SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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Anthony S. Hoffmann; Marco Carrión; Courtney Gibbons; Lauren Foley; Mary Kain; Kevin Meggett; Clinton Miller; Seth Pearce; Verity Van Tassel Richard; and Nancy Van Tassel,

Index No. 904972-22

Petitioners,

-against-

The New York State Independent Redistricting Commission, *et al.*,

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,

Intervenor-Respondents.

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REPLY MEMORANDUM OF LAW IN SUPPORT OF INTERVENOR-RESPONDENTS' MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes And Rules

Constitutional Provisions

PRELIMINARY STATEMENT

Petitioners' opposition to Intervenors' motion to dismiss alters the purported source of authority and nature of Petitioners' requested relief from their prior filings in this case, but these belated changes only make matters worse for Petitioners. Petitioners now claim that they want this Court to act under Article III, Section 4(e) of the New York Constitution by "order[ing] the adoption of, or changes to, a redistricting plan as a remedy" for the IRC and Legislature failing to follow the Constitution's mandatory procedures in adopting a new congressional map. NYSCEF No.161 at 1–2. When exercising this claimed remedial authority under Section 4(e), Petitioners want this Court to require the IRC to submit a new map within 15 days, after which the Legislature will either adopt that map or reject the map and adopt its own. Petitioners' reformulated relief only worsens all three of the fundamental problems that Intervenors pointed out in their Motion to Dismiss: (1) the Steuben County Supreme Court already adopted its remedy under Section 4(e) for the exact same violation of the New York Constitution—the failure of the constitutional process in early 2022, including the IRC's failure to submit a second map within 15 days of the Legislature's rejection of the IRC's first submission—and this Court lacks authority to override that final judgment with a different remedy; (2) the Court of Appeals concluded that the only permissible, constitutional remedy under Section 4(e) is a court-adopted map, over the specific objection of Judge Troutman, who proposed a remedy very similar to the one that Petitioners now seek; and (3) Petitioners' requested remedy is untimely, as it should have been sought immediately after January 24. Petitioners have no serious response to any of these points, and this Court should dismiss their Petition for those reasons.

Further, given that Petitioners have revised the nature of their request for relief, there is now a fourth fundamental problem with their lawsuit: the relief that they seek is entirely

inequitable. Even entertaining the unrealistic and wrongheaded premise that it is practical for the IRC to negotiate and submit a map within 15 days, given that the IRC has not discussed the congressional map in nine months, the IRC is now differently composed from the one that heard from the People in 2021 about what map they want. And that 2021 testimony is irremediably stale, including because the People of New York are now experiencing an election under an entirely new congressional map. Surely, if the newly composed IRC is forced to act, it must first hear from the People as to what they want from their congressional map now, including whether the People want to retain, in part or in whole, the Steuben County Supreme Court map. Put another way, if this Court is going to order a new Article III, Section 4(e) remedy for the same violation of the New York Constitution that the Steuben County Supreme Court and Court of Appeals already remedied—***which, to be clear, Intervenors very strongly believe this Court lacks authority to do***—this Court must, at minimum, follow the lead proposal of legislative leaders in *Nichols v. Hochul*, Index No.154213/2022 (N.Y. Cnty. Sup. Ct.), and allow for a fulsome public process that "adheres more closely to the constitutional redistricting process." *See Harkenrider v. Hochul*, ___ N.Y.3d ___, 2022 WL 1236822, at *14 (N.Y. Apr. 27, 2022) (Troutman, J., dissenting in part).

ARGUMENT

I. Petitioners' Lawsuit Is An Impermissible Collateral Attack On The *Harkenrider* Judgment, Their Arguments To The Contrary Notwithstanding

As Intervenors explained, Petitioners' Amended Petition is an impermissible collateral attack on the Steuben County Supreme Court's judgment in *Harkenrider*. Petitioners have requested that this Court compel the IRC to submit a second map to the Legislature to govern New York's post-2022 congressional elections, turning the remedial congressional map that the Steuben County Supreme Court adopted earlier this year in *Harkenrider* into an interim map. NYSCEF No.144 at 11–12. That would be deeply insulting to the Steuben County Supreme Court, which

followed the Court of Appeals' instructions by adopting a remedial map under Section 4(e) for the entire decade. *Harkenrider* No.696 at 1[*]; NYSCEF No.144 at 11–12, as all understood, *see Harkenrider*, 2022 WL 1236822, at *1, *5, *8, *12–13; *accord id.* at *14 (Troutman, J., dissenting in part). In doing so, the Steuben County Supreme Court rejected Petitioners' request that it limit the remedial congressional map's applicability only "for the 2022 congressional election." NYSCEF No.146 at 1; *see* NYSCEF No.144 at 12–13. Petitioners now ask this Court to turn the Steuben County Supreme Court's map into an interim map, but the only proper method for Petitioners to modify, amend, or otherwise seek relief from the Steuben County Supreme Court's judgment would be to file the appropriate motion in the *Harkenrider* case under CPLR 4404(b) or CPLR 5015(a), which they have not done. NYSCEF No.144 at 13. Additionally, and independently, Petitioners have asked this Court to relitigate a decided issue in *Harkenrider*, which is impermissible for that additional reason. NYSCEF No.144 at 11–13.

Petitioners have little to say about the first, independent basis for the Intervenors' argument on this score: that Petitioners are asking this Court to take the extraordinary, unlawful path of amending the judgment of a different Supreme Court. Only the court that issued a judgment may enter an order altering, amending, or relieving any portion of that judgment, acting under CPLR 5015 or 4404(b), NYSCEF No.144 at 11 (citing these CPLR sections, among other authorities); *see also, e.g.*, *Calabrese Bakeries, Inc. v. Rockland Bakery, Inc.*, 83 A.D.3d 1060, 1061 (2d Dep't 2011) ("A motion for relief from a default judgment must be brought in the original action or proceeding. A plenary action or proceeding for such relief will not lie."); *Oppenheimer v. Westcott*, 47 N.Y.2d 595, 602 (1979); *James v. Shave*, 62 N.Y.2d 712, 714 (1984); *Bond v.*

[*] All citations to filings in Harkenrider v. Hochul, Index No.E2022-0116CV (Steuben Cnty. Sup. Ct.), may be found at https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=kmywkTvfcaoSsQ66zseQsg==&display=all. Such documents will be cited as "*Harkenrider* No.XX."

Giebel, 101 A.D.3d 1340, 1341–42 (3d Dep't 2012); *N.Y. Sign & Supply-Impressive Prod., Inc. v. Delong Realty Co.*, 282 A.D.2d 510, 510 (2d Dep't 2001). Further, "[t]he rule forbidding collateral attack upon a judgment is applicable not only to the parties *but to other interested persons, who were not parties, as well*." *Donato v. Am. Locomotive Co.*, 283 A.D. 410, 414 (3d Dep't 1954) (emphasis added). Petitioners' apparent belief that nonparties to a judgment entered by one court may file a new lawsuit in another court seeking to alter or amend that judgment, NYSCEF No.161 at 8, is a lawlessly "chaotic one," which would "destroy[ ]" the "integrity" of the judicial process, *Donato*, 283 A.D. at 414–15. This is why CPLR 5015 addresses nonparties, providing that "any interested person" seeking to alter, amend, or relieve a party from a judgment must move the court that entered that judgment. CPLR 5015(a); *Oppenheimer*, 47 N.Y.2d at 602 ("to avail himself of the remedy provided by" CPLR 5015(a), "one need not have been a party to the original action"); NYSCEF No.144 at 11 (citing CPLR 5015).

Petitioners claim that the Steuben County Supreme Court "did not address whether the map would be in place beyond the 2022 midterm elections," NYSCEF No.161 at 9–10, but that is wrong. The Steuben County Supreme Court adopted as a constitutional remedy under Section 4(e) "the *final* enacted [congressional] redistricting map[ ]" for the State with no temporal limitation, *Harkenrider* No.696 at 1 (emphasis added), thereby applying for the entire next decade, just as the "2012 Congressional map[ ]" adopted by the federal court was "used these last 10 years," *Harkenrider* No.670 at 3. And doing so followed the Court of Appeals' requirement that the Steuben County Supreme Court provide "judicial oversight of remedial action in the wake of a determination of judicial unconstitutionality," in order to meet the Constitution's requirement for "reapportionment of . . . congressional districts" "[e]very ten years," and to "giv[e] meaningful effect to the 2014 constitutional amendments." *Harkenrider*, 2022 WL 1236822, at *1, *5, *8,

*12–13. So, while Petitioners argue that the language in the Steuben County Supreme Court's orders, including the use of the word "final" to describe its map, *Harkenrider* No.696 at 1, is insufficient to show that the court intended its map to apply "for the remainder of the decade," they point to *nothing* in that court's orders at all indicating that the remedial congressional map was a mere interim map only for the 2022 elections. NYSCEF No.161 at 9–10. And even if Petitioners think there is some ambiguity in the Steuben County Supreme Court's decision on this point, *see* NYSCEF No.157 at 12, Petitioners surely should have sought relief from that court, instead of asking this Court to take the deeply insulting and judicially destabilizing step of limiting the scope of a different Supreme Court's judgment.

Notably, in now asking this Court to create a *new* remedial procedure under Section 4(e), NYSCEF No.161 at 1–2, Petitioners admit that they are *not* simply asking for a writ of mandamus from this Court ordering the IRC to follow the Constitution's exclusive and mandatory redistricting procedure, which would now be impossible because the constitutional deadline passed. Rather, they are asking this Court to issue a new Section 4(e) remedy for the constitutional procedural violation, but the Steuben County Supreme Court already remedied that exact same violation under Section 4(e), which further shows that this lawsuit is an attack on that court's judgment.

Petitioners' arguments that this case involves new parties and new issues never addressed in *Harkenrider*, and that Petitioners did not have a "full and fair opportunity" to address the issues raised here, NYSCEF No.161 at 8–9, are incorrect. As an initial matter, these arguments go only to the second, independent basis for why this is an impermissible collateral attack—that these issues were fully litigated and decided in the Steuben County Supreme Court—and nowhere address the issue of the impropriety of one Supreme Court amending or superseding another court's final judgment. *Supra* pp.3–4. Further, and in any event, Petitioners are simply incorrect

that they had no "full and fair opportunity" to address the issues raised here, or that these issues were never litigated. The proper remedy under Section 4(e) for the procedural violation arising from the IRC's failure to submit second-round maps, including whether to permit the IRC or Legislature any opportunity to cure them or to order a judicial remedy, were fully litigated in *Harkenrider*, including by Petitioners and Intervenors on remand. *See Harkenrider*, 2022 WL 1236822, at *11–13 & n.20; *id.* at *13–14 (Troutman, J., dissenting in part); NYSCEF No.146 at 1; *Harkenrider* Nos.696 at 1, 670 at 1–5. Indeed, Petitioners remarkably fail to address that they participated in the remedial process before the Steuben County Supreme Court, explicitly asking that Court to limit the applicability of the remedial congressional map so as to "only be used for the 2022 congressional election." NYSCEF No. 146 at 1.

Petitioners' final argument here—that "there are plenty of examples" of a court-drawn map later being replaced by a legislative plan, NYSCEF No.161 at 10–11—relies on inapposite precedent. As the Court of Appeals explained in *Harkenrider*, the 2014 Amendments created a "mandatory process" and "exclusive method of redistricting," which "explicitly authorizes" as part of that process the "judicial oversight of remedial action in the wake of a determination of unconstitutionality." 2022 WL 1236822, at *1, *8, *12. Thus, cases from other jurisdictions or from prior to the adoption of the 2014 Amendments' mandatory and exclusive redistricting process have no bearing on whether a final, judicially adopted map under Article III, Section 4(e) can later be revoked by legislative action. *Contra* NYSCEF No.161 at 10–11 (citing *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004); *In re Below*, 855 A.2d 459 (N.H. 2004) (per curiam)). And *Rodriguez* supports Intervenors' arguments, as the federal court there stated in its ruling adopting a new map that it "was willing, even eager, to accommodate timely state action and . . . open to the possibility of withdrawing the Plan we are adopting if the State were to enact an *appropriate*

and lawful plan of its own that allows for a full, fair, and orderly election process," 308 F. Supp. 2d at 357–58 (citation omitted) (emphasis added). In *Harkenrider*, on the other hand, the Steuben County Supreme Court nowhere indicated willingness to revisit its final order and adopted map upon any action by the IRC/Legislature, as it would obviously not be "appropriate and lawful" for those bodies to violate the constitutional text and the Court of Appeals' decision in *Harkenrider*.

II. Petitioners' Requested Relief Is Unconstitutional, As The Court Of Appeals Already Held In *Harkenrider*

Petitioners' Amended Petition also violates the New York Constitution because it requests relief that conflicts with the 2014 Amendments' exclusive congressional redistricting procedure, including those Amendments' specific *judicial* remedy. NYSCEF No.144 at 13–18. Under the 2014 Amendments, a failure of the IRC to submit a second round of congressional maps by the constitutional deadline—"[w]ithin fifteen days" of the Legislature's rejection of the IRC's first set of maps, and "in no case later than February twenty-eighth," N.Y. Const. art. III, § 4(b)—is not remediable through additional proceedings before the IRC itself and/or the Legislature, N.Y. Const. art. III, § 4(e); NYSCEF No.144 at 13–14. Instead, the 2014 Amendments provide for a mandatory and exclusive *judicial* remedy for such a violation: ***a court "order[ing] the adoption of, or changes to, a redistricting plan as a remedy for a violation of law***." N.Y. Const. art. III, § 4(e) (emphasis added); *see Harkenrider*, 2022 WL 1236822, at *12 & nn.19–20 (after February 28, the "procedural unconstitutionality of the congressional . . . map[ ] is, at th[at] juncture, incapable of a legislative cure"); NYSCEF No.144 at 14–15. Indeed, after the relevant constitutional deadline has passed, the *only* power that the IRC retains under the Constitution is in response to a court ordering that the map "be *amended*" under Article III, Section 5-b(a). *Id.* (emphasis added); NYSCEF No.144 at 15; *see Harkenrider*, 2022 WL 1236822, at *6 (distinguishing between "amendments" and the "wholesale drawing of entirely new maps"). Yet,

Petitioners did not lawfully ask this Court to amend the Steuben County Supreme Court's map, so that path under N.Y. Const. art. III, § 5-b(a) does not apply. *See* NYSCEF No.144 at 16–17.

In their opposition, Petitioners concede that they are not asking this Court to act under the "amend[ment]" path under Article III, Section 5-b(a), and, instead, request that this Court act under Article III, Section 4(e), which provides for a court "order[ing] the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." N.Y. Const. art. III, § 4(e) (emphasis added). But the text of Section 4(e) squarely forecloses Petitioners' requested relief. The IRC submitting a new map to the Legislature within 15 days, with the Legislature thereafter adopting that map or rejecting it and adopting its own, is the IRC and the Legislature adopting a new map, not a "court" itself *"*order[ing] the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.*"* N.Y. Const. art. III, § 4(e) (emphasis added).

This is precisely how the Court of Appeals understood Article III, Section 4(e), explaining that the same "procedural unconstitutionality" at issue here was "incapable of a legislative cure" after the constitutional deadline had lapsed, necessitating "the procedure directed by Supreme Court to 'order the adoption of . . . a redistricting plan.'" *Harkenrider*, 2022 WL 1236822, at *12 (quoting N.Y. Const. art. III, § 4(e)) (ellipses in original). This understanding of Section 4(e) was why the Court of Appeals rejected Judge Troutman's proposed "judicially crafted remedy" of ordering the Legislature "to adopt one of the IRC-approved plans on a strict timetable, with limited opportunity to make amendments." *Compare id.* at *13 (Troutman, J., dissenting in part); *with id.* at *12 n.20 (majority op.). "[A]lthough Judge Troutman posit[ed] that the People would not approve of a court-ordered redistricting map that is, in fact, exactly what the People have approved in the State Constitution as a remedy by declaring that the IRC 'process . . . shall govern . . . except

to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.'" *Id.* (quoting N.Y. Const. art. III, § 4(e)).

Indeed, had the Court of Appeals wanted to take anything like the approach that Petitioners advance here, there was ample time to do so last Spring. After all, affording the IRC 15 days to submit a map after *Harkenrider*'s April 27 decision—when the IRC was still composed of the same members who had engaged in the constitutional process a couple of months before—could easily have resulted in the Legislature adopting a map around the same time as the Steuben County Supreme Court's remedial map, May 21, given how quickly the Legislature has shown that it can. *See Harkenrider*, 2022 WL 1236822, at *2; NYSCEF No.144 at 8. Yet the Court of Appeals did not adopt that approach, or the similar approach that Judge Troutman suggested, correctly understanding that Section 4(e) did not permit any remedy other than a court-adopted map.

III. Petitioners Cannot Show That They Timely Filed This Petition

Petitioners' lawsuit is untimely, providing independent grounds to dismiss the Amended Petition because Petitioners filed more than half a year too late. NYSCEF No.144 at 18–21. The IRC declared that it would violate the Constitution by not submitting a second round of maps on January 24, 2022—thus "abdicati[ng]" its constitutional duties, *Harkenrider*, 2022 WL 1236822, at *12 n.18—and then the IRC lost any possible constitutional authority to submit second-round maps on February 28, 2022. NYSCEF No.144 at 18. Therefore, to secure relief, Petitioners had to file immediately after January 24, the point at which the IRC took, but could still remedy, its unconstitutional action. NYSCEF No.144 at 18; *see Harkenrider*, 2022 WL 1236822, at *8 n.10 (explaining that if the IRC "fail[s] . . . to otherwise perform [its] constitutional duties, judicial intervention in the form of a mandamus proceeding" is "available to ensure the IRC process is completed *as constitutionally intended*" (emphasis added)).

Petitioners argue that their Amended Petition is timely because did not suffer an injury until the Court of Appeals declared invalid the 2021 legislation, L.2021 c. 633, § 1, purportedly permitting the Legislature to enact its own redistricting maps if the IRC failed to submit maps to the Legislature. NYSCEF No.161 at 16–17. But that 2021 legislation was always unconstitutional, as the Court of Appeals overwhelming agreed. *Harkenrider*, 2022 WL 1236822, at *9; *id.* at *13 (Troutman, J., dissenting in part). And the Court of Appeals merely affirmed the Steuben County Supreme Court's conclusion that the 2021 legislation was unconstitutional, *Harkenrider* No.243 at 9–10, 17, so Petitioners cannot be heard now to claim that they delayed on the unrealistic hope that the Court of Appeals would reach a different conclusion. In any event, the existence of the 2021 legislation, purporting to allow the Legislature to enact its own maps "if the commission does not vote on any redistricting plan or plans, for any reason, by the date required for submission," L.2021 c. 633, § 1, in no way lifts the IRC's obligations under the Constitution, as the legislation would have been irrelevant if the IRC completed its constitutional obligation.

No better is Petitioners' contention that their claims "could not have accrued until, at the earliest, February 28, 2022" because that is the "constitutional deadline" for the IRC to submit its second set of maps to the Legislature. *See* NYSCEF No.161 at 17. A claim for "mandamus to compel the performance of a duty" enjoined by law on an officer or body accrues "upon the refusal to perform such duty." *Kolson v. N.Y.C. Health & Hosps. Corp.*, 53 A.D.2d 827, 827 (1st Dep't 1976). Here, the IRC declared on January 24, 2022, that it "would not present a second plan to the legislature," *Harkenrider*, 2022 WL 1236822, at *2, thereby establishing that Petitioners claim accrued on that date, *Kolson*, 53 A.D.2d at 827; *see Harkenrider*, 2022 WL 1236822, at *8 n.10. In any event, February 28 was not the constitutional deadline for the IRC's provision of second-round maps during this redistricting cycle in this decennial. Rather, the IRC was constitutionally

required to submit a second-round congressional map to the Legislature "[w]ithin 15 days" of the Legislature's "notification" that that it had "disapproved" the "first redistricting plan," N.Y. Const. art. III, § 4(b), meaning the outside limit on the IRC's constitutional duty to submit a second-round congressional map was January 25, 2022, *Harkenrider*, 2022 WL 1236822, at *2.

Nor are Petitioners correct in arguing that Intervenors and the People lack reliance interests in the continuation of the remedial congressional map for the remainder of the decade. NYSCEF No.161 at 17 n.3. "A judgment is a solemn record" and "[p]arties have a right to rely upon it." *Mitchell, Maxwell & Jackson, Inc. v. New York*, 117 N.Y.S.3d 442, 446 (Ct. Claims 2019). Intervenors have invested their time, energy, and funds into campaigning for Republican candidates and interests under the Steuben County Supreme Court map, *Harkenrider* Nos.29, 107–17, relying on the fact that their efforts would pay off for the remainder of the decade under the Steuben County Supreme Court's final judgment, not merely for a single election.

IV. Petitioners New Articulation Of Their Requested Remedy Is Entirely Inequitable.

Even if this Court were to put aside each of Intervenors' three independently sufficient reasons for dismissing this case, *contra supra* Parts I–III, the Court should still deny relief, as Petitioners have now revealed that their requested remedy is deeply inequitable. In particular, in Petitioners' new submission, they ask this Court to act under Section 4(e) to order the IRC to submit one new map to the Legislature within 15 days, after which the Legislature will either adopt that map, or reject the map and adopt its own. NYSCEF No.161 at 1–2, 18; *see also id.* at 5, 9, 13–14. Yet, Petitioners offer no reason for why this Court should adopt this break-neck, thoughtless course, rather than one that actually "adheres more closely to the constitutional redistricting process." *Harkenrider*, 2022 WL 1236822 at *14 (Troutman, J., dissenting in part).

In particular, in the extremely unlikely event that Petitioners are correct that this Court can adopt a different remedy under Section 4(e) than did the Steuben County Supreme Court, *and* that

Section 4(e) gives this Court leeway to enlist the IRC in this remedial process, *and* that this lawsuit is timely, *contra supra* Parts I–III, it would be far more equitable for this Court to require that the IRC gather the relevant information from the People to present a well-considered map to the Legislature, rather than forcing the IRC to rely upon stale, year-old testimony, presented before a differently composed IRC. That more-equitable procedure could mirror the one that the legislative leaders proposed in *Nichols*: hold new rounds of public hearings around the State, N.Y. Const. art. III, § 4(c); *Harkenrider*, 2022 WL 1236822, at *5; then submit new first-round maps to the Legislature, N.Y. Const. art. III, § 4(b); and then, if necessary, submit new second-round maps as well, *id.* That would require the newly composed IRC to hear from the People, requiring the IRC to consider the People's *current* views on what their congressional map will look like, including whether the IRC should adopt the Steuben County Supreme Court's remedial map, in part or in whole. That would also be far more administrable than Petitioners' belated submission, as it appears entirely unrealistic for the newly composed IRC—which as a body has not engaged with the congressional map in nine months—to negotiate and submit a new map in 15 days.

Petitioners' request that this Court order the IRC "to pick up where it left off," without "restart[ing] the public hearing process," NYSCEF No.161 at 17–19, also contradicts one of the core premises for this lawsuit. Petitioners complained that the Steuben County Supreme Court's remedial process was deficient in large part because it "provided no meaningful opportunity for the public to comment on maps submitted to the court without traveling to Bath *in person*," which prohibited many voters from participating and resulted in a "lack of transparency." NYSCEF No.47, ¶¶ 52–57. Petitioners' new 15-days-and-that's-it approach allows for no public input—in person or otherwise—contradicting what they claimed was their concern in this case.

CONCLUSION

For the foregoing reasons, the Court should dismiss Petitioners' Article 78 Petition.

Dated: New York, New York
September 9, 2022

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CERTIFICATION

I hereby certify that the foregoing memorandum of law complies with the word count limitations set forth in 22 NYCRR § 202.8-b(a). According to the word-processing system used to prepare this memorandum of law, it contains 4,162 words, excluding parts of the document exempted by Rule 202.8-b(b).

Dated: New York, New York
September 9, 2022

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