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

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Court of Appeals

of the

State of New York

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

Petitioners-Respondents,

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

– against –

INDEPENDENT REDISTRICTING COMMISSIONER ROSS BRADY, INDEPENDENT REDISTRICTING COMMISSIONER JOHN CONWAY III, INDEPENDENT REDISTRICTING COMMISSIONER LISA HARRIS, INDEPENDENT REDISTRICTING COMMISSIONER CHARLES NESBITT

(For Continuation of Caption See Inside Cover)

BRIEF FOR PETITIONERS-RESPONDENTS

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and INDEPENDENT REDISTRICTING COMMISSIONER WILLIS H. STEPHENS,

Respondents-Appellants,

– and –

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

Respondents,

– and –

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

Intervenors-Respondents-Appellants.

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STATEMENT OF RELATED LITIGATION

Pursuant to Court of Appeals Rule of Practice 500.13(a), Petitioners-Respondents ("Petitioners") state that they are not aware of any related litigation as of the date of this brief.

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PRELIMINARY STATEMENT

In 2014, New York voters "adopted substantial redistricting reforms aimed at ensuring that the starting point for redistricting legislation would be district lines proffered by a bipartisan commission following significant public participation, thereby ensuring each political party and all interested persons a voice in the composition of those lines." *Harkenrider v. Hochul*, 38 N.Y.3d 494, 517 (2022). Following each decennial census, the process would begin with an independent redistricting commission (the "IRC"), a group of diverse New Yorkers who would share proposals for maps, travel the state to collect public comment and feedback, and ensure "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." *Id.* at 513–14. The process would end with the People's representatives in the Legislature, who would ultimately approve or reject the IRC's proposals—and, if the latter, take up the task of redistricting themselves.

In the first cycle following the enactment of the Redistricting Amendments, New Yorkers were denied this constitutional process. The IRC's Republican-appointed commissioners refused to meet after the Legislature rejected the first round of map proposals, halting the constitutionally mandated procedure in its tracks and preventing the Legislature from assuming its role as final arbiter of the IRC's maps. By the time the issue reached this Court, the 2022 election cycle was already

underway, necessitating a congressional map drawn by a special master in a truncated process without meaningful opportunities for public comment or participation.

The plain constitutional text requires the IRC to submit a second set of maps and allow for final legislative consideration of redistricting plans, with court-drawn maps permitted *only* to the extent necessary. *See* N.Y. Const. art. III, § 4(e). Though a judicial solution was needed in 2022 given the exigencies of the election calendar, that is no longer the case. New Yorkers deserve a congressional map that fulfills the promise of the Redistricting Amendments, and there is now time to make things right for 2024 and the rest of the decade. Voters adopted the IRC process in 2014. They should not have to wait a total of *18 years* to finally cast ballots in districts drawn under its "procedural requirements"—which, as this Court noted, "matter and are imposed precisely because . . . they safeguard substantive rights." *Harkenrider*, 38 N.Y.3d at 512 n.9.

To secure those procedural and substantive protections, Petitioners commenced this suit and employed the Court's prescribed legal mechanism: "judicial intervention in the form of a mandamus proceeding," which is "available to ensure the IRC process is completed as constitutionally intended." *Id.* at 515 n.10. The Appellate Division has ruled in Petitioners' favor, concluding that they "have demonstrated a clear legal right to the relief sought" and ordering the IRC to

"commence its duties forthwith." R.417. The remedy ordered by the Appellate Division is far from unprecedented: Earlier this year, the First Department affirmed an order requiring the IRC to "initiate the constitutional process for amending the New York State Assembly maps." *Nichols v. Hochul*, 212 A.D.3d 529, 529–30 (1st Dep't 2023). These remedies are consistent not only with the Redistricting Amendments, but also decades of federal and state jurisprudence that favors legislative redistricting as matter of first principle—even *after* court-drawn maps have been adopted.

The IRC's current Republican-appointed commissioners (the "Brady Respondents") and the original *Harkenrider* petitioners ("Intervenors," and together with the Brady Respondents, "Appellants") vigorously oppose this relief, but their arguments lack merit. As the Appellate Division concluded, far from precluding this proceeding, the Redistricting Amendments *entitle* Petitioners to the relief they seek, and nothing in this Court's *Harkenrider* decision counsels otherwise or mandates that the current congressional map remain in place for the remainder of the decade. And, as both the Appellate Division and Supreme Court found, this proceeding was filed in the proper forum and timely commenced—what matters is when the IRC's failure to perform its duty injured Petitioners, who filed this suit within four months of that date.

An independent, transparent, and democratic redistricting process need only be deferred, not denied. The IRC currently stands fully constituted, with staff and resources ready to submit a second round of proposed congressional maps for the Legislature's consideration. Consistent with this Court's stay ruling, that process has already begun: The IRC's current Democratic-appointed commissioners (the "Jenkins Respondents") have solicited public comment via email to supplement the record compiled during the hearings undertaken in 2021. Having "gather[ed] input from stakeholders and voters across the state to inform their composition of redistricting maps," the IRC and Legislature can now assure New Yorkers a congressional map drawn in the spirit of "bipartisanship and transparency" that the Redistricting Amendments guarantee. *Harkenrider*, 38 N.Y.3d at 503–04.

Denying the relief Petitioners seek will incentivize future IRC intransigence, effectively excluding the state's duly elected representatives from the process and rendering the Redistricting Amendments a dead letter. To vindicate the substance and spirit of these vital constitutional reforms—and ensure that New Yorkers can live and vote in congressional districts proposed by the IRC and ultimately approved or modified by the Legislature—Petitioners respectfully request that the Court affirm the Appellate Division's order.

QUESTIONS PRESENTED

1. Whether the Appellate Division correctly concluded that the New York Constitution permits Petitioners' requested relief, where the Redistricting Amendments expressly contemplate that the IRC can be established to modify adopted redistricting maps when courts so order to remedy legal violations.

2. Whether the Appellate Division correctly concluded that this Court's *Harkenrider* decision does not bar Petitioners' requested relief, where the *Harkenrider* litigation did not seek to remedy (and did not remedy) the injury that forms the basis of Petitioners' mandamus proceeding and this Court did not hold that a judicially adopted map is the exclusive remedy for a violation of the Redistricting Amendments.

3. Whether the Appellate Division correctly concluded that Petitioners timely initiated this proceeding, where their mandamus petition was filed within four months of the date their claim accrued.

4. Whether the Appellate Division correctly concluded that Petitioners' proceeding is not an improper collateral attack on the Steuben County Supreme Court's *Harkenrider* remedial order, where this case involves different claims and different parties.

BACKGROUND

A. The Redistricting Amendments created a process in which the IRC and Legislature together undertake New York's decennial redistricting.

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

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

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

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

B. As a result of IRC intransigence, the 2021 redistricting process was not completed as constitutionally mandated.

The current redistricting cycle provided the IRC's first opportunity to exercise its new, constitutionally mandated duties. The IRC convened as required in the spring of 2021, following receipt of data from the 2020 census. R.275. After months of meetings and hearings, which furnished the IRC with detailed input from concerned citizens across the state, the IRC voted on a first set of maps. *Id.* Because no single plan garnered the support of the required seven members, the IRC submitted the two plans that received the most votes—a Republican-proposed set of maps and a Democratic-proposed set of maps, each of which received five votes. *Id.* The Legislature rejected both sets of maps on January 10, 2022. *Id.*

The Legislature's rejection of the first round of maps triggered the IRC's mandatory duty to go back to the drawing board and submit a second round of proposals to the Legislature. *See* N.Y. Const. art. III, § 4(b). But, on January 24, the five Democratic-appointed commissioners issued a statement explaining that, although they were committed to fulfilling their constitutional duties, their Republican colleagues had refused even to meet; this defiance continued for the next several weeks, frustrating the IRC's ability to prepare a second set of senate, assembly, and congressional maps. R.275–76. Absent the required quorum, the IRC could not prepare new maps for legislative consideration, and the "outer" February 28 deadline for it to do so was not met. *Harkenrider*, 38 N.Y.3d at 523 n.19. New

Yorkers were thus left without new maps, as the Redistricting Amendments do not squarely prescribe a course of action if the IRC fails to fulfill its constitutional obligations and submit a second set of maps to the Legislature. R.276.

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

C. The commencement of the 2022 election cycle necessitated a court-adopted congressional map following the *Harkenrider* litigation.

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

The matter quickly made its way to this Court, which held that the 2021 legislation violated the Redistricting Amendments. *See Harkenrider*, 38 N.Y.3d at 494. Specifically, the Court concluded that "the legislature and the IRC deviated from the constitutionally mandated procedure" required by the Redistricting

Amendments' "plain language." *Id.* at 509. The Court described the "mandatory process for submission of electoral maps to the legislature" as follows:

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

Id. at 501, 511 (quoting N.Y. Const. art. III, § 4(b)). Finding that "the detailed amendments leave no room for legislative discretion regarding the particulars of implementation," the Court held the 2021 legislation unconstitutional because "the drafters of the [Redistricting Amendments] and the voters of this state intended compliance with the IRC process to be a constitutionally required precondition to the legislature's enactment of redistricting legislation." *Id.* at 515, 517.

The Court issued its decision on April 27, 2022—with the 2022 election cycle not merely imminent, but "already underway." *Id.* at 521. Notwithstanding the Redistricting Amendments' provision giving the Legislature a "full and reasonable opportunity to correct . . . legal infirmities" in redistricting plans, N.Y. Const. art. III, § 5, the Court held that "[t]he procedural unconstitutionality of the congressional and senate maps is, *at this juncture*, incapable of a legislative cure" because the IRC had not submitted a second set of maps to the Legislature and there was no longer time for the IRC/legislative process to finish, *Harkenrider*, 38 N.Y.3d at 523

(emphasis added). Accordingly, the Court ordered the Steuben County Supreme Court to draw a new congressional map for the 2022 elections with the help of a special master. *See id.* at 524.

The Steuben County Supreme Court's adopted maps resulted from a rushed, opaque process, producing a congressional plan that split longstanding minority communities of interest. Unlike the constitutionally mandated IRC/legislative redistricting process, the Steuben County Supreme Court provided no meaningful opportunity for public comment. New Yorkers who wished to have a voice were required to travel to Steuben County, in person, for a one-day hearing—with only one week's notice. This posed a severe hardship for the vast majority of New Yorkers, including and especially minority voters, some of whom live hours away in New York City; voters who do not own cars; and voters whose personal circumstances did not allow them to take an entire day off work to participate in a court hearing.

Moreover, the Redistricting Amendments require that the IRC's commissioners "reflect the diversity of the residents of this state with regard to race, ethnicity, gender, language, and geographic residence" and mandate that "to the extent practicable the appointing authorities shall consult with organizations devoted to protecting the voting rights of minority and other voters concerning potential appointees to the commission." N.Y. Const. art. III, § 5-b(e). By contrast, the

Steuben County Supreme Court selected its special master without regard to whether his experience and the map-drawing process he undertook would protect the interests of New York's minority populations. R.280–81.

Ultimately, neither the process nor the maps reflected the state's diversity. The special master's map-drawing process took place exclusively in Steuben County, which is both geographically removed from New York's major metropolitan areas and one of the least racially diverse areas in the state. R.280.[1] Comments directed at the special master's proposed congressional map were due just two days after it was first released—which was followed by the map's ordered implementation just two days later, on May 20, 2022. R.281. This truncated, closed-door process was a clear and dramatic departure from the constitutionally mandated map-drawing safeguards adopted by New York voters.

D. The Appellate Division ordered Petitioners' requested relief.

Petitioners are ten New York voters who were injured by the failure of the constitutionally mandated IRC/legislative redistricting process. They initiated the underlying Article 78 proceeding for a writ of mandamus on June 28, 2022, in the Albany County Supreme Court. Petitioners named as respondents the IRC and its members and sought a court order compelling them to "prepare and submit to the

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

legislature a second redistricting plan and the necessary implementing legislation for such plan," R.266, thus completing the process required by the Redistricting Amendments. Notably, Petitioners did *not* seek relief for the 2022 midterm elections; instead, as their amended petition explained, they commenced this proceeding more than two years before the 2024 elections "in order to ensure that a lawful plan is in place immediately following the 2022 elections that can be used for subsequent elections this decade." R.269.

The petitioners in the *Harkenrider* litigation intervened in the underlying proceeding, and they and the Brady Respondents—but *not* the IRC or the Jenkins Respondents—moved to dismiss. Supreme Court granted the motion. R.8–21. Supreme Court rejected the argument that the petition was untimely, R.16–17, but agreed with the Brady Respondents and Intervenors that the IRC could not submit a second set of redistricting plans after February 28, 2022. R.17–19. Supreme Court further interpreted what it took to be this Court's silence as to the intended duration of the Steuben County Supreme Court's congressional map to be an indication that it was meant to apply for the remainder of the decade. R.11–12 & n.2.

Petitioners appealed, and the Appellate Division reversed Supreme Court's dismissal on July 13, 2023. R.410–26. The Appellate Division first held that Petitioners' claim accrued when the 2021 legislation was declared unconstitutional and the underlying proceeding was therefore brought within the applicable statute of

limitations. R.413–14. Turning next to this Court's *Harkenrider* decision, the Appellate Division concluded that nothing in that opinion forecloses the relief Petitioners seek here. R.414–16. The Appellate Division noted that the *Harkenrider* opinion emphasized "that the maps being ordered would be 'for use in the 2022 election.'" R.415 (quoting *Harkenrider*, 38 N.Y.3d at 502). It therefore rejected the argument that the Steuben County Supreme Court's congressional map must remain in place for the rest of the decade, explaining that while "there was a reason to forgo the overarching intent of the" Redistricting Amendments "due to the then-fast-approaching 2022 election cycle," this Court "was not 'required' to divert the constitutional process beyond the then-imminent issue of the 2022 elections." R.415–16. Furthermore, the Appellate Division concluded that "*Harkenrider* left unremedied the IRC's failure to perform its duty to submit a second set of maps" because only "two questions [were] posed before the Court of Appeals in *Harkenrider*, neither of which addressed the IRC's duty." R.416.

Given that "[t]he IRC had an indisputable duty under the NY Constitution to submit a second set of maps upon the rejection of its first set," the Appellate Division concluded that Petitioners "demonstrated a clear legal right to the relief sought" and directed the IRC "to commence its duties forthwith." R.416–17.

This appeal followed. R.404–09. Following preliminary briefing regarding an automatic stay of enforcement under CPLR 5519(a), this Court declined to vacate

the stay but clarified that it "does not prohibit the IRC or its members from taking any actions."

ARGUMENT

The Appellate Division correctly concluded that Petitioners are entitled to the relief they seek. *See* R.417. Mandamus lies where a government "body or officer failed to perform a duty enjoined upon it by law." CPLR 7803(1); *see also Klostermann v. Cuomo*, 61 N.Y.2d 525, 540 (1984) (explaining that "function of mandamus [is] to compel acts that officials are duty-bound to perform"). Here, the Redistricting Amendments provide that the IRC "*shall* prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation"—a "*mandatory* process for submission of electoral maps to the legislature." *Harkenrider*, 38 N.Y.3d at 501, 511 (second emphasis added) (quoting N.Y. Const. art. III, § 4(b)). Accordingly, as the Appellate Division concluded, "[t]he IRC had an indisputable duty under the NY Constitution to submit a second set of maps upon the rejection of its first set," R.416, and Petitioners thus established "'a clear legal right to the relief demanded' by demonstrating the 'existence of a corresponding nondiscretionary duty' on the part of the" IRC, *Waite v. Town of Champion*, 31 N.Y.3d 586, 593 (2018) (quoting *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 757 (1991)).

Each of Appellants' arguments to the contrary was raised before—and rejected by—the Appellate Division. The Court should affirm the Appellate Division's well-reasoned order, which correctly concluded that neither the Redistricting Amendments nor this Court's *Harkenrider* decision bars Petitioners' requested relief, and that Petitioners initiated their mandamus proceeding at the proper time and in the proper court.

POINT I

THE APPELLATE DIVISION'S ORDERED RELIEF IS CONSISTENT WITH THE REDISTRICTING AMENDMENTS.

Appellants do not dispute that the IRC was required to submit a second set of congressional maps to the Legislature; indeed, Intervenors concede that "[t]he IRC, of course, 'had an indisputable duty' to submit second-round maps to the Legislature under Section 4(b), as the Appellate Division recognized." Intervenors' Br. 40 (quoting R.416). Intervenors nevertheless assert that the Appellate Division's ordered relief violates the Redistricting Amendments, in particular a purported "prohibition on mid-decade redistricting." *Id.* at 34–43. But the constitutional text clearly and repeatedly permits court-ordered modification of maps to remedy legal violations, which is exactly what Petitioners seek and the Appellate Division granted. Intervenors' arguments to the contrary are premised on distinctions and limitations of their own invention, and their proffered interpretation of the

Redistricting Amendments would invite future manipulation of the process. The Court should reject their constitutional revisionism.

A. The Redistricting Amendments do not prohibit mid-decade changes to redistricting plans when needed to remedy legal violations.

Although the Redistricting Amendments set "a clear default duration for electoral maps," R.415, at no point do they suggest that a redistricting plan is beyond the reach of judicial action once it is adopted. To the contrary, section 4(e) provides that "[a] reapportionment plan and the districts contained in such plan shall be in force until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero *unless modified pursuant to court order*." N.Y. Const. art. III, § 4(e) (emphasis added). Section 5-b(a) further explains that the IRC "shall be established" "at any [] time a court orders that congressional or state legislative districts be amended." *Id.* art. III, § 5-b(a). That is precisely what Petitioners seek here—and what the Appellate Division ordered. That court "direct[ed] the IRC to commence its duties forthwith," R.417, requiring the IRC to fulfill its obligations and submit a second round of congressional maps for the Legislature's consideration. The constitutional redistricting process having been resumed, any modifications or amendments to the congressional plan that the IRC/legislative process produces will have resulted "pursuant to court order." Because sections 4(e) and 5-b(a) clearly contemplate such a result, the Appellate Division's ordered relief is wholly consistent with the Redistricting Amendments.

The Brady Respondents' main and overarching argument that the Steuben County Supreme Court's adopted congressional map is not an "interim map," Brady Resp'ts' Br. 14–27, is therefore misplaced. Even if the current map were intended to last until the next redistricting cycle, the Redistricting Amendments would still permit it to be "modified pursuant to court order." N.Y. Const. art. III, § 4(e). That is what the Appellate Division ordered, and that is what the constitutional text expressly allows.

Notably, to the extent the Redistricting Amendments impose guardrails on mid-decade interference with redistricting plans, they are intended to protect maps created using the prescribed IRC/legislative process. The first sentence of section 4(e) requires that 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." N.Y. Const. art. III, § 4(e) (emphasis added). Section 4 generally outlines the IRC's procedural and substantive duties, while section 5 empowers the Legislature to remedy legal issues with maps, *see id.* art. III, § 5 ("In the event that a court finds [] a violation, the legislature *shall* have a full and reasonable opportunity to correct the law's legal infirmities." (emphasis added)), and section 5-b(a) empowers the IRC to do the same, *see id.* art. III, § 5-b(a) ("[A]t any [] 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." (emphasis added)). Section 4(e)'s preamble thus expresses a clear preference for an IRC/legislative process, both before maps are adopted and to remedy subsequent legal violations, and only *after* signaling that preference contemplates judicially ordered redistricting when "*required*." *Id*. art. III, § 4(e) (emphasis added). The structure of the constitutional text reflects a core principle of the Redistricting Amendments: Absent exigent circumstances of the sort the Court confronted in 2022, *see infra* at 32–37, the IRC and Legislature together are primarily responsible for producing new maps and remedying legal violations, *see Nichols*, 212 A.D.3d at 530 ("The IRC procedures control the redistricting process, except to the extent that a court is *required* to forgo them in order to adopt a plan as a remedy for a violation of law." (citation omitted)).

B. Intervenors' attempt to limit the legal violations that can be remedied mid-decade is inconsistent with the constitutional text and untenable in the redistricting context.

The relief the Appellate Division ordered clearly comports with the Redistricting Amendments. It issued a "court order" to "modif[y]" the adopted congressional plan, N.Y. Const. art. III, § 4(e), tasking the IRC "to determine the district lines" for the "amended" map, *id.* art. III, § 5-b(a). In response to this straightforward application of the New York Constitution, Appellants have manufactured two baseless limitations on the types of legal remedies that courts can order for adopted maps: that "modif[ications]" to maps are limited only to minor

changes to district lines, Intervenors' Br. 36–37, and that only maps that contain "legal errors" can be modified mid-decade consistent with the Redistricting Amendments, *id.*; *see also* Brady Resp'ts' Br. 26–27 & n.6. These restrictions find no support in the constitutional text and should not be imposed.

First, at no point do the Redistricting Amendments limit the extent to which adopted maps can be changed to remedy legal violations, expressly or otherwise. To the contrary, the Redistricting Amendments recognize that the IRC can redraw district lines "at any [] time a court orders that congressional or state legislative districts be *amended*." N.Y. Const. art. III, § 5-b(a) (emphasis added). Here, Petitioners seek to *amend* New York's congressional plan by ordering the IRC to resume its duties and redraw the map under the constitutional IRC/legislative process. The plain meaning of the term "amend" includes changes that are necessary "to rectify or make right," which is what the Appellate Division ordered. *Amend*, *Black's Law Dictionary* (11th ed. 2019);[2] *see also Nichols*, 212 A.D.3d at 530

[2] *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 (Oct. 12, 2023) (defining "amend" as "to put right" or "to change or modify (something) for the better," without quantitative qualification). As anyone who has observed the legislative process for any length of time can confirm, amendments to laws might be minor or extensive—or anything in between.

(affirming, under section 5-b, supreme court's "order[] that the Assembly map be *redrawn* through the IRC process" (emphasis added)).[3]

Nor, for that matter, would Intervenors' overly restrictive interpretation of "modify" in section 4(e) make sense in the context of redistricting. Whenever a congressional map is "modified" or "amended," whether pursuant to court order or otherwise, the old map is necessarily and inevitably replaced. Districts must maintain equal populations; as such, any changes to the boundaries of one district, no matter how small, necessarily require changes to the boundaries of neighboring districts, with effects rippling throughout the map.

Sometimes, modifications to maps are indeed minor; for example, the Steuben County Supreme Court made slight changes to its adopted senate and congressional maps to conform to the New York Constitution's block-on-border requirement, shuffling two-dozen census blocks and the Town of Barker between districts. *See* Decision & Order at 1–2, *Harkenrider v. Hochul*, No. E2022-0116CV (Steuben Cnty. Sup. Ct. June 2, 2022), NYSCEF Doc. No. 696. Remedies for other legal violations—for example, vote dilution under Section 2 of the Voting Rights Act of 1965, which Intervenors concede may be cured notwithstanding their incorrectly

[3] Elsewhere, Intervenors try to distinguish between the types of legal violations that can be remedied under section 4(e) and those that can be remedied under section 5-b(a), *see* Intervenors' Br. 50–51, but the attempt is unpersuasive, *see infra* at 38–40.

restricted reading of section 4(e), *see* Intervenors' Br. 50–51—might require changes to entire districts, if not necessarily entire maps, *see, e.g.*, *Singleton v. Allen*, Nos. 2:21-cv-1291-AMM, 2:21-cv-1530-AMM, 2023 WL 6567895 (N.D. Ala. Oct. 5, 2023) (three-judge court) (adopting remedial map in Section 2 case that left three of Alabama's seven congressional districts unchanged); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 563 (E.D. Va. 2016) (three-judge court) (adopting remedial map in racial-gerrymandering case that left six of Virginia's eleven congressional districts unchanged). But some court-ordered remedies necessarily involve the wholesale replacement of a challenged map—as evidenced by *Harkenrider* itself, in which the Steuben County Supreme Court adopted a completely redrawn congressional map. *See* Decision & Order at 3, 9–10, *Harkenrider v. Hochul*, No. E2022-0116CV (Steuben Cnty. Sup. Ct. May 21, 2022), NYSCEF Doc. No. 670; *see also, e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 86 (1997) (affirming remedial map in racial-gerrymandering case that changed all of Georgia's congressional districts). Ultimately, courts will always be required to order changes "to the extent necessary to remedy the defects [they have] identified," no matter how small—or how large. *N.C. League of Conservation Voters, Inc. v. Hall*, Nos. 21 CVS 015426, 21 CVS 500085, 2022 WL 2610499, at *8 (N.C. Super. Ct. Feb. 23, 2022) (three-judge court), *vacated on other grounds sub nom. Harper v. Hall*, 886 S.E.2d 393 (N.C. 2023).

In short, there is no principled distinction between "modifying" or "amending" a map and "replacing" a map. The degree of the modification hinges on the magnitude of the violation, and Intervenors certainly offer no manageable standard for determining how much "modification" is too much. Instead, they propose an unjustified, blanket limitation that not only might have foreclosed the relief they sought in their own partisan-gerrymandering case under different circumstances, but would also lead to an absurd result where the largest substantive violations would be immunized from judicial redress. This cannot be the law, and it is certainly not commanded by the Redistricting Amendments, which impose no quantitative or qualitative limitation on the types of legal violations that can be remedied mid-decade.

Second, Appellants' claim that only a "map [] infected with [] illegality" is "subject to any constitutional judicial 'modifi[cation],'" Intervenors' Br. at 39 (third alteration in original) (quoting N.Y. Const art. III, § 4(e)), is nothing more than an invented gloss to place this mandamus proceeding outside the scope of section 4(e). The limitation has no basis in the constitutional text: The word "illegal" appears nowhere in the Redistricting Amendments, which do not otherwise reserve mid-decade remediation only for substantive issues with maps. Instead, section 4(e) refers generally to "violation[s] of law" and permits "modifi[cation] pursuant to court order"—without limiting or specifying the types of violations or court orders

that qualify. N.Y. Const. art. III, § 4(e); *see also id.* art. III, §§ 5, 5-b(a) (empowering IRC and Legislature to remedy legal violations without qualitative or quantitative limitation).

Here, there was a violation of law: As the Appellate Division correctly found—*and Intervenors concede*—the IRC failed to perform its duties mandated by the Redistricting Amendments, which unequivocally required it "to submit a second set of maps upon the rejection of its first set." R.416 (citing N.Y. Const. art. III, § 4(b)). Because a legal violation has occurred, the Appellate Division can order modification of the current congressional map consistent with the New York Constitution, regardless of whether the map is also substantively defective.

In the end, Intervenors' two invented limitations are in tension not only with the constitutional text, but with *each other*. They claim that a substantively "illegal" map *can* be modified under section 4(e), but *only* if the remedy required is not too extensive. This inherent friction confirms that the Redistricting Amendments do not impose either limitation, and instead contemplate judicial intervention to remedy *any* legal violation—no matter what type, no matter how large, and no matter when a map is challenged.

C. The relief ordered by the Appellate Division is consistent with the purpose of the Redistricting Amendments.

"In construing the language of the Constitution," courts "look for the intention of the People and give to the language used its ordinary meaning." *Harkenrider*, 38

N.Y.3d at 509 (quoting *Sherrill v. O'Brien*, 188 N.Y. 185, 207 (1907)); *see also Pfingst v. State*, 57 A.D.2d 163, 165 (3d Dep't 1977) (per curiam) ("It is a cardinal rule of construction that no part of the Constitution should be construed so as to defeat its purpose or the intent of the people adopting it."). As this Court explained in *Harkenrider*, "the text of section 4 contemplates that any redistricting act ultimately adopted must be founded upon a plan submitted by the IRC." 38 N.Y.3d at 511–12. This is because the Redistricting Amendments "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." *Id.* at 513–14. Interpreting section 4(e) to permit the Appellate Division's ordered relief and the completion of the IRC/legislative process is consistent with the overall purpose of the Redistricting Amendments and ensures that future redistricting cycles are not thwarted by IRC intransigence or partisan gamesmanship.

Intervenors attempt to argue otherwise by noting that the Redistricting Amendments "serve[] the vital interests of promoting stability in the State's adopted redistricting maps and public confidence in the redistricting process," Intervenors' Br. 37, but the relief the Appellate Division ordered does not contravene those principles. To the contrary, ensuring that the state's congressional map results from

the process chosen by New York voters and enshrined in the Redistricting Amendments *vindicates* those interests, and certainly does not undermine them.

Intervenors (and, for that matter, Supreme Court) wrongly suggest that the Appellate Division's decision will "create 'a path to an annual redistricting process, wreaking havoc on the electoral process." Intervenors' Br. 42 (quoting R.19). Once the IRC/legislative process has run its course consistent with the Appellate Division's order, no further mandatory acts would be left unaccomplished, and mandamus would not lie. Accordingly, any future attempts to restart or redo the constitutionally mandated redistricting process would be doomed from the start, as the Appellate Division explained. *See* R.417 n.6 ("[T]he right to compel the IRC to submit a second set of redistricting maps will be exhausted once it has done so."). Barring substantive defects (which Intervenors readily acknowledge would be amenable to judicial redress in any event), the new congressional map adopted through the constitutional process would stand for the remainder of the decade—just as the Redistricting Amendments contemplate.

Ultimately, it is *Appellants'* position in this litigation, not Petitioners', that risks gamesmanship in future redistricting cycles. Denying mandamus relief here would encourage the IRC (or, more likely, the IRC members representing the Legislature's minority party) to simply stall until the constitutional deadline and then disregard its obligations, creating a vacuum in which litigants would rush to a court

of their choosing to secure judicially drawn maps that would remain in place for the ensuing decade. Far from the transparent, thoughtful, and deliberative process that New York voters approved to ensure that the state's diversity is accurately reflected in the districts in which they vote and are represented, the redistricting pen would instead be wielded in the first instance by a lone supreme court justice, incentivizing forum-shopping, "encourag[ing] partisans involved in the IRC process to avoid consensus," and "render[ing] the constitutional IRC process inconsequential"—just as this Court warned in *Harkenrider*. 38 N.Y.3d at 517. A decennial race to the courthouse would be at odds with both the text and purpose of the Redistricting Amendments.

As the Appellate Division concluded, this proceeding

> honors the constitutional enactments as the means of providing a robust, fair and equitable procedure for the determination of voting districts in New York. The right to participate in the democratic process is the most essential right in our system of governance. The procedures governing the redistricting process, all too easily abused by those who would seek to minimize the voters' voice and entrench themselves in the seats of power, must be guarded as jealously as the right to vote itself; in granting this petition, we return the matter to its constitutional design.

R.417 (footnote omitted). That decision, and the principles it upholds, should be affirmed.

POINT II

THIS COURT'S *HARKENRIDER* DECISION DOES NOT FORECLOSE THE APPELLATE DIVISION'S ORDERED RELIEF.

Appellants misconstrue the Court's *Harkenrider* decision to argue that it forbids the Appellate Division's ordered relief. It does not. In *Harkenrider*, the Court did not remedy the IRC's constitutional abdication at issue here—because it was not asked to. Because *Harkenrider* addressed different claims under different circumstances, the relief granted by the Appellate Division is entirely consistent with that earlier opinion.

A. The *Harkenrider* litigation did not address the constitutional violation that underlies Petitioners' mandamus proceeding.

The Appellate Division correctly recognized that "*Harkenrider* left unremedied the IRC's failure to perform its duty to submit a second set of maps," which is the injury that forms the basis of Petitioners' mandamus proceeding. R.416. Nor could that injury have been remedied in *Harkenrider*—the petitioners (Intervenors here) did not seek to remedy the constitutional violation caused by the IRC's failure to fulfill its constitutional obligations. Instead, the *Harkenrider* litigation addressed and remedied different issues; specifically, *the Legislature's* unlawful gap-filling legislation that permitted it to depart from the process outlined in the Redistricting Amendments and the consequent malapportionment of the only lawful congressional map then in existence. *The IRC's* violation of the Redistricting

Amendments, on the other hand, was not and has never been redressed. Indeed, neither the IRC nor its commissioners were even parties in *Harkenrider*.

In *Harkenrider*, Intervenors 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, as their amended petition before the Steuben County Supreme Court demonstrated:

> [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 under the specific circumstances that the case presented, including imminent election deadlines. *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 abdication of its constitutional duties was only an incidental detail to that claim; as the Appellate Division explained, "*Harkenrider* addresses the IRC's inaction solely by way of factual background." R.416. Intervenors *did not seek* to order the IRC to resume its efforts consistent with the Redistricting Amendments. *See* R.198–99 (*Harkenrider* prayer for relief). Nor could they have sought the relief that Petitioners seek here—neither the IRC nor its constituent commissioners were ever joined as defendants in *Harkenrider*.

The Steuben County Supreme Court concluded 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. This Court agreed, 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. To remedy the malapportionment of the prior decade's map—*not* to remedy the

IRC's default—the Court ordered that the Steuben County Supreme Court "adopt constitutional maps with all due haste." *Id.* at 524.

In short, as the Appellate Division explained, "[t]here were two questions posed before the Court of Appeals in *Harkenrider*, neither of which addressed the IRC's duty. The challenge brought and the remedy granted were directed at the Legislature's unconstitutional reaction to the IRC's failure to submit maps, rather than the IRC's failure in the first instance." R.416 (citations omitted). The *Harkenrider* "petitioners did not sue the IRC to secure compliance with what they and the [Court's] majority maintain[ed] is the '*exclusive* method of redistricting,'" 38 N.Y.3d at 552 (Rivera, J., dissenting) (quoting *id.* at 515 (majority opinion)), and consequently, "the IRC's discrete failure to perform its constitutional duty was left unaddressed until this proceeding," R.416–17. Indeed, unlike Intervenors in *Harkenrider*, Petitioners here aim to vindicate the Redistricting Amendments' purpose of ensuring that the redistricting process is "democratic, transparent, and conducted by the IRC and the Legislature pursuant to certain procedural and substantive safeguards," which are explicitly laid out and mandated by the constitutional text. R.268. The special-master process overseen by the Steuben County Supreme Court—though necessary under the exigencies of the moment, *see infra* at 32–37—achieved none of these goals. It therefore could not have "resolved the procedural constitutional violation" at issue here, Intervenors' Br. 42; namely,

the IRC's failure to submit a second set of redistricting maps for the Legislature's approval or modification.[4]

B. The *Harkenrider* decision did not conclude that a judicially adopted map is the exclusive remedy for procedural constitutional violations.

Intervenors read this Court's *Harkenrider* opinion as holding that "only the courts can adopt a map after the IRC's constitutional deadline to submit a second set of maps has passed." Intervenors' Br. 43. Their argument both mischaracterizes the remedial discussion in *Harkenrider* and ignores the circumstances that necessitated judicial map-drawing in that case.

Intervenors cite the following language from the *Harkenrider* decision as evidence that "this Court sided firmly with [them] on this remedial dispute" and endorsed their view that only the courts could adopt a new congressional map following the IRC's default: "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

[4] Intervenors observe that "no one appealed to challenge the [Steuben County Supreme Court's] map's legality in any respect," Intervenors' Br. 39, but Petitioners were not parties to that litigation. Indeed, five of the Petitioners in this action moved to intervene in *Harkenrider* to defend their interests, but their request was denied. *See* Order, *Harkenrider v. Hochul*, No. 22-00506 (4th Dep't Apr. 14, 2022), NYSCEF Doc. No. 41. In any event, for the reasons discussed above, an appeal of the substance of the Steuben County Supreme Court's map would not have remedied the IRC's constitutional violation that is the subject of *this* litigation.

since passed." Intervenors' Br. 46 (quoting *Harkenrider*, 38 N.Y.3d at 523).[5] This language does not carry the weight Intervenors put on it, nor does it foreclose future IRC action.

To begin, Intervenors wrongly assert that there was "no suggestion that the IRC could constitutionally submit a second set of proposed maps following the expiration of its deadline to do so." Intervenors' Br. 46. To the contrary, this Court expressly recognized mandamus as a "course[] of action available to ensure the IRC process is completed as constitutionally intended." *Harkenrider*, 38 N.Y.3d at 515 n.10. A mandamus proceeding cannot ripen before the respondent agency fails to undertake its constitutionally obligated duties. *See, e.g.*, *Agoglia v. Benepe*, 84 A.D.3d 1072, 1076 (2d Dep't 2011). Under the unique structure of the IRC's responsibilities, that failure occurs only once its deadline for action has passed. *Harkenrider* thus necessarily allows a suit to compel further IRC action following the constitutional deadline, which is exactly what Petitioners filed here.

[5] Elsewhere, Intervenors reference *their own* Harkenrider *briefing* as indicative of this Court's conclusions, *see, e.g.*, Intervenors' Br. 44, and repeatedly muse as to what the Court *might* have intended—including suggesting, without authority, that the Court could have granted relief that was never requested and ordered nonparties to undertake specific actions, *see, e.g.*, *id.* at 46 ("If this Court in *Harkenrider* believed that the Constitution permitted it to return redistricting to the IRC/Legislature process, it presumably would have so ordered[.]").

Moreover, the Redistricting Amendments themselves foreclose Intervenors' claim that court-drawn maps are the exclusive remedy for legal violations. The constitutional text expressly contemplates IRC efforts *following* the deadlines enumerated in section 4(b), providing that "[o]n or before February first of each year ending with a zero *and at any other time a court orders that congressional or state legislative districts be amended*, an independent redistricting commission shall be established to determine the district lines for congressional and state legislative offices." N.Y. Const. art. III, § 5-b(a) (emphasis added). That the constitutional text permits the IRC to act "at any [] time a court orders" belies Intervenors' assertion that "if the IRC/Legislature process fails and the constitutional deadline passes, then the *only* constitutionally available remedy would be a judicially adopted map." Intervenors' Br. 44. Indeed, section 5-b(a) provided the basis for the First Department's affirmance of an order requiring the IRC to reconvene and redraw assembly maps earlier this year. *See Nichols*, 212 A.D.3d at 530 (finding IRC redrawing of assembly map to be "appropriate remedial measure[] for a constitutional violation" and "consistent with the procedures set forth in the Constitution" notwithstanding that initial IRC deadlines had elapsed).

Intervenors also rely on the *Harkenrider* oral argument to support their view that a judicially adopted map is the exclusive remedy for the IRC's default, *see* Intervenors' Br. 45–46, but the transcript demonstrates that this was not the Court's

conclusion. Judge Rivera's colloquy with Intervenors' counsel concerned a *then-hypothetical* lawsuit in which "petitioners . . . sued the IRC." Oral Argument Transcript at 33:8–10, *Harkenrider v. Hochul*, No. 60 (N.Y. Apr. 26, 2022). That case was *not Harkenrider*, as Intervenors' counsel acknowledged. *See id.* at 33:11 (responding, when asked whether *Harkenrider* petitioners could have sued IRC, "[w]e *could* have" (emphasis added)). The later discussion between Judge Troutman and Intervenors' counsel regarding whether "the remedy [should] match the error" concerned whether *the Legislature* should "get another shot" at remedying any legal violation as section 5 generally requires, not whether the IRC should submit a second set of maps to resume the constitutional process. *Id.* at 40:2–41:14. The discussion of whether recommencement of the IRC/legislative process would be a viable remedy in a suit against the IRC was not only short, but hypothetical. And, at any rate, merely *considering* the remedy would not have compelled the IRC to complete its constitutional duties and redress Petitioners' injury here—that remedy was never actually ordered.

Ultimately, the adoption of a judicially drawn map in *Harkenrider* was a limited remedy tailored to the particular legal violation and exigent situation that the Court faced in 2022. Because the previous decade's map was malapportioned due to changes in population over the previous decade—and with the midterm election season not only imminent, but *in progress*—if the Steuben County Supreme Court

had not expeditiously created remedial maps with the help of a special master, there would have been no constitutional maps in place for 2022. In preventing that outcome, this Court was clear that it was exercising "judicial oversight . . . to facilitate the expeditious creation of constitutionally conforming maps *for use in the 2022 election*." *Harkenrider*, 38 N.Y.3d at 502 (emphasis added); *see also Nichols*, 212 A.D.3d at 531 ("In *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. . . . There is much more time available in this case than there was in *Harkenrider* 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." (citation omitted)).[6]

That limited remedy was consistent with the remedial provision in the Redistricting Amendments, which provides that the IRC process "shall govern redistricting in this state except *to the extent* that a court is *required* to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law."

[6] Intervenors call this conclusion "simply preposterous" and claim that it "blinks reality," Intervenors' Br. 47–48 (quoting *Amicus Curiae* Br. for League of Women Voters of New York State in Supp. of Intervenors-Resp'ts-Appellants 7), but it was, of course, the conclusion reached by a majority of the justices on the Appellate Division panel and the First Department in *Nichols*.

N.Y. Const. art. III, § 4(e) (emphases added); *see also Nichols*, 212 A.D.3d at 530 ("The IRC procedures control the redistricting process, except to the extent that a court is *required* to forgo them in order to adopt a plan as a remedy for a violation of law." (citation omitted)). As the Appellate Division recognized, this Court "was required to fashion a remedy that would provide valid maps in time for the 2022 elections, and it did so." R.415–16. Although the imminence of the midterm elections required the use of a special master in 2022, that necessary deviation from the process prescribed by the Redistricting Amendments does not preclude the IRC from performing its constitutional duties for the remainder of the decade. "Simply put, the Court was not 'required' to divert the constitutional process beyond the then-imminent issue of the 2022 elections." R.416. And given that those exigent circumstances are no longer present, as in *Nichols*, the IRC/legislative process can be completed, just as the Redistricting Amendments generally admonish. *See supra* at 18–19.[7]

[7] It is not unusual for legislative redistricting processes to recommence following judicial adoption of maps; other states' high courts have recognized in similar circumstances that when a redistricting body "fails to enact a new redistricting plan [within the timeframe provided by the state constitution], it is neither deprived of its authority nor relieved of its obligation to redistrict." *In re Below*, 855 A.2d 459, 462 (N.H. 2004) (per curiam); *see also Lamson v. Sec'y of Commonwealth*, 168 N.E.2d 480, 486 (Mass. 1960) (explaining that while failure of redistricting body to act "thwarts the intention of the Constitution," an "even more serious nullification of constitutional purpose will result under a construction which would" prohibit redistricting body from "return[ing] to reapportion"); *Harris v. Shanahan*, 387 P.2d

C. *Nichols* was correctly decided and supports the Appellate Division's ordered relief.

As a parting shot to their *Harkenrider* argument, Intervenors suggest both that *Nichols* was wrongly decided because it "violates this Court's binding remedial holding in *Harkenrider*" and that it is otherwise distinguishable from Petitioners' case here. Intervenors' Br. 49–52. Neither argument is persuasive.

First, Intervenors' disagreement with the result in *Nichols* is premised on the same misunderstandings of the constitutional text and the *Harkenrider* decision already discussed. They complain that *Nichols* "order[ed] the IRC to restart the redistricting process on the State Assembly map under Section 5(b) many months after the constitutional deadline for IRC action had passed," *id.* at 51, but as discussed above, neither the *Harkenrider* decision nor the Redistricting Amendments preclude IRC action following the initial constitutional deadlines, *see supra* at 17–19, 32–37. To the contrary, as the First Department recognized in *Nichols*, section 5-b "contemplate[s]" precisely the sort of "viable legislative plan" that was ordered in that case—and that the Appellate Division ordered here. 212 A.D.3d at 531; *see also* N.Y. Const. art. III, § 5-b(a) (providing for IRC action "at

771, 795 (Kan. 1963) ("[T]he duty to properly apportion legislative districts is a continuing one, imposed by constitutional mandate . . . , notwithstanding the failure of any previous session to make such a lawful apportionment.").

any [] time a court orders that congressional or state legislative districts be amended").

In response to this straightforward application of section 5-b(a), Intervenors propose yet another distinction that is found nowhere in the constitutional text. They try to distinguish between "amend[ing]" a map under section 5-b(a), which expressly contemplates IRC participation, and "adopt[ing]" or "modif[ying]" a map under section 4(e), which does not. *See* Intervenors' Br. 50–51. Under this theory, a violation of a federal statute would trigger the remedy provided in section 5-b(a), whereas "certain constitutional infirmities" (never explicated) are solely within the ambit of section 4(e). *Id.* at 51. The distinction is not convincing. To support their theory that only courts can remedy "certain constitutional infirmities," Intervenors cite this Court's discussion of whether a legislative cure was possible in *Harkenrider*. *See id.* at 51 (citing *Harkenrider*, 38 N.Y.3d at 523). But there, the Court rejected the argument that "the legislature possesses *exclusive* jurisdiction and unrestricted power over redistricting," noting instead that "the Constitution explicitly *authorizes* judicial oversight of remedial action in the wake of a determination of unconstitutionality." *Harkenrider*, 38 N.Y.3d at 523 (emphases added). That the Redistricting Amendments *permit* judicial remediation does not mean that the courts have any more exclusive authority to remedy unconstitutional redistricting than the Legislature. *See Nichols*, 212 A.D.3d at 530 ("The Constitution

does not mandate any particular remedial action when a violation of law has occurred[.]"). To the contrary, the constitutional text expressly contemplates that both the IRC and the Legislature can play roles in correcting legal violations, without limitation as to the type of violation within their remedial powers. *See* N.Y. Const. art. III, §§ 5, 5-b(a); *supra* at 19–24.

Neither *Harkenrider* nor the Redistricting Amendments require the Court to drive a wedge between section 4(e) and section 5-b(a), and Intervenors do not and cannot draw a principled line between these two remedial provisions. Instead, it is more sensible to read them in concert. Section 4(e) is silent as to *who* may "modify" a reapportionment plan "pursuant to court order," and section 5-b(a) addresses this issue: "at any [] 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." N.Y. Const. art. III, §§ 4, 5-b(a).

Second, Intervenors attempt to distinguish this case from *Nichols* by noting that "no Assembly map had yet been lawfully adopted under the first sentence of Section 4(e)" in that case, whereas the Steuben County Supreme Court adopted a congressional map in *Harkenrider*. Intervenors' Br. 51–52. This is a distinction without a difference. It is simply not the case that the "'adopt[ed]' congressional map [] must 'be in force' for the remainder of the decade." *Id.* at 52 (alteration in

original) (quoting N.Y. Const. art. III, § 4(e)). The Redistricting Amendments clearly provide that an adopted plan can be "modified pursuant to court order," N.Y. Const. art. III, § 4(e)—which is exactly what the Appellate Division ordered here, *see supra* at 17–19.

In short, the IRC/legislative remedy employed in *Nichols* was appropriate, as was the similar remedy ordered by the Appellate Division in this case. Neither *Harkenrider* nor the Redistricting Amendments foreclose the requested relief in either case, and the First Department's affirmance in *Nichols* confirms the conclusions of the Appellate Division in this case:

> [I]n the absence of a viable legislative plan, a court *may* order the adoption of a redistricting plan with the assistance of a special master, as an appropriate remedial measure. Yet the Constitution also favors a legislative resolution when available, and does not expressly limit the potential remedies a court may order to facilitate a viable legislative plan.

Nichols, 212 A.D.3d at 530–31 (emphasis added) (citations omitted). Here, as in *Nichols*, the courts are confronted with an unremedied legal violation. And here, as in that case, there is now time and opportunity for a viable legislative plan to draw New Yorkers' district lines for the rest of the decade.

* * *

Both Intervenors and the Brady Respondents repeatedly invoke stare decisis, with the latter devoting an entire section of their brief to the principle. *See* Brady Resp'ts' Br. 27–29. But the Appellate Division's ordered relief is consistent with the

principles of stare decisis because it is consistent with *Harkenrider*—as demonstrated by the fact that affirming the Appellate Division does not require overruling or otherwise disturbing this Court's earlier decision.

POINT III

PETITIONERS TIMELY COMMENCED THIS SUIT.

Appellants collectively raise two alternative timing-related defenses: that Petitioners failed to commence this suit during the applicable statute-of-limitations period and that "general equitable timeliness principles" bar relief. Intervenors' Br. 25–34; *see also* Brady Resp'ts' Br. 29–33. Both Supreme Court *and* the Appellate Division correctly rejected these arguments, and this Court should do the same.

A. Petitioners filed suit within the applicable statute of limitations.

Appellants are incorrect that the underlying Article 78 petition was untimely. As the Appellate Division correctly concluded, Petitioners' claim accrued when the 2021 legislation was declared unconstitutional, and this proceeding was therefore filed well within the applicable four-month statute of limitations period set forth in CPLR 217(1). R.419–21. Even if the 2021 legislation had not been in place, this proceeding is timely because the IRC's constitutional deadline to act did not pass until February 28, and the petition was filed within four months of that date. The statute of limitations thus does not bar relief.

Actions against governmental bodies or officers, including mandamus proceedings, "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner." CPLR 217(1). An agency action is not "final and binding upon the petitioner" until the agency has "reached a definitive position on the issue that inflicts [an] actual, concrete injury" that "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). Thus, a cause of action for mandamus accrues only when (1) the agency has reached a "definitive" position *and* (2) that position has inflicted an "actual, concrete injury" that "may not be prevented or significantly ameliorated." *Id.*; *see also Smith v. State*, 201 A.D.3d 1225, 1228 (3d Dep't 2022) ("When making the determination as to whether an agency determination is final, courts must consider the completeness of the administrative action and make a pragmatic evaluation as to whether a position has been reached that inflicts an *actual, concrete injury*." (emphasis added) (quoting *Cap. Dist. Reg'l Off-Track Betting Corp. v. N.Y. State Racing & Wagering Bd.*, 97 A.D.3d 1044, 1046 (3d Dep't 2012))). Put more plainly, the statute of limitations begins to run not when a governmental body fails to perform a mandatory duty, but rather when that lapse of duty causes injury.

Here, the IRC did not reach a "definitive" position until its constitutional deadline to act expired on February 28. And that decision did not inflict "actual, concrete injury" on Petitioners until the Legislature's 2021 gap-filling legislation was declared unconstitutional. Petitioners are New York voters who are injured because they cannot vote—and, indeed, have never been able to vote—using maps drawn in accordance with the transparent, democratically accountable IRC/legislative process set forth in the Redistricting Amendments. That process begins with maps drawn by the IRC and concludes with the People's representatives in the Legislature approving or modifying those maps. Until the Legislature's 2021 gap-filling legislation was deemed unconstitutional, Petitioners had no reason to anticipate that the democratically accountable process required by the New York Constitution would be denied to them and the state's voters. As the Appellate Division explained:

> The 2021 legislation in effect at the time of the IRC's failure to submit a second redistricting plan to the Legislature provided that, "[i]f the [IRC] does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan, the [IRC] shall submit to the [L]egislature all plans in its possession, both completed and in draft form, and the data upon which such plans are based," and that each house must then "introduce such implementing legislation with any amendments each house deems necessary." In this CPLR article 78 proceeding, petitioners seek strict compliance with the constitutionally enshrined IRC procedure, which does not tolerate a nonvote. Thus, that claim accrued when the 2021 legislation was deemed unconstitutional to the extent that it permitted the Legislature "to avoid a central requirement of the reform amendments," a determination first made by Supreme Court (McAllister, J.) on March 31, 2022. Petitioners

> commenced this proceeding on June 28, 2022, well within the period in which to do so.

R.413–14 (alterations in original) (citations omitted) (first quoting L. 2021, ch. 633, § 1; and then quoting *Harkenrider*, 38 N.Y.3d at 517).[8]

Put in the terms of the statute-of-limitations caselaw, the IRC's failure to submit a second set of congressional maps did not inflict "actual, concrete injury" until the Legislature's gap-filling 2021 legislation was declared unconstitutional. *Best Payphones*, 5 N.Y.3d at 34. Prior to this Court's *Harkenrider* decision, the IRC/legislative redistricting process had proceeded as prescribed by the operative law in place at the time. The 2021 legislation, which provided a mechanism for completing the constitutional redistricting process in the event of IRC default, "prevented or significantly ameliorated" Petitioners' injury by giving the Legislature the opportunity to act as final arbiter of the IRC's map proposals, just as the Redistricting Amendments contemplate. *Id.* Because the 2021 legislation provided the means of achieving the IRC's constitutional endpoint, it was not "reasonable for

[8] Whether the precise accrual date is, as the Appellate Division concluded, the date the Steuben County Supreme Court found the 2021 legislation unconstitutional (March 31, 2022) or the date this Court agreed with that conclusion (April 27, 2022), Petitioners' action was timely filed within the four-month window set forth in CPLR 217(1). Supreme Court, for its part, concluded that the statute of limitations does not bar relief in this proceeding based on an even *later* date—May 20, 2022, when "the new 2022 Congressional Maps went into effect." R.17. Each of these dates reflects why this matter was timely filed: The cause of action accrued when Petitioners were injured by the denial of the constitutionally mandated IRC/legislative process.

petitioners to demand that the IRC act" before this Court struck down the legislation. R.419 (Pritzker, J., dissenting); *cf. League of Women Voters of N.Y. v. N.Y. State Bd. of Elections*, 206 A.D.3d 1227, 1231 (3d Dep't 2022) (per curiam) ("[I]n the absence of an express judicial order invalidating the assembly map, petitioner failed to demonstrate that it had a clear legal right to the relief demanded or that there was a corresponding nondiscretionary duty on the part of respondent[.]" (cleaned up)).

By focusing solely on the IRC's default, Appellants misconstrue the nature of Petitioners' alleged injury. It was only when the 2021 legislation was struck down that Petitioners' injuries fully materialized—specifically, when it became clear that both the IRC and the Legislature would be cut out of the redistricting process entirely. The gap-filling procedure outlined in the 2021 legislation "significantly ameliorated" the concerns that gave rise to this lawsuit. *Best Payphones*, 5 N.Y.3d at 34. That procedure required the IRC to "submit to the legislature all plans in its possession, both completed and in draft form, and the data upon which such plans are based." L. 2021, ch. 633, § 1. The 2021 legislation thus "clarified that," if the IRC failed to submit a second set of plans, "the outcome would be the same as if the IRC produced plans that the legislature rejected." *Harkenrider*, 38 N.Y.3d at 544 (Wilson, J., dissenting). The Legislature would have had the benefit of the IRC's work, the voters of New York would have received a congressional map approved by their democratically elected representatives in the Legislature, and the process

would have concluded as the Redistricting Amendments contemplate. The denial of that constitutional IRC/legislative process was the injury that Petitioners suffered, and the statute of limitations therefore began running as of the date that denial became law.

In the end, the necessarily truncated process that resulted from the IRC's deadlock and the invalidation of the 2021 legislation failed to vindicate the purposes of the Redistricting Amendments. The adopted congressional map was hastily drawn by a special master with little transparency, accountability, or opportunity for public comment or input. While the judicial remedy ordered by this Court was appropriate given the exigencies of the 2022 election calendar, this deviation from the ordinary legislative process inflicted a concrete injury on Petitioners. As explained in their amended petition, "the IRC's failure to send a second set of maps to the Legislature not only stymied the constitutional procedure enacted by New York voters, but also resulted in a congressional map that does not properly reflect the substantive redistricting criteria contained in the Redistricting Amendments." R.282. Though Petitioners' claim is procedural in nature and does not challenge the substance of the *Harkenrider* map, "procedural requirements matter and are imposed precisely because, as here, they safeguard substantive rights." *Harkenrider*, 38 N.Y.3d at 512 n.9; *cf. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787,

808 (2015) ("[R]edistricting is a legislative function[.]"); *Nichols*, 212 A.D.3d at 530 ("[T]he Constitution [] favors a legislative resolution when available[.]").

Notwithstanding that Petitioners' injury did not manifest until the 2021 legislation was invalidated, Appellants collectively propose two other accrual dates: January 24, 2022, when five members of the IRC issued a press release seeking to pressure their colleagues to schedule a meeting, and January 25, 2022, "when the IRC's 15-day window to submit a second-round congressional map to the Legislature expired." Intervenors' Br. 26. The Appellate Division correctly rejected these alternatives.

The January 24 press release merely described the situation at that time, stating that five members of the IRC "have repeatedly attempted to schedule a meeting by [January 25, 2022], and our Republican colleagues have refused. This is the latest in a repeated pattern of Republicans obstructing the Commission doing its job." R.359. A press release by five members of the ten-member IRC describing their efforts to schedule a meeting is neither a "final and binding" determination that the IRC will not act nor a communication of the IRC's "definitive position." *Best Payphones*, 5 N.Y.3d at 34. And it is certainly not a "refus[al] to act" on the part of the IRC. Brady Resp'ts' Br. 32. The five commissioners who signed the January 24 statement *could not bind* the IRC under the Redistricting Amendments. *See* N.Y. Const. art. III, § 5-b(f) ("[N]o exercise of any power of the independent redistricting

commission shall occur without the affirmative vote of at least a majority of the members[.]"). Moreover, the signatories of the January 24 statement expressed their *willingness* to perform their constitutional duties and exhorted their colleagues to do the same. In short, the press release did not and could not articulate the IRC's position on anything.

Nor is January 25, 2022, the proper accrual date. Even after that date, the 2021 gap-filling legislation created a procedure for the Legislature to assume its intended role at the end of the constitutional IRC/legislative process, which "prevented or significantly ameliorated" Petitioners' injury. *Best Payphones*, 5 N.Y.3d at 34. The Appellate Division was therefore correct: Petitioners did not suffer the injury for which they now seek mandamus relief until the gap-filling legislation was deemed unconstitutional. And this proceeding commenced within four months of that date.

Even under Intervenors' lapse-of-duty-based approach to accrual—as distinguished from the injury-based approach found in New York caselaw—this proceeding was timely. The Redistricting Amendments require the IRC to submit a second round of map proposals "in no case later than *February twenty-eighth*," N.Y. Const. art. III, § 4(b) (emphasis added), which this Court has described as the "outer end date for the IRC process" and the "outer . . . constitutional deadline for IRC action," *Harkenrider*, 38 N.Y.3d at 522–23 nn.18–19. Indeed, *Intervenors themselves* previously argued that "the Constitution provided that the IRC's

authority to submit such maps expired on February 28, 2022." Harkenrider Intervenors' Memorandum of Law in Support of Motion to Dismiss at 18, *Hoffmann v. N.Y. State Indep. Redistricting Comm'n*, No. 904972-22 (Albany Cnty. Sup. Ct. Sept. 2, 2022), NYSCEF Doc. No. 144; *see also* Brief for Intervenors-Respondents at 47, *Hoffmann v. N.Y. State Indep. Redistricting Comm'n*, No. CV-22-2265 (3d Dep't Mar. 22, 2023), NYSCEF Doc. No. 52 (describing February 28 as "the date the IRC's constitutional authority to submit [] maps expired"). Accordingly, the IRC had until February 28, 2022, to take "further administrative action," *Best Payphones*, 5 N.Y.3d at 34, and Petitioners commenced this proceeding within four months of that date.[9]

B. Neither laches nor "general equitable timeliness principles" bar this proceeding.

As explained above, Petitioners acted within four months of the accrual of their right to relief. Intervenors, like the dissenting justices in the Appellate Division,

[9] Intervenors misconstrue Petitioners' previous explanation that mandamus against the IRC would not lie until after it "fails to undertake its constitutionally obligated duties." Intervenors' Br. 29 (quoting Opp'n to Cross-Mot. for Stay Pending Appeal 12–13); *see also supra* at 33. This unremarkable assertion does *not* constitute a "conce[ssion]" by Petitioners that their claim accrued on January 25. *Id.* at 30 n.8. As discussed above, the outer deadline for IRC action was February 28, not January 25. And, at any rate, that a mandamus action could not have been brought *before* the deadline does not mean that the deadline itself was the accrual date because, under New York law, the date the IRC's lapse caused Petitioners' *injury*—not the date of the lapse itself—triggers the statute of limitations.

are therefore incorrect that this proceeding is barred by equitable principles apart from the statute of limitations.

First, the Appellate Division dissenters treated the underlying petition in this proceeding as a "demand" within the meaning of CPLR 217(1). R.418–19 (Pritzker, J., dissenting) ("[P]etitioners did not make a demand until June 28, 2022[.]"). Under that view, the four-month statute of limitations did not begin to run until that demand was "refused," and therefore CPLR 217(1) does not bar this proceeding. *See Meegan v. Griffin*, 161 A.D.2d 1143, 1143 (4th Dep't 1990) ("Here, there was no formal demand until petitioners commenced the proceeding. Accordingly, the petition may be construed as the demand and the answer as a refusal, rendering the proceeding timely commenced."); *Gopaul v. N.Y.C. Emps.' Ret. Sys.*, 122 A.D.3d 848, 849 (2d Dep't 2014) (collecting cases and noting that "[t]he filing of a CPLR article 78 petition can itself be construed as a demand"); *Speis v. Penfield Cent. Schs.*, 114 A.D.3d 1181, 1183 (4th Dep't 2014) ("[B]ecause the petition may be construed as the demand, we reject respondent's contention that the proceeding was barred by the statute of limitations.").

The dissenters nonetheless found that this proceeding is barred by the doctrine of laches, referring to the equitable requirement that an Article 78 petitioner "make his or her demand within a reasonable time after the right to make it occurs, or after the petitioner knows or should know of the facts which give him or her a clear right

to relief." R.419 (quoting *Granto v. City of Niagara Falls*, 148 A.D.3d 1694, 1695 (4th Dep't 2017)). For the reasons explained above, however, Petitioners acted "within a reasonable time" after "facts which g[a]ve [them] a clear right to relief" arose, *Granto*, 148 A.D.3d at 1695—namely, both IRC inaction *and* the subsequent injury caused by the denial of the constitutional IRC/legislative process. Because the 2021 legislation specifically provided for the completion of the IRC/legislative process even if the IRC failed to submit a second set of maps, it was not "reasonable for petitioners to demand that the IRC act" before this Court struck down the legislation. R.419 (Pritzker, J., dissenting). In any event, "[t]he defense of laches is not available to respondents because the relief petitioners seek is not discretionary but, rather, is mandated by law." *Meegan*, 161 A.D.2d at 1143–44; *see also* R.416 ("The language of NY Constitution, article III, § 4 makes clear that this duty [to submit a second set of maps upon the rejection of its first set] is mandatory, not discretionary."). The dissenters' laches conclusion cannot carry the day.

Second, although they do not invoke laches, Intervenors vaguely gesture to "general equitable timeliness principles" as a bar to this suit. Intervenors' Br. 33–34. That argument essentially boils down to a rejection of the statute of limitations in favor of a legal standard of Intervenors' own invention.

Intervenors cite no authority for the novel proposition that "general equitable principles" can somehow *shorten* the statute of limitations for an Article 78

proceeding. Instead, each of their ostensibly supporting citations is either wholly inapposite or merely confirms the unremarkable proposition that an Article 78 proceeding may be dismissed if brought outside the applicable statute of limitations. *See Anderson v. Lockhardt*, 310 N.Y.S.2d 361, 362 (Westchester Cnty. Sup. Ct. 1970) (non-final determinations are not reviewable under Article 78 and courts have "discretion, in any event, to deny review under Article 78 where another adequate remedy exists"); *Ouziel v. State*, 667 N.Y.S.2d 872, 876–77 (Ct. Cl. 1997) (Court of Claims lacked jurisdiction because relief sought was equitable and could have been sought under Article 78); *Hill v. Giuliani*, 272 A.D.2d 157, 157 (1st Dep't 2000) (case dismissed as untimely because it was brought outside applicable four-month state-of-limitations period); *U.S. Bank Nat'l Ass'n v. Losner*, 145 A.D.3d 935, 938 (2d Dep't 2016) (vacating default judgment of foreclosure "in the interest of substantial justice"); *Sheerin v. N.Y. Fire Dep't Articles 1 & 1B Pension Funds*, 46 N.Y.2d 488, 495–96 (1979) (Article 78 relief denied where petitioners waited over two years from issuance of formal agency opinion to make demand).

Moreover, the crux of Intervenors' argument is that Petitioners should have filed no later than February 28, 2022, because that was the constitutional deadline for the IRC to submit a second round of maps.[10] But Petitioners' claim could not

[10] Tellingly, in this appeal, Intervenors do not identify a precise date by which Petitioners should have filed under their "equitable" theory. *See* Intervenors' Br. 34–

have even *accrued* until February 28, at the earliest. *See supra* at 49–50. It cannot be the case that equitable principles require a party seeking mandamus relief to do so *before* an agency's deadline to act. If that were true, an agency could effectively immunize itself from mandamus review by simply running out the clock, like the IRC did here. As the Appellate Division aptly explained, to hold 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." R.417.

Finally, Petitioners note that, although this proceeding commenced in June 2022, they did *not* request relief for the 2022 midterm elections. Instead, they sought "to ensure that a lawful plan is in place immediately following the 2022 elections that can be used for subsequent elections this decade." R.269. Far from delaying, Petitioners filed suit more than two years before the next election, thus ensuring that the proceeding would be fully adjudicated with sufficient time to allow for the completion of the IRC/legislative process ahead of the 2024 cycle. There is still time following the resolution of this appeal to implement a remedy that vindicates the constitutional reforms adopted by New York voters.

Ultimately, to the extent the equities are relevant here, they weigh *in favor* of Petitioners' effort to give life to the Redistricting Amendments by ordering the IRC

35. But in Supreme Court and at the Appellate Division, they identified February 28 as the supposed equitable deadline. *See supra* at 49–50.

to complete the constitutionally mandated redistricting process that voters enshrined in the New York Constitution nearly a decade ago. At any rate, timeliness is not a bar to Petitioners' success in this appeal. Both the Appellate Division and Supreme Court correctly rejected Appellants' attempt to avoid adjudication on these grounds, and this Court should follow suit.[11]

POINT IV

THIS PROCEEDING IS NOT AN IMPROPER "COLLATERAL ATTACK."

Intervenors' reliance on a purported "collateral attack doctrine," Intervenors' Br. 52–54, is entirely misplaced and was correctly rejected by both Supreme Court and the Appellate Division, *see* R.15; R.417 n.5.

As this Court has explained, "the so-called 'collateral attack doctrine' does not exist apart from . . . collateral estoppel principles." *ABN AMRO Bank, N.V. v. MBIA, Inc.*, 17 N.Y.3d 208, 226 (2011). Intervenors have not argued, and cannot show, that collateral estoppel principles bar this proceeding. Collateral estoppel may be invoked only "in a subsequent action or proceeding to prevent *a party from*

[11] The amicus brief filed by the Lawyers Democracy Fund raises another timing-related issue: that it is too late to implement a new congressional map for 2024. Setting aside that this limited objection is no reason to foreclose relief for the remainder of the decade, the point is negated by the fact that the Redistricting Amendments specifically contemplate that the IRC might not complete its constitutional role until February 28 of an election year. *See* N.Y. Const. art. III, § 4(b). (The Lawyers Democracy Fund's other primary contribution—the rather outrageous notion that New York election officials are too inept and dysfunctional to implement a remedial plan—will pass without comment.)

relitigating an identical issue decided against that party in a prior adjudication." *Id.* (cleaned up) (emphasis added). Petitioners here did not participate as parties in the *Harkenrider* litigation; indeed, several *tried* to intervene, but their motion was denied. *See supra* at 32 n.4. Moreover, *Harkenrider* was not a proceeding in mandamus against the IRC, and so the issues in that case and this one are not identical. *See supra* at 28–32.

Intervenors' cited authorities are all off point, and certainly do not refute this Court's clear statement in *ABN AMRO Bank* that New York courts do not recognize any freewheeling "collateral attack doctrine." *Gager v. White* concerned retroactivity, not collateral estoppel or res judicata, 53 N.Y.2d 475, 484 (1981); the footnoted dictum Intervenors seem to be relying on, *see id.* at 484 n.1, addressed *federal* precedent about collateral attacks in bankruptcy actions, *see Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940). *Divito v. Glennon* explained that res judicata requires "identity or privity of parties," 193 A.D.3d 1326, 1328 (4th Dep't 2021), which does not help Intervenors since Petitioners were not parties to the *Harkenrider* litigation. *Donato v. American Locomotive Co.* concerned a collateral attack by a union member on an arbitration judgment in which he was already represented by his union, 283 A.D. 410, 414 (3d Dep't 1954), and is thus wholly inapposite. And CPLR 4404(b), CPLR 5015, and *Calabrese Bakeries, Inc.*

v. Rockland Bakery, Inc., 83 A.D.3d 1060, 1061 (2d Dep't 2011), all concern relief from judgment.

Intervenors also claim that "any modification of a judicially adopted map is necessarily a request to modify the *order* adopting that map." Intervenors' Br. 53 (emphasis added). That utterly misunderstands the Appellate Division's mandate. The Appellate Division did not purport to modify the Steuben County Supreme Court's order; instead, it instructed *the IRC* to perform its mandatory duty to submit a second round of redistricting plans to the Legislature. *See* R.417 & n.5. If a map based on that submission becomes law (after legislative approval or amendment), New York's congressional map will be modified, but the Steuben County Supreme Court's order will not—rather, it will be *mooted*.

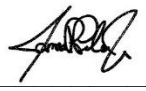
CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court affirm the Appellate Division's order and thus "return the matter to its constitutional design." R.417.

Dated: October 23, 2023

Respectfully submitted,

DREYER BOYAJIAN LLP

By: 

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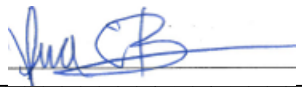
By: 

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CERTIFICATE OF COMPLIANCE

Pursuant to Court of Appeals Rules of Practice 500.1(j) and 500.13(c)(1), the undersigned certifies that the foregoing brief uses a proportionally spaced typeface (Times New Roman) in 14-point type and contains 13,517 words, exclusive of the contents listed in Rule of Practice 500.13(c)(3).

Dated: October 23, 2023

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