To be Argued by:
TIMOTHY F. HILL
(Time Requested: 20 Minutes)

New York Supreme Court

Appellate Division—Third Department

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

Petitioners-Appellants,

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

– against –

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

Respondents-Respondents,

(For Continuation of Caption, See Inside Cover)

Docket No.: CV-22-2265

BRIEF FOR RESPONDENTS-RESPONDENTS ROSS BRADY, JOHN CONWAY III, LISA HARRIS, CHARLES NESBITT, AND WILLIS H. STEPHENS

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– 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.

TABLE OF CONTENTS

Cases

Independent Redistricting Commissioners Ross Brady, John Conway III, Lisa Harris, Charles Nesbitt, and Willis H. Stephens, by their attorneys, Perillo Hill LLP, hereby respectfully submit the within Respondents' Brief.

PRELIMINARY STATEMENT

The Supreme Court properly dismissed Appellants' Article 78 proceeding. This narrow and limited proceeding in the nature of mandamus seeks solely to compel the New York State Independent Redistricting Commission (the "IRC") to perform a certain act as specified in the New York State Constitution. Specifically, the Amended Petition imagines that the IRC and its members could be made to advance a second set of congressional maps to the legislature. The relief sought is in direct conflict with the very same section of the Constitution that forms the basis of the proceeding. Because the proceeding seeks to compel an act that is not constitutionally permissible, it fails as a matter of law and was properly dismissed.

Most critically, although Appellants belabor the point that the IRC failed to meet the constitutional directive to submit such maps, they consciously ignore that this *constitutional violation* has already received its *constitutional remedy*—Harkenrider.[1] Harkenrider concerned the same violation that Appellants base this proceeding on, and it delivered a remedy for same pursuant to the constitution, Article III, Section 4(e).

[1] Matter of Harkerider v. Hochul, 38 N.Y.3.d 494, 176 N.Y.S.3d 157 (2022).

The very section of the state constitution that Appellants point to as having been violated by the IRC in failing to submit a second set of maps, Article III, §4, also provides that a court may order a remedy for such violation. That judicial remedy, a court-ordered plan, is thus not outside of, but is itself built into, the constitutional process. And here, the constitutional redistricting process, as it pertains to the congressional districts, had already been fully navigated and completed prior to this proceeding. It ended at the last phase of the procedures set forth in Article III, §4 with a judicial remedy in the Harkenrider litigation, as expressly provided for in the final subsection of thereof, §4(e). That result constitutionally forecloses the action that this proceeding seeks to compel.

Much of the Amended Petition, and the Appellants' Brief, reads as an extended critique of Harkenrider. Appellants don't like that a special master was engaged, nor the individual that served as special master; they appear not to like his report, or that a judge oversaw the process, or the venue of the proceeding, or the districts that were ultimately drawn. They remark pejoratively that the maps were drawn by "an out of state academic" and were approved by an "elected judge." See App. Br. 2. Appellants proceed to offer a superficial critique of the map, concluding that it "does not reflect the substantive redistricting criteria contained" in the constitution. App. Br. at 15-17. But recall that this is an Article 78 mandamus proceeding in which the sole respondent is the IRC. These critiques,

whether substantive or petty, have no relevance in this mandamus proceeding.[2] Appellants could have brought an action challenging the Harkenrider maps, but they did not.

Despite its direct or indirect attempts at arguing policy or principle, this narrow Article 78 mandamus proceeding is not actually a redistricting case at all—it presents no claim or cause of action to challenge the presently existing congressional districts and it does not seek as a remedy that the existing congressional districts be struck down or replaced. And as a mandamus proceeding, it could not in any case address or deliver such relief as a matter of law.

A judicial map may not be ideal, but it is the necessary backstop the constitution employs. Once a court-order plan is created, it is *the* plan. This does not mean that a court-made plan is beyond review under substantive law. Just as a legislatively enacted plan could be challenged for violating equal protection (one person one vote) or the Voting Rights Act or substantive state redistricting laws (such as the New York Municipal Home Rule Law), so too could a judicial map alleged to be suffering from substantive infirmities be challenged and perhaps struck down. As noted, Appellants expend much time here offering conclusory

[2] Although not material, Appellants' commentary ignores that Harkenrider's court-ordered remedy included public participation and input, a process the Appellants had some involvement with and which also made use of the IRC's prior work.

editorial glosses critical of the court-ordered congressional map. But, notably, neither the Appellants herein, nor anyone else has challenged that map in court—not by way of an appeal from Harkenrider, nor by commencing a state or federal action to declare it unconstitutional or in violation of substantive law. Instead, Appellants present the instant incongruous and ineffectual Article 78 mandamus proceeding.

The plain language of the Constitution provides that a court may order a redistricting plan in order to remedy a violation of law. NY Const. Art. III, §4(e). Such judicial intervention was required after a) the IRC was found to have not submitted a second set of maps as required by the Constitution and b) the legislature unilaterally and without legal or constitutional authority seized control of the redistricting process and proceeded to enact into law a redistricting plan that was a partisan gerrymander. The Amended Petition only concerns itself with the first of these violations and largely glosses over the second. More importantly, it fails to reckon with the fact that the Constitution sets forth a procedure for remedying such violations and that the constitutional remedy was already applied.

Upon the Section 4(e) remedy being employed in Harkenrider, the IRC is without constitutional or other legal authority to submit a second set of congressional maps to the legislature. Thus, this mandamus proceeding is and was

a constitutional non-starter from the outset and was properly dismissed. The Supreme Court's dismissal should be affirmed.

STANDARD OF REVIEW

In evaluating a motion to dismiss, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. See Goshen v. Mutual Life Ins. Co. of NY, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 (2002). However, bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference. See Ruffino v. New York City Tr. Auth., 55 A.D.3d 817, 818, 865 N.Y.S.2d 667, 668-69 (2d Dept 2008).

Article 78 motions to dismiss and "objections are appropriately afforded review similar in nature to that applied to defenses raised in a pre-answer motion to dismiss pursuant to CPLR 3211." Lally v. Johnson City Cent. Sch. Dist., 105 A.D.3d 1129, 1131, 962 N.Y.S.2d 508 (3d Dep't 2013).

Mandamus to compel is an extraordinary remedy that is available only in limited circumstances. See Hene v. Egan, 206 A.D.3d 734, 735–36, 170 N.Y.S.3d 169, 171 (2d Dep't 2022) citing County of Fulton v. State of New York, 76 N.Y.2d 675, 678, 564 N.E.2d 643; Klostermann v. Cuomo, 61 N.Y.2d 525, 463 N.E.2d 588).

Appellants request to expedite this appeal, made by embedded reference in their brief, is improper. This Court already rejected Appellants' prior improper letter request and explicitly directed Appellants to file a motion. Appellants failed to do that and nevertheless again repeat the improper request.

ARGUMENT

POINT I

THIS SINGLE ISSUE ARTICLE 78 PROCEEDING WAS PROPERLY DISMISSED

This Article 78 mandamus proceeding was properly dismissed by the Supreme Court because it sought to compel the IRC to undertake an action that would be unconstitutional. The IRC has no authority to submit another set of congressional maps to the legislature because the court-ordered congressional maps represent the completion of the constitutional process under Section 4(e). That constitutional remedy is a one-way valve and does not permit ad hoc selective revisting of procedural infirmities that have already been addressed through the remedy provided for in the constitution. There is nothing in the constitution that would allow what Appellants seek herein.

"Manifestly, mandamus does not lie to compel an official act for which no legal basis exists." Matter of Altamore v. Barrios-Paoli, 90 N.Y.2d 378, 384-85 (1997) ("petitioners have failed to allege any basis upon which the Director would have had the authority to extend the 7022 list beyond the scheduled May 25, 1995,

expiration date"). Nor may mandamus compel an unconstitutional act. See Council of City of New York v. Bloomberg, 6 N.Y.3d 380, 388 (2006). Likewise, "Mandamus will not lie to compel a public official to perform a vain or useless or illegal act." Matter of Thorsen v. Nassau County Civ. Serv. Comm'n, 32 A.D.3d 1037, 1037-38 (2d Dep't 2006).

The relief sought by this mandamus proceeding is unavailable as a matter of law because it seeks to compel an act that is not permitted by the express language of the constitution. Because mandamus will not be granted to compel the performance of an act where compliance is impossible, or to compel a body or officer to perform an act that is not within his or her authority or for which no legal basis exists, the proceeding fails to state a claim and was properly dismissed.

The congressional districts drawn and certified in Harkenrider are the product of the constitutional process. Pursuant to and in full compliance with Section 4(e) of Article III of the constitution, the court in Harkenrider, as a remedy for a violation of law (including the very IRC failure that is the focus of the Amended Petition herein), ordered the adoption of a redistricting plan. Undertaken at the constitutional backstop that Section 4(e) provides, the resulting congressional map is the congressional map for the 2020 redistricting cycle. That backstop having been employed, it forecloses any constitutional basis for the IRC to revisit work on a congressional (or state senate) map. The violation that

Appellants concern themselves with here, the IRC's failure to submit a second set of maps, has thus already received its constitutional remedy—the court-order map that Harkenrider produced. This being the case, the Amended Petition's singular requested relief, to have the IRC go back and submit a second set of congressional maps, is moot, is a non-starter, and is fatally defective as it would require and itself constitute a constitutional violation.

Appellants acknowledge that the constitution expressly contemplates that a redistricting plan can be adopted or amended by a court (see App. Br. at 2), which makes their failure to recognize that such a court-ordered plan was already implemented in Harkenrider truly incredible. And perhaps even more perplexing is Appellants' statement that a court-ordered redistricting plan is "precisely what [they] seek" (see id.) when in fact this mandamus proceeding quite obviously does not and cannot seek such relief.

The New York State Constitution, Article III, § 4(e) unambiguously provides as follows:

> The process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article shall govern redistricting in this state *except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law*.

N.Y. Const. Art III, §4(e) (emphasis added).

A court-ordered redistricting plan, thus, is not only contemplated by the Constitution, it is the remedial action authorized by the Constitution to address violations, such as, as here, the IRC's non-compliance with the mandate to timely submit a second set of plans upon the Legislature's rejection of its first set, or the Legislature's unauthorized usurpation of the redistricting authority, or both.[3] Here, in the face of such violations, that constitutional process was invoked in the context of Harkenrider and resulted, after review and remand by the Court of Appeals, in a court-ordered redistricting plan.

Appellants aggressively ignore the Court of Appeals instruction and holding that:

> …the Constitution explicitly authorizes judicial oversight of remedial action in the wake of a determination of unconstitutionality—a function familiar to the courts given their obligation to safeguard the constitutional rights of the people under our tripartite form of government. Thus, we endorse the procedure directed by Supreme Court to "order the adoption of . . . a redistricting plan" (NY Const, art III, § 4 [e]) with the assistance of a neutral expert, designated a special master, following submissions from the parties, the legislature, and any interested stakeholders who wish to be heard.

Harkenrider, 38 N.Y.3d at 523.

[3]"Where, as here, legislative maps have been determined to be unenforceable, we are left in the same predicament as if no maps has been enacted." Harkenrider at *12.

Appellants' fundamental error is that they fail to recognize the import of Harkenrider as having already performed that which the "exception" in §4(e) permits and requires, i.e., a court to "order the adoption of or changes to a redistricting plan." Appellants' mandamus proceeding against the IRC does not (and could not) ask this court to either adopt or change a redistricting plan. Rather, it seeks to compel the IRC to perform a certain act. The exception in §4(e) is a judicial remedy and where employed, it results in a court-ordered redistricting plan. This mandamus proceeding is entirely incongruous with the §4(e)'s language permitting a court to adopt a redistricting plan. Appellants' suggestion that a court's authority under the §4(e) exception somehow authorizes the relief they seek by this mandamus action is fabricated out of thin air. The constitution says no such thing. Section 4(e) provides a mechanism for a court to adopt a redistricting plan; this is not the relief sought by this mandamus action.

It should be noted that the arguments suggested by Appellants have already been thoroughly foreclosed by both the plain language of the Constitution and the Court of Appeals. To begin with, the Court recognized that "the Constitution explicitly authorizes judicial oversight of remedial action in the wake of a determination of unconstitutionality" (Harkenrider, at *12).[4] This proceeding

[4]As the Court of Appeals recognized, New York's past redistricting efforts have often necessitated federal judicial intervention. Harkenrider at*1 (citing Favors v. Cuomo, 2012 WL 928223, at *1

impermissibly seeks to replace the constitutionally authorized remedial course of action with an entirely *ultra vires* mechanism of the Appellants' own invention. The Court of Appeals, however, has explained that it declined to engage or indulge in interpreting the state constitution through "interstitial and interpretive gloss" in a manner that "substantially alters the specific law-making regimen." Harkenrider at *6, quoting Matter of King v. Cuomo, 81 N.Y.2d 247, 253 (1993). It is never appropriate to ask the courts to effectively draft legislation that does not exist, a prohibition that is all the more pronounced when it comes to the Constitution. And, to be sure, to attempt to do so by the incongruous and unavailing mechanism of an Article 78 mandamus provision is simply non-viable.

Referring in part to the plain directive in the Constitution for a court to order a reapportion plan as a remedy, the Court of Appeals explained that "this is not a scenario where the Constitution fails to provide specific guidance or is silent on the issue" Harkenrider, at *8 (internal citations and quotations omitted). The Court thus observed that: "[i]t is no surprise, then, that the Constitution dictates that the IRC-based process for redistricting established therein '*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.'" Id. (citing Art.

(E.D.N.Y. Mar. 19, 2012); Rodriguez v. Pataki, 2002 WL 1058054 (S.D.N.Y. May 24, 2002); Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt, 796 F.Supp. 681 (E.D.N.Y.1992).

III, §4(e)(emphasis added by the Court). Indeed, the Court emphasized that by providing 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," the Constitution specifically provides for and authorizes a court-ordered redistricting plan as the exclusive remedy for the precise circumstances that exist herein. See Harkenrider, at *12, fn. 20.

The IRC has no constitutional authority to submit a plan after February 28, 2022 after the constitutionally-authorized procedure for judicial adoption of a reapportionment plan has already been executed and completed.

The petitioners in the Harkenrider proceeding asserted that the 2022 maps enacted by the legislature were constitutionally defective both because the IRC did not submit a second redistricting plan and because the legislature lacked authority to compose and enact its own plan. Either or both of these violations triggered the exclusive remedial action set forth in the constitution—the court ordering of a redistricting plan. See N.Y. Const., Art III §4(e); Harkenrider, at *12 ("Where, as here, legislative maps have been determined to be unenforceable, we are left in the same predicament as if no maps has been enacted.").

Appellants fully ignore that the Court of Appeals confirmed that the Supreme Court, Steuben County, properly determined that, as a result of both the IRC's and Legislature's procedural constitutional violations, the authority

prescribed by §4(e) thereof, a court-ordered redistricting plan, was the remedy available under the Constitution and endorsed the particular mechanics of that judicial remedy.

Appellants misread Section 4(e). They italicize the word "except" as if the exception in Section 4(e) helps their cause. App. Br. at 2-3. It does the opposite. The authority of Section 4(e) is what permitted the Harkenrider court to order the current congressional maps.

Appellants cite Harkenrider's references to the IRC process being a "precondition" to the legislature's enactment of redistricting legislation. App. Br. at 14, citing Harkenrider at 514 and 517. They cite this language in order to argue that the IRC absolutely must be made to perform its map submissions. But, as seemingly missed on Appellants, these references in Harkenrider concern the point that the IRC's work is a necessary precondition and check on "legislative" action.

The congressional maps now in placed as the result of Harkenrider are not legislatively enacted plans; they are court-ordered plans. This is not to minimize the clear directives the constitution gives the IRC. But, critical for the purposes of this proceeding, the requirement that a legislative plan be preceded by the IRC is not a basis to compel IRC action now. To the precise contrary, the Harkenrider court was forced to employ not the ordinarily governing processes for "redistricting congressional and state legislative districts established by …[Article

III]," as expressed in Section 4(e), but rather the exception to those processes permitted by the final clause of that sub-section. Because this court-ordered and constitutionally authorized remedy was employed, the constitution offers no path back to address prior procedural errors.

The proceeding sought to compel an act not permitted by the constitution. As such, it was properly dismissed.

POINT II

THE CONGRESSIONAL MAP IS NOT AN INTERIM MAP

Appellants contention that the 2022 congressional elections proceeded under an interim map, or that the Harkenrider map "was put in place only as a temporary measure," is blatantly false. App. Br. at 1, 2.

To the extent that Appellants suggest that the court-ordered redistricting plan coming out of Harkenrider could merely serve as a placeholder until the redistricting process could be re-engaged from some interim point from its past proceedings, that suggestion has no basis in the law and is completely unconstitutional. As a result of the constitutional process by which the 2022 redistricting plan was required to be court-ordered, the Harkenrider maps serve to define legislative districts through the next census (2030) and redistricting cycle. See Harkenrider, at *14 (Troutman, dissenting in Part) (describing application of the court-ordered maps for "the next ten years"). This understanding was again

reflected in recent oral argument made before the First Department in Nichols v. Hochul, 177 N.Y.S.3d 424 (NY Sup. 2022).

If the Constitution intended to provide that if judicial intervention were required to correct a violation of law, any resulting court-ordered redistricting plan would temporarily remain in place only for so long as it took to correct the violation through non-judicial means, the Constitution would say as much. It does not.

POINT III

NICHOLS IS INAPPOSITE

Nichols v. Hochul, 177 N.Y.S.3d 424 (NY Sup. 2022) is not a parallel action to this mandamus proceeding. As noted, Appellants' primary error here is that they refuse to acknowledge that Harkenrider was the constitutional remedy for the congressional map and the import of this constitutional remedy having already run through to its constitutional completion in the form of a Section 4(e) court-ordered map. Nichols, however concerns the State Assembly map. The Assembly plan, while also impacted by the IRC's failure to submit a second set of maps, never reached the constitutional backstop of Section 4(e) and did not pass through its one-way valve (as was the case for the congressional and state senate maps). The Assembly map has not yet received its constitutional remedy. Unlike the Petitioners is Nichols, the Appellants' case here concerns a congressional map that

already received its constitutional remedy in Harkenrider. In Nichols, the court addressed this clear distinction between that case and this one. See id. at 429.

POINT IV

THE PROCEEDING IS BARRED BY THE STATUTE OF LIMITATIONS

In addition to the above merits issue, the Supreme Court should have also dismissed the case on statute of limitations grounds.[5] This issue is fully dispositive on its own and would require dismissal even if the lower court's dismissal on the merits were to be reversed or altered.

As the Supreme Court correctly noted, the applicable statute of limitation for an Article 78 proceeding is four (4) months under CPLR 217(1). However, the court below mis-stepped in failing to identify the proper date upon which this particular form of Article 78 proceeding accrued. It applied general concepts as to when a cause of action accrues citing, for example, CPLR 203(a) and Utica Mutual Ins. Co. v. Avery, 261 A.D. 802, 803 (3d Dep't 1999) for the basic tenet that "a cause of action accrues upon the occurrence of all events essential to the claim..."

[5] Having prevailed upon their motion to dismiss below, Respondents need not have cross-appealed in order to continue to urge, as an alternative basis for affirmance of the dismissal, such additional grounds, i.e., statute of limitations, as the court below may have overlooked or erred in deciding. See Save the Pine Bush v. Zoning Bd. of Appeals, 220 A.D.2d 90, 94, 643 N.Y.S.2d 689 (3d Dep't 1996) (party not aggrieved by the dismissal of the petition has no need to file a cross appeal but may raise adverse statute of limitations ruling as an alternative ground for affirmance); see also Wiley v. Marjam Supply Co., Inc., 166 A.D.3d 1106, 1108, 87 N.Y.S.3d 675 (3d Dep't 2018).

R.16. In so doing, the court overlooked the specific and settled law clearly defining when the four-month statute of limitations begins to run on a mandamus to compel proceeding under CPLR 7803(1). Simply put, as the authorities cited below confirm, the statute of limitations for a mandamus to compel begins to run on the date of the body's refusal to act. In this case, Appellants themselves assert that said refusal occurred on January 24, 2022, which date therefore serves as the accrual date from which the limitations period begins to run.

In a mandamus proceeding seeking to compel a municipality to perform a duty that is enjoined by law, the four-month Statute of Limitations in CPLR 217 begins to run on the date that the municipality refuses to perform the alleged duty. See Montco Constr. Co. v. Giambra, 184 Misc. 2d 970, 972, 712 N.Y.S.2d 766, 768 (Sup. Ct., Erie Co., 2000); see also Smuckler v. City of N.Y., 2009 N.Y. Slip Op. 30816(U), ¶ 9 (Sup. Ct., N.Y. Co. 2009) (the statute of limitations on a mandamus petition begins to run upon a respondent's refusal to perform a duty enjoined upon it by law.).

An Article 78 "proceeding seeking mandamus to compel accrues even in absence of a final determination. Hence, the statute of limitations for such a proceeding runs not from the final determination but from the date upon which the agency refuses to act." 193 Realty LLC v. Rhea, 2012 N.Y. Slip Op. 51865(U), ¶ 6, 37 Misc. 3d 1203(A), 1203A, 964 N.Y.S.2d 61 (Sup. Ct., N.Y. Co. 2012) (citing

Ruskin Assocs., LLC v. State of N.Y. Div. of Hous. & Community Renewal, 77 A.D.3d 401, 403, 908 N.Y.S.2d 392 [1st Dep't 2010]).

In Van Aken v. Town of Roxbury, 211 A.D.2d 863, 864, 621 N.Y.S.2d 204, 205-06 (3rd Dep't 1995), this Court held that the fourth-month limitations period for the mandamus proceeding therein began to run when the Town Attorney issued a letter conveying that the Town was refusing to perform its mandatory duty to maintain a road.

Here, Appellants affirmatively allege and expressly acknowledge that the IRC clearly declared on January 24, 2022 that it would not perform the act this mandamus proceeding seeks to compel (the submission of a second set of maps). See App. Br. at p. 10. Paragraph 37 of the amended petition alleges that "[o]n January 24, 2022, Chair Imamura announced that the IRC was deadlocked and would not submit a second round of recommended congressional plans to the Legislature." R. 276 Like the Town Attorney letter in Van Aken, supra, such statement is a clear declaration and refusal and, as such, triggered the running of the statute on a mandamus to compel. Under the specific controlling law as to when a proceeding under CPLR 7803(1) accrues, Appellants' claim thus accrued on January 24, 2022, and the limitations period expired on May 24, 2022. This proceeding was commenced on June 28, 2022, over a month after the expiration of

the statute of limitations. It was thus untimely commenced and should have been dismissed for that reason in addition to the merits grounds.

The court below reasoned that a justiciable controversy did not arise until May 20, 2022, when the new congressional maps went into effect (i.e., the Harkenrider judicial remedy). R.17. But this is not a declaratory judgment action, nor is it an action challenging the congressional maps implemented by way of Harkenrider. And so the date upon which the court-ordered congressional maps became effective is immaterial to the limitations issue, and the court below plainly erred in determining the May 20, 2022 date to be the accrual date. R.17.

By Appellants' conscious election, this is an exceedingly narrow proceeding—a mandamus to compel directed only at the IRC and seeking only to compel a specific, discrete act. The applicable statute of limitations and the applicable accrual date must and may only correspond to the specific form of proceeding that Petitioners chose to bring. Thus, as this is singularly an Article 78 proceeding in the nature of a mandamus to compel, the accrual date is determined by the petition's own allegation of the IRC's declared refusal to act on January 24, 2022. Accordingly, the limitations period expired on May 24, 2022, well prior to the commencement of the proceeding. As such, the proceeding must be dismissed as untimely as a matter of law.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the decision and order of the Supreme Court dismissing the Amended Petition and Article 78 proceeding in its entirety should be affirmed.

Dated: March 22, 2023
Sayville, New York

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT

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Dated: March 22, 2023