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Misha Tseytlin
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Court of Appeals

STATE OF NEW YORK

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

Petitioners-Respondents,

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

against

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

Respondents-Respondents,

(Caption Continued on the Reverse)

REPLY BRIEF FOR INTERVENORS-RESPONDENTS-APPELLANTS

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Date Completed: November 6, 2023

INDEPENDENT REDISTRICTING COMMISSIONER ROSS BRADY, INDEPENDENT REDISTRICTING COMMISSIONER JOHN CONWAY III, INDEPENDENT REDISTRICTING COMMISSIONER LISA HARRIS, INDEPENDENT REDISTRICTING COMMISSIONER CHARLES NESBITT, and INDEPENDENT REDISTRICTING COMMISSIONER WILLIS H. STEPHENS,

Respondents-Appellants,

and

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

Intervenors-Respondents-Appellants.

NO RELATED LITIGATION

Pursuant to Court of Appeals Rule of Practice 500.13(a), Intervenors state that they are unaware of any other litigation related to this appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes And Rules

Other Authorities

PRELIMINARY STATEMENT

In their Opening Brief, Intervenors explained that this lawsuit flouts the 2014 Antigerrymandering Amendments, *Harkenrider v. Hochul,* 38 N.Y.3d 494 (2022), and basic principles of New York law—for four independently fatal reasons. First, Petitioners' mandamus petition was untimely, as Petitioners waited to file it until over five months after the Independent Redistricting Commission ("IRC") violated its constitutional duty to submit second-round maps to the Legislature, thus missing their four-month deadline under CPLR 217(1). As this Court correctly explained in *Harkenrider*, any citizen may file a mandamus petition as soon as the IRC "fail[s]" to "perform [its] constitutional duties," which happened here in January 2022. 38 N.Y.3d at 515 n.10. Second, Petitioners' request for a court order requiring the "adoption" of a new congressional map violates Article III, Section 4(e)'s prohibition on mid-decade redistricting, including because Petitioners are not even arguably seeking to "modif[y]" the *Harkenrider* map. N.Y. Const. art. III, § 4(e). Third, Petitioners' requested relief contravenes *Harkenrider*'s holding that once the constitutional deadline for IRC action has passed, only a court may adopt a map to remedy a failure of the IRC/Legislature redistricting process. Finally, if Petitioners' lawsuit is somehow seeking a "modification" of the *Harkenrider* map—as they now claim—it was filed in the wrong court.

The meager arguments that Petitioners and their *amici* raise in response to Intervenors' statute-of-limitations argument confirm that Petitioners missed CPLR 217(1)'s four-month deadline. Petitioners claim that they suffered an injury when *Harkenrider* invalidated the unconstitutional 2021 legislation, but that is legally irrelevant under CPLR 217(1) because Petitioners concede by silence Intervenors' core point that *any* citizen—including Petitioners—could have filed this same action as soon as the IRC made clear it was violating its constitutional duty, which occurred in January 2022. Indeed, Petitioners' timeliness arguments are so plainly meritless that the Governor asks this Court to construe this lawsuit as something other than a mandamus petition, to evade CPLR 217(1)'s clear deadline. But that eleventh-hour request suffers from numerous fatal defects, including that it violates *Harkenrider*'s holding that mandamus actions are the proper tool for forcing the IRC to comply with its constitutional obligations.

Petitioners' responses to Intervenors' merits arguments fare no better. With respect to Section 4(e)'s prohibition on mid-decade redistricting, Petitioners fail to grapple with the Constitution's plain text, having no serious answer to the binding rule that once a redistricting map has been lawfully "adopt[ed]," that map must stay in place for a decade, subject only to court-ordered "modifi[cations]." N.Y. Const. art. III, § 4(e). Petitioners would demote a map that a court lawfully adopted under the first sentence of Section 4(e) to mere stopgap status, but that is not what the

Constitution says. Further, Petitioners' claim that relaunching the IRC/Legislature process to adopt a new map is somehow a "modification" of the existing *Harkenrider* map makes no sense. Independently, Petitioners also have no persuasive answer for *Harkenrider*'s clear holding that a failure of the IRC process can only be remedied by a judicially adopted map after the "deadline in the Constitution for the IRC to submit a second set of maps has long since passed," 38 N.Y.3d at 523, and the Governor's claim that this holding is dicta is wrong. Finally, even if this Court were to accept Petitioners' meritless assertion that they only want to "modify" the *Harkenrider* map, the collateral-attack doctrine would bar relief here, notwithstanding Petitioners' efforts to claim this doctrine does not exist.

While the three IRC Commissioners supporting Petitioners assert that this case is not an example of "hyper-partisan[ship]," Br. of Resp'ts Jenkins *et al.* at 38–39, no one even remotely familiar with these proceedings could take that claim seriously. During the *Harkenrider* remedial proceedings, several Petitioners jointly submitted a letter brief with incumbent and prospective Congressional Democrats (the beneficiaries of the Legislature's gerrymander), urging the Steuben County Supreme Court to ignore *Harkenrider*'s mandate. Meanwhile, another one of the Petitioners brought a lawsuit asking the federal courts to keep the Legislature's map in place notwithstanding *Harkenrider*. When those gambits failed—after the Steuben County Supreme Court adopted a map that experts across the political

spectrum have praised for its fairness, and after the courts dismissed the federal case as a "Hail Mary" assault on "[f]ree, open, rational elections" and "respect for the courts," Transcript of Hearing at 15, 40, *De Gaudemar v. Kosinski*, No.1:22-cv-3534 (S.D.N.Y. May 4, 2022), Dkt.38—Petitioners brought another "Hail Mary" case, with the same counsel, *see id.*, now as a patently untimely mandamus action.

The cynical hypothesis underlying Petitioners' latest lawsuit is the following: if the Court is now willing to accept the incredible assertion that mid-decade redistricting to adopt a replacement map is actually just a "modifi[cation]" of the *Harkenrider* map under Section 4(e), in a lawsuit where Petitioners missed by more than a month the filing deadline for bringing a mandamus action, the Democrats who control the Legislature will know they have the green light to "take up the task of redistricting," Pet.Br.1, and enact an even more ruthless gerrymander than they did last year. And the reason that gerrymander will be worse this time around is one of the reasons why the People outlawed mid-decade redistricting in Section 4(e) (and why the mid-2000 Texas gerrymander, which led to the proposed Coretta Scott King Mid-Decade Redistricting Prohibition Act, was so insidious): knowing the election results in an actual election held under a new map, the Legislature will now have critical information to make its gerrymander even more viciously effective.

This Court should not permit Petitioners to enlist its imprimatur to drag New York into a national embarrassment even worse than the one this Court stopped in

Harkenrider. Intervenors thus respectfully request that this Court reject Petitioners' petition, while making clear that the same rules of constitutional interpretation and four-month deadlines for filing mandamus petitions apply equally to all litigants.

ARGUMENT

I. Point I: As Even The Governor Appears To Recognize, Petitioners' Mandamus Petition Is Untimely

A. Petitioners' mandamus petition is untimely because they failed to file it within the time period that CPLR 217(1) mandates. Op.Br.25–33. Under CPLR 217(1), a petitioner must file a mandamus-to-compel action "within four months," CPLR 217(1), of the date on which "a body or officer refuse[s] . . . to act or to perform a duty enjoined by law," *Waterside Assocs. v. N.Y. State Dep't of Env't Conservation*, 72 N.Y.2d 1009, 1010 (1988) (citation omitted), meaning that actions filed outside this four-month period are untimely, CPLR 217(1). Here, the IRC refused to perform its constitutional duty to submit a second plan to the Legislature either on January 24, 2022, when the IRC announced it "would not present a second plan" as Section 4(b) requires, or on January 25, 2022, when the IRC's 15-day window to submit that "second plan" expired. N.Y. Const. art. III, § 4(b); Op.Br.26–27. Thus, any mandamus action seeking to compel the IRC's compliance with this constitutional duty had to be filed within four months of January 24 or 25, 2022. Op.Br.27–28. This Court confirmed this conclusion in *Harkenrider*, holding that a

litigant may bring a "mandamus proceeding" at the time the IRC's members "fail . . . to [ ] perform their constitutional duties" to "ensure the IRC process is completed as constitutionally intended." 38 N.Y.3d at 515 n.10. As Intervenors explained, given that *all* New Yorkers suffer harm from the IRC's failure to perform its mandatory constitutional duties, *any* New Yorker—including Petitioners—may bring such a mandamus action as soon as the IRC violates those duties. Op.Br.28–29. So, given that Petitioners did not file this mandamus action within four months of January 24 or 25, 2022, this petition is plainly untimely. Op.Br.27–28.

Petitioners do not dispute that they—like any New Yorker—suffered harm and could have brought a mandamus petition when the IRC violated its constitutional duty in January 2022; rather, they argue that they *also* suffered an *additional* harm when *Harkenrider* struck down the 2021 legislation. Pet.Br.44–47. Petitioners' argument here is both irrelevant and wrong.

The argument is irrelevant because Petitioners specifically brought this mandamus petition to "compel" the IRC to comply with its constitutional obligation "to 'prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan,' as required by Article III, Sections 4 and 5(b) of the New York Constitution." R.266, 284. *That* violation of the IRC's constitutional obligation—as well as the concomitant harm that *all* New Yorkers suffered from that violation—occurred on January 24, 2022, when the IRC

announced it "would not present a second plan to the legislature," or on January 25, 2022, when the IRC's 15-day window to submit that "second plan" expired. N.Y. Const. art. III, § 4(b); *Harkenrider*, 38 N.Y.3d at 515 n.10 (mandamus lies when "IRC members . . . fail . . . to [ ] perform their constitutional duties"); Op.Br.25–31, and harmed all New Yorkers at that time, *see supra* p.6. As Intervenors pointed out in their Opening Brief, no one could plausibly argue that a mandamus petition filed on at least January 25 was unripe, *see* Op.Br.29, 32, and Petitioners did not even try to dispute this devastating point, *see generally* Pet.Br.42–50. So, consistent with Petitioners' concessions by silence that they—like any New Yorker—*could have* brought their mandamus action at that time, that is when the four-month deadline to file a mandamus action under CPLR 217(1) began to run.[1]

Or, as even the three IRC Commissioners supporting Petitioners on the merits concede, "the IRC [ ] failed to carry out their constitutional obligation by not submitting a second congressional redistricting plan," and such failure is challengeable under the "black-letter law of mandamus." Br. of Resp'ts Jenkins *et al.* at 25. Notably, these Commissioners cannot even bring themselves to argue that

[1] Although *amici* Mark Favors, Theodore Harris and Mark Weisman appear to suggest that Petitioners could not have brought this mandamus action before this Court's *Harkenrider* decision, *see* Vot.Br.3, neither Petitioners nor the Governor make this claim, which is plainly wrong for all of the reasons outlined herein.

Petitioners' mandamus petition is timely, instead "defer[ring]" to Petitioners' "arguments on this point." Br. of Resp'ts Jenkins *et al.* at 20 n.9.

In any event, Petitioners' argument that they suffered an additional injury when this Court struck down the 2021 legislation, Pet.Br.44, is simply wrong. A party suffers no harm when this Court invalidates an unconstitutional statute, as that judicial action remedies "capricious legislative action" that had deprived the People of their rights under the Constitution. *See Harkenrider*, 38 N.Y.3d at 516–17.

Petitioners next suggest that their lawsuit did not accrue until February 28, 2022, Pet.Br.49–50, but that finds no support in CPLR 217(1) or the Constitution. CPLR 217(1) requires the filing of a mandamus action within four months of "a body or officer refus[ing] . . . to act or to perform a duty enjoined by law." *Waterside Assocs.*, 72 N.Y.2d at 1010 (citation omitted); Op.Br.25–26. Here, the IRC's refusal to "present a second plan to the legislature" occurred on January 24, 2022, when it "announced" that intention to the public. *Harkenrider*, 38 N.Y.3d at 504–05. But even if this Court were to accept Petitioners' efforts to downplay the IRC's announcement on January 24, Pet.Br.48–49, the "deadline" for IRC actions would then be January 25, *Harkenrider*, 38 N.Y.3d at 504–05. The Constitution provides that the IRC "shall prepare and submit to the legislature a second redistricting plan" "[w]ithin fifteen days of such notification" of the Legislature's rejection of the first plan, N.Y. Const. art. III, § 4(b), which, here, was January 25, 2022, *Harkenrider*,

38 N.Y.3d at 504–05; *see also* Op.Br.13–14. And while the Constitution also provides that the IRC may not submit second-round maps "later than February twenty-eighth," N.Y. Const. art. III, § 4(b), that was irrelevant in 2022, because the IRC *must* in all cases also submit its second-round maps within "the 15-day deadline" of Section 4(b), *Harkenrider*, 38 N.Y.3d at 504, which in 2022 was January 25. Thus, Section 4(b)'s "outer . . . constitutional deadline" of February 28 is irrelevant to when Petitioner's obligation to file their mandamus petition under CPLR 217(1) began to accrue. *See id.* at 522–23 nn.18–19.

Petitioners also contend that their underlying petition is timely if construed as a "demand" under CPLR 217(1), Pet.Br.51, but as the Appellate Division dissenters explained—with no response from Petitioners—"petitioner must make his or her demand within a reasonable time after the right to make it occurs," which "reasonable time requirement" is "measured by CPLR 217(1)'s four-month limitations period," R.418–19 (Pritzker, J., dissenting) (citation omitted). Accordingly, "a demand should be made no more than four months after the right to make the demand arises," *id.* at 419 (citation omitted), that is, the date on which "the petitioner knows or should know of the facts which give him or her a clear right to relief," *id.* (citation omitted). Here, again, that date was either January 24, 2022, the day the IRC announced that it "would not present a second plan to the legislature"

as Section 4(b) requires, or January 25, 2022, when the 15-day window for the IRC to submit the "second plan" expired. N.Y. Const. art. III, § 4(b).

The Governor appears to understand that Petitioners missed their deadline under CPLR 217(1), which is why she asks this Court to turn Petitioners' mandamus petition into a different lawsuit, transforming it into a purported "timely challenge to the current congressional map pursuant to article III, § 5 of the Constitution and to the Unconsolidated Laws §§ 4221-4225 (L. 1911, ch. 773, as amended)." Gov.Br.34–35. The reason that Petitioners brought an Article 78 mandamus petition is because, as *Harkenrider* explained, a mandamus petition is the proper method for challenging IRC members' "fail[ure to] perform their constitutional duties." *Harkenrider*, 38 N.Y.3d at 515 n.10. Indeed, requiring parties to bring such claims "in the form of a mandamus proceeding" against the IRC brought within CPLR 217(1)'s deadline makes sense, as the goal of such claims is "to ensure the IRC process is [timely] completed as constitutionally intended"—rather than "derail[ed]"—by ordering IRC members to "perform their constitutional duties." *Id*. Further, recasting this mandamus petition as a challenge to the *Harkenrider* map would violate the prohibition on collaterally attacking a prior court ruling without first moving the court that issued that ruling. *See infra* Point IV.

B. Even if this Court were to conclude that Petitioners' mandamus petition were somehow timely filed under CPLR 217(1), the petition would still be time-

barred under equitable principles, as Intervenors explained. Op.Br.33–34. Courts have "discretion . . . to deny review" of a mandamus petition filed within the statutory limitations period, *Anderson v. Lockhardt*, 310 N.Y.S.2d 361, 362 (Westchester Cnty. Sup. Ct. 1970), if the petition is nonetheless filed outside of the time when equitable relief may be granted by the court, *see Sheerin v. N.Y. Fire Dep't Arts. 1 & 1B Pension Funds*, 46 N.Y.2d 488, 496 (1979). Here, the Constitution establishes deadlines for the IRC to complete its redistricting duties, including the submission of second-round maps to the Legislature. N.Y. Const. art. III, § 4(b). However, Petitioners did not file their mandamus petition until well after those deadlines. *Supra* pp.5–6. Accordingly, equitable principles foreclose granting any relief to Petitioners at this late hour, given the time-sensitive redistricting context. Op.Br.33–34. Indeed, allowing litigants like Petitioners to challenge the IRC's failure at this late date creates perverse incentives: litigants could delay challenging an IRC constitutional violation until after reviewing a remedial map adopted by a court to cure that violation to see if that map suits their political preferences—precisely the unfortunate situation that occurred here.

Petitioners claim that equitable-timeliness principles do not apply in mandamus proceedings, given CPLR 217(1)'s four-month statute of limitations, Pet.Br.52–53, but that is contrary to this Court's explanation in *Sheerin* that "laches is designed to introduce flexibility into the process of determining when rights have

been asserted so unseasonably that a point at which they should be barred has been reached," 46 N.Y.2d at 496; *see White v. Priester*, 78 A.D.3d 1169, 1171 (2d Dep't 2010) (laches applied "regardless of whether the statutory limitations period has expired" (citation omitted)). Petitioners also fault Intervenors for "not invok[ing] laches," Pet.Br.52, but Intervenors invoked that doctrine here, as that is their argument under "general equitable timeliness principles," Op.Br.33–34 (formatting altered); *see Sheerin*, 46 N.Y.2d at 495 ("the equitable defense of laches").

II. Point II: Petitioners' Request Violates Article III, Section 4(e)'s Prohibition On Mid-Decade Redistricting

A. Petitioners' requested relief violates Article III, Section 4(e)'s prohibition on mid-decade redistricting, as Intervenors explained. Op.Br.34–43. Under Section 4(e)'s first sentence, the IRC/Legislature process "govern[s] redistricting" at the start of each decade, but if that process fails, a court is "required" to "adopt[ ]" a lawful "redistricting plan." N.Y. Const. art. III, § 4(e). Then, under Section 4(e)'s second sentence, a redistricting plan adopted under the first sentence must remain "in force" until the next decennial census. *Id.* Any changes to the "adopt[ed]" map are limited solely to judicially ordered "modifi[cations]," rather than wholesale replacement by adoption of a new redistricting map. *Id.*; Op.Br.34–37.

Here, the IRC/Legislature process failed to "adopt[ ]" redistricting maps in 2022. *See* N.Y. Const. art. III, § 4. That failure, in turn, required this Court to order a judicially "adopt[ed]" map under Section 4(e)'s first sentence, *Harkenrider*, 38

N.Y.3d at 522, which map the Steuben County Supreme Court adopted on May 21, 2022, *see Harkenrider*, No.696 at 1. At that point, and under the Constitution's plain terms, the judicially adopted map remains "in force" until the next decennial census, subject only to court-ordered "modifi[cations]" to resolve any legal infirmities in that map. N.Y. Const. art. III, § 4(e); Op.Br.37. Indeed, the Steuben County Supreme Court ordered such a "modifi[cation]," N.Y. Const. art. III, § 4(e), on June 2, 2022, to correct certain violations of the Constitution's block-on-border requirement, *id.* § 4(c)(6); Op.Br.37. Here, the relief that Petitioners request in this lawsuit—the "adopt[ion]" of an entirely new congressional map, rather than mere "modifi[cation]" of the *Harkenrider* map—is unconstitutional under Section 4(e)'s text, a point the Third Department did not even address.

Notably, this argument has nothing do with the issue that the First Department decided in *Nichols v. Hochul*, 206 A.D.3d 463, 464 (1st Dep't 2022), since in that case neither the Legislature nor the courts had lawfully adopted a map under Section 4(e)'s first sentence. Op.Br.34–37. That is why counsel for the Speaker of the Assembly in both *Harkenrider* and *Nichols* explained in *Nichols* that the Assembly "respect[ed]" that the *Harkenrider* map would "determine the lines for all of

congress . . . for the next 10 years." Oral Argument Recording at 29:55–30:17, *Nichols v. Hochul*, No.154213/2022 (1st Dep't Jan. 17, 2023).[2]

B. Having no serious answer to Intervenors' careful analysis of Section 4(e)'s two sentences, Petitioners ask this Court not to concern itself with that text because that Section serves only to "protect maps created using the prescribed IRC/legislative process." Pet.Br.18. That is just wrong. Although the first sentence of Section 4(e) provides that the IRC/Legislature process "shall govern redistricting in this state," that provision also recognizes an express "except[ion]" to the IRC/Legislature process: requiring "a court" to "order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." N.Y. Const. art. III, § 4(e). Section 4(e)'s second sentence—which mandates that a "reapportionment 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"—*applies equally and without distinction to any "reapportionment plan" adopted under Section 4(e)'s first sentence, court-adopted or otherwise*. *Id.* That the Constitution recognizes a "clear preference" for the IRC/Legislature process at the start of the decade, Pet.Br.19, is thus irrelevant to the prohibition against mid-decade redistricting found in Section

[2] Available at https://wowza.nycourts.gov/vod/wowzaplayer.php?source=ad1&video=AD1_Archive2023_Jan17_11-59-13.mp4.

4(e)'s second sentence, which prohibition applies to *any* map lawfully adopted under Section 4(e)'s first sentence, including a judicially adopted map.

The surrounding constitutional provisions that Petitioners cite, Pet.Br.18–19, do not suggest otherwise—nor do they provide any evidence of a "core principle" that the IRC and Legislature may engage in mid-decade redistricting absent "exigent circumstances," Pet.Br.19. While Section 5 requires a court to give the Legislature a "full and reasonable opportunity to correct" a plan's "legal infirmities," N.Y. Const. art. III, § 5, if a court "adopt[s]" a replacement map under Section 4(e), that map governs for the decade, *id.* § 4(e), regardless of whether, as Petitioners suggest, some other remedy could have been ordered initially, *but see infra* Point III. Here, *Harkenrider* ordered a judicially adopted map under Section 4(e)'s first sentence, 38 N.Y.3d at 522, which map now serves as New York's redistricting map for purposes of the mid-decade-redistricting prohibition found in Section 4(e)'s second sentence. Further, while Section 5-b(a) provides that the IRC may reconvene "at any . . . time a court orders that congressional or state legislative districts be amended," N.Y. Const. art. III, § 5-b(a); Op.Br.50–51, that provision does not purport to override Section 4(e)'s prohibition against mid-decade redistricting. Rather, Section 5-b(a) is consistent with Section 4(e), permitting a court to enlist the IRC's help in "modif[ying]," N.Y. Const. art. III, § 4(e), or "amend[ing]," *id.* § 5-b(a), a map

lawfully adopted under Section 4(e), whether adopted via the IRC/Legislature process or adopted by a court if that process fails.

Petitioners claim that Section 4(e)'s recognition that a redistricting plan may be "modified" mid-decade via "court order" means that a court may now compel the IRC to submit second-round maps to the Legislature, such that the Legislature can adopt a new map. Pet.Br.20–24. This argument is risible. Section 4(e) recognizes only one exception to the requirement that a redistricting map "be in force" for the remainder of the decade: a court may "order" that the map be "*modified*." N.Y. Const. art. III, § 4(e) (emphasis added). "[M]odify," as Intervenors explained, means to "make partial or minor changes to" something, *Modify*, OED Online (3d ed. Dec. 2022);[3] *see Modify*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003), and it does not permit restarting the IRC/Legislature process to adopt a new map that replaces the judicially adopted map, *see* Op.Br.36–37, 38–39.[4]

Petitioners' contention that whenever a congressional map is "modified," it is "necessarily and inevitably replaced," Pet.Br.21–22, is also wrong. To "replace" is

[3] Accessible at https://www.oed.com/dictionary/modify_v (subscription required).

[4] Petitioners focus on the meaning of the word "amend" in Section 5-b(a). Pet.Br.20 (citing N.Y. Const. art. III, § 5-b(a)). That gets them nowhere, as "amend"—like "modify"—does not permit "adopt[ion]" of a new redistricting map. *Compare* N.Y. Const. art. III, § 4(e), *with id.* § 5-b(a). In any event, this Court need not reach this issue, as Section 4(e)'s plain terms provide the only exception to the 2014 Amendments' ban on mid-decade redistricting, and that provision uses "modif[y]," not "amend." *See* N.Y. Const. art. III, § 4(e).

to "put something new in the place of" something else, or to "take the place of" something "as a substitute or successor." *Replace*, Merriam-Webster's Collegiate Dictionary (11th ed. 2003); *see Replace*, OED Online (3d ed. Dec. 2022) ("To fill the place of (a person or thing) *with* (also *by*) a substitute.").[5] To "modify," by contrast, is to "make partial or minor changes to" an *existing* thing. *Modify*, OED Online (3d ed. Dec. 2022). These terms are in no way synonymous, and Petitioners are thus wrong to argue that Section 4(e)'s term "modif[y]" is expansive enough to encompass "the wholesale replacement of a challenged map." Pet.Br.22.

The example that Petitioners rely upon belies their argument that "modify" includes the adoption of new maps. Petitioners claim that *Harkenrider* merely ordered "modifications" to the prior, now-unconstitutional redistricting maps, Pet.Br.21–22, when it ordered the Steuben County Supreme Court to "*adopt* constitutional maps with all due haste," *see Harkenrider*, 38 N.Y.3d at 524 (emphasis added). But the "*adoption*" of a new map is a specific remedy addressed only in the first sentence of Section 4(e), which remedy allows a court to step in when the IRC/Legislature redistricting process fails. *See* N.Y. Const. art. III, § 4(e) (emphasis added). Section 4(e)'s second sentence, which provides the *only* exception to the 2014 Amendments' prohibition on mid-decade redistricting, does

[5] Accessible at https://www.oed.com/dictionary/replace_v (subscription required).

not mention the term "adopt" and refers only to "modifi[cations]." *Id.* In *Harkenrider*, this Court relied on Section 4(e)'s first sentence because, given the specific constitutional violations at issue there, the Court was required to order "adoption" of new maps. 38 N.Y.3d at 522.

Nor does Intervenors' position allow only for "minor" changes to an existing map, as Petitioners incorrectly suggest. Pet.Br.21–23. As Intervenors' have explained, the ordinary meaning of "modify" is to "make *partial* or minor changes." *Modify*, OED Online (3d ed. Dec. 2022) (emphasis added). So, for example, if a court were to determine that a map that either the IRC/Legislature or a court "adopt[ed]" under the first sentence of Section 4(e) violated Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, by failing to include a legally required majority-minority district, a court would be well-advised to enlist the IRC's help in "modif[ying]" the map to resolve that legal violation, which resolution would involve a modification of at least two adjoining districts. *See* N.Y. Const. art. III, § 4(e); *id.* § 5-b(a). Other "modifi[cations]," such as the Steuben County Supreme Court's modification to resolve block-on-border violations, are more minor and thus do not call for a court enlisting the IRC's assistance. *See supra* p.13. But in all events—and although court-ordered "modifi[cations]" to an existing map may be significant if required to remedy significant legal violations—once a map has been adopted under Section 4(e) and survives initial review, that is the map that governs

for the decade, given that the Constitution does not permit the "adoption" of a new map in the guise of a "modifi[cation]." N.Y. Const. art. III, § 4(e).

Petitioners also argue that a court may "order modification of the current congressional map" to resolve the IRC's "legal violation" in failing to submit second-round maps to the Legislature, Pet.Br.24, but the *Harkenrider* map already "remed[ied that] constitutional violation[ ]" by ordering the "adoption of new constitutional maps," *see Harkenrider*, 38 N.Y.3d at 521–22. Indeed, the very first issue before this Court in *Harkenrider* was whether the "process by which the 2022 maps were enacted was constitutionally defective," given that "the IRC failed to submit a second redistricting plan as required under the 2014 constitutional amendments." *Id.* at 505. This Court remedied that violation by ordering the Steuben County Supreme Court to adopt a "constitutionally conforming" congressional map, *id.* at 502, under Section 4(e)'s first sentence, *id.* at 522. But even if this Court holds that *Harkenrider* somehow did not remedy the IRC's legal violation, that is ultimately irrelevant, because the judicially adopted *Harkenrider* map itself does not suffer from any legal defect and so is the controlling map for the next decade under Section 4(e)'s second sentence. *See* N.Y. Const. art. III, § 4(e). And, indeed, neither the parties nor their *amici* can point to any specific legal infirmities in the *Harkenrider* map itself.

Nor does Section 4(e)'s use of the phrase "to the extent . . . required" prevent a court from ordering the "adoption" of a redistricting map that will, as Section 4(e)'s second sentence requires, be in place for a full decade. Pet.Br.36–37; Br. of Resp'ts Jenkins *et al.* at 37–38. Petitioners suggest that a court may only order the "adoption" of a new map "to the extent," N.Y. Const. art. III, § 4(e), necessary to ensure a map is in place for an upcoming election, and must thereafter allow the IRC/Legislature process to recommence to completion. Pet.Br.36–37. But Section 4(e) does not say anything about a renewed IRC/Legislature process in the event of a violation of the Constitution's IRC/Legislature redistricting process. *See* N.Y. Const. art. III, § 4(e). Rather, that Section requires that any "adopt[ed]" redistricting plan "shall be in force" for a decade "unless modified pursuant to court order." *Id.* Again, and as explained above, that command does not contemplate any distinction between legislatively and judicially adopted maps, including as to the time such plans will remain "in force." *Supra* pp.14–15.

Finally, Petitioners argue that their effort to launch a prohibited mid-decade redistricting for New York conforms with the "overall purpose" of the 2014 Amendments, Pet.Br.25, but that is wrong. The 2014 Amendments' ban on the infamous practice of mid-decade redistricting is a critical feature furthering the Amendments' anti-gerrymandering purpose. *See Harkenrider*, 38 N.Y.3d at 503. That is because mid-decade redistricting allows partisans to gerrymander a

protected-party advantage based upon demonstrated results. Op.Br.38–39. Section 4(e) prohibits this practice by requiring that any adopted plan—whether by the IRC/Legislature process or, if necessary, by a court—remains in place for a decade. Petitioners' request for mid-decade redistricting thus conflicts with this fundamental purpose of the 2014 Amendments, whereas Intervenors' interpretation—which flows directly from the Constitution's plain text—furthers this purpose by ensuring that any adopted map stays in place, subject to any necessary modifications.

Contrary to their arguments, Petitioners' position necessarily increases the risk of partisan gamesmanship and undermines stability by giving partisan actors the chance to mid-decade gerrymander. *See* Pet.Br.25–27. If this Court were to accept Petitioners' position that a court-drawn map is a mere stopgap measure, pending completion of the IRC/Legislature process, then every time there is a legislative or legislative-executive deadlock over a redistricting map—which happened just last decade in this State, *see Harkenrider*, 38 N.Y.3d at 502—the Constitution would allow for mid-decade redistricting as soon as that deadlock is broken by a new election or a change of heart by politicians after they decide they do not like the judicially adopted map. While Petitioners contend that Intervenors' position would encourage IRC members to "simply stall," Pet.Br.26, that is incorrect, as all a citizen needs to do is file a *timely* mandamus petition—which is precisely the procedure that *Harkenrider* highlighted "to ensure the IRC process is completed as constitutionally

intended," 38 N.Y.3d at 515 n.10. Further, the specter of a judicially adopted map should only incentivize consensus in the IRC/Legislature process, as the 2014 Amendments contemplate. By contrast, the 2014 Amendments' "overall purpose," Pet.Br.25, certainly is not served by parties filing an untimely mandamus petition after they decide a judicially adopted map does not suit their political preferences, which is what happened here.

III. Point III: Petitioners Have No Coherent Response To This Court's Clear Holding That Only A Court Can Adopt A Map To Remedy A Violation Of The IRC/Legislature Process After "The Deadline In The Constitution For The IRC To Submit A Second Set Of Maps Has . . . Passed"

A. Petitioners' lawsuit fails for the additional reason that, as *Harkenrider* held, only a court can adopt a redistricting map to remedy a violation of the IRC/Legislature process after the constitutional deadline for IRC action has expired. 38 N.Y.3d at 523. In *Harkenrider*, this Court considered the question of what remedy is available to resolve a violation of the constitutional redistricting process if the IRC blows its constitutional deadline. Intervenors argued that where the IRC/Legislature process fails and the constitutional deadline passes, the only constitutional remedy is a judicially adopted map, Op.Br.44–46, while the *Harkenrider* respondents disagreed, Op.Br.45. At oral argument, this Court addressed this remedy dispute, questioning whether the proper remedy for the "procedural defect[ ]" that Intervenors identified was "to require the IRC to comply with its duty." Oral Argument Transcript at 33–34, *Harkenrider v. Hochul*, No.60

(N.Y. Apr. 26, 2022) ("*Harkenrider* Tr."). Then, in its *Harkenrider* opinion, the Court analyzed the "proper remedy" for the "constitutional violations" at issue:

> The procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure. The deadline in the Constitution for the IRC to submit a second set of maps has long since passed.

38 N.Y.3d at 523. That holding is fatal to Petitioners' lawsuit.

B. Petitioners argue that *Harkenrider* only held that a "legislative cure" was unavailable because, at the time of decision, "there was no longer time for the IRC/legislative process to finish." Pet.Br.10. That is just not what *Harkenrider* said. *Harkenrider* made no mention of whether there would be enough time for the IRC to submit second-round maps so that the Legislature might adopt a replacement map in time for an August primary. *See generally* 38 N.Y.3d at 521–24. Instead, what *Harkenrider* held was that the "procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure" because the constitutional deadline "for the IRC to submit a second set of maps has long since passed." *Id.* at 523. Petitioners' assertion that *Harkenrider* only ordered the relief that it did due to "exigent circumstances," Pet.Br.37, also lacks any basis in the *Harkenrider* decision itself. Indeed, at the time *Harkenrider* was decided, the same IRC that had just held hearings around the State was still in place and funded, and it could have submitted a new map even more quickly than the Steuben County

Supreme Court could do starting from scratch, allowing the Legislature to adopt a map in plenty of time for an August primary. Op.Br.47. Accordingly, had this Court been concerned with exigency—rather than with following the Constitution's plain text—it could have ordered the IRC to submit a second-round map, including by ordering the IRC's joinder as a party at that stage. *See* CPLR 1001.

Petitioners' reliance on this Court's assertion that it was exercising "judicial oversight . . . to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election" takes the statement entirely out of context. Pet.Br.36 (quoting *Harkenrider*, 38 N.Y.3d at 502). In *Harkenrider*, the respondents argued that, even if the maps were unconstitutional, "no remedy should be ordered for the 2022 election cycle because the election process for this year is already underway." 38 N.Y.3d at 521. Put another way, the respondents "urge[d] that the 2022 congressional and senate elections be conducted using the unconstitutional maps," and specifically asked this Court to "defer[ ] any remedy for a future election." *Id.* *Harkenrider*'s order that maps be adopted "for use in the 2022 election" rejected respondents' request that the unconstitutional maps stay in place until the next election. *See id.* at 502. Had this Court believed an IRC/Legislature remedy was constitutionally available either at that time or in advance of future mid-decade elections, it surely would have said so or, at minimum, would have designated the *Harkenrider* map a mere interim map, which the Court did not do.

See Br. of *Amici* League of Women Voters of N.Y. at 7–8 ("preposterous" to think "the Court consigned" the State "to guess that new maps would be created after the election through a process the nature of which was never even hinted at in [ ] *Harkenrider*").

Petitioners misconstrue Intervenors' position when they cast Intervenors' brief as arguing that "court-drawn maps are the *exclusive* remedy for legal violations." Pet.Br.34 (emphasis added). Intervenors' position is that only *certain* constitutional infirmities—such as a failure of the IRC process, after passage of the constitutional deadline "for the IRC to submit a second set of maps," *Harkenrider*, 38 N.Y.3d at 523—may only be remedied by the "adopt[ion]" of a court-drawn map to replace the challenged map, *see* N.Y. Const. art. III, § 4(e). That is the very argument that Intervenors made in their briefing and at oral argument in *Harkenrider*, Op.Br.17–20, and this Court agreed with that argument, as its clear holding quoted repeatedly above demonstrates, *Harkenrider*, 38 N.Y.3d at 523.

Finally, the Governor is wrong to suggest that this Court's holding that the "procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure," *id.*, is mere dicta, *see* Governor *Amici* Br.23–29, 29 n.11. The parties briefed and then argued this very issue extensively in *Harkenrider*, disagreeing on whether the Court could, if it ruled in Intervenors' favor, order relief other than the judicial "adoption" of new maps. Op.Br.43–47. At

oral argument, Intervenors' counsel explained that the IRC/Legislature "could [not] possibly fix" the challenged procedural violation because the IRC "did not [meet] the deadline," *Harkenrider* Tr.36, and this Court adopted this argument, *see Harkenrider*, 38 N.Y.3d at 523. That determination is essential to this Court's remedy ruling because, had this Court rejected Intervenors' argument, it would have ordered a different remedy. This Court's holding thus controls the outcome here.

IV. Point IV: If This Court Concludes That The Requested Relief Seeks A Constitutionally Permissible "Modifi[cation]" Of The *Harkenrider* Map Under Section 4(e), Then This Lawsuit Was Filed In The Wrong Court

A. If this Court were to conclude that Petitioners' mandamus action seeks a constitutionally permissible "modifi[cation]" of the *Harkenrider* map under Section 4(e), *but see supra* Point II, their lawsuit would then fail for another reason: Petitioners would have filed their petition in the wrong court, under the collateral-attack doctrine. Op.Br.52–54. The collateral-attack doctrine bars litigants from challenging the validity of a prior court ruling without first moving the court that issued that ruling to reconsider or vacate its judgment. *See Gager v. White*, 53 N.Y.2d 475, 484 n.1 (1981); CPLR 4404(b), 5015. This rule requires "any interested person" seeking relief from a court ruling to submit a motion directly to the "court which rendered [the] judgment or order." CPLR 5015(a). Thus, if this Court holds that Petitioners' requested relief seeks a "modifi[cation]" of the *Harkenrider* map under Section 4(e), *see* N.Y. Const. art. III, § 4(e); *but see supra* Point II, such relief

would require modification of the Steuben County Supreme Court's May 21 order adopting a "final . . . redistricting map[ ]" for the State, *Harkenrider* No.696 at 1, meaning that Petitioners had to file this lawsuit in Steuben County, Op.Br.52–54.

B. Petitioners argue that the collateral-*attack* doctrine does not exist outside of collateral *estoppel* principles, Pet.Br.55–57, but they are wrong. This Court has made clear that CPLR 5015's requirement that collateral attacks on a judgment be filed in the original "court which rendered a judgment or order," CPLR 5015(a), "was intended to assure that a broad class of persons, not limited to parties in the formal sense, could move in the original action on grounds vastly broader than permitted at common law or under prior practice, and thus to minimize the necessity for use of independent procedures of collateral attack upon a judgment," *Oppenheimer v. Westcott*, 47 N.Y.2d 595, 603 (1979) (citation omitted). The collateral-attack doctrine thus extends beyond the narrow confines of collateral estoppel—which applies only to parties in the original case, *see Calabrese Bakeries, Inc. v. Rockland Bakery, Inc.*, 83 A.D.3d 1060, 1061 (2d Dep't 2011)—and instead applies to "a broad class of persons," *Oppenheimer*, 47 N.Y.2d at 603.

Petitioners rely upon *ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 N.Y.3d 208 (2011), but that case does not support their argument. Pet.Br.55–56. There, this Court addressed the "preclusive effect, if any, of" an administrative decisionmaking, which "inquiry require[d] an analysis of *administrative* collateral estoppel

principles." *ABN AMRO Bank*, 17 N.Y.3d at 225 (emphasis added). This case does not implicate administrative collateral estoppel principles, making *ABN AMRO Bank* inapt. And none of this Court's concerns in *ABN AMRO Bank* about the "protections of notice and opportunity to be heard for affected constituencies," *id.* at 226, caution against requiring Petitioners to bring this lawsuit in Steuben County.

Finally, Petitioners' claim that the Appellate Division's order requiring the IRC to submit second-round maps to the Legislature would moot—rather than modify—the Steuben County Supreme Court's order, Pet.Br.57, confirms Intervenors' core argument that Petitioners are seeking a replacement of the *Harkenrider* map, not a modification of that map, *supra* Point II. If Petitioners are not seeking to modify the *Harkenrider* map—and, to be clear, they are not—then they are seeking to replace that map with a new redistricting map, "adopt[ed]" pursuant to the IRC/Legislature process. *See* N.Y. Const. art. III, § 4(e). Any new map capable of mooting the *Harkenrider* map would not be a "modifi[cation]" of that map, and thus would violate Section 4(e). *See id.*; *supra* Point II.

CONCLUSION

The Court should reverse the Appellate Division, Third Department, and affirm the Supreme Court's dismissal of Petitioners' Article 78 mandamus Petition.

Dated: New York, NY
November 6, 2023

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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

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