court has ordered that districts be amended."). Moreover—and contrary this time to Intervenors' misinterpretation of the remedies available to redress violations of the Redistricting Amendments, *see supra* Part III—the First Department explained that "[t]he Constitution does not mandate any particular remedial action when a violation of law has occurred and authorizes broad judicial oversight of remedial action when the courts find that it is necessary." *Nichols*, 212 A.D.3d at 530. Although *one* such judicial remedy might be for a court to "order the adoption of a redistricting plan with the assistance of a special master," the First Department further explained that "the Constitution [] favors a legislative resolution when available, and does not expressly limit the potential remedies a court may order to facilitate a viable legislative plan." *Id.* at 530–31 (citations omitted).

The First Department therefore concluded that reestablishing the IRC to draw a new State Assembly plan constitutes "a viable legislative plan . . . as contemplated by [Section] 5-b," and thus that the New York County Supreme Court's "order setting deadlines for, among other things, the IRC's submission of maps, in order to facilitate such a plan, was an appropriate remedial measure which is not prohibited by [Section] 4(e)." *Id.* at 531. In short, the First Department approved the very relief

that Petitioners seek in this action—and, in so doing, rejected the arguments Intervenors make here regarding the remedies available to cure constitutional infirmities in the redistricting process.[7]

Intervenors' attempts to undermine the First Department's conclusions are unavailing. They once more recite the *Harkenrider* Court's language regarding the unavailability of a legislative cure, suggesting that *Nichols* therefore "contradicts *Harkenrider*." Intervenors' Br. 42. But, as discussed above, *see supra* Part III.B, this argument is premised on a misreading of the relevant section of the *Harkenrider* opinion—and ignores that the Redistricting Amendments allow the IRC process to be reinitiated to create new maps. *See* 38 N.Y.3d at 523 & n.19; N.Y. Const. art. III, § 5-b(a).

Similarly, Intervenors' assertion that *Harkenrider*'s "conclusion that an IRC-and-legislative-based cure was unavailable rested entirely on the fact that the Constitution's mandatory deadlines for IRC involvement 'ha[d] long since passed,'" Intervenors' Br. 43 (alteration in original) (quoting *Harkenrider*, 38 N.Y.3d at 523), is misguided—it takes the *Harkenrider* Court's language out of context and, as a

[7] The progress of the *Nichols* litigation also belies Supreme Court's conclusion that "directing the IRC to submit a second plan would be futile." R. 12; *see also* Pet'rs' Br. 31–35. Notably, the Republican Commissioners do not address this erroneous finding in their brief, and Intervenors pointedly "do not defend it." Intervenors' Br. 32 n.3.

result, arrives at a conclusion more expansive than what the Court of Appeals actually articulated.

Finally, the suggestion that "*Harkenrider* had enough time to order the remedy at issue in the present case," *id.*, ignores the *Harkenrider* Court's determination that "*[p]rompt judicial intervention* [wa]s both *necessary* and appropriate to guarantee the people's right to a free and fair election" in 2022, 38 N.Y.3d at 522 (emphases added). Only now, as the First Department concluded in *Nichols*, "is much more time available . . . for the IRC and legislative procedures to proceed and conclude prior to the next election cycle, thereby allowing for a reasonable opportunity for the legislature to meet its constitutional requirements." 212 A.D.3d at 531.

In sum, the First Department's conclusions in *Nichols* effectively counter the arguments Respondents raise before this Court—and provide additional support for the viability of Petitioners' mandamus action and the relief they seek in it.[8]

[8] The Republican Commissioners also suggest that the *Nichols* remedy is not available here because *Harkenrider* already provided "the constitutional remedy for the congressional map," Republican Comm'rs' Br. 15–16, but as discussed above, *see supra* Parts I–II, this argument is premised on a misunderstanding of the *Harkenrider* remedy and their misguided "one-way valve" theory—and thus does not undermine *Nichols*'s persuasive force in this case.

V. Petitioners' mandamus action is timely.

Supreme Court correctly concluded that this mandamus action is timely. Actions against governmental bodies or officers, including mandamus actions, "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." CPLR 217(1). Petitioners' claim here accrued no earlier than February 28, 2022—the deadline for the IRC to submit its second round of maps. They filed their initial petition on June 28, 2022, within four months of that date.

Intervenors argue that Petitioners' mandamus claim accrued on January 24, 2022, when the IRC "announced" that it "would not present a second plan to the legislature." Intervenors' Br. 44. (quoting *Harkenrider*, 38 N.Y.3d at 504–05). Not so. An agency action is not "final and binding upon the petitioner" until the agency has "reached a definitive position on the issue that inflicts actual, concrete injury," which "may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." *Best Payphones, Inc. v. Dep't of Info. Tech. & Telecomms.*, 5 N.Y.3d 30, 34 (2005). There was nothing "final" or "binding" about the January 24 announcement.

Moreover, the IRC's failure to submit a second set of congressional maps did not inflict "actual, concrete injury" until the Court of Appeals invalidated the Legislature's gap-filling 2021 legislation on April 27, 2022. *Id.* Until the Court of

Appeals' decision in *Harkenrider*, this legislation effectively gave the IRC discretion as to whether to submit a second set of congressional maps to the Legislature. Mandamus relief is not available for "[d]iscretionary acts" that "are not mandated and involve the exercise of reasoned judgment, which could typically produce different acceptable results." *All. to End Chickens as Kaporos v. N.Y.C. Police Dep't*, 152 A.D.3d 113, 117 (1st Dep't 2017). Prior to the Court of Appeals' decision, the mandamus relief sought by Petitioners—completion of the steps necessary to place redistricting in the hands of the Legislature and ensure that maps would be drawn according to the procedures in Article III—would have been unavailable because the gap-filling legislation created an alternative procedure. That legislation effectively cured the IRC's failure to act and thus "prevented or significantly ameliorated" Petitioners' injury. *Best Payphones*, 5 N.Y.3d at 34.

Furthermore, notwithstanding its January 24 announcement, the IRC had until February 28 to take "further administrative action." *Id.* That was the constitutional deadline for the IRC to submit its second set of proposed maps. *See* N.Y. Const. art. III, § 4(b) ("[I]n no case later than February twenty-eighth, the redistricting commission shall prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan."). Petitioners' claim accrued, at the earliest, when the IRC failed to act by February 28.

For the same reasons, Intervenors' vague appeal to "general equitable principles" also falls flat. Intervenors' Br. 45–46. Intervenors essentially argue that Petitioners should have filed *no later than* February 28 because that is the constitutional deadline to submit the second round of maps. *Id.* at 46 (citing N.Y. Const. art. III, § 4(b)). But Petitioners' claim could not have even *accrued* until February 28, at the earliest.

Finally, the cases relied upon by Respondents to support their argument that the statute of limitations began to run on January 24 are each inapposite. None of those cases involved a situation like the one here, where the respondents had a legally specified timeframe within which to act.[9] Each of these cases also involved some form of official action that communicated a "definitive position on the issue." *Best Payphones*, 5 N.Y.3d at 34. The January 24 press release from Chair Imamura was neither official nor binding on the IRC, and thus could not mark the end of the IRC's administrative process.

[9] *See Montco Constr. Co. v. Giambra*, 184 Misc. 2d 970, 972 (Erie Cnty. Sup. Ct. 2000) (action accrued when, after repeated demands from petitioner, city sent petitioner letter denying request); *Smuckler v. City of New York*, 2009 N.Y. Slip Op. 30816(U), ¶ 9 (N.Y. Cnty. Sup. Ct. 2009) (action accrued on date public-school teacher first received notice of termination); *Ruskin Assocs., LLC v. State of N.Y. Div. of Hous. & Cmty. Renewal*, 77 A.D.3d 401, 403 (1st Dep't 2010) (action accrued 30 years earlier, when agency sent petitioner letter informing him that it lacked jurisdiction over matter); *Van Aken v. Town of Roxbury*, 211 A.D.2d 863, 864 (3d Dep't 1995) (action accrued when town attorney informed petitioners that road they sought to compel town to maintain was not town road).

VI. Petitioners' mandamus action is not an improper collateral attack.

Finally, Supreme Court correctly held that this litigation is not a "collateral attack" on the *Harkenrider* judgment. R. 15. As Supreme Court recognized, Petitioners were not parties to that litigation. *Id.* Nor were the IRC Respondents. And, as explained above, *Harkenrider* involved different issues and sought different relief for a different constitutional violation. Intervenors' suggestion that Petitioners' claim is barred because they did not file "a motion for reconsideration or a motion to vacate" in *Harkenrider* simply makes no sense. Intervenors' Br. 49.

The doctrine of collateral estoppel "may be invoked in a subsequent action or proceeding to prevent a party from relitigating an *[identical]* issue decided *against that party in a prior adjudication*." *ABN AMRO Bank, N.V. v. MBIA, Inc.*, 17 N.Y.3d 208, 226 (2011) (alteration in original) (emphases added) (quoting *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 152 (1988)). "Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling." *Buechel v. Bain*, 97 N.Y.2d 295, 303–04 (2001); *see also Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 17 (2015).

Neither requirement is satisfied here. First, the issues addressed in this proceeding are not "identical" to the issues addressed in *Harkenrider*, for the reasons

explained above. Second, Petitioners, as non-parties to *Harkenrider*, did not have a "full and fair" opportunity to contest that decision. As Supreme Court recognized, "the submission of a letter to the Court as part of a public comment process[] did not afford Petitioners a full and fair adjudication on the merits of the subject claim." R. 16. That is in part because the "subject claim" has nothing at all to do with the issues addressed during the public-comment process. But more importantly, the opportunity to comment on a proposed remedial map is no substitute for the relief Petitioners seek here, which is for the IRC to fulfill its constitutional role in redistricting.

Intervenors attempt to resist this straightforward conclusion by arguing that Supreme Court "conflates the prohibition on collateral attacks with the doctrine of *res judicata*." Intervenors' Br. 54. Intervenors are wrong. Supreme Court correctly applied principles of res judicata and collateral estoppel and concluded that neither bars Petitioners' action. R. 15. The Court of Appeals has flatly rejected the distinction that Intervenors attempt to draw here, explaining that "the so-called 'collateral attack doctrine' does not exist apart from . . . collateral estoppel principles." *ABN AMRO Bank*, 17 N.Y.3d at 226. As the Court explained, "there is good reason for this," because these doctrines, "as they exist in New York, build in protections of notice and opportunity to be heard for affected constituencies." *Id.*

The cases relied upon by Intervenors confirm that collateral estoppel simply does not apply here. For example, in *Divito v. Glennon*, the Fourth Department concluded that the plaintiff's claims "constitute an impermissible collateral attack and should have been resolved by either an appeal from or a motion to vacate the judgments" because "this action *involves the same relevant parties* and arises out of the same transaction or series of transactions that served as the basis for those judgments," from which the plaintiff did not appeal. 147 N.Y.S.3d 759, 761 (4th Dep't 2021) (emphasis added).

Similarly, in *Calabrese Bakeries, Inc. v. Rockland Bakery, Inc.*, 83 A.D.3d 1060 (2d Dep't 2011), there was identity of both issues and parties. Rockland Bakery, a 50% owner of B.M. Baking Company, obtained judicial dissolution of B.M. Baking Company on default. *Id.* at 1060. Its 50% co-owner, Calabrese Bakeries, filed a new action to set aside that judicial dissolution. *Id.* The Second Department held that Calabrese Bakeries' motion to set aside the default judgment needed to be brought in the original action. *Id.* at 1061–62.

Lastly, in *Donato v. American Locomotive Co.*, a union member complained that his discharge by his employer was not supported by "proper cause." 283 A.D. 410, 411 (3d Dep't 1954). Pursuant to the terms of a collective-bargaining agreement, the union demanded arbitration of the controversy and lost, in part because the case was not "pressed to timely arbitration." *Id.* at 411–12. The union

member sued both the union and his employer, arguing that the union acted negligently in failing to press his claim and seeking to be reinstated. *Id.* at 412. This Court held that the union member could not collaterally attack the arbitration panel's decision, even though he was not a "party" to the arbitration, in part because he had "entrusted his grievance solely to the hands of his union." *Id.* at 414–15. Here, in contrast, no party to the *Harkenrider* action represented the interests of Petitioners.

Intervenors' reasoning that this is an impermissible "collateral attack" because a "necessary part of the relief" that Petitioners seek would require replacing the *Harkenrider* map is wrong. Petitioners do not challenge the validity of the 2022 congressional map or ask any court to "overrule" the Steuben County Supreme Court. Instead, they ask the judiciary to order the IRC and its members to undertake their "mandatory" duty to meet and submit a second set of congressional plans to the Legislature. *Harkenrider*, 38 N.Y.3d at 501. That this process, which will result in a set of maps drawn according to the constitutionally prescribed procedure, would mean that the *Harkenrider* court-drawn map would not be used in the 2024 and subsequent elections is not an attack on the validity of the *Harkenrider* judgment. It is a vindication of the constitutional process chosen by New York voters and bedrock principles of separation of powers.

There are many examples—including from here in New York—of court-drawn remedial maps being replaced, even in the same congressional cycle, with

constitutionally compliant maps that arise later out of the state's normal process for redistricting. In 2002, for example, a New York federal court adopted a congressional map and ordered its use for the 2002 elections, but two weeks later, with enough time before the relevant filing and primary deadlines, the Legislature and Governor agreed to a different plan. *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 357 (S.D.N.Y.) (per curiam) (three-judge court), *aff'd*, 543 U.S. 997 (2004). That legislatively enacted plan mooted and superseded the court-drawn plan. *Id.*; *see also In re Below*, 151 N.H. 135, 136–37, 150–51 (2004) (per curiam) (allowing legislatively enacted plan in 2004 to supplant map used in 2002 election, which was drawn by New Hampshire Supreme Court due to impasse, despite clear constitutional language requiring legislature to reapportion "at its regular session following the federal decennial census"). Similarly, if Petitioners' relief is granted, the IRC would be able modify the map drawn by the Steuben County Supreme Court in accordance with the procedural safeguards prescribed by the Redistricting Amendments.

CONCLUSION

For these reasons and those discussed in Petitioners' opening brief, they request that this Court reverse Supreme Court's orders as to the motions to dismiss and remand this case for further proceedings.

Dated: Albany, New York
April 3, 2023

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR § 1250.8(j), 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 signature blocks and pages containing the table of contents, table of citations, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc., is 6,613.