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,

Docket No.: CV-22-2265

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)

BRIEF FOR *AMICI CURIAE* SCOTTIE COADS, MARK FAVORS AND MARK WEISMAN IN SUPPORT OF PETITIONERS-APPPELLANTS

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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.

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INTRODUCTION

It is a "fundamental principle" of New York law that our State's Constitution embodies "the voice of the people speaking in their sovereign capacity, and it must be heeded." *Harkenrider v. Hochul*, 38 N.Y.3d 494, 524 (2022) (quoting *Matter of New York El. R.R. Co.*, 70 N.Y. 327, 342 (1877)). In 2014, the people of New York spoke clearly by ratifying "historic reforms" amending the Constitution (the "2014 Amendments") to require the creation of decennial electoral maps by an Independent Redistricting Commission ("IRC"), and to rid the redistricting process of certain "undemocratic practices" such as partisan and racial gerrymandering. *Id.* at 501. In the very first redistricting conducted under the 2014 Amendments, however, the new process commanded by the people broke down. As a result, the 2022 election for congressional and State Senate seats in New York proceeded under an emergency set of judicially-created maps—drawn principally by a single court-appointed special master on a rushed schedule—that were not prepared by the IRC and did not result from the carefully designed procedures for redistricting incorporated into the Constitution in 2014.

By its plain terms, and consistent with the Constitution's express command, the judicial intervention held necessary by the Court of Appeals in *Harkenrider* was narrowly tailored and applied *only* to the election of 2022. Article III, § 4(e) of the Constitution "dictates that the IRC-based process for redistricting '*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.* at 515 (quoting N.Y. Const. art. III, § 4(e)) (italics added by court). Consistent with that limited authority, the majority opinion in *Harkenrider* addressed *only* 2022, holding that "judicial oversight [wa]s *required* to facilitate the expeditious creation of constitutionally conforming maps *for use in the 2022 election* and to safeguard the constitutionally protected right of New Yorkers to a fair *election*" in 2022. *Id.* at 502 (emphases added). Thereafter, the Steuben County Supreme Court adhered to that limited remedial scope on remand and issued a final order certifying only "the official approved *2022* Congressional map and the *2022* State Senate map." R.229 (emphases added). Nowhere did either of these courts state or suggest that these maps extended beyond 2022 to any subsequent election.

The mandamus relief sought by Petitioners-Appellants in this Article 78 proceeding is therefore essential to ensure that the IRC now fulfills its constitutional duty by submitting a second redistricting plan, and to implement § 4(e)'s command that the IRC-based redistricting process "shall govern" all future elections in New York until after the 2030 decennial census. The undersigned *amici curiae* ("Amici") are registered New York voters committed to the promise of greater "fairness, transparency, and bipartisanship" in redistricting heralded by the 2014 Amendments. *Harkenrider*, 38 N.Y.3d at 516. The tripartite balance of powers between the judicial

and legislative branches recognized by the Court of Appeals in *Harkenrider*, *see id.* at 524, now demands that this Court restore the integrity of the mandated procedures by requiring the IRC to carry out its "substantial and constitutionally required role in the map drawing process," *id.*, and return that process to the IRC and the legislature, as the people of New York have directed.

The Supreme Court in this case erred in holding that the limited judicial remedy required for 2022 deprived the IRC and the legislature of any authority to implement the constitutionally mandated process, and thereby placed a court-imposed chokehold on that process, *for the entire next decade.* Article III, § 4(e) of the Constitution prohibits such an overbroad and anti-democratic judicial remedy. Contrary to Supreme Court's unsupported assertion, the Constitution also does not reflect any overriding preference for the duration of a single set of maps at the expense of the paramount IRC-based process. Other provisions of the Constitution plainly contemplate the need for and allow intra-decade modifications by the IRC. Nothing in either the Constitution or the *Harkenrider* courts' prior rulings prevents the IRC from now fulfilling its constitutional function by preparing and submitting a second redistricting plan to the legislature pursuant to § 4(e).

Supreme Court's refusal to require the IRC to fulfill its constitutional mandate on grounds of "futility" also makes no sense, because the IRC will have no choice but to comply with a valid order of this Court, subject to traditional sanctions and

compulsion if it fails to do so. Moreover, Supreme Court's hand-wringing is belied by the facts: the IRC has already reconvened and is complying in good faith with another court order directing the IRC to submit a new set of post-2022 State Assembly maps to replace the procedurally unconstitutional maps used in the 2022 State Assembly election. There is no basis to speculate that the IRC would flout this Court's order and fail to perform its constitutional duty. For the foregoing reasons, Amici respectfully urge this Court to reverse the Supreme Court's order dismissing the Amended Petition and to direct the IRC to submit a second redistricting plan to the legislature as soon as practicable.

INTEREST OF AMICI CURIAE

Amici are New York citizens and registered voters concerned with the integrity and transparency of New York's redistricting process. Amici supported the 2014 Amendments and reasonably expected the IRC to comply with its constitutional mandate. As New York citizens and voters, Amici wish to ensure that the political will of all New Yorkers, who voted overwhelmingly to approve the 2014 Amendments, is respected and that the IRC-based redistricting process incorporated into the Constitution through those amendments is completed and implemented.

Scottie Coads is a New York registered voter who resides in West Hempstead, New York. She is the Civil Engagement Chair of the New York State Conference of the National Association for the Advancement of Colored People (NAACP). In this

role, Ms. Coads works to ensure that voters have free, open, equal, and protected access to the vote and fair representation at all levels of the political process. Ms. Coads appears here as *amicus curiae* solely in her individual capacity as a New York citizen and voter.

Mark Favors is a New York registered voter who resides in New York, New York. He was the lead plaintiff in *Favors v. Cuomo*, No. 11-cv-05632 (E.D.N.Y. 2011), litigation challenging the legislature's redistricting process following the release of the 2010 decennial census that resulted in court-ordered district lines.

Mark Weisman is a New York registered voter who resides in Lynbrook, New York. He was an intervenor-plaintiff in *Favors v. Cuomo*, No. 11-cv-05632 (E.D.N.Y. 2011), litigation challenging the legislature's redistricting process following the release of the 2010 decennial census that resulted in court-ordered district lines.

FACTUAL BACKGROUND

I. The 2014 Amendments to the Constitution Establish a Transparent, Bipartisan Redistricting Process Anchored by the IRC.

Prior to 2012, the redistricting process in New York was "entirely within the purview of the legislature, subject to state and federal constitutional restraint and federal voting laws, as well as judicial review." *Harkenrider*, 38 N.Y.3d at 502. Previous cycles of redistricting by the legislature were often bitterly partisan and contentious, resulting in repeated judicial interventions. *See id.* Most recently,

federal court intervention was required to establish and implement constitutionally valid New York congressional maps for the 2012 election. *See Favors v. Cuomo*, 2012 WL 928223, at *1 (E.D.N.Y. Mar. 19, 2012).

In adopting the 2014 Amendments, the people of New York expressed their will to fundamentally change the way that district lines are drawn in New York. The 2014 Amendments were "intended to introduce a new era of bipartisanship and transparency through the creation of [the IRC] and the adoption of additional limits on legislative discretion in redistricting, including explicit prohibitions on partisan and racial gerrymandering." *Harkenrider*, 38 N.Y.3d at 503 (citing supporting legislative memoranda). As the legislative record demonstrates, the drafters of the 2014 Amendments "intended to 'comprehensively' reform and 'implement historic changes to achieve a fair and readily transparent process' to 'ensure that the drawing of legislative district lines in New York will be done by a bipartisan, independent body.'" *Id.* at 514. The official ballot text for the 2014 ballot initiative not only highlighted the creation of the IRC, but also assured New Yorkers that they would have a say in how the new district lines were drawn in New York. *See* 2014 New York State Ballot Proposals, available at https://www.nyccfb.info/public/voter-guide/general-2014/ballot-proposals.aspx (noting requirements for broad public hearings). New York voters resoundingly endorsed these historic reforms by ratifying the 2014 Amendments by a large majority on November 4, 2014.

The 2014 Amendments were "intended to promote fairness, transparency, and bipartisanship" by establishing the IRC to "fulfill a substantial and constitutionally required role in the map drawing process." *Harkenrider*, 38 N.Y.3d at 516; *see also* Assembly Mem. in Support, 2012 NY Senate-Assembly Concurrent Resolution S6698, A9526 (emphasizing benefits of "transparency and predictability to the process"). The Amendments "were carefully crafted to guarantee that redistricting maps have their origin in the collective and transparent work of [the IRC]," which is "constitutionally required to pursue consensus to draw district lines." *Harkenrider*, 38 N.Y.3d at 513-14. Under Article III, § 4(b), the legislature is precluded from inserting itself into the substantive map-drawing process until *after* it has held an up-or-down vote on each of two separate rounds of proposed maps as submitted by the IRC*, without amendments*. *See* N.Y. Const. art. III, § 4(b). Only if the legislature rejects *two* rounds of IRC-submitted maps is the legislature authorized to modify and adopt the IRC maps with "any amendments each house deems necessary." *Id.*

The intention of the IRC process "to operate as a limitation on the legislature's power to compose district lines" was underscored by the New York legislature's enactment of the Redistricting Reform Act of 2012, which was adopted simultaneously with the 2012 constitutional resolution supporting the 2014 Amendments. *Harkenrider*, 38 N.Y.3d at 516. The Redistricting Reform Act imposes stringent limits on the legislature's power to amend the IRC's second

redistricting plan (after rejecting it without amendments by up-or-down vote), by prohibiting any amendment containing alterations that would affect more than two percent of the population in any district. *Id.* at 504 (citing L 2012, ch 17, § 3). Under the 2014 Amendments, the obligation of the IRC to submit both an initial *and* a "second" redistricting plan, if necessary, is compulsory. *See* N.Y. Const. art. III, § 4(b) (IRC "*shall* prepare" and *"shall* submit" a redistricting plan with implementing legislation and, upon rejection of initial plan, IRC "*shall* prepare and submit to the legislature a second redistricting plan") (emphases added).

The 2014 Amendments also spell out the limited role of the judiciary in policing and correcting violations of the IRC-based map-drawing procedures set forth in §§ 4 and 5-b. In particular, § 4(e) "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.'" *Harkenrider*, 38 N.Y.3d at 515 (quoting N.Y. Const. art. III, § 4(e)) (italics added by court). Under the plain language of this provision, a court's remedial power to implement or alter must be exercised only "to the extent" that is "required" to correct the legal violation at issue. Moreover, "[i]n the event that a court finds such a violation, the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities." N.Y. Const. art. III, § 5. An adopted redistricting plan shall remain in effect until the effective date of a

new plan under the next decennial census, "unless modified pursuant to court order." *Id*. § 4(e).

II. The 2014 Amendments Lead to Broad Public Participation in the IRC Process in 2021.

Another paramount goal of the 2014 Amendments was to ensure that the redistricting process would be led by a diverse and representative group of New Yorkers. "To the extent practicable," IRC members must be chosen to reflect the "diversity of the residents of [New York] with regard to race, ethnicity, gender, language, and geographic residence." *Id.* § 5-b(c). The authorities charged with appointing IRC members are further enjoined to "consult with organizations devoted to protecting the rights of minority and other voters" in selecting appointees. *Id.* The 2014 Amendments also codified a commitment to ensuring that the IRC works with advocacy groups dedicated to protecting the rights of minority and other voters and maximizes opportunities for robust input by the public into the redistricting process, mandating that the IRC hold public hearings across the state in New York's major cities—Albany, Buffalo, Syracuse, Rochester, and White Plains—and also in counties in New York City and across Long Island. *Id*. § 4(b)(6). The IRC is required to "widely publish[]" notice of the public hearings and to "make widely available to the public . . . its draft redistricting plans, relevant data, and related information. *Id.* Finally, when submitting its restricting plans to the legislature, the IRC is required to "report the findings of all such hearings." *Id.* Confirming the broad public interest

in preserving the integrity of the IRC-based process, § 5 provides that "any citizen" of the State of New York may bring suit to remedy any legal violation in a redistricting plan. *Id.* § 5.

Commencing in 2021, a huge number of New Yorkers seized the opportunity to actively participate in the IRC redistricting process. Following the IRC's release of its first set of redistricting maps in September 2021, the IRC conducted 24 public hearings statewide, listened to testimony from over 630 speakers, and received over 2,100 written submissions from New Yorkers. *See* Doc. No. 49 ("Respondents' Br.") at 6. This diverse and voluminous public input was considered by the IRC prior to submitting its first set of maps to the legislature on January 3, 2022. R.275.

III. The IRC-Based Redistricting Process Breaks Down.

It is undisputed that, notwithstanding the above, the IRC-based redistricting process broke down in partisan bickering and intransigence. In the summer of 2021—even "before the IRC had even been given a chance to fulfill its constitutional role"—the New York legislature foresaw the potential breakdown and attempted to further amend Article III, § 4 of the Constitution to allow the legislature to take over the redistricting process if the IRC failed to submit a plan as required by the Constitution. *Harkenrider*, 38 N.Y.3d at 516. New York voters thwarted that effort, however, by rejecting the proposed amendment (and others) in the November 2021 election. *Id.* Undeterred, the legislature enacted a statute (the "2021 Legislation")

providing that "if the [IRC] d[oes] not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan," the legislature could take control of the process by using the IRC's drafts and data and introducing its own redistricting legislation. L 2021, ch. 633; *see also Harkenrider,* 38 N.Y.3d at 512.

On January 3, 2022—after dividing on partisan lines and failing to agree on a single set of district maps—the IRC submitted to the legislature two sets of maps supported by an equal number of IRC commissioners, as permitted under Article III, § 5(g). R.275; *Harkenrider*, 38 N.Y.3d at 504-05. The legislature rejected both plans on an up-or-down vote one week later, thereby triggering the IRC's *obligation* to submit a second redistricting plan by the constitutional deadline (February 28, 2022). *Harkenrider*, 38 N.Y.3d at 504-05; R.275. Thereafter, the IRC deadlocked and failed to submit a second set of district maps for legislative approval, as required under § 4(b), by the deadline. *Harkenrider*, 38 N.Y.3d at 504. At no time since then has the IRC submitted the required second redistricting plan.

In response to the IRC's announcement that it would not submit a second redistricting plan, the legislature invoked its power under the 2021 Legislation (*not* under the Constitution) to assert control over the redistricting process. R.275; *Harkenrider*, 38 N.Y.3d at 505. On February 3, 2022, the legislature passed its own congressional, State Senate, and State Assembly plans, which also superseded the

two-percent restriction in the 2012 Redistricting Reform Act. R. *Harkenrider*, 38 N.Y.3d at 505. Later the same day, Governor Kathy Hochul signed the plans into law. *Id.*; Doc. No. 36 ("Appellants' Br.") at 11.

Also on the same day, a group of Republican voters filed a petition in the Steuben County Supreme Court, challenging the enacted plans as unconstitutional. *See* Appellants' Br. at 11-12. The subsequent proceedings, which are summarized in detail in the parties' briefs in this case, *see*, *e.g.*, *id.* at 12-18, led to two critical events: (1) the New York Court of Appeals' decision in *Harkenrider*, striking down the enacted maps as unconstitutional and remanding to the Supreme Court for implementation of a judicial remedy, and (2) the Steuben County Supreme Court's appointment of a special master and subsequent approval of the congressional and State Senate maps for the 2022 election cycle.

IV. The Imposition of a Judicial Remedy for the Election of 2022.

On April 27, 2022, the Court of Appeals in *Harkenrider* held that the 2021 Legislation, authorizing legislative takeover of the redistricting process if the IRC failed to submit a required plan under §4(b), was unconstitutional. *See* 38 N.Y.3d at 517. The Court held that the 2021 Legislation overreached because the 2014 Amendments left "no room" for discretion as to the IRC-based implementation process. *Id.* To the contrary, the people of New York "intended compliance with the IRC process to be a constitutionally required precondition to the legislature's

enactment of redistricting legislation." *Id.* Consequently, the maps drawn by the legislature in 2022 were invalid *ab initio* because they were the product of an unconstitutional process.[1]

The Court concluded that the consequence of this unconstitutional process was "to leave the state without constitutional district lines for use *in the 2022 primary and general elections*." *Id.* at 521 (emphasis added). The *Harkenrider* decision was issued in the midst of the 2022 election cycle—one week before the deadline to certify ballots for the congressional and Senate primary elections. *See* Appellants' Br. at 13. Nonetheless, the Court rejected the state respondents' argument that "no remedy should be ordered *for the 2022 election cycle*" and refused to "subject the people of this state to *an election* conducted pursuant to an unconstitutional reapportionment." *Harkenrider*, 38 N.Y.3d at 521 (emphases added). The Court opined that the state respondents' proposal would impermissibly "render the constitutional IRC process inconsequential" by allowing the legislature to commandeer the redistricting process and sideline the IRC. *Id.* at 517. On that basis, the Court declared that "judicial oversight [wa]s required to facilitate the expeditious creation of constitutionally conforming maps *for use in the 2022 election*

[1] The Court of Appeals further held that the legislature's maps were *substantively* unconstitutional because they violated the 2014 Amendments' prohibition against partisan gerrymandering. *See id.* at 518-21. However, the procedural violations alone were sufficient to require invalidation of the legislature's maps for use in 2022. *Id.* at 521.

and to safeguard the constitutionally protected right of New Yorkers *to a fair election*" in 2022. *Id.* at 502 (emphases added); *see also id.* at 521 (finding "prompt judicial intervention" required to protect "the people's right to *a free and fair election*") (emphasis added).

As the majority opinion in *Harkenrider* makes clear, the Court justified judicial intervention based on the urgent need to have constitutionally valid congressional and Senate maps in place *for the 2022 election*. While acknowledging that its decision would disrupt the calendar for the then-imminent 2022 primary election, the Court held that "there is sufficient time" to develop and adopt new district lines "[w]ith judicial supervision and the support of a neutral expert designated [as] a special master," and expressed confidence that, on remand, the Supreme Court could "swiftly" implement a judicial remedy. *Id.* at 522-23. In contrast, given the 2022 election schedule, the alternative "legislative cure" sought by the state respondents was infeasible "at this juncture." *Id.* at 523. Since the IRC's submission of a second redistricting plan was essential to the constitutionally mandated procedure and the deadline for the IRC to act "ha[d] long since passed," no constitutional method existed to permit the legislature to remedy the redistricting plan's "infirmities" in time for the 2022 election. *Id.* The Court said nothing about any elections beyond 2022 and sent the case back to the Supreme Court to implement the judicial remedy "with all due haste." *Id.* at 524.

Thereafter, the Supreme Court appointed a special master and completed a new map-drawing process for the 2022 congressional and Senate election in less than one month. *See* R.225-29. The redistricting process overseen by the Supreme Court included only one in-person public hearing, held in Bath, New York, located far from New York's major cities and with a significantly lower minority population than the state as a whole. R.280-82. The special master, Jonathan Cervas, prepared new maps essentially from scratch: the court elected to develop its own "unbiased independent maps" rather than relying upon the existing IRC-drawn maps or attempting to reconcile the two competing sets of IRC maps submitted to the legislature in January 2022. R.227. Commenting on the rushed nature of its process, the Supreme Court declared it "[f]rankly . . . remarkable that special master Cervas was able to create both the Congressional and State Senate maps in such a short period of time." *Id.*

Consistent with the Court of Appeals' opinion and the Supreme Court's foreshortened map-drawing process, the Supreme Court's Decision and Order approving the remedial maps is explicitly limited to the *2022* congressional and Senate election:

> Attached are the maps that this court hereby certifies as being the *2022* Congressional and the *2022* New York State Senate maps. . . .

> NOW, therefore, upon consideration of all papers and proceedings heretofore had herein, and after due deliberation, it is
>
> ORDERED, ADJUDGED, and DECREED that the attached maps be, and hereby are certified as being the official approved *2022* Congressional map and the *2022* State Senate map . . . .

R.229 (emphases added); *see also* R.224 (Preliminary Order directing that "the new *2022* impartial redistricting maps for the Congressional and State Senate districts to be prepared by [the] Special Master" will be available by May 20, 2022) (emphasis added). Nothing in the above court order suggests that the judicially-approved maps apply to any election cycle after 2022.

V. The Ongoing Court-Ordered Continuation of IRC Work on New York Assembly Maps.

The *Harkenrider* petitioners challenged only the congressional and State Senate maps adopted by the legislature prior to the 2022 election; they did not challenge the State Assembly maps. 38 N.Y.3d at 521 n.15. In parallel litigation, *see Nichols v. Hochul*, 206 A.D.3d 463 (1st Dep't), *appeal dismissed*, 38 N.Y.3d 1053 (2022), the First Department concluded that, although the 2022 State Assembly redistricting plan was tainted by the same "procedural infirmity" identified in *Harkenrider*, the 2022 Assembly lines would remain in effect for the 2022 Assembly election cycle. *Id.* at 463. The court directed that, "upon the formal adoption and implementation of a new legally compliant State Assembly map, for use no sooner than the 2024 regular election, the February 2022 map will be void and of no effect."

Id. at 463-64. The First Department remanded the case to the New York County Supreme Court to determine "the proper means for redrawing the State Assembly maps in accordance with N.Y. Const., art III, § 5–b." *Id.* at 464.

On remand, the Supreme Court held that, for purposes of drawing post-2022 Assembly maps, "there is no valid reason to resort to the utterly anti-democratic emergency response necessarily resorted to in *Harkenrider*" in 2022. *Nichols v. Hochul*, 77 Misc.3d 245, 254 (Sup. Ct. 2022), *aff'd*, 212 A.D.3d 529 (1st Dep't 2023). Instead, the Supreme Court ruled that, with the 2022 elections behind them, the IRC and the legislature had an opportunity to correct their prior failures, consistent with "the constitutionally mandated procedure approved by the people of the State of New York." *Id*. The court ordered the IRC to fulfill its constitutional mandate by submitting an amended redistricting plan to the legislature for approval. *Id*. at 255-56.

Noting that § 5-b of the 2014 Amendments "allows," and the First Department's ruling "require[d]," the court to "modify the deadlines in the Constitution in order to remedy a violation of law," *id.* at 252, the court ordered the IRC to submit new Assembly maps for legislative approval by April 28, 2023, and if those maps are rejected by the legislature, to submit a second redistricting plans within 15 days thereafter "in no case later than June 16, 2023," *id*. at 255. *See also id.* at 252 ("Without such ability [to modify deadlines], the text of section 5-b . . .

would be rendered meaningless."). The court also rejected any "futility" concerns as "clearly premature" since, notwithstanding the IRC's previous failure to perform its duty, "there is no basis to predetermine they would fail again." *Id.* at 253. While "the adoption of a judicially-drawn map was previously necessary due to time constraints," the court stated that "the landscape has changed dramatically providing significantly more time to implement a new Assembly map for the 2024 election cycle." *Id*. at 254. The IRC has re-convened pursuant to the *Nichols* order and is expected to meet the April 28 submission deadline. *See* Appellants' Br. at 20-21.

ARGUMENT

This Court should reject Respondents' contention that the Court of Appeals' decision in *Harkenrider* constitutes the final "constitutional remedy" for the constitutional violation addressed in that case, *see* Respondents' Br. at 1; *see also* Doc. No. 52 ("Interv. Br.") at 2 (claiming this Court cannot "re-remedy" what *Harkenrider* already remedied), and that the people of New York should therefore have to live with judicially-imposed congressional and State Senate maps for the next 10 years, until 2032. This attempt to thwart the people's constitutional right to redistricting pursuant to the mandated IRC-based process has no legal foundation, for three fundamental reasons.

First, Respondents' argument fails to acknowledge the time-limited scope of the Court of Appeals' ruling in *Harkenrider* and ignores the express time limit

inscribed in the Steuben County Court's subsequent orders, which adopted the special master's redrawn maps *only* for the congressional and Senate elections *in 2022*. *Second*, the temporal limitation to 2022 placed upon the judicial remedy imposed in *Harkenrider* was not merely an act of judicial restraint or discretion; rather, as the Court of Appeals in *Harkenrider* recognized, it was a constitutional requirement under the plain language of the 2014 Amendments. *Third*, consistent with this requirement, the responsibility for redistricting must be returned to the IRC and the legislature for the remainder of the decade to preserve the tripartite balance of powers embodied in the state Constitution and fulfill the people's specific constitutional mandate as set forth in the 2014 Amendments.

I. The Judicial Remedy Ordered in *Harkenrider* Applied Only to "the 2022 Congressional Election and 2022 State Senate Election," and the Maps Approved by the Steuben County Court Do Not Govern Beyond 2022.

In *Harkenrider*, the Court of Appeals concluded that a judicial remedy for the violations found was "required" only to ensure "the expeditious creation of constitutionally conforming maps *for use in the 2022 election*," and "to safeguard the constitutionally protected right of New Yorkers *to a fair election*." 38 N.Y.3d at 502 (emphases added). The limiting phrase "for use in the 2022 election" and the singular form of "a fair election" in the foregoing quotation eliminate any doubt that the remedy ordered by the Court was restricted to the 2022 election alone. *See also id.* at 521 (using singular form in describing necessity of judicial remedy to protect

"the people's right to a free and fair election"). This limitation is consistent with the *Harkenrider* majority's exclusive focus on the urgency of the 2022 election calendar in rejecting the state respondents' preferred "legislative cure" for the constitutional violation. *See id.* at 523. The Court recognized that the remedy would have to be "swift[]," "expeditious," and conducted "with all due haste," and that only with "judicial supervision and the support of . . . a special master" would there be "sufficient time" to protect the people's right to constitutional maps in 2022. *Id.* at 522, 524. Nothing in *Harkenrider* suggests that the Court of Appeals expected or intended its judicial remedy to endure beyond 2022, let alone for an entire decade.

Furthermore, the final Decision and Order of the Steuben County Court confirms that the maps subsequently prepared by the special master and approved by the court in May 2022 would govern only the 2022 election cycle. *See* R.229; R.224. The Supreme Court's order could not be more clear in certifying those maps as "the *2022* Congressional and the *2022* State Senate maps." R.229 (emphases added). Indeed, the final decretal paragraphs of the Decision and Order carefully repeat that temporal limitation, certifying the special master maps as "the official approved *2022* Congressional map and the *2022* State Senate map." *Id.* (emphases added). The foregoing rulings by the Supreme Court correctly implemented the Court of Appeals' limited instruction to the trial court to swiftly create

constitutionally conforming congressional and State Senate district maps "for use in the 2022 election" alone.

In short, the Court of Appeals in *Harkenrider* did not order or even address a remedy beyond the 2022 election, and the Supreme Court plainly—and correctly—limited the certification of its remedial congressional and State Senate maps to the 2022 election only. Intervenors' assertion that the Supreme Court "declined to . . . limit the applicability of the remedial congressional map only to the 2022 election" ignores the plain language of the court's orders and misrepresents the record.[2] *See* Interv. Br. at 6. Because that court has *already* "limit[ed] the applicability of [its approved] maps . . . only to the 2022 election," *id.*, there is no need for that court to "modify or vacate" its final order to make way for the mandamus relief Petitioners seek here. Consequently, Petitioners' action is also not an "impermissible collateral attack" on that order or the Steuben County Court maps, which expired upon completion of the 2022 election cycle.[3] The 2022 election having come and gone,

[2] Intervenors improperly attempt to support this point by resorting to another Supreme Court Order (Dkt. No. 696) which is not included in the Record on Appeal and therefore should not be considered by this Court. *See* Interv. Br. at 21. But the document is also inconsequential, as it merely adopted minor technical corrections to the final approved maps under the above-quoted Decision and Order and did not purport to extend the duration of those maps beyond the 2022 election cycle. The mere fact that the maps were "final" *for 2022* does not mean they were intended to supersede the IRC-based process and remain binding for the rest of the decade.

[3] Moreover, there is no significance to the fact that Petitioners did not appeal the scope of the Supreme Court's ruling and seek to have it limited to 2022. Interv. Br. at 21. There was no need to seek that limitation because the Steuben County Court orders were and are self-limiting on their face.

the way is clear for the IRC to resume its work on congressional and State Senate district maps that, when approved, will be in place for the remainder of this decade.

In light of the above, Amici respectfully submit that, absent further action by the IRC and the legislature to complete the redistricting process mandated under the 2014 Amendments, New York has no valid redistricting plan in effect to govern congressional and State Senate elections after 2022. To fill this constitutional vacuum, it is imperative for this Court to grant the requested relief and direct the IRC to perform its constitutional duty by submitting to the legislature a second redistricting plan pursuant to the 2014 Amendments.

II. The 2014 Amendments Require Courts to Narrowly Tailor a Redistricting Remedy to Minimize Impact on the Governing IRC-Based Process.

Article III, § 4(e) of the Constitution dictates that the IRC-based process for redistricting established by the 2014 Amendments "*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) (emphases added). The "plain and precise" language of constitutional provisions must be "given its full effect," *Harkenrider*, 38 N.Y.3d at 511 (quoting *People v. Rathbone*, 145 N.Y. 434, 438 (1895)), without "'interstitial or interpretative gloss . . . that alters the specified law-making regimen' set forth in the Constitution," *id.* (quoting *Matter of King v. Cuomo*, 81 N.Y.2d 247, 253 (1993)). The plain and

precise language of § 4(e) commands that all redistricting in New York "shall" be conducted under the specified IRC regimen, except "to the extent" that a court-ordered deviation from that regimen is "required" as a remedy for a "violation of law." Thus, § 4(e) clearly compels the adoption of the *narrowest* available remedy necessary to correct the specific violation at issue: a court has no authority to displace the IRC-based process "except to the extent that is . . . required." As the courts in *Harkenrider* recognized, no curtailment of the IRC-based process was "required" beyond the 2022 election, and § 4(e) therefore prohibited a broader remedy.

Moreover, under § 5, when a court finds a legal violation, "the legislature *shall* have a full and reasonable opportunity to correct the law's legal infirmities." N.Y. Const. art. III, § 5 (emphasis added). The Court of Appeals concluded in *Harkenrider* that a "legislative cure" for the procedural unconstitutionality of the congressional and State Senate maps was infeasible "at this juncture," given the 2022 electoral timeline. 38 N.Y.3d at 523. But § 5 is not a "one strike and you're out" provision. The procedural unconstitutionality of the legislature's challenged maps was due to its impermissible use of the 2021 Legislation to bypass the IRC and enact maps without prior IRC submission of (and an up-or-down vote on) a second redistricting plan. Under § 5, the legislature must still be given a "full and fair opportunity to correct" the procedural violations that produced the constitutionally

invalid maps, and the means to fulfill that constitutional command is for this Court to direct the IRC to resume its work and submit a second plan, as the Constitution requires. *See* N.Y. Const. art. III, § 4(b).

There is simply no textual basis for Respondents' contention that the "only constitutional remedy" for the legislature's redistricting violation is a judicially-adopted map with a 10-year duration. *See* Interv. Br. at 4. That contention is refuted by the plain language of § 4(e), which requires a narrowly tailored remedy to minimize encroachment on the "govern[ing]" IRC-based process. Respondents' reliance upon the second paragraph of § 4(e)—stating that a reapportionment plan shall be in force until the effective date of a subsequent plan based on the next decennial census, "unless modified pursuant to court order"—is also unavailing. Pursuant to § 4(e), the Steuben County Court's Decision and Order itself "modified" the effective period of the special master's maps by certifying them as "the *2022* Congressional and the *2022* State Senate maps" only. R.229. In any event, the word "modified" in § 4(e) imposes no limit on the extent to which a plan may be changed or altered. Mandamus relief ordering the IRC to perform its constitutional duty, and enabling the legislature to complete its work, would result in the plan being "modified pursuant to court order" within the plain meaning of that phrase.

Finally, this Court should reject Respondents' untenable suggestion that the IRC has been permanently foreclosed from fulfilling its constitutional duty because

it did not meet the February 28, 2022 deadline for submitting a second redistricting plan. As shown above, both the First Department and the Supreme Court in *Nichols v. Hochul*, recognized that modification of deadlines in the Constitution was not just permitted but required to remedy the infirmities of the 2022 Assembly maps. *See* 206 A.D.3d at 464; 77 Misc.3d at 252. Under Respondents' theory, any official or body charged with constitutional duties could irremediably upend the Constitution simply by failing to act within a specified deadline. The remedy for such a failure is a court order to comply, not a blanket forfeiture of responsibilities to the judiciary.

III. Mandamus Relief Should Be Granted to Vindicate the People's Right to a Redistricting Plan Drawn Pursuant to the IRC-Based Process.

Finally, Respondents' position that the judicially-created maps must remain in place for the next decade violates the fundamental balance struck in *Harkenrider*, which recognized that judicial intervention preempting the prescribed redistricting process set forth in the Constitution must be narrowly tailored to address the immediate constitutional controversy and correct only the urgent threat to the integrity of the 2022 election at issue.

Courts have long recognized that judicial restraint is necessary when reviewing disputes related to redistricting, given the inherent political nature of such disputes. *See In re Orans* 15 N.Y.2d 339, 352 (1965) ("the Legislature is under an obligation to reapportion and . . . the Federal courts move in only as a last resort"). As the Court of Appeals repeatedly emphasized in *Harkenrider*, the people of New

York adopted the 2014 Amendments to "ensur[e] that the starting point for redistricting legislation would be district lines proffered by a bipartisan commission following significant public participation, thereby ensuring each political party and all interested persons a voice in the composition of those lines." 38 N.Y.3d at 517. The drafters of the 2014 Amendments "intended to 'comprehensively' reform and 'implement historic changes to achieve a fair and readily transparent process' to 'ensure that the drawing of legislative district lines in New York will be done by a bipartisan, independent body.'" *Id.* at 514 (quoting Assembly Mem. in Supp., 2012 NY Senate-Assembly Concurrent Resolution S6698, A9526; Senate Introducer's Mem. in Supp., 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). Respondents' contention that the maps generated by the rushed emergency judicial remedy required in 2022 should nevertheless become the irremediable status quo *for the next decade* cannot be reconciled with the tripartite balance of powers among the judicial and legislative branches or with the voice of the People embodied in the text and purpose of the 2014 Amendments. New Yorkers spoke decisively in 2014 when they incorporated the IRC-based redistricting process into the Constitution. With ample time remaining before the 2024 election, this Court should respect the People's mandate by directing the IRC to fully perform its constitutional duties.

Scholars who have studied independent redistricting commissions recognize that they are a vital tool for increasing trust in the redistricting process. For example,

a 2019 study from the University of Southern California found that independent redistricting commissions "improve voter attitudes toward the fairness of the process of redrawing lines in contrast to legislative-drawn redistricting institutions." Christian R. Grose & Matthew Nelson, *Independent Redistricting Commissions Increase Voter Perceptions of Fairness*, at 2 (June 1, 2021), available at http://dx.doi.org/10.2139/ssrn.3865702. New York voters are not alone in recognizing that independent redistricting commissions are an effective means to reduce the risk of partisan taint in the redistricting process. *Id.* at 5; *see also* David G. Oedel et al., *Does the Introduction of Independent Redistricting Reduce Congressional Partisanship?*, 54 Vill. L. Rev. 57, 69 (2009) (listing numerous states' reforms to redistricting procedures designed to reduce partisan bias).

As *Harkenrider* emphasized, the 2014 Amendments (and the Redistricting Reform Act of 2012) were "enacted in response to criticism of the scourge of hyper-partisanship, which the United States Supreme Court has recognized as 'incompatible with democratic principles.'" 38 N.Y.3d at 514 (quoting *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 791 (2015)). The Court of Appeals refused to "render the constitutional IRC process inconsequential" by allowing the 2021 Legislation to commandeer the redistricting process and sideline the IRC. *Id*. at 517. As a result of the judicial intervention—necessary though that may have been *in 2022*—that constitutional directive *still* has

not been fulfilled, and the scourge of legislative hyper-partisanship that thwarted the implementation of the 2014 Amendments last year still has not been healed. To leave a judicially-imposed plan in place through 2032 would exacerbate the same kind of harm by depriving the public of the IRC-based redistricting process that it embraced in 2014, and would entrench a negative example of hyper-partisan breakdown and judicial takeover of the legislative redistricting process for an entire decade.

Indeed, this Court's failure here to grant relief and force the IRC to complete its job under the Constitution would increase the likelihood of more partisan mischief in the future, by providing a roadmap for future IRC commissioners to derail the redistricting process in a gamble for partisan advantage. Such an incentive to disrupt the process could result in a cycle of procedural breakdown, court intervention, and implementation of judicially-created maps every ten years. That outcome would contravene the right of New Yorkers to have redistricting conducted pursuant to the IRC-based redistricting process that they embraced and adopted in 2014. In *Harkenrider*, the Court of Appeals rejected the legislature's attempt to step in and draw district lines when the IRC abdicated its constitutional duty, declaring that "such an approach would encourage partisans involved in the IRC process to avoid consensus" and "engineer[] a stalemate at any stage of the IRC process, or even by failing to appoint members or withholding funding from the IRC." *Id*. But this undesirable risk of disruption would also ensue from *judicial* preemption of the

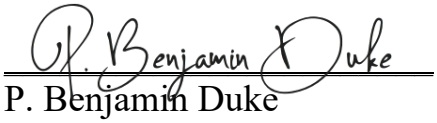
IRC process for an entire decade. By holding the IRC to its duties, this Court will ensure that IRC members must come together to make the process work and produce redistricting maps for legislative approval. Now that there is no imminent election, this Court should send the IRC back to the drawing board to complete the process as prescribed by the 2014 Amendments.

CONCLUSION

For the above reasons, Amici support Petitioners' request that the Court reverse the dismissal of the Amended Petition and grant the mandamus relief sought by Petitioners.

Dated: March 31, 2023
New York, New York

Respectfully submitted,



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Type. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point size:	14
Line spacing:	Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service and this Statement is 6,824.

Dated: March 31, 2023