

SIGNED ORDER TO SHOW CAUSE, DATED JUNE 30, 2022 [256 - 258]

FILED: ALBANY COUNTY CLERK 06/30/2022 09:48 AM
NYSCEF DOC. NO. 12

INDEX NO. 904972-22
RECEIVED NYSCEF: 06/30/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X
Anthony S. Hoffmann; Courtney Gibbons;
Lauren Foley; Seth Pearce; and Nancy Van Tassel,

Index No. 904972-22

Petitioners,

ORDER TO SHOW CAUSE

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

Oral argument requested

-against-

The New York State Independent Redistricting
Commission; Independent Redistricting Commission
Chairperson David Imamura; 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.

-----X

UPON reading and filing the annexed Verified Petition of Petitioners Anthony S. Hoffmann, Courtney Gibbons, Lauren Foley, Seth Pearce, and Nancy Van Tassel, dated June 28, 2022, and the Affirmation of James R. Peluso and the exhibits attached thereto, and the accompanying Memorandum of Law, dated June 28, 2022, and upon due consideration:

LET THE RESPONDENTS OR RESPONDENTS' COUNSEL SHOW CAUSE before this court, at the Albany County Courthouse located at ¹⁶~~20~~ Eagle Street, Albany, New York, on ~~July 29~~ ^{August 5}, 2022 at 9:30 a.m., or as soon thereafter as counsel may be heard, why a judgment should not be entered in this proceeding:

~~✱~~ NO PERSONAL OR VIRTUAL APPEARANCES ON RETURN ~~✱~~
UNLESS DIRECTED BY ASSIGNED JUSTICE

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1. Granting judgment, pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR"), compelling the New York State Independent Redistricting Commission and its commissioners to fulfill their constitutional duty under Article III, Sections 4 and 5 of the New York Constitution by submitting a second round of proposed congressional and state legislative districting plans for consideration by the Legislature, in order to ensure that a lawful plan is in place immediately following the 2022 elections and can be used for subsequent elections this decade; and

2. Grant such other and further relief as this Court may find just and proper.

And it is further ORDERED, that service of a copy of this order on the Attorney General, Independent Redistricting Commission Chairperson David Imamura, 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, by ~~personal or electronic mail service~~, ^{a method of service authorized in CPLR article 3} together with the papers upon which it is granted, on or before the ~~30th~~ ^{5th} day of ~~June~~ ^{July}, 2022, be deemed good and sufficient service upon Respondents thereof; and it is further

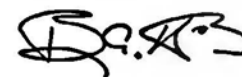
ORDERED that answering papers shall be served on Petitioners' counsel by electronic ~~service~~ ^{22nd} service on or before the ~~30th~~ day of July, 2022; and it is further

ORDERED that reply papers, if any, shall be served on Respondents' counsel by electronic ~~service~~ ^{4th} service on or before the ~~26th~~ day of ~~July~~ ^{August}, 2022.

ENTER:


 RICHARD PLATKIN, A. J.S.C.

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**Pro hac vice applications forthcoming*

DECISION AND ORDER OF THE HONORABLE PETER A. LYNCH,
DATED AUGUST 1, 2022 [259 - 264]

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INDEX NO. 904972-22

NYSCEF DOC. NO. 44

RECEIVED NYSCEF: 08/02/2022

THE STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

Anthony S. Hoffman; Courtney Gibbons;
Lauren Foley; Seth Pearce; and Nancy
Van Tassel,

Petitioners,

-against-

DECISION AND ORDER
Index No. 904972-22
RJI No. 01-22-ST2408
(Hon. Lynch, J.)

The New York State Independent redistricting
Commission; Independent Redistricting Commission
Chairperson David Imamura; 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.

INTRODUCTION

This is an Article 78 proceeding in the form of mandamus (CPLR § 7803(1)) to compel Respondents to timely prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan in accord with Article III, Sections 4 and 5(b) of the New York Constitution, to ensure that a lawful congressional plan is in place following the 2022 elections, for the next successive elections.

Petitioner seeks to amend the Petition and leave to effect service on respondents Conway and Harris pursuant to CPLR § 308(5).¹ By the proposed amendment, Petitioner seeks to add new Petitioners Marco Carrión, Mary Kain, Kevin Meggett, Reverend Clinton Miller, and Verity Van Tassel Richards, and to limit the requested relief to compel the IRC to submit a second set of congressional district plan for consideration by the Legislature.²

STATEMENT OF FACTS

NY Const. Article III, Section 4 (b) provides, inter alia:

“The independent redistricting commission established pursuant to section five-b of this article shall **prepare a redistricting plan to establish senate, assembly, and congressional districts every ten years commencing in two thousand twenty-one**, and shall submit to the legislature such plan and the implementing legislation therefore on or before January first or as soon as practicable thereafter but no later than January fifteenth in the year ending in two beginning in two thousand twenty-two. The redistricting plans for the assembly and the senate shall be contained in and voted upon by the legislature in a single bill, and the congressional district plan may be included in the same bill if the legislature chooses to do so. The implementing legislation shall be voted upon, without amendment, by the senate or the assembly and if approved by the first house voting upon it, such legislation shall be delivered to the other house immediately to be voted upon without amendment. If approved by both houses, such legislation shall be presented to the governor for action. If either house shall fail to approve the legislation implementing the first redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto, each house or the governor if he or she vetoes it, shall notify the commission that such legislation has been disapproved. **Within fifteen days of such notification and in no case later than February twenty-eighth, the redistricting commission shall prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan.** Such legislation shall be voted upon, without amendment, by the senate or the assembly and, if approved by the first house voting upon it, such legislation shall be delivered to the other house immediately to be voted upon without

¹ NYSCEF Doc Nos. 1, 23, 34, 39.

² NYSCEF Doc No. 23 - Mukherjee Aff. ¶ 30-31; see also NYSCEF No. 38 -redline of Petition delineating the amendments.

amendment. If approved by both houses, such legislation shall be presented to the governor for action.

In Matter of Harkenrider v. Hochul, 2022 N.Y. LEXIS 874, p. 4-5 [2022], the Court held,

“The Constitution now requires that the IRC — a bipartisan commission working under a constitutionally mandated timeline — is charged with the obligation of drawing a set of redistricting maps that, with appropriate implementing legislation, must be submitted to the legislature for a vote, without amendment (*see NY Const, art III, § 4 [b]; § 5-b [a]*). If this first set of maps is rejected, the IRC is required to prepare a second set that, again, would be subject to an up or down vote by the legislature, without amendment (*see NY Const, art III, § 4 [b]*).” (Emphasis added)

The Court noted,

“As a result of their disagreements, the IRC submitted, as a first set of maps, two proposed redistricting plans to the legislature — maps from each party delegation — as is constitutionally permitted if a single consensus map fails to garner sufficient votes (*see NY Const, art III, § 5-b [g]*). The legislature voted on this first set of plans without amendment as required by the Constitution and rejected both plans. The legislature notified the IRC of that rejection, **triggering the IRC's obligation to compose — within 15 days — a second redistricting plan for the legislature's review** (*see NY Const, art III § 4 [b]*). On January 24, 2022 — the day before the 15-day deadline but more than one month before the February 28, 2022 deadline—the IRC announced that it was **deadlocked and, as a result, would not present a second plan to the legislature.**” (Id. @ 6-7; emphasis added)

Without question, the record supports Petitioner’s claim that the IRC failed to submit a second redistricting plan in time for the 2022 elections.

Petitioner has personally served the Petition on 6 of the 8 Commissioners.³ Despite numerous attempts, Petitioner has not been able to serve Commissioners Conway and Harris.⁴

³ NYSCEF Doc No. 23 - Mukherjee Aff. ¶ 3, 7-21.

⁴ NYSCEF Doc No. 23 - Mukherjee Aff. ¶ 22-25; NYSCEF Doc. Nos. 31-33.

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Petitioner even e-mail Commissioners Conway and Harris at their official IRC e-mail account to inquire if they would accept service via e-mail but received no response.⁵

To the limited extent that Respondents have appeared, they do not oppose the motions.⁶

STATEMENT OF LAW

CPLR R 3025 (b) provides:

“Amendments and Supplemental Pleadings by Leave. A party may amend his or her pleading or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. **Leave shall be freely given** upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.” (emphasis added)

(see Moon v. Clear Channel Communs., Inc., 307 A.D.2d 628, 629 [3d Dept. 2003], where the Court held,

“As we have previously explained, “leave to amend a complaint rests within the trial court’s discretion and should be **freely granted** in the absence of prejudice or surprise resulting from the delay **except in situations where the proposed amendment is wholly devoid of merit**.” (emphasis added)).

Petitioner has demonstrated the proposed amendments have merit, since they have added Petitioners who were engaged in the underlying redistricting process and have narrowed the scope of their focus to redistricting for congressional districts only.

Motion Granted. The caption of the action shall be amended to add Marco Carrión, Mary Kain, Kevin Meggett, Reverend Clinton Miller, and Verity Van Tassel Richards, as a named Petitioners.

⁵ NYSCEF Doc No. 23 - Mukherjee Aff. ¶ 23 and 25.

⁶ NYSCEF Doc. No. 42.

CPLR § 308 (5) provides:

“Personal service upon a natural person shall be made by any of the following methods:

in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.”

The record evidences a good faith effort to serve Commissioners Conway and Harris. The Court notes that other Commissioners have cooperated with Petitioner’s service efforts and accepted service via electronic means.⁷ It is inexplicable that Commissioners Conway and Harris have not acted in a responsible manner to cooperate with the service process, for undue delay undermines the integrity of the redistricting process. Petitioner’s application to serve Commissioner’s Conway and Harris in accord with CPLR 308 (5) is granted, and such service may be made by e-mail to their official IRC account (See Safadjou v Mohammadi, 105 A.D.3d 1423 [4th Dept. 2013]).

CONCLUSION

For the reasons more fully stated above, Petitioner’s motions for leave to amend the Petition is Granted, and it is further,

ORDERED, that Petitioner’s motion to allow alternate service in accord with CPLR 308 (5) is granted, and Petitioner authorized to serve Commissioners Conway and Harris by e-mail to their official IRC e-mail account, and it is further,

ORDERED, that the caption shall be amended to add Marco Carrión, Mary Kain, Kevin Meggett, Reverend Clinton Miller, and Verity Van Tassel Richards, as a named Petitioners.

⁷ NYSCEF Doc No. 23 - Mukherjee Aff. ¶ 12, 21.

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This memorandum constitutes both the decision and order of the Court.⁸

Dated: Albany, New York
August 1, 2022


PETER A. LYNCH, J.S.C

PAPERS CONSIDERED:

All e-filed pleadings, with exhibits.


08/02/2022

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⁸ Compliance with CPLR R 2220 is required.

⁹ Subject to Pro hac Vice Order

¹⁰ Subject to Pro hac Vice Order

¹¹ Subject to Pro hac Vice Order

AMENDED VERIFIED PETITION FOR WRIT OF MANDAMUS,
DATED AUGUST 4, 2022 [265 - 288]

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NYSCEF DOC. NO. 47

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RECEIVED NYSCEF: 08/04/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X

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,

Index No. 904972-22

**AMENDED VERIFIED
PETITION FOR WRIT OF
MANDAMUS**

Petitioners,

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 David Imamura; 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.

-----X

Petitioners Anthony S. Hoffmann, Marco Carrión, Courtney Gibbons, Lauren Foley, Mary
Kain, Kevin Meggett, Reverend Clinton Miller, Seth Pearce, Verity Van Tassel Richards, and
Nancy Van Tassel, by and through their counsel, Emery Celli Brinckerhoff Abady Ward & Maazel
LLP, Dreyer Boyajian LLP, and Elias Law Group LLP, for their Amended Verified Petition for
an Order and Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules
("CPLR") against Respondents the New York State Independent Redistricting Commission (the
"IRC"), IRC Chair David Imamura, and IRC Commissioners Ross Brady, John Conway III,

Ivelisse Cuevas-Molina, Elaine Frazier, Lisa Harris, Charles Nesbitt, and Willis H. Stephens, allege as follows:

PRELIMINARY STATEMENT

1. Petitioners bring this writ of mandamus to compel Respondents to “prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan” as is required by Article III, Sections 4 and 5(b) of the New York Constitution, in order to ensure a lawful congressional plan is in place immediately following the 2022 elections and can be used for subsequent elections this decade.
2. In 2014, New York voters approved constitutional amendments (the “Redistricting Amendments”) to reform the redistricting process.
3. The Redistricting Amendments, now codified in Article III, Sections 4 and 5(b) of the New York Constitution, altered many aspects of the redistricting process, from changing the legislative procedures used to approve new districts and mandating new substantive criteria for maps to creating a process for judicial review of adopted plans.
4. Notably, the Redistricting Amendments provided for the creation of an independent redistricting commission (the “IRC”), whose members would be appointed in a bipartisan fashion and would reflect the diversity of the state. The Redistricting Amendments require the IRC to submit proposed redistricting plans for consideration by the Legislature in accordance with a carefully crafted process that includes extensive public comment.
5. Following the 2020 census, the IRC held numerous public hearings both virtually and in person across the State of New York, as required by Article III, Section 4(b). N.Y. Const. art. III, § 4(b).

6. Following this months-long process, the Democratic and Republican members of the IRC could not agree on a congressional redistricting plan, and so each delegation submitted a proposed map in January 2022. The Legislature rejected both proposed congressional maps, as it was entitled to do under Article III, Section 4. *Id.*

7. At that point, the IRC abandoned its constitutional duty. Rather than prepare and submit a second round of maps as was constitutionally required by Article III, Section 4(b), the members of the IRC instead declared that they could not reach agreement. Although the option of sending separate plans to the Legislature—as they had done the first time around—remained available, certain members of the IRC refused to meet, thereby denying a quorum. Paralyzed, the IRC failed to send a second round of plans to the Legislature.

8. The Legislature had anticipated this possibility and passed legislation in 2021 (the “2021 Legislation”) purportedly filling a gap in the New York constitutional language by authorizing the Legislature to pass a redistricting plan in the event that the IRC failed to submit redistricting plans. *See* L 2021, ch 633 (stating that “if the commission does not vote on any redistricting plan or plans, for any reason . . . each house shall introduce such implementing legislation with any amendments each house deems necessary”).

9. Pursuant to that statutory authority, the Legislature stepped into the void left by the IRC’s inaction, introducing and adopting a congressional map to ensure that New York’s 2022 congressional primary elections could proceed as scheduled.

10. But on April 27, 2022, the New York Court of Appeals held the 2021 Legislation unconstitutional to the extent that it allowed the Legislature to pass a redistricting plan in the absence of a second set of plans submitted by the IRC. Consequently, the Court of Appeals invalidated the statute as well as the Legislature’s congressional and State Senate plans. *See*

Harkenrider v. Hochul, 2022 N.Y. Slip Op. 02833, 2022 WL 1236822, at *1 (N.Y. Apr. 27, 2022) (nullifying district maps because IRC failed to complete “mandatory process for submission of electoral maps to the legislature”). The Steuben County Supreme Court then moved the primary date for congressional and State Senate elections and ordered that judicially drawn maps be implemented in advance of the new date.

11. The Court of Appeals’ decision makes clear that the IRC did not complete its constitutionally required redistricting duties because it failed to submit a second proposed congressional districting plan. And by striking down the 2021 Legislation, the Court of Appeals also made clear that the Legislature was powerless to enact a new congressional plan once the IRC refused to submit a second set of plans.

12. Through the Redistricting Amendments, New Yorkers demanded that the state’s redistricting process be democratic, transparent, and conducted by the IRC and the Legislature pursuant to certain procedural and substantive safeguards. They did so to ensure that their voices would be heard in the redistricting process—directly through the IRC public-input process and indirectly through their elected legislators. That process was crafted to ensure the substantive outcomes the voters sought; namely, maps drawn without partisan intent that respect the Empire State’s communities of interest. *See* N.Y. Const. art. III, § 4(c)(5). Instead of achieving this result during the past redistricting cycle, New Yorkers ended up with a judicial map-drawing process for congressional districts that was not transparent, did not adequately consider the views of minority voters, and tore apart longstanding communities of interest.

13. In other words, as a direct result of the IRC’s refusal to carry out its constitutional duty, New York voters, including Petitioners—three of whom submitted comments or testimony

to the IRC regarding New York's congressional plan—have yet to vindicate their rights under the Redistricting Amendments.

14. The Court of Appeals has already determined that the 2022 elections will occur under a court-drawn congressional plan. Subsequent congressional elections this decade should occur under plans adopted pursuant to the constitutionally mandated process for the IRC and Legislature. Accordingly, Petitioners ask this Court to issue a writ of mandamus pursuant to Article 78 of the CPLR ordering the IRC and its commissioners to fulfill their constitutional duty under Article III, Sections 4 and 5 of the New York Constitution by submitting a second round of proposed congressional districting plans for consideration by the Legislature, in order to ensure that a lawful plan is in place immediately following the 2022 elections and can be used for subsequent elections this decade.

PARTIES

15. Petitioners are citizens of the United States and registered to vote in New York. They intend to vote for congressional candidates in the primary and general elections in 2024, 2026, 2028, and 2030. Petitioners are specifically invested in their congressional representation, as several Petitioners who submitted comments to and testified before the IRC did so regarding the congressional plan.

16. Petitioner Anthony S. Hoffmann submitted comments to and testified in front of the IRC regarding congressional map drawing following the 2020 census.¹ Mr. Hoffmann has been

¹ See NYS Independent Redistricting Commission, *Bronx and New York Counties Public Meeting*, YouTube (July 26, 2021), https://www.youtube.com/watch?v=WQo4aFhlH_E (video at 49:40–53:00); see also *New York County Public Hearing: Part 2*, N.Y. State Indep. Redistricting Comm'n (Nov. 10, 2021), <https://totalwebcasting.com/view/?func=VIEW&id=nysirc&date=2021-11-10&seq=1> (video at 33:24–38:10).

a resident of Greenwich Village for over 50 years. He testified at a public meeting on July 26, 2021, that the residents on the East and West Sides of Manhattan had different interests and encouraged the IRC to keep the Tenth Congressional District—which previously included much of Manhattan’s West Side—intact.

17. Mr. Hoffmann again testified on November 10, 2021, in support of one proposed map and against another map, and once again encouraged the IRC to recognize the West Side of Manhattan as a community of interest distinct from that of the East Side of Manhattan for the purpose of the congressional plan. While the legislatively enacted map reflected this comment, the court-drawn congressional map pairs these communities together.

18. Petitioner Marco Carrión submitted a comment to the IRC regarding the congressional map following the 2020 census.² Mr. Carrión described the shared interest between the communities of Williamsburg and the Lower East Side, noting that they “are not only connected by a bridge, transportation and the families/friends linking these diverse boroughs, but they are also partners in climate advocacy,” particularly in light of “the devastating effects of Superstorm Sandy” on these coastal communities. Nonetheless, the court-drawn congressional map entirely separates the Lower East Side, in the Tenth Congressional District, from Williamsburg, which is split across the Seventh and Eighth Congressional Districts.

19. Petitioner Verity Van Tassel Richards submitted comments to the IRC regarding congressional map drawing following the 2020 census.³ Ms. Van Tassel Richards resides in the

² See NYS Independent Redistricting Commission, *Kings and Richmond Counties*, https://www.nyirc.gov/storage/archive/Kings_Richmond_Redacted.pdf (last visited July 13, 2022).

³ See *Letter from Verity Ann Van Tassel Richards*, N.Y. State Indep. Redistricting Comm’n (Nov. 7, 2021), <https://nyirc.gov/storage/testimony/zbTjPDDx23ijD3jbrkGpPb0Rfp1U9CBmWF1VHKyi.pdf>.

Village of Tarrytown, Town of Greenburgh, and her family has lived in that area since the 1600s. Ms. Van Tassel Richards asked the IRC to keep Tarrytown and the Town of Greenburgh in the same congressional district, and also asked the IRC to keep certain longstanding river communities of interest together based on their “shared history, geography, and community.” While the legislatively enacted map reflected this comment, the court-drawn congressional map splits Tarrytown and divides these river towns across two congressional districts.

20. Respondents the New York State Independent Redistricting Commission and its members—Chairman David Imamura, Commissioner Ross Brady, Commissioner John Conway III, Commissioner Ivelisse Cuevas-Molina, Commissioner Elaine Frazier, Commissioner Lisa Harris, Commissioner Charles Nesbitt, and Commissioner Willis H. Stephens—are responsible under Article III, Sections 4 and 5 of the New York Constitution for proposing congressional redistricting plans to the Legislature. As explained in further detail below, Respondents’ submission of proposed plans to the Legislature is a necessary step in the congressional redistricting process, and thus Respondents’ failure to propose plans as required by Article III, Section 4(b) has prevented New York from completing its constitutional process for redrawing its congressional districts.

VENUE

21. Venue is proper in Albany County because that is where Respondents “refused to perform the dut[ies] specifically enjoined upon [them] by law”; because “material events . . . took place” in Albany County, as described in the paragraphs below; and because Respondents’ principal offices are located in Albany County. CPLR § 506(b); *see also id.* § 7804(b) (providing that a proceeding brought pursuant to Article 78 must be brought in the supreme court of the county specified in CPLR § 506(b)).

LEGAL BACKGROUND

22. Every ten years, the district lines for New York's congressional seats are redrawn to adjust for population variances based on the results of the decennial U.S. census. *See* N.Y. Const. art. III, § 4(a). Newly drawn maps must be approved by the Legislature and signed by the Governor before they become effective. *See id.* art. III, § 4(b). In 2014, New York voters amended the state constitution, establishing new procedural and substantive requirements for redistricting.

I. The Redistricting Amendments established a new redistricting process that imposes mandatory obligations on the IRC.

23. New Yorkers adopted procedural changes by creating an independent redistricting commission with authority to draw congressional districting plans and to submit those plans to the Legislature for its approval, rejection, or amendment. N.Y. Const. art. III, §§ 4(b), 5-b. The IRC is comprised of ten commissioners who are appointed in bipartisan fashion. Each party's legislative leaders must appoint four commissioners. *Id.* art. III, § 5-b. A bipartisan majority of the resulting eight commissioners must then appoint the remaining two. *Id.* The Redistricting Amendments require that, "to the extent practicable," commissioners "reflect the diversity of the residents of this state with regard to race, ethnicity, gender, language, and geographic residence." *Id.* art. III, § 5-b(c).

24. When both houses of the Legislature are controlled by the same political party, a seven-vote majority in the IRC is required to approve a redistricting plan and send it to the Legislature, with one exception. *Id.* If the IRC "is unable to obtain seven votes to approve a redistricting plan on or before January first . . . or as soon as practicable thereafter," it must submit to the Legislature the plan or plans that received the most votes. *Id.* art. III, § 5-b(g).

25. The IRC must submit its first approved congressional plan or plans to the Legislature for a vote “on or before January first or as soon as practicable thereafter but no later than January fifteenth.” *Id.* art. III, § 4(b). Each house of the Legislature must then vote on the IRC’s submissions “without amendment.” *Id.*

26. If the Legislature does not approve the IRC’s first proposed map or maps, then the IRC must repeat the process again. The Redistricting Amendments provide that “[w]ithin fifteen days of [the] notification [of disapproval of the first plan] and in no case later than February twenty-eighth, the redistricting commission shall prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan.” *Id.*

27. Upon receipt of the second round of IRC maps, the Legislature must vote on the maps “without amendment.” *Id.* Should that vote fail, the IRC process is complete, and the Legislature assumes the redistricting pen to draw its own plans “with any amendments each house of the legislature deems necessary.” *Id.*

28. The Redistricting Amendments are silent on what should occur if the IRC fails to submit a second set of congressional maps to the Legislature.

29. The 2021 Legislation provided 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 proceed to introduce redistricting legislation. *See* L 2021, ch 633; *see also Harkenrider*, 2022 WL 1236822, at *9 (describing statute as “authorizing the legislature to move forward on redistricting even if the IRC fails to submit maps”).

30. The 2021 Legislation also required that “the [IRC] . . . submit to the legislature all plans in its possession, both completed and in draft form, and the data upon which such plans are

based,” L 2021, ch 633, presumably to ensure that the Legislature could benefit from the IRC record in adopting new redistricting plans.

31. The Redistricting Amendments also included several new substantive requirements that map-drawers must consider when drawing district lines. Districts shall not result “in the denial or abridgement” of minority voting rights and “shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.” N.Y. Const. art. III, §§ 4(c)(1), (5). Additionally, map-drawers must consider “the maintenance of cores of existing districts,” “pre-existing political subdivisions,” and “communities of interest.” *Id.* art. III, § 4(c)(5).

II. The Redistricting Amendments also created a process for remedying legal deficiencies in redistricting plans.

32. The Redistricting Amendments provide that “[a]n apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen.” N.Y. Const. art. III, § 5.

33. The Redistricting Amendments also provide that “[i]n any judicial proceeding relating to redistricting of congressional or state legislative districts, any law establishing congressional or state legislative districts found to violate the provisions of [Article III] shall be invalid in whole or in part.” *Id.* Furthermore, “[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.*” *Id.* (emphasis added).

FACTUAL BACKGROUND

III. The IRC failed to fulfill its constitutional duties.

34. The newly established IRC convened in the spring of 2021, pursuant to the requirements of the Redistricting Amendments. The IRC held hearings in the summer and fall of 2021 to aid its drawing of the state's congressional boundaries.

35. On January 3, 2022, following months of meetings, hearings, and legwork, the IRC voted on plans to submit to the Legislature. No congressional plan garnered the seven required votes, and, consistent with the New York Constitution, the IRC submitted the congressional plans that received the most votes—a Republican-proposed plan and a Democratic-proposed plan, each of which received five votes.⁴ On January 10, 2022, the Legislature rejected both congressional plans and notified the IRC.

36. Subsequently, the IRC refused to submit a second set of congressional plans and the necessary implementing legislation “[w]ithin fifteen days of such notification and in no case later than February twenty-eighth,” as required by Article III, Section 4(b) of the New York Constitution.

37. On 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. Republican Vice Chair Martins claimed that the IRC's Democratic commissioners refused to

⁴ *Letter from Karen Blatt to Legislative Leaders*, N.Y. State Indep. Redistricting Comm'n (Jan. 3, 2022), https://www.nyirc.gov/storage/plans/20220103/planA_cover_letter.pdf; *Letter from Jack Martins et al.*, N.Y. State Indep. Redistricting Comm'n (Jan. 3, 2022), https://www.nyirc.gov/storage/plans/20220103/planB_cover_letter.pdf.

develop a new proposal,⁵ while Chair Imamura stated that the Republican commissioners simply refused to meet.⁶

38. The Democratic commissioners said in a statement, “We have repeatedly attempted to schedule a meeting by [January 25, 2022], and our Republican colleagues have refused. This is the latest in a repeated pattern of Republicans obstructing the Commission doing its job. We have negotiated with our Republican colleagues in good faith for two years to achieve a single consensus plan. At every step, they have refused to agree to a compromise.”⁷ They added, “The Republicans are intentionally running out the clock to prevent the Commission from voting on second maps by its deadline.”⁸

39. Ultimately, January 25, 2022, and February 28, 2022, came and went without any action by the IRC. At that point, it was not clear whether the redistricting process had failed, as the 2021 Legislation at least facially gave the Legislature the opportunity to pass a new congressional redistricting map.

IV. The Legislature and Governor enacted a new congressional map.

40. Following the IRC’s failure to vote on and submit a second round of congressional maps, the Legislature assumed control over the redistricting process.⁹ Pursuant to the 2021

⁵ See Joshua Solomon, *Independent Redistricting Commission Comes to a Likely Final Impasse*, Times Union (Jan. 24, 2022), <https://www.timesunion.com/state/article/Independent-Redistricting-Commission-comes-to-a-16800357.php>.

⁶ See Rachel Vick, *Redistricting Deadline Leaves Electoral Lines in Limbo*, Queens Daily Eagle (Jan. 25, 2022), <https://queenseagle.com/all/redistricting-deadline-leaves-electoral-lines-in-limbo>.

⁷ *Id.*

⁸ *Id.*

⁹ See Nick Reisman, *New York Lawmakers to Draw Redistricting Maps, Expect Vote Next Week*, Spectrum News (Jan. 26, 2022), <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2022/01/26/new-york-lawmakers-to-draw-redistricting-maps--expect-vote-next-week>.

Legislation, the Legislature passed new a congressional plan on February 3, 2022. Governor Kathy Hochul signed the plan into law later that day. *See* A9167/S8196, A9039-A/S8172-A, A9168/S8197, S8185-A/A9040-A, 2022 Leg., Reg. Sess. (N.Y. 2022).

41. That same day, a group of Republican voters filed a petition in the New York Supreme Court in Steuben County, claiming that the new congressional plan was unconstitutional. *See generally* Pet., *Harkenrider v. Hochul*, No. E2022-0116CV (Steuben Cnty. Sup. Ct. Feb. 3, 2022), NYSCEF Doc. No. 1 (attached to Affirmation of James R. Peluso (Aug. 3, 2022) (“Peluso Aff.”) as Ex. 1). The *Harkenrider* petitioners alleged that the plan was procedurally defective because the Legislature lacked the authority to enact it after the IRC failed to submit a second set of proposed plans to the Legislature. *Id.* ¶¶ 186–97. The petitioners further alleged that, because the enacted congressional plan was procedurally invalid, New York’s prior congressional map remained in place, rendering the state’s congressional districts unconstitutionally malapportioned. *Id.* ¶¶ 198–207. The petitioners also alleged that the legislatively enacted congressional plan was a partisan gerrymander in violation of the New York Constitution. *Id.* ¶¶ 208–15. They later amended their petition to challenge the Legislature’s State Senate plan on the same bases. *See generally* Am. Pet., *Harkenrider*, No. E2022-0116CV (Steuben Cnty. Sup. Ct. Feb. 14, 2022), NYSCEF Doc. No. 33 (attached to Peluso Aff. as Ex. 2).

42. On March 3, one month after the *Harkenrider* petition was filed, the Steuben County Supreme Court held its first hearing on the matter. The Steuben County Supreme Court proceeded to hold a trial from March 14 to 16.

43. On March 31, 2022, the Steuben County Supreme Court enjoined use of the legislatively enacted congressional plan for the 2022 elections. *See* Decision & Order at 17–18, *Harkenrider*, No. E2022-0116CV (Steuben Cnty. Sup. Ct. Mar. 31, 2022), NYSCEF Doc. No. 243

(attached to Peluso Aff. as Ex. 3). The court held that the Legislature violated the New York Constitution by enacting redistricting legislation after the IRC failed to submit a second round of proposed maps. *Id.* at 10. It also held that the enacted congressional plan was drawn with unconstitutional partisan intent under Article III, Section 4(c)(5) of the New York Constitution. *Id.* at 14.

44. The Steuben County Supreme Court ordered that “the Legislature shall have until April 11, 2022 to submit bipartisanly supported maps to this court for review,” and further ordered that it would appoint a neutral expert to draw new maps if the Legislature failed to produce bipartisan maps by that date. *Id.* at 18.

45. Soon after, the Fourth Department of the New York Supreme Court, Appellate Division, stayed the Steuben County Supreme Court’s order, allowing primary processes and petitioning to continue under the Legislature’s congressional plan. *See Order, Harkenrider v. Hochul*, No. CAE 22-00506 (4th Dep’t Apr. 8, 2022) (attached to Peluso Aff. as Ex. 4). Two weeks later, on April 21, the Fourth Department reversed the Steuben County Supreme Court’s holding that the new plans were procedurally invalid—but nonetheless struck down the congressional map as an unconstitutional partisan gerrymander. *See Harkenrider v. Hochul*, 204 A.D.3d 1366, 1369–70, 1374 (4th Dep’t 2022).

V. The Court of Appeals invalidated the 2021 Legislation and the Legislature’s plans.

46. On April 27, 2022—one week before the New York State Board of Elections’ deadline to certify ballots for the state’s primary elections—the New York Court of Appeals held that the 2021 Legislation was unconstitutional and invalidated the enacted congressional plan.

47. The Court of Appeals explained that “the legislature and the IRC deviated from the constitutionally mandated procedure” required by the “plain language” of the Redistricting

Amendments. *Harkenrider*, 2022 WL 1236822, at *5. It described the “mandatory process for submission of electoral maps to the legislature,” as follows:

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

Id. at *1, *6 (quoting N.Y. Const. art. III, § 4(b)). The Court of Appeals emphasized that “the detailed amendments leave no room for legislative discretion regarding the particulars of implementation.” *Id.* at *8.

48. The Court of Appeals explained that the 2021 Legislation was unconstitutional because “the drafters of the [Redistricting Amendments] and the voters of this state intended compliance with the IRC process to be a constitutionally required precondition to the legislature’s enactment of redistricting legislation.” *Id.* at *9. In other words, “the IRC’s fulfillment of its constitutional obligations was unquestionably intended to operate as a necessary precondition to, and limitation on, the legislature’s exercise of its discretion in redistricting.” *Id.* at *7.

49. The Court of Appeals ordered the Steuben County Supreme Court to draw new congressional and State Senate maps for the 2022 elections with the help of a special master. *See id.* at *13. In so ordering, the Court of Appeals explained that “it will likely be necessary to move the congressional and senate primary elections to August.” *Id.* at *12.

50. Even though the Redistricting Amendments included a provision requiring that the Legislature be given a “full and reasonable opportunity to correct . . . legal infirmities,” N.Y. Const. art. III, § 5, the Court of Appeals held that “[t]he procedural unconstitutionality of the

congressional and senate maps is, at this juncture, incapable of a legislative cure” because the IRC had not sent a second set of maps. *Harkenrider*, 2022 WL 1236822, at *12.

VI. Despite widespread objections, the Steuben County Supreme Court adopted a congressional plan that unnecessarily shifts residents into new districts and divides long-recognized communities of interest.

51. Two days after the Court of Appeals’ decision invalidating the legislatively enacted congressional and State Senate plans, the Steuben County Supreme Court ordered that New York’s congressional and State Senate primary elections would occur on August 23, 2022, rather than the originally scheduled date of June 28, 2022. Prelim. Order at 2, *Harkenrider*, No. E2022-0116CV (Steuben Cnty. Sup. Ct. Apr. 29, 2022), NYSCEF Doc. No. 301 (attached to Peluso Aff. as Ex. 5).

52. Unlike the constitutionally mandated IRC and legislative redistricting process, the Steuben County Supreme Court’s process for adopting a new congressional plan provided no meaningful opportunity for the public to comment on maps submitted to the court without traveling to Bath *in person*—a hardship for the vast majority of New Yorkers, including minority voters who live hours away in New York City, voters who do not own cars, and voters who were not able to take an entire day off work to participate in the court’s hearing. Steuben County is not only geographically removed from New York’s major metropolitan areas, it is one of the *least* racially diverse areas of the state. Indeed, while New York State’s non-Hispanic White population is 55.3%, Steuben County’s is 93.4%.¹⁰

53. Article III, Section 5-b(c) of the New York Constitution requires that IRC commissioners “reflect the diversity of the residents of this state with regard to race, ethnicity,

¹⁰ Compare *Quick Facts: Steuben County, New York*, U.S. Census Bureau, <https://www.census.gov/quickfacts/steubencountynewyork> (last visited June 15, 2022), with *QuickFacts: New York*, U.S. Census Bureau, <https://www.census.gov/quickfacts/NY> (last visited June 15, 2022).

gender, language, and geographic residence” and mandates that “to the extent practicable the appointing authorities shall consult with organizations devoted to protecting the voting rights of minority and other voters concerning potential appointees to the commission.” By contrast, the Steuben County Supreme Court’s special master was not selected on diversity-related criteria.

54. And while the IRC’s public-comment process played out over the course of many months as part of an iterative map-drawing process, comments regarding the special master’s proposed congressional map were due just two days after it was released—which was followed by the map’s ordered implementation just two days later, on May 20, 2022.

55. In a report justifying his congressional map, the special master stated that “[c]ommunities of interest are notoriously difficult to precisely define. Even within a specific minority community there may be issues of what are the boundaries of particular neighborhoods and which neighborhoods most appropriately belong together.” Rep. of the Special Master at 20, *Harkenrider*, No. E2022-0116CV (Steuben Cnty. Sup. Ct. May 21, 2022), NYSCEF Doc. No. 670 (attached to Peluso Aff. as Ex. 6). The special master went on to state that it was “impossible to incorporate most of the suggestions” he received due in part to his desire to minimize county splits. *Id.* at 17.¹¹ And while the special master apparently considered the comments previously submitted to the IRC, he also considered unidentified “suggestions given directly to [him] prior to [his] drafting of a preliminary map.” *Id.* at 18. Those comments were apparently not part of the public record, further underscoring the lack of transparency in the judicial map-drawing process.

¹¹ The IRC and Legislature must consider communities of interest *and* political boundary lines when drawing districts, but the New York Constitution does not specify which consideration shall take precedence. *See* N.Y. Const. art. III, § 4(c)(5).

56. It is no surprise, then, that the failure to follow New York’s constitutionally required map-drawing process resulted in a congressional plan that splits longstanding minority communities of interest for reasons that remain unclear. For example, the special master’s plan split Prospect Heights, a predominantly working-class Black community in Brooklyn, and combined part of that community with wealthy Manhattan residents in the Financial District and Tribeca. The special master’s plan also failed to keep Bedford-Stuyvesant, Fort Greene, East New York, and Canarsie together, even though those areas had historically been grouped together in a single congressional district once represented by Shirley Chisholm, the first Black woman elected to Congress. And even though “hundreds of citizens” requested that Co-Op City—historically the largest housing cooperative in the world—be placed in the Sixteenth Congressional District, the special master declined to do so based in part on unspecified “other criteria.” *Id.* at 20.

57. In short, the IRC’s failure to send a second set of maps to the Legislature not only stymied the constitutional procedure enacted by New York voters, but also resulted in a congressional map that does not properly reflect the substantive redistricting criteria contained in the Redistricting Amendments.

PETITION FOR WRIT OF MANDAMUS AGAINST RESPONDENTS

**Failure to Fulfill Constitutional Duty Under
Article III, Sections 4 and 5 of the New York Constitution**

58. Petitioners reallege and reincorporate by reference all prior paragraphs of this Verified Petition and the paragraphs in the count below as though fully set forth herein.

59. A writ of mandamus is available where a government “body or officer failed to perform a duty enjoined upon it by law.” CPLR § 7803(1).

60. Article III, Section 4(b) of the New York Constitution requires that, if the Legislature “shall fail to approve the legislation implementing the [IRC’s] first redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto,” then “[w]ithin fifteen days of [the notification of rejection] and in no case later than February twenty-eighth, the [IRC] *shall* prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such a plan.” N.Y. Const. art. III, § 4(b) (emphasis added).

61. After the Legislature rejected the IRC’s first set of congressional plans, the IRC refused to prepare and submit a second set of plans.

62. Under the 2021 Legislation, “if the [IRC] d[id] not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan,” the Legislature could proceed to introduce redistricting legislation. L 2021, ch 633.

63. The Court of Appeals subsequently declared the 2021 Legislation “unconstitutional to the extent that it permits the legislature to avoid a central requirement of the” Redistricting Amendments. *Harkenrider*, 2022 WL 1236822, at *9. The Court of Appeals then invalidated the Legislature’s congressional plans and ordered that a new plan be drawn before the 2022 primary elections.

64. As the Court of Appeals stated, “No one disputes that this year, during the first redistricting cycle to follow adoption of the 2014 amendments, the IRC and the legislature failed to follow the procedure commanded by the State Constitution. A stalemate within the IRC resulted in a breakdown in the mandatory process for submission of electoral maps to the legislature.” *Id.* at *1.

65. The Court of Appeals was correct: The IRC failed to complete its mandatory duty to submit a second set of congressional plans to the Legislature for consideration.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for relief as follows:

- A. Grant Petitioners' Amended Verified Petition for a Writ of Mandamus by commanding the New York State Independent Redistricting Commission and its commissioners to fulfill their constitutional duty under Article III, Sections 4 and 5 of the New York Constitution by submitting a second round of proposed congressional districting plans for consideration by the Legislature, in order to ensure that a lawful plan is in place immediately following the 2022 elections and can be used for subsequent elections this decade.
- B. Grant such other and further relief as this Court may find just and proper.

Dated: August 4, 2022

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& ABADY, LLP

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**Pro hac vice applications forthcoming*

VERIFICATION

State of New York)

: ss.:

County of Nassau)

Anthony S. Hoffmann, being duly sworn, deposes and says:

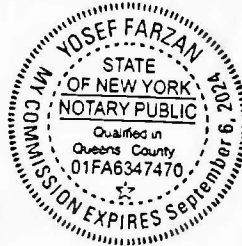
1. I am a petitioner in the above-entitled action.
2. I am united in interest and plead together with the other Petitioners in this action.
3. I have read the contents of the foregoing Amended Petition.
4. The information stated therein is true to my own knowledge except as to those matters stated to be alleged upon information and belief, and as to those matters I believe the information to be true.

Anthony S. Hoffmann
 Anthony S. Hoffmann

Sworn to before me this

3rd day of August, 2022 .

Yusef Farzan
 Notary Public



VERIFICATION

State of New York)

: ss.:

County of Kings)

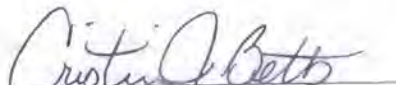
Marco Carrion, being duly sworn, deposes and says:

1. I am a petitioner in the above-entitled action.
2. I am united in interest and plead together with the other Petitioners in this action.
3. I have read the contents of the foregoing Amended Petition.
4. The information stated therein is true to my own knowledge except as to those matters stated to be alleged upon information and belief, and as to those matters I believe the information to be true.


 Marco Carrion

Sworn to before me this

3rd day of August, 2022


 Notary Public



VERIFICATION


State of New York)

: ss.:

County of Kings)

Seth Pearce, being duly sworn, deposes and says:

1. I am a petitioner in the above-entitled action.
2. I am united in interest and plead together with the other Petitioners in this action.
3. I have read the contents of the foregoing Amended Petition.
4. The information stated therein is true to my own knowledge except as to those matters stated to be alleged upon information and belief, and as to those matters I believe the information to be true.



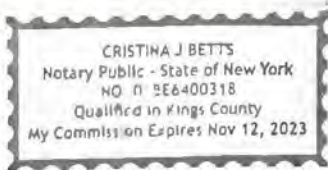
Seth Pearce

Sworn to before me this

3rd day of August, 2022



Notary Public



**PROPOSED ORDER TO SHOW CAUSE,
FILED AUGUST 4, 2022 [289 - 291]**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X
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,

Index No. 904972-22

ORDER TO SHOW CAUSE

Petitioners,

Oral argument requested

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 David Imamura; 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.

-----X
UPON reading and filing the annexed Amended Verified Petition of Petitioners Anthony
S. Hoffmann, Marco Carrión, Courtney Gibbons, Lauren Foley, Mary Kain, Kevin Meggett,
Reverend Clinton Miller, Seth Pearce, Verity Van Tassel Richards, and Nancy Van Tassel, dated
August 4, 2022, and the Affirmation of James R. Peluso and the exhibits attached thereto, and the
accompanying Memorandum of Law, dated August 4, 2022, and upon due consideration:

LET THE RESPONDENTS OR RESPONDENTS' COUNSEL SHOW CAUSE before
this court, at the Albany County Courthouse located at 16 Eagle Street, Albany, New York, on

September 9, 2022, at 9:30 a.m., or as soon thereafter as counsel may be heard, why a judgment should not be entered in this proceeding:

1. Granting judgment, pursuant to Article 78 of the New York Civil Practice Law and Rules (“CPLR”), compelling the New York State Independent Redistricting Commission and its commissioners to fulfill their constitutional duty under Article III, Sections 4 and 5 of the New York Constitution by submitting a second round of proposed congressional and state legislative districting plans for consideration by the Legislature, in order to ensure that a lawful plan is in place immediately following the 2022 elections and can be used for subsequent elections this decade; and

2. Grant such other and further relief as this Court may find just and proper.

And it is further ORDERED, that service of a copy of this order, together with the papers upon which is granted, on the Attorney General, Independent Redistricting Commission Chairperson David Imamura, 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, or counsel thereof, by electronic mail service, on or before the 5th day of August, 2022, be deemed good and sufficient service upon Respondents thereof; and it is further

ORDERED that Respondents’ answering papers shall be filed on or before the 23rd day of August, 2022; and it is further

ORDERED that Petitioners’ reply papers, if any, shall be filed on or before the 2nd day of September, 2022.

ENTER:

HON. PETER A. LYNCH, J.S.C.

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& ABADY, LLP

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**Pro hac vice applications forthcoming*

AFFIRMATION OF JAMES R. PELUSO, ESQ., FOR PETITIONER,
IN SUPPORT OF AMENDED VERIFIED PETITION,
DATED AUGUST 4, 2022 [292 - 293]

FILED: ALBANY COUNTY CLERK 08/04/2022 04:55 PM
NYSCEF DOC. NO. 49

INDEX NO. 904972-22
RECEIVED NYSCEF: 08/04/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X

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,

Index No. 904972-22

**ATTORNEY AFFIRMATION
OF JAMES R. PELUSO
IN SUPPORT OF AMENDED
VERIFIED PETITION**

Petitioners,

-against-

The New York State Independent Redistricting
Commission; Independent Redistricting Commission
Chairperson David Imamura; 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.

-----X

JAMES R. PELUSO, an attorney admitted to practice in the courts of this State, and not a party to the within action, affirms the following to be true under the penalties of perjury pursuant to CPLR § 2106:

1. I am an attorney at law duly admitted to practice before this Court and partner with the law firm of Dreyer Boyajian LLP.
2. I submit this Affirmation to present to the Court certain unreported court opinions and pleadings underlying said authority in support of Petitioners' Amended Verified Petition submitted herewith, which materials are attached hereto as described below.

3. A true and correct copy of the Petition, dated February 3, 2022, from the action captioned *Harkenrider v. Hochul*, No. E2022-0116CV (Sup Ct, Steuben County, Feb. 3, 2022), is annexed hereto as “Ex. 1.”

4. A true and correct copy of the Amended Petition, dated February 14, 2022, from the action captioned *Harkenrider v. Hochul*, No. E2022-0116CV (Sup Ct, Steuben County, Feb. 14, 2022) and attached as Exhibit B to an Order to Show Cause in that action, is annexed hereto as “Ex. 2.”

5. A true and correct copy of the Decision and Order, dated March 31, 2022, from the action captioned *Harkenrider v. Hochul*, No. E2022-0116CV (Sup Ct Steuben County, Mar. 31, 2022), is annexed hereto as “Ex. 3.”

6. A true and correct copy of the Decision, dated April 8, 2022, from the action captioned *Harkenrider v. Hochul*, No. CAE 22-00506 (4th Dept, Apr. 8, 2022), is annexed hereto as “Ex. 4.”

7. A true and correct copy of the Preliminary Order, dated April 29, 2022, from the action captioned *Harkenrider v. Hochul*, No. E2022-0116CV (Sup Ct, Steuben County, Apr. 29, 2022) is annexed hereto as “Ex. 5.”

8. A true and correct copy of the Decision and Order, dated May 21, 2022, from the action captioned *Harkenrider v. Hochul*, No. E2022-0116CV (Sup Ct, Steuben County, May 21, 2022) is annexed hereto as “Ex. 6.”

Dated: August 4, 2022
Albany, New York

By: /s/ James R. Peluso
James R. Peluso

EXHIBIT 1 TO PELUSO AFFIRMATION -
PETITION, DATED FEBRUARY 3, 2022, FROM THE
ACTION CAPTIONED HARKENRIDER V. HOCHUL,
INDEX NO. E2022-0116CV
(REPRODUCED HEREIN AT PP. 51-117)

EXHIBIT 2 TO PELUSO AFFIRMATION -
AMENDED PETITION FROM
HARKENRIDER V. HOCHUL,
INDEX NO. E2022-0116CV
(REPRODUCED HEREIN AT PP. 118-200)

EXHIBIT 3 TO PELUSO AFFIRMATION -
DECISION AND ORDER, DATED MARCH 31, 2022,
FROM HARKENRIDER V. HOCHUL,
INDEX NO. E2022-0116CV
(REPRODUCED HEREIN AT PP. 201-218)

EXHIBIT 4 TO PELUSO AFFIRMATION -
DECISION, DATED APRIL 8, 2022, HARKENRIDER V. HOCHUL, CAE 22-00506
(REPRODUCED HEREIN AT PP. 219-222)

EXHIBIT 5 TO PELUSO AFFIRMATION -
PRELIMINARY ORDER, DATED APRIL 29, 2022,
FROM HARKENRIDER V. HOCHUL,
INDEX NO. E2022-0116CV
(REPRODUCED HEREIN AT PP. 223-224)

EXHIBIT 6 TO PELUSO AFFIRMATION -
DECISION AND ORDER, DATED MAY 21, 2022,
FROM HARKENRIDER V. HOCHUL,
INDEX NO. E2022-0116CV
(REPRODUCED HEREIN AT PP. 225-255)

**SIGNED ORDER TO SHOW CAUSE,
DATED AUGUST 5, 2022 [295 - 297]**

FILED: ALBANY COUNTY CLERK 08/05/2022 03:58 PM

NYSCEF DOC. NO. 58

INDEX NO. 904972-22

RECEIVED NYSCEF: 08/05/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X
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,

Index No. 904972-22

ORDER TO SHOW CAUSE

Petitioners,

Oral argument requested

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 David Imamura; 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.

-----X
UPON reading and filing the annexed Amended Verified Petition of Petitioners Anthony
S. Hoffmann, Marco Carrión, Courtney Gibbons, Lauren Foley, Mary Kain, Kevin Meggett,
Reverend Clinton Miller, Seth Pearce, Verity Van Tassel Richards, and Nancy Van Tassel, dated
August 4, 2022, and the Affirmation of James R. Peluso and the exhibits attached thereto, and the
accompanying Memorandum of Law, dated August 4, 2022, and upon due consideration:

LET THE RESPONDENTS OR RESPONDENTS' COUNSEL SHOW CAUSE before
this court, at the Albany County Courthouse located at 16 Eagle Street, Albany, New York, on

FILED: ALBANY COUNTY CLERK 08/05/2022 03:58 PM

NYSCEF DOC. NO. 58

INDEX NO. 904972-22

RECEIVED NYSCEF: 08/05/2022

September 9, 2022, at 9:30 a.m., or as soon thereafter as counsel may be heard, why a judgment should not be entered in this proceeding:

1. Granting judgment, pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR"), compelling the New York State Independent Redistricting Commission and its commissioners to fulfill their constitutional duty under Article III, Sections 4 and 5 of the New York Constitution by submitting a second round of proposed congressional and state legislative districting plans for consideration by the Legislature, in order to ensure that a lawful plan is in place immediately following the 2022 elections and can be used for subsequent elections this decade; and

2. Grant such other and further relief as this Court may find just and proper.

And it is further ORDERED, that service of a copy of this order, together with the papers upon which is granted, on the Attorney General, Independent Redistricting Commission Chairperson David Imamura, 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, or counsel thereof, by electronic mail service, on or before the ^{9th} 5th day of August, 2022, be deemed good and sufficient service upon Respondents thereof; and it is further

ORDERED that Respondents' answering papers shall be filed on or before the 23rd day of August, 2022; and it is further

ORDERED that Petitioners' reply papers, if any, shall be filed on or before the 2nd day of September, 2022.

FILED: ALBANY COUNTY CLERK 08/05/2022 03:58 PM

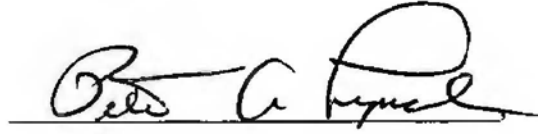
NYSCEF DOC. NO. 58

INDEX NO. 904972-22

RECEIVED NYSCEF: 08/05/2022

ENTER:

8/5/2022



HON. PETER A. LYNCH, J.S.C.

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08/05/2022

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**Pro hac vice applications forthcoming*

VERIFIED ANSWER OF RESPONDENTS, DAVID IMAMURA,
IVELISSE CUEVAS-MOLINA, AND ELAINE FRAZIER,
DATED AUGUST 26, 2022 [298 - 314]

FILED: ALBANY COUNTY CLERK 08/26/2022 05:19 PM

INDEX NO. 904972-22

NYSCEF DOC. NO. 105

RECEIVED NYSCEF: 08/26/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

- - - - - X

Anthony S. Hoffmann et al.

Petitioners,

-against-

Index No. 904972-22

Hon. Peter A. Lynch

The New York State Independent Redistricting
Commission et al.,

Respondents.

**VERIFIED ANSWER OF
RESPONDENTS DAVID
IMAMURA, IVELISSE
CUEVAS-MOLINA, AND
ELAINE FRAZIER**

Respondents DAVID IMAMURA, IVELISSE CUEVAS-MOLINA, and ELAINE FRAZIER (“Undersigned Respondents), by their attorneys Jenner & Block LLP, as and for their answer to the Amended Verified Petition for Writ of Mandamus (Dkt. 47) (the “Amended Petition”), respectfully answer the allegations of each paragraph of the Amended Petition as follows:

1. Undersigned Respondents lack sufficient knowledge about this allegation to admit or deny.
2. Admitted.
3. The allegations contained in this paragraph purport to describe the contents of the Redistricting Amendments, the contents of which speak for themselves, and no further response is required. To the extent a response is required, Undersigned Respondents respectfully refer to the Redistricting Amendments for the best evidence of their content.

4. Admitted that “the Redistricting Amendments provided for the creation of an independent redistricting commission (the ‘IRC’)” and that “[t]he Redistricting Amendments require the IRC to submit proposed redistricting plans for consideration by the Legislature.” The remaining allegations contained in this paragraph purport to describe the contents of the Redistricting Amendments, the contents of which speak for themselves, and no further response is required. To the extent a response is required, Undersigned Respondents respectfully refer to the Redistricting Amendments for the best evidence of their content.

5. Admitted, except that to the extent the allegations contained in this paragraph purport to describe the contents of Article III, Section 4 of the New York Constitution, the contents speak for themselves and no further response is required. To the extent a response is required, Undersigned Respondents respectfully refer to Article III, Section 4 of the New York Constitution for the best evidence of its content.

6. Admitted, except denied that “each delegation submitted a proposed map in January 2022.” Two proposed congressional redistricting plans were submitted by the IRC, not by any particular delegation. The submitted plans are incorporated herein by reference. *See* N.Y. State Indep. Redistricting Comm’n, *Plans*, <https://www.nyirc.gov/plans> (last visited Aug. 24, 2022).

7. Admitted, except denied that “the IRC abandoned its constitutional duty.” Undersigned Respondents demanded a meeting to vote on a second round of maps to submit to the Legislature; however, other Commissioners refused to meet, which denied the IRC a quorum to hold a vote. Undersigned Respondents thereafter acted in accord with their understanding of the applicable constitutional and statutory procedures and their duties under the circumstances, which preceded any judicial interpretation of the relevant constitutional and statutory provisions.

8. The allegations contained in this paragraph purport to describe the content of the 2021 Legislation, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the 2021 Legislation for the best evidence of its content.

9. Undersigned Respondents lack sufficient knowledge about this allegation to admit or deny.

10. The allegations contained in this paragraph purport to describe the content of the New York Court of Appeals' decision in *Harkenrider v. Hochul*, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the New York Court of Appeals' decision in *Harkenrider v. Hochul* for the best evidence of its content.

11. The allegations contained in this paragraph purport to describe the content of the New York Court of Appeals' decision in *Harkenrider v. Hochul*, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the New York Court of Appeals' decision in *Harkenrider v. Hochul* for the best evidence of its content.

12. The allegations contained in this paragraph purport to describe the contents of the Redistricting Amendments, the contents of which speak for themselves, and no further response is required. To the extent a response is required, Undersigned Respondents respectfully refer to the Redistricting Amendments for the best evidence of their content. Undersigned Respondents otherwise lack sufficient knowledge about this allegation to admit or deny.

13. Undersigned Respondents lack sufficient knowledge about this allegation to admit or deny.

14. To the extent this allegation requests relief from the Court, no response is required. Undersigned Respondents otherwise lack sufficient knowledge about this allegation to admit or deny.

15. Undersigned Respondents lack sufficient knowledge about this allegation to admit or deny.

16. Undersigned Respondents lack present awareness sufficient to admit or deny the allegation. The records of who spoke at different hearings and the contents of their positions, as well as the contents of public comment submissions to the IRC, are reflected in public records which speak for themselves. *See* N.Y. State Indep. Redistricting Comm'n, *Meetings*, <https://www.nyirc.gov/meetings> (last visited Aug. 24, 2022); *see also* N.Y. State Indep. Redistricting Comm'n, *Submissions*, <https://nyirc.gov/submissions> (last visited Aug. 24, 2022). The record of the hearings and submissions is incorporated herein.

17. Undersigned Respondents lack present awareness sufficient to admit or deny the allegation. The records of who spoke at different hearings and the contents of their positions, as well as the contents of public comment submissions to the IRC, are reflected in public records which speak for themselves. *See* N.Y. State Indep. Redistricting Comm'n, *Meetings*, <https://www.nyirc.gov/meetings> (last visited Aug. 24, 2022); *see also* N.Y. State Indep. Redistricting Comm'n, *Submissions*, <https://nyirc.gov/submissions> (last visited Aug. 24, 2022). The record of the hearings and submissions is incorporated herein.

18. Undersigned Respondents lack present awareness sufficient to admit or deny the allegation. The records of who spoke at different hearings and the contents of their positions, as well as public comment submissions to the IRC, are reflected in public records which speak for themselves. *See* N.Y. State Indep. Redistricting Comm'n, *Meetings*,

<https://www.nyirc.gov/meetings> (last visited Aug. 24, 2022); *see also* N.Y. State Indep.

Redistricting Comm'n, *Submissions*, <https://nyirc.gov/submissions> (last visited Aug. 24, 2022).

The record of the hearings and submissions is incorporated herein.

19. Undersigned Respondents lack present awareness sufficient to admit or deny the allegation. The records of who spoke at different hearings and the contents of their positions, as well as public comment submissions to the IRC, are reflected in public records which speak for themselves. *See* N.Y. State Indep. Redistricting Comm'n, *Meetings*,

<https://www.nyirc.gov/meetings> (last visited Aug. 24, 2022); *see also* N.Y. State Indep.

Redistricting Comm'n, *Submissions*, <https://nyirc.gov/submissions> (last visited Aug. 24, 2022).

The record of the hearings and submissions is incorporated herein.

20. Denied that "Chairman David Imamura, Commissioner Ross Brady, Commissioner John Conway III, Commissioner Ivelisse Cuevas-Molina, Commissioner Elaine Frazier, Commissioner Lisa Harris, Commissioner Charles Nesbitt, and Commissioner Willis H. Stephens" comprise the entire New York State Independent Redistricting Commission. The remaining allegations in this paragraph are a legal conclusion to which no response is required. To the extent a response is required, Undersigned Respondents stand ready to propose a second set of congressional redistricting plans to the Legislature.

21. Admitted.

22. Certain of the allegations contained in this paragraph purport to describe the content of Article III, Section 4 of the New York Constitution, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents respectfully refer to Article III, Section 4 of the New York Constitution for the best

evidence of its contents. Admitted that “[i]n 2014 New York voters amended the state constitution, establishing new procedural and substantive requirements for redistricting.”

23. The allegations contained in this paragraph purport to describe the contents of the Redistricting Amendments, the contents of which speak for themselves, and no further response is required. To the extent a response is required, Undersigned Respondents respectfully refer to the Redistricting Amendments for the best evidence of their content.

24. The allegations contained in this paragraph purport to describe the contents of the Redistricting Amendments, the contents of which speak for themselves, and no further response is required. To the extent a response is required, Undersigned Respondents respectfully refer to the Redistricting Amendments for the best evidence of their content.

25. The allegations contained in this paragraph purport to describe the contents of the Redistricting Amendments, the contents of which speak for themselves, and no further response is required. To the extent a response is required, Undersigned Respondents respectfully refer to the Redistricting Amendments for the best evidence of their content.

26. The allegations contained in this paragraph purport to describe the contents of the Redistricting Amendments, the contents of which speak for themselves, and no further response is required. To the extent a response is required, Undersigned Respondents respectfully refer to the Redistricting Amendments for the best evidence of their content.

27. The allegations contained in this paragraph purport to describe the contents of the Redistricting Amendments, the contents of which speak for themselves, and no further response is required. To the extent a response is required, Undersigned Respondents respectfully refer to the Redistricting Amendments for the best evidence of their content.

28. The allegations contained in this paragraph purport to describe the contents of the Redistricting Amendments, the contents of which speak for themselves, and no further response is required. To the extent a response is required, Undersigned Respondents respectfully refer to the Redistricting Amendments for the best evidence of their content.

29. The allegations contained in this paragraph purport to describe the content of the 2021 Legislation, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the 2021 Legislation for the best evidence of its content.

30. Certain of the allegations contained in this paragraph purport to describe the content of the 2021 Legislation, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the 2021 Legislation for the best evidence of its content. Undersigned Respondents lack sufficient knowledge to admit or deny the allegation “presumably to ensure that the Legislature could benefit from the IRC record in adopting new redistricting plans.”

31. The allegations contained in this paragraph purport to describe the contents of the Redistricting Amendments, the contents of which speak for themselves, and no further response is required. To the extent a response is required, Undersigned Respondents respectfully refer to the Redistricting Amendments for the best evidence of their content.

32. The allegations contained in this paragraph purport to describe the contents of the Redistricting Amendments, the contents of which speak for themselves, and no further response is required. To the extent a response is required, Undersigned Respondents respectfully refer to the Redistricting Amendments for the best evidence of their content.

33. The allegations contained in this paragraph purport to describe the contents of the Redistricting Amendments, the contents of which speak for themselves, and no further response is required. To the extent a response is required, Undersigned Respondents respectfully refer to the Redistricting Amendments for the best evidence of their content.

34. Admitted.

35. Admitted.

36. Denied that “the IRC refused to submit a second set of congressional plans and the necessary implementing legislation.” Undersigned Respondents attempted to submit one or more second set of congressional plans to the Legislature, and requested a meeting to vote on proposed second sets of plans. However, other Commissioners refused to attend such a meeting, denying the IRC a quorum to conduct business. *See* N.Y. Const. Art III § 5-b(f) (“a minimum of seven members shall constitute a quorum” when the Commission is fully constituted). Admitted that the IRC did not submit a second set of congressional plans or implementing legislation to the Legislature. To the extent the allegations contained in this paragraph purport to describe the contents of Article III, Section 4(b) of the New York Constitution, the contents speak for themselves, and no further response is required. To the extent a response is required, Undersigned Respondents respectfully refer to the cited portion of the New York Constitution for the best evidence of its content.

37. Admitted.

38. Admitted.

39. Admitted that the IRC did not submit a second congressional redistricting plan or set of plans to the Legislature by January 25, 2022 or February 28, 2022. The remaining allegations contained in this paragraph purport to describe the content of the 2021 Legislation,

the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the 2021 Legislation for the best evidence of its content.

40. Admitted that the Legislature passed a congressional map on February 3, 2022 and Governor Kathy Hochul signed the plan into law later than day. As to the remaining allegations, Undersigned Respondents lack sufficient knowledge about these allegations to admit or deny.

41. The allegations contained in this paragraph purport to describe the content of the filings, hearings, and/or rulings in the *Harkenrider v. Hochul* action, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the filings, hearings, and rulings in the *Harkenrider v. Hochul* action for the best evidence of their content.

42. The allegations contained in this paragraph purport to describe the content of the filings, hearings, and/or rulings in the *Harkenrider v. Hochul* action, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the filings, hearings, and rulings in the *Harkenrider v. Hochul* action for the best evidence of their content.

43. The allegations contained in this paragraph purport to describe the content of the Supreme Court's decision and order in the *Harkenrider v. Hochul* action, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the Supreme Court's decision and order in the *Harkenrider v. Hochul* action for the best evidence of its content.

44. The allegations contained in this paragraph purport to describe the content of the Supreme Court's decision and order in the *Harkenrider v. Hochul* action, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the Supreme Court's decision and order in the *Harkenrider v. Hochul* action for the best evidence of its content.

45. The allegations contained in this paragraph purport to describe the content of the Fourth Department's rulings in the *Harkenrider v. Hochul* action, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the Fourth Department's rulings in the *Harkenrider v. Hochul* action for the best evidence of their content.

46. The allegations contained in this paragraph purport to describe the content of the New York Court of Appeals' decision in *Harkenrider v. Hochul*, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the New York Court of Appeals' decision in *Harkenrider v. Hochul* for the best evidence of its content.

47. The allegations contained in this paragraph purport to describe the content of the New York Court of Appeals' decision in *Harkenrider v. Hochul*, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the New York Court of Appeals' decision in *Harkenrider v. Hochul* for the best evidence of its content.

48. The allegations contained in this paragraph purport to describe the content of the New York Court of Appeals' decision in *Harkenrider v. Hochul*, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned

Respondents refer to the New York Court of Appeals' decision in *Harkenrider v. Hochul* for the best evidence of its content.

49. The allegations contained in this paragraph purport to describe the content of the New York Court of Appeals' decision in *Harkenrider v. Hochul*, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the New York Court of Appeals' decision in *Harkenrider v. Hochul* for the best evidence of its content.

50. The allegations contained in this paragraph purport to describe the content of the New York Court of Appeals' decision in *Harkenrider v. Hochul*, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the New York Court of Appeals' decision in *Harkenrider v. Hochul* for the best evidence of its content.

51. The allegations contained in this paragraph purport to describe the content of the Supreme Court's decision and order in the *Harkenrider v. Hochul* action, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the Supreme Court's decision and order in the *Harkenrider v. Hochul* action for the best evidence of its content.

52. Undersigned Respondents lack sufficient knowledge about this allegation to admit or deny.

53. Certain of the allegations contained in this paragraph purport to describe the content of Article III, Section 5-b(c) of the New York Constitution, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents respectfully refer to Article III, Section 5-b(c) of the New York Constitution for the

best evidence of its contents. Undersigned Respondents otherwise lack sufficient knowledge about this allegation to admit or deny the remaining allegations in this paragraph.

54. Undersigned Respondents lack sufficient knowledge about this allegation to admit or deny.

55. Undersigned Respondents lack sufficient knowledge about this allegation to admit or deny.

56. Undersigned Respondents lack sufficient knowledge about this allegation to admit or deny.

57. The allegations in this paragraph are a legal conclusion to which no response is required. To the extent a response is required, Undersigned Respondents lack sufficient knowledge about this allegation to admit or deny.

58. Undersigned Respondents allege that no response is necessary to Petitioners' reallegation of prior paragraphs of the Amended Petition.

59. The allegations contained in this paragraph purport to describe the content of CPLR § 7803(1), the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to CPLR § 7803(1) for the best evidence of its content.

60. Certain of the allegations contained in this paragraph purport to describe the content of Article III, Section 4(b) of the New York Constitution, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents respectfully refer to Article III, Section 4(b) of the New York Constitution for the best evidence of its contents. Undersigned Respondents otherwise admit the allegations in this paragraph.

61. Denied that “[a]fter the Legislature rejected the IRC’s first set of congressional plans, the IRC refused to prepare and submit a second set of plans.” Admitted that the IRC did not submit a second set of plans to the Legislature, because Commissioners other than the Undersigned Respondents prevented the submission of second set of plans by refusing to attend an official meeting to vote on a second set of plans. That refusal to meet denied the IRC a quorum to conduct official business, including voting on and submitting a second set of plans to the Legislature.

62. The allegations contained in this paragraph purport to describe the content of the 2021 Legislation, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the 2021 Legislation for the best evidence of its content.

63. The allegations contained in this paragraph purport to describe the content of the New York Court of Appeals’ decision in *Harkenrider v. Hochul*, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the New York Court of Appeals’ decision in *Harkenrider v. Hochul* for the best evidence of its content.

64. The allegations contained in this paragraph purport to describe the content of the New York Court of Appeals’ decision in *Harkenrider v. Hochul*, the contents of which speak for themselves, and no response is required. To the extent a response is required, Undersigned Respondents refer to the New York Court of Appeals’ decision in *Harkenrider v. Hochul* for the best evidence of its content.

65. The allegations in this paragraph are a legal conclusion to which no response is required. To the extent a response is required, Undersigned Respondents stand ready to

complete the duty to submit a second set of congressional plans to the Legislature for consideration.

WHEREFORE Respondents DAVID IMAMURA, IVELISSE CUEVAS-MOLINA, and ELAINE FRAZIER do not oppose the relief identified in the first paragraph of Petitioners' prayer for relief as set forth in the Amended Petition.

DATED: August 26, 2022
New York, New York

Respectfully Submitted,

By: /s/ Jeremy H. Ershow

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*Attorneys for Respondents David
Imamura, Ivelisse Cuevas-Molina,
and Elaine Frazier*

FILED: ALBANY COUNTY CLERK 08/26/2022 05:19 PM

NYSCEF DOC. NO. 105

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RECEIVED NYSCEF: 08/26/2022

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Above parties served by NYSCEF

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

----- x
Anthony S. Hoffman et al.

Petitioners,

-against-

Index No. 904972-22

Hon. Peter A. Lynch

The New York State Independent Redistricting
Commission et al.,

VERIFICATION
PURSUANT TO CPLR
§ 3020(d)(2)

Respondents.

COUNTY OF WESTCHESTER)

STATE OF NEW YORK) SS:

DAVID IMAMURA, of full age, being duly sworn, hereby deposes and says as follows:

1. I am the chairperson of the New York State Independent Redistricting Commission and am an attorney admitted to practice before the Courts of New York State.
2. I have read the foregoing Verified Answer, and know the contents thereof, and the same is true except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.
3. I am familiar with the facts and circumstances at hand herein based upon my personal experience as Chairperson of the New York State Independent Redistricting Commission and based on a review of books, papers, and records maintained by the respondents.
4. This verification is made as to the foregoing Respondents under CPLR § 3020(d) because the foregoing Respondents are united in interest and I am acquainted with the facts.

FILED: ALBANY COUNTY CLERK 08/26/2022 05:19 PM

NYSCEF DOC. NO. 105

INDEX NO. 904972-22

RECEIVED NYSCEF: 08/26/2022

DATED: August 26, 2022
Kapolei, Hawaii



David Imamura

Sworn to before me this
26 Day of August, 2022


Notary Public

TAMMY MARIE MAZZULLO
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01MA6301698
Qualified in Westchester County
Commission Expires April 21, 2026

**NOTICE OF MOTION TO DISMISS, BY RESPONDENTS,
INDEPENDENT REDISTRICTING COMMISSIONERS
ROSS BRADY, JOHN CONWAY III, LISA HARRIS,
CHARLES NESBITT AND WILLIS H. STEPHENS,
(MOVING RESPONDENTS), DATED AUGUST 26, 2022 [315 - 316]**

FILED: ALBANY COUNTY CLERK 08/26/2022 09:16 PM

NYSCEF DOC. NO. 106

INDEX NO. 904972-22

RECEIVED NYSCEF: 08/29/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Petitioners,

For an Order and Judgement 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 David Imamura; 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.

Index No.: 904972-22

NOTICE OF MOTION
TO DISMISS

PLEASE TAKE NOTICE that upon the Affirmation of Timothy Hill, Esq., dated August 26, 2022 and the Memorandum of Law in Support of even date, Respondents, Independent Redistricting Commissioners: Ross Brady; John Conway III; Lisa Harris; Charles Nesbitt and Willis H. Stephens, (hereinafter the "Moving Respondents") will move this Court, at the Courthouse located at 16 Eagle Street, Albany, New York, on the 12th day of September, 2022, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an Order pursuant to CPLR 7804(f) and CPLR 3211(a)(5)(7), dismissing the Amended Verified Petition in its entirety, with prejudice, on the grounds that the amended verified petition fails to state a claim, that mandamus does not lie, that the

FILED: ALBANY COUNTY CLERK 08/26/2022 09:16 PM

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RECEIVED NYSCEF: 08/29/2022

petition is untimely, and that the relief is not available as against the individual Moving Respondents, together with such other and further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR §7804 (c) and (f), this motion is made upon notice within the time for Moving Respondents to file their answer.

PLEASE TAKE FURTHER NOTICE that in the event this motion is denied, in whole or in part, Moving Respondents reserve the right to answer the Verified Petition.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR §2214(b), answering papers, if any, shall be served upon the undersigned at least seven (7) days before the return date of this motion.

Dated: Sayville, New York
August 26, 2022

Timothy Hill /s/
TIMOTHY HILL
MESSINA PERILLO HILL, LLP
285 W. Main Street, Suite 203
Sayville, New York 11782
thill@mphilawgroup.com
Attorneys for Moving Respondents

To: All counsel via NYSECF

**AFFIRMATION OF TIMOTHY HILL, ESQ., FOR MOVING RESPONDENTS,
IN SUPPORT OF MOTION TO DISMISS, DATED AUGUST 26, 2022 [317 - 319]**

FILED: ALBANY COUNTY CLERK 08/26/2022 09:16 PM

NYSCEF DOC. NO. 107

INDEX NO. 904972-22

RECEIVED NYSCEF: 08/26/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Petitioners,

For an Order and Judgement 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 David Imamura; 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.

Index No.: 904972/22

**AFFIRMATION IN
SUPPORT OF
MOTION TO DISMISS**

Timothy Hill, Esq., an attorney duly admitted to practice law before the Courts of the
State of New York, hereby affirms the following statement to be true:

1. I am a partner at the firm Messina Perillo Hill LLP, attorneys of record for
Respondents, INDEPENDENT REDISTRICTING COMMISSIONERS: COMMISSIONER
ROSS BRADY, COMMISSIONER JOHN CONWAY III; COMMISSIONER LISA HARRIS,
COMMISSIONER CHARLES NESBITT; and COMMISSIONER WILLIS H. STEPHENS (the
“Moving Respondents”). As such, I am fully familiar with the facts and circumstances set forth
herein.

2. This affirmation is submitted in support of the Moving Respondents' motion made pursuant to CPLR 7803 and 7804(f) and CPLR 3211(a)(5)(7), seeking an order dismissing the Petitioners' amended verified petition (the "Petition").

3. A true copy of the Petition is annexed hereto as Exhibit A.

4. Moving Respondents' legal arguments in support of this motion to dismiss are set forth in the accompanying Memorandum of Law in Support of Motion to Dismiss and in Opposition to Order to Show Cause, dated August 26, 2022 (the "Memorandum of Law"). The Memorandum of Law and the arguments therein are hereby incorporated herein as if expressly set forth. The Court is respectfully referred to said Memorandum of Law and the arguments therein in support of dismissal.

5. Finally, the Moving Respondents respectfully reserve the right to answer the underlying Petition if this motion to dismiss is denied, in whole or in part. See CPLR 7804(f) & CPLR 3211(f).

WHEREFORE, for the reasons set forth herein and in the Memorandum of Law, Moving Respondents respectfully request an order pursuant to CPLR § 7804(f) and CPLR § 3211(a), dismissing the Amended Verified Petition in its entirety, denying the relief requested therein, and granting such other and further relief as the Court may deem just and proper together with costs and disbursements herein.

Dated: Sayville, New York
August 26, 2022

Timothy Hill /s/
TIMOTHY HILL
MESSINA PERILLO HILL, LLP
285 W. Main Street, Suite 203
Sayville, New York 11782
Attorneys for Moving Respondents

To: All counsel via NYSECF

FILED: ALBANY COUNTY CLERK 08/26/2022 09:16 PM

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RECEIVED NYSCEF: 08/26/2022

CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Timothy Hill, Esq., an attorney duly admitted to practice law before the Courts of the State of New York, hereby certify that the within Affirmation submitted and filed in the above-captioned proceeding contains 555 words, excluding the parts exempted by § 202.8-b(b) and, as such, complies with the word count limits set forth in 22 NYCRR § 202.8-b.

In preparing this certification, I relied on the word count of the word processing system (Microsoft Word) used to prepare the document.

Dated: Sayville, New York
August 26, 2022

Timothy Hill

TIMOTHY HILL, ESQ

EXHIBIT 1 TO HILL AFFIRMATION -
AMENDED VERIFIED PETITION FOR WRIT OF MANDAMUS,
DATED AUGUST 4, 2022
(REPRODUCED HEREIN AT PP. 265-288)

**AFFIRMATION OF TIMOTHY HILL, ESQ., FOR MOVING RESPONDENTS,
IN OPPOSITION TO ORDER TO SHOW CAUSE, DATED AUGUST 26, 2022 [321 - 323]**

FILED: ALBANY COUNTY CLERK 08/26/2022 09:19 PM

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RECEIVED NYSCEF: 08/26/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Petitioners,

For an Order and Judgement 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 David Imamura; 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.

Index No.: 904972/22

**AFFIRMATION IN
OPPOSITION TO
ORDER TO SHOW CAUSE**

Timothy Hill, Esq., an attorney duly admitted to practice law before the Courts of the State
of New York, hereby affirms the following statement:

1. I am a partner at the firm Messina Perillo Hill LLP, attorneys of record for
Respondents, COMMISSIONER ROSS BRADY, COMMISSIONER JOHN CONWAY III,
COMMISSIONER LISA HARRIS, COMMISSIONER CHARLES NESBITT, and
COMMISSIONER WILLIS H. STEPHENS (the "Moving Respondents"). As such, I am fully
familiar with the facts and circumstances set forth herein.

2. This Affirmation, together with the accompanying Memorandum of Law, is
submitted in opposition to Petitioners' Order to Show Cause seeking that the Court grant judgment

pursuant to CPLR Article 78, compelling the New York State Redistricting Commission and its commissioners to submit a second round of proposed redistricting plans for consideration by the Legislature.

3. The Moving Respondents are filing, simultaneously with this Affirmation in Opposition, a Motion to Dismiss the Amended Verified Petition pursuant to CPLR 7803, 7804(f), CPLR 3211(a)(5) and (7). The Memorandum is submitted both in support of the Moving Respondents' motion to dismiss, as well as in opposition to the Petitioners' Order to Show Cause.

4. Moving Respondents hereby incorporate and reassert, as if fully set forth herein, in opposition to the Petitioners Order to Show Cause, all of the factual and legal arguments set forth in their Memorandum of Law dated August 26, 2022.

WHEREFORE, it is respectfully submitted that the Order to Show Cause be denied in its entirety, together with such other and further relief as the Court deems just and proper.

Dated: Sayville, New York
August 26, 2022

Timothy Hill /s/ _____
TIMOTHY HILL
MESSINA PERILLO HILL, LLP
285 W. Main Street, Suite 203
Sayville, New York 11782
thill@mphlawgroup.com
Attorneys for Moving Respondents

To: All counsel via NYSECF

FILED: ALBANY COUNTY CLERK 08/26/2022 09:19 PM

NYSCEF DOC. NO. 110

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RECEIVED NYSCEF: 08/26/2022

CERTIFICATION PURSUANT TO 22 NYCRR § 202.8-b

I, Timothy Hill, Esq., an attorney duly admitted to practice law before the Courts of the State of New York, hereby certify that the within Affirmation dated August 26, 2022 submitted and filed in the above-captioned proceeding contains 509 words, excluding the parts exempted by § 202.8-b(b) and, as such, complies with the word count limits set forth in 22 NYCRR § 202.8-b.

In preparing this certification, I relied on the word count of the word processing system (Microsoft Word) used to prepare the document.

Dated: Sayville, New York
August 26, 2022

Timothy Hill

Timothy Hill

PROPOSED ORDER TO SHOW CAUSE REGARDING THE HARKENRIDER INTERVENORS' MOTION TO DISMISS, FILED SEPTEMBER 2, 2022 [324 - 325]

At IAS Part __ of the Supreme Court of the State of New York, held in and for the County of Albany, at the Courthouse located at 20 Eagle Street, Albany, New York, on the __ day of August, 2022.

PRESENT: _____

HON. PETER A LYNCH, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X

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; Independent Redistricting Commission Chairperson David Imamura; 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,

**ORDER TO SHOW CAUSE
REGARDING THE
HARKENRIDER
INTERVENORS' MOTION
TO DISMISS**

Respondents,

-and-

Tim Harkenrider; Guy C. Brought; Lawrence Canning; Patricia Clarino; George Dooher, Jr.; Stephen Evans; Linda Fanton; Jerry Fishman; Jay Frantz; Lawrence Garvey; Alan Nephew; Susan Rowley; Josephine Thomas; and Marianne Violante,

Intervenors-Respondents.

-----X

UPON reading of the Harkenrider Intervenors’ Memorandum Of Law In Support Of Their Motion To Dismiss, and all of the pleadings and proceedings heretofore had herein, Petitioners and Respondents are hereby:

ORDERED to appear and show cause before this Court, at IAS Part __, Room ____, at the Courthouse located at 20 Eagle Street, Albany, New York, on the ___th day of August, 2022, at 9:30 a.m., or as soon thereafter as counsel can be heard, why an Order should not be issued granting Harkenrider Intervenors’ Motion To Dismiss; and it is

FURTHER ORDERED that the Harkenrider Intervenors shall serve a copy of this Order and all papers in support thereof upon counsel for Petitioners and Respondents via NYSCEF, on or before the ____ day of August, 2022; and it is

FURTHER ORDERED that Petitioners and Respondents shall serve any papers in opposition to the Harkenrider Intervenors’ Motion To Dismiss by NYSCEF no later than the ____ day of September, 2022; and it is

FURTHER ORDERED that Harkenrider Intervenors shall serve any reply papers in further support of their Motion To Dismiss by NYSCEF no later than the ____ day of September, 2022.

DATED: Albany, New York
August __, 2022

ENTER:

HON. PETER A. LYNCH, J.S.C.

AFFIRMATION OF BENNET J. MOSKOWITZ, ESQ., FOR PROPOSED INTERVENOR-RESPONDENTS 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 (PROPOSED INTERENORS), FILED SEPTEMBER 2, 2022 [326 - 327]

FILED: ALBANY COUNTY CLERK 09/02/2022 12:58 PM
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RECEIVED NYSCEF: 09/02/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY
-----X

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-

AFFIRMATION

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,

Intervenors-Respondents.
-----X

BENNET J. MOSKOWITZ, an attorney duly admitted to practice before the Courts
of the State of New York, hereby affirms the following under penalty of perjury:

1. I am a Partner at Troutman Pepper Hamilton Sanders LLP, counsel for Proposed
Intervenor-Respondents 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 (hereinafter,
collectively, "Proposed Intervenors") in this CPLR Art. 78 special proceeding.

2. I submit this Affirmation solely to present to the Court information and materials relating to Proposed Intervenors' Motion To Dismiss, which materials are attached hereto as described below.

3. Attached hereto as Exhibit 1 is a letter filed with the Steuben County Supreme Court in *Harkenrider v. Hochul*, Index No. E2022-0116CV, on behalf of Petitioners Courtney Gibbons, Lauren Foley, Seth Pearce, Verity Van Tassel Richard, and Nancy Van Tassel, filed with that Court on May 18, 2022, and served on counsel for Proposed Intervenors via email on May 19, 2022.

WHEREFORE, it is respectfully requested that the Court grant Proposed Intervenors' Motion To Dismiss.

Dated: New York, New York
August 23, 2022



BENNET J. MOSKOWITZ

EXHIBIT 1 TO MOSKOWITZ AFFIRMATION -
LETTER FILED WITH THE STEUBEN COUNTY SUPREME COURT IN
HARKENRIDER V. HOCHUL, INDEX NO. E2022-0116CV [328 - 338]

FILED: ALBANY COUNTY CLERK 09/02/2022 12:58 PM

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RECEIVED NYSCEF: 09/02/2022



May 18, 2022

Hon. Patrick F. McAllister
Supreme Court, Steuben County
3 East Pulteney Square
Bath, NY 14810

Re: *Harkenrider v. Hochul*, Index No. E2022-0116CV – Letter on behalf of DCCC and New York Voters Lauren Foley, Belinda de Gaudemar, Lauren Furst, Courtney Gibbons, Seth Pearce, Leah Rosen, Susan Schoenfeld, Nancy Van Tassel, Verity Van Tassel Richards, and Ronnie White, Jr.

Dear Judge McAllister:

On behalf of DCCC, the national political party committee dedicated to electing Democrats to the U.S. House of Representatives, and a group of diverse voters from different parts of New York, including Brooklyn, Manhattan, Long Island, Rochester, Syracuse, the Hudson River Valley, and the Utica area, we write to express serious concerns about the congressional map proposed by Special Master Jonathan Cervas (the “Proposed Map”).

First, the Proposed Map pairs four Black incumbents in two districts, suggesting that they should run against each other. This would result in fewer Black members of Congress from New York, undoing decades of hard-fought racial progress that began with the creation of a majority-Black congressional district in Brooklyn represented by Shirley Chisholm following the enactment of the Voting Rights Act of 1965 (“VRA”). Second, the Proposed Map fractures important communities of interest throughout New York in contravention of the New York Constitution. The Proposed Map dismantles historic minority communities in New York City, including Brooklyn, Woodside, and the Bronx. It also splits communities of interest on Long Island and in the Hudson River Valley. The Proposed Map is the result of a flawed process that did not provide the public, including minority voters who live in historically marginalized communities, with an opportunity to provide input.

We urge the Special Master to uncouple Black incumbents and reunite communities of interest around New York City, on Long Island, and in the Hudson River Valley. Additionally, we urge this court to ensure that the map drawn by the Special Master only be used for the 2022 congressional election. The Court should then require the elected representatives of the people—who are best equipped to consider the interests of local populations and to weigh the specific equities involved—to enact a congressional map that complies with both the United States and New York Constitutions to be used for the rest of the decade.

- I. **The Proposed Map pairs four Black incumbents, which is likely to result in fewer Black members of the New York congressional delegation.**

Harkenrider v Hochul, Civil Action No. E2022-0116CV

Letter objection to proposed congressional map on behalf of DCCC and New York Voters—2

New York’s congressional delegation is currently comprised of 27 members. Of those, seven are Black: Rep. Jamaal Bowman, Rep. Yvette Clarke, Rep. Antonio Delgado, Rep. Hakeem Jeffries, Rep. Mondaire Jones, Rep. Gregory Meeks, and Rep. Ritchie Torres, all of whom are Democrats. The Proposed Map pairs four of those members in two districts.¹ Rep. Yvette Clarke and Rep. Hakeem Jeffries are paired in NY-09, and Rep. Jamaal Bowman and Rep. Mondaire Jones are paired in NY-16. The Proposed Map appears to suggest that these Black Members should run against each other, which would result in a reduction in the number of Black members in New York’s congressional delegation.

The Black members of the New York congressional delegation all represent minority opportunity districts. These districts are not comprised of a majority of Black voters, but Black voters in these districts nonetheless have the opportunity to elect representatives of their choice. In many ways, these districts embody the spirit of the Voting Rights Act, which was enacted to “remedy 95 years of pervasive racial discrimination in voting” and “enable[] racial minorities to participate in the political life of the nation.” S. Rep. No. 109-925, at 2 (2006) (S. Rep. accompanying 2006 amendments to VRA). Black members of New York’s congressional delegation have built diverse coalitions of support; they represent communities of Black, Brown, and White voters. The Proposed Map threatens to undo this significant progress.

After Illinois, New York voters have elected more African-American representatives to Congress than any other state—a total of 14.² But this is the result of hard-fought progress. New York has a history of discrimination in voting that deprived Black voters of the opportunity to elect their candidates of choice. The New York State Senate recently recognized that history in a 2021 report: “Although its record has significantly improved in recent years, New York has a long history of discrimination against racial, ethnic, and language minority groups in voting. The result is a persistent gap between white and non-white New Yorkers in political participation and elected representation.” Rep. and Findings of the N.Y. State S. Elections Comm. (Nov. 15, 2021), at 35, https://nysenate.gov/sites/default/files/press-release/attachment/elex1115_vfinal.pdf (emphasis added). Indeed, New York voters did not elect a Black member of Congress until 1944, and not again until after the passage of the VRA, which led to the creation of a majority-Black congressional district in Brooklyn represented by Shirley Chisholm, who was the first African-American woman elected to Congress. Prior to the enactment of the VRA—which was aimed at overcoming nearly 100 years of barriers at the state and local levels that prevented Black Americans from exercising their right to vote after the passage of the 15th Amendment—Black voters were divided among several predominantly white congressional districts.³

¹ Antonio Delgado is not running for Congress. Out of the six Black candidates who are running for re-election in 2022, four—a majority—are paired.

² See <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Black-American-Representatives-and-Senators-by-State-and-Territory/>.

³ Debra Michaels, *Shirley Chisholm (1924-2005)*, National Women’s History Museum (2015), <https://www.womenshistory.org/education-resources/biographies/shirley-chisholm>; Voting Rights Act, Gotham Gazette, <https://www.gothamgazette.com/index.php/about/1856-voting-rights-act>.

Harkenrider v Hochul, Civil Action No. E2022-0116CV

Letter objection to proposed congressional map on behalf of DCCC and New York Voters—3

Not only do these pairings threaten to reduce Black representation, they also disfavor incumbents. Under the New York Constitution, maps cannot be drawn for the purpose of favoring or disfavoring incumbents, particular candidates, or political parties. *See* N.Y. Const. art. III, § 4 (c)(5). But the Special Master’s map does just that, bunking six Democratic incumbent representatives and pairing no Republican incumbents who are running for re-election. Courts have found far less to be compelling evidence of illicit intent to favor or disfavor particular incumbents. As the North Carolina trial court recently found in determining the plan to be an illegal Republican gerrymander, that map’s single instance of “double bunking” of incumbents that disadvantaged Democrats was evidence of “intentional, pro-Republican partisan redistricting.” *Harper v. Hall*, Nos. 21 CVS 015426 and 21 CVS 500085 ¶¶ 549, 551 (Wake Cnty. Sup. Ct.), *aff’d*, *Harper v. Hall*, 868 S.E.2d 499 (N.C. Feb. 14, 2022).

Whether these pairings were intended or not, their effect is real and threatens to harm New York’s voters and the diversity of representation in New York. The U.S. Supreme Court has recognized that avoiding contests between incumbents and preserving the relationship between an elected official and their constituents is a legitimate redistricting goal. *See Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *White v. Weiser*, 412 U.S. 783, 797 (1973). In *Diaz v. Silver*, the Eastern District of New York explained why courts adopting redistricting plans should respect “the ability of representatives to maintain relationships they had already developed with their constituents.” 978 F. Supp. 96, 123 (E.D.N.Y. 1997). As that court and many others have recognized, this provides continuity to residents and helps ensure that their elected officials are familiar with their concerns. *See, e.g., Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688-89 (D. Ariz. 1992) (“The court [plan] also should avoid unnecessary or invidious outdistricting of incumbents. Unless outdistricting is required by the Constitution or the Voting Rights Act, the maintenance of incumbents provides the electorate with some continuity. The voting population within a particular district is able to maintain its relationship with its particular representative and avoids accusations of political gerrymandering.”) (citation omitted), *aff’d sub nom. Hisp. Chamber of Com. v. Arizonans for Fair Representation*, 507 U.S. 981 (1993).

These relationships are particularly critical in districts with a substantial number of minority voters, whose representatives are already acutely familiar with the needs of the voters in that district. The Special Master’s Proposed Map jeopardizes those relationships for millions of New York’s voters, including in particular for at least hundreds of thousands of New York’s Black voters.

II. The Proposed Map unnecessarily divides important communities of interest—particularly minority communities—across the state.

The Proposed Map needlessly fractures communities of interest across the state in direct contravention of the New York Constitution, which mandates the consideration of several different factors, including keeping together communities of interest. N.Y. Const. art. III, § 4(c)(5). Although the New York Constitution does not provide an explicit definition of what constitutes a “community of interest,” that term has a specialized meaning in the redistricting context. Other state constitutions, for instance, define a “community of interest” as a community of voters who

Harkenrider v Hochul, Civil Action No. E2022-0116CV

Letter objection to proposed congressional map on behalf of DCCC and New York Voters—4

are united by certain social, cultural, racial, economic, and historical issues and dynamics. *See, e.g.*, Mich. Const. art. IV, § 6(13)(c) (“Districts shall reflect the state’s diverse population and communities of interest. Communities of interest may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests.”); Cal. Const. art. XXI, § 2(d)(4) (“A community of interest is a contiguous population which shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation. Examples of such shared interests are those common to an urban area, a rural area, an industrial area, or an agricultural area, and those common to areas in which the people share similar living standards, use the same transportation facilities, have similar work opportunities, or have access to the same media of communication relevant to the election process.”). Dividing communities of interest, in particular minority communities of interest, disregards and disturbs on-the-ground political, cultural, and social realities.

It is not surprising that that the Proposed Map dismantles communities that have long been united in one congressional district. The remedial map-drawing process has taken place in a vacuum, essentially closed off to the public. The Special Master has thus drawn a map based on what may look visually pleasing but that ignores the realities on the ground. Indeed, this Court explicitly prohibited anyone other than the Respondents from submitting a proposed remedial plan. *See* Second Am. Order (Apr. 29, 2022), NYSCEF Doc. No. 296. And once maps were submitted, there was no meaningful opportunity for the public to comment. The Court held only one hearing on a weekday in Bath, New York. It was nearly impossible for most voters, including minority voters, to attend that hearing because Bath is nearly five hours away from New York City and essentially inaccessible via public transportation. As a result, the voices of the richly diverse communities of New York have not been heard in the remedial map-drawing process. The consequence of that process is the deeply flawed Proposed Map. We urge the Special Master to unite the following communities in the final map.

a. New York City

First, the Brooklyn neighborhoods of Bedford-Stuyvesant, Prospect Heights, Fort Greene, East New York, and Canarsie should be kept together in one congressional district. These communities have historically been grouped together in one congressional district, a seat once held by Shirley Chisholm, who, as noted above, was the first African-American woman elected to Congress. As discussed below, the Proposed Map instead needlessly fractures these communities between several districts when they should be united in one.

- Even though the Bedford-Stuyvesant neighborhood has been kept together in the same congressional district for decades, the Proposed Map splits it between two districts—NY-8 and NY-9—fracturing a community that has been the center of Brooklyn’s Black community since the early 1800s.⁴ The Bedford-Stuyvesant

⁴ *See, e.g.*, Melanie Eversley, *Protecting black history from gentrification*, USA Today (Feb. 2, 2016), <https://www.usatoday.com/story/news/nation-now/2016/02/02/black-history-gentrification-new-york-brooklyn/78685354/>; Sam Roberts, *Striking Change in Bedford-Stuyvesant as the White Population Soars*, New

Harkenrider v Hochul, Civil Action No. E2022-0116CV

Letter objection to proposed congressional map on behalf of DCCC and New York Voters—5

communities have large Black populations with shared business districts, public safety concerns, transportation modalities, and education concerns, and their issues should be represented by one member of Congress.

- Prospect Heights is cracked between NY-9 and NY-10, which means that part of the predominantly working-class Black community in that area has been combined with the wealthy Manhattan residents in the Financial District and Tribeca.⁵ These communities have very few shared interests. Prospect Heights should be reunited with other Brooklyn neighborhoods with which its voters have shared interests.
- The neighborhood of Fort Greene alone is inexplicably split across *three* congressional districts—NY-7, NY-9, and NY-10.

The Proposed Map severely fractures these predominantly Black communities and should be revised to restore the congressional district lines that have housed these communities for so long.

Second, Woodside should remain whole. The predominantly South Asian community in Woodside is cracked between NY-6, NY-7, and NY-14, diluting that community's voting strength and voice. NY-7, for example, reaches into increasingly gentrified Williamsburg and Greenpoint, which are neighborhoods whose voters share few concerns with the South Asian community in Woodside.⁶

Third, Black voters in Northeast Bronx should be kept together in NY-16. In yet another example of cracking minority communities with shared interests across multiple districts, the predominantly Black voters of Northeast Bronx, including residents of Williamsbridge, Baychester, Wakefield, Edenwald, and Co-Op City, are split among NY-14, NY-15, and NY-16. Those communities were previously all residents of NY-16. Not only is this area predominantly

York Times (Aug. 4, 2011), <https://www.nytimes.com/2011/08/05/nyregion/in-bedford-stuyvesant-a-black-stronghold-a-growing-pool-of-whites.html> (noting that Bedford-Stuyvesant “traces its African-American roots to the early 19th century and has been the borough’s black cultural capital for decades”).

⁵ Compare NYC Health Community Health Profiles 2018: Crown Heights and Prospect Heights (noting that 64% of the population of Crown Heights and Prospect Heights is Black, and that its poverty rate is higher than New York City as a whole), with Shelly Hagan and Wei Lu, *NYC’s Trendy Neighborhood Leaps Into Top Five Richest Zip Codes*, Bloomberg (Mar. 4, 2019), <https://www.bloomberg.com/news/articles/2019-03-04/nyc-s-trendy-neighborhood-leaps-into-top-five-richest-zip-codes>, and Katie Warren, *NYC’s richest and most expensive ZIP code has an average income of \$879,000 and a median sale price of \$3.9 million*, Business Insider (Nov. 18, 2019, 5:18 PM), <https://www.businessinsider.com/tribeca-new-york-city-richest-neighborhood-photos-tour-2019-6> (noting that Tribeca contains one of the top five richest zip codes in America).

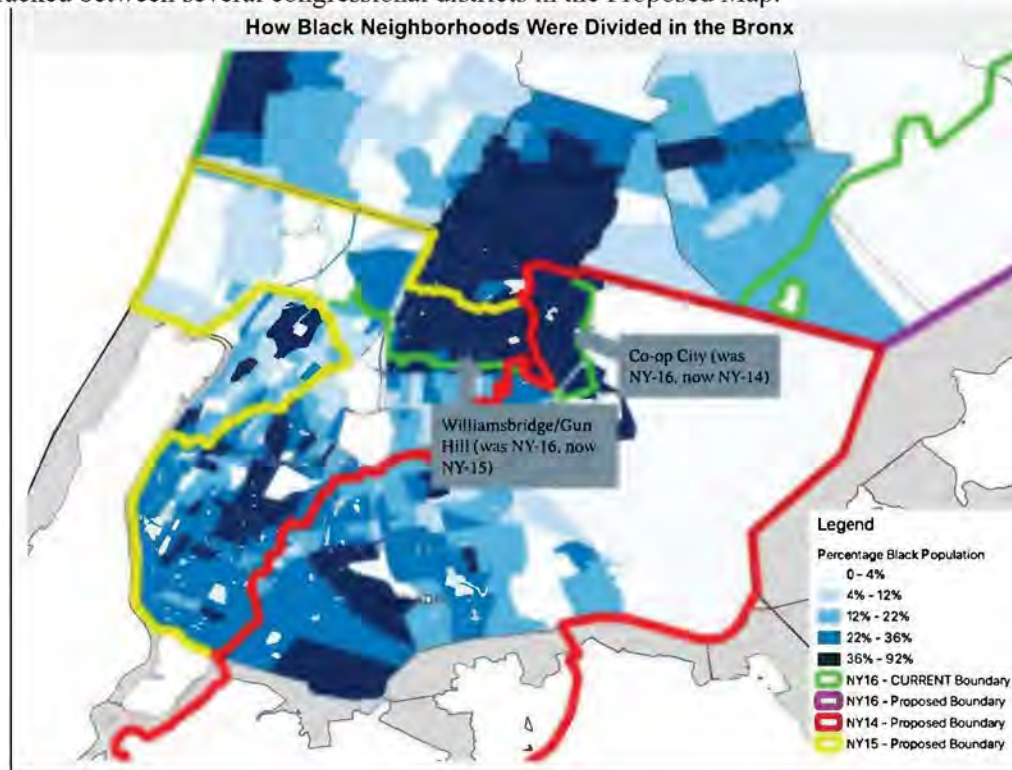
⁶ See, e.g., NYC Health Community Health Profiles 2018: Greenpoint and Williamsburg at 7, available at: <https://www1.nyc.gov/assets/doh/downloads/pdf/data/2018chp-bk1.pdf>; John V. Santore, *Study: Williamsburg and Greenpoint Are NYC’s Gentrification Capitals*, Patch (May 11, 2016), <https://patch.com/new-york/williamsburg/study-williamsburg-greenpoint-are-nyses-gentrification-capitals>.

Harkenrider v Hochul, Civil Action No. E2022-0116CV

Letter objection to proposed congressional map on behalf of DCCC and New York Voters—6

Black in a part of the City that is predominantly Hispanic,⁷ but it includes Co-Op city, which is historically the largest housing cooperative in the world and an obvious and important community that should be represented by one Member of Congress. Under the Proposed Map, however, Co-Op City is split between two districts, including one—NY-15—that snakes around to group some of these residents of affordable housing with predominantly affluent, white Woodlawn and Riverdale. In the Proposed Map, the residents of public housing in Edenwald are separated from the other parts of the Bronx Black community. They should continue to be connected with the predominantly Black city of Mount Vernon, but also joined with other parts of the Bronx such as Co-Op City, Baychester and Williamsbridge. This area makes one connected community of interest as they share an interest in common issues such as affordable housing.

The figure below shows how the predominantly Black community in the Northeast Bronx is cracked between several congressional districts in the Proposed Map:



The Northeast Bronx community should remain united in NY-16. These residents send their children to the same public schools and are grappling with shared political interests and issues

⁷ See *Co-Op City: History* (last visited May 17, 2022), <https://coopcitynyc.com/aboutus>; NYC Housing Preservation and Development, *City Secures Affordability and Prevents Displacement for Over 16,000 NYC Households* (Apr. 3, 2020), <https://www1.nyc.gov/site/hpd/news/021-20/city-secures-affordability-prevents-displacement-over-16-000-nyc-households#/0>.

Harkenrider v Hochul, Civil Action No. E2022-0116CV

Letter objection to proposed congressional map on behalf of DCCC and New York Voters—7

including combatting the threat of gun violence in their neighborhoods.

b. Long Island

The New York Constitution requires the consideration of “pre-existing political subdivisions including counties, cities, and towns, and of communities of interest,” making each criteria equally important. N.Y. Const. art. III, § 4(c)(5). The Proposed Map, however, seems to prioritize minimizing county splits in Long Island over all other criteria, including preserving existing communities of interest. The Special Master must correct this problem when finalizing the map by uniting communities of interest across Long Island.

Long Island should be divided using district lines that run from East to West instead of North to South. This would result in three districts across the majority of Long Island: a North Shore district, a South Shore district, and a Central Long Island district. East-to-West lines would allow voters with similar socio-economic interests to vote together, and shared economic interests is a traditional ground for recognizing a community of interest. *See Diaz*, 978 F. Supp. at 123 (“Courts will find the existence of a community of interest where residents share substantial cultural, economic, political and social ties.”).

In addition, the East-to-West division reflects common commuter patterns, which courts often consider as part of a community-of-interest analysis. *See Kelley v. Bennett*, 96 F. Supp. 2d 1301, 1321 (M.D. Ala. 2000), *vacated on other grounds by Sinkfield v. Kelley*, 531 U.S. 28 (2000); *Johnson v. Miller*, 864 F. Supp. 1354, 1389 (S.D. Ga. 1994); *see also Caster v. Merrill*, No. 2:21-cv-1536-AMM, 2022 WL 264819, at *20 (N.D. Ala. Jan. 24, 2022) (quoting *Johnson*, 864 F. Supp. at 1389-90). The commuter patterns on Long Island are divided between the North Shore, South Shore, and Central areas and would correspond to districts being drawn in those regions. The Babylon/Montauk branch of the Long Island Railroad runs all the way across the South Shore and is a thoroughfare for people commuting into New York City. The North Shore has the Port Washington, Oyster Bay, and Port Jefferson railroad branches, in addition to ferries that cross the Long Island Sound to bring passengers to Connecticut. Those in Central Long Island have access to the Long Island Expressway and the Ronkonkoma Branch of the Long Island Railroad.⁸

Creating districts using East-to-West lines also provides a greater opportunity for minority voters who have been historically marginalized on Long Island to have the opportunity to elect candidates of their choice. Practices like redlining, restrictive zoning, blockbusting, discriminatory tax assessments, and racial steering have caused Long Island to be one of most segregated regions in the country.⁹ Just ten years ago, a 2012 report concluded that one in three Black Long Islanders have experienced housing discrimination first-hand or within their immediate family. And *Newsday*, a newspaper that serves Long Island, conducted a three-year investigation culminating

⁸ *See* Long Island Railroad Map, Metropolitan Transportation Authority, <http://web.mta.info/lirr/Timetable/SystemMap.pdf>.

⁹ The planned community of Levittown famously excluded people of color with a restrictive covenant and remains overwhelmingly white. Olivia Winslow, *Dividing Lines, Visible and Invisible*, *Newsday* (Nov. 17, 2019), <https://projects.newsday.com/long-island/segregation-real-estate-history/#nd-promo>.

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in 2019 that revealed that real estate agents continue to show Black residents houses in predominantly Black areas, and white people houses in predominantly white areas. This practice has had the effect of pushing people of color into a small number of communities towards Central Long Island. Census estimates from 2017, for example, showed that half of Long Island's black residents lived in just 11 communities, and 90% lived in 62 communities.¹⁰

These communities with large minority populations are currently split among Districts 1, 2, 3, and 4. Cities with some of the highest minority populations are located relatively close to each other in West-Central Long Island—like Elmont, Roosevelt, Hempstead, Uniondale, Westbury, North Amityville, and Wyandanch—yet are split between districts. A map that unites these cities, and runs East-to-West in the center of the Island, would afford minority voters a greater chance to elect candidates who represent their interests. It seems particularly unjust that, after using discriminatory tactics to force people of color into these locations, we would also divide their political power in a part of the state that has highly racially polarized voting. While these voters would not currently make up a majority of any district, they would be well-positioned to build coalitions and, by the end of the decade, there could be a compact Central Long Island majority-minority district.

Finally, environmental factors favor building East-to-West districts. As Dr. Stephen Ansolabehere presented to this Court in his expert report, the North Shore of Long Island is a unique ecological zone. It is part of the Long Island Sound Watershed and is managed by the New York Department of Environmental Conservation and under the oversight of the Long Island Sound Study. Expert Rep. of Dr. Stephen Ansolabehere ¶ 74 (Feb. 24, 2022), NYSCEF Doc. No. 92. Keeping the communities of the North Shore together in one district, rather than splitting them between several districts, would allow voters there to prioritize their environmental needs. Because the next decade is poised to have an increasing policy focus on climate change and clean energy, this court should put New York's residents in the best position possible to have a representative who can focus on their specific circumstances and resources. *See Diaz*, 978 F. Supp. at 123 (listing shared political interests as a factor that defines a community).

c. Hudson River Valley

The Congressional district lines along the Hudson River Valley should be drawn North-to-South to account for the communities of interest that live in this region. Under the Proposed Map, this region is divided East-to-West. New York's Hudson River towns in Greenburgh and Rockland should be united—across the river—in one district that includes White Plains, the urban and transit center of that part of the region. Instead, the Proposed Map divides the Hudson River towns between NY-16 and NY-17, a division that splits a community of interest and creates an arguably

¹⁰ See Erase Racism, Housing and Neighborhood Preferences of African Americans on Long Island at 2 (Feb. 2012), http://www.eraseracismny.org/storage/documents/FINAL_ERASE_Racism_2012_Housing_Survey_Report_web_version.pdf; Winslow, *supra* note 8.

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Letter objection to proposed congressional map on behalf of DCCC and New York Voters—9

not contiguous 17th district that cannot be traversed by bridge without entering another district, as shown in the maps below.¹¹

District 17



Governor Mario M. Cuomo (Tappan Zee) Bridge



¹¹ No bridge directly connects both sides of the NY-17. The Governor Mario M. Cuomo (Tappan Zee) Bridge and the Bear Mountain Bridge are the only two options for crossing the Hudson in the area. However, once across a bridge, a person would have to cross through NY-16 or NY-18, respectively, to get back to NY-17, meaning the district cannot be traversed in whole without entering another district. See *Matter of Schneider v. Rockefeller*, 31 N.Y. 2d 420, 430 (1972) (finding contiguity when it is not “necessary to travel through an adjoining district to keep within the boundaries of the challenged district”); *Ince v. Rockefeller*, 290 F. Supp. 878, 883 (S.D.N.Y. 1968) (finding contiguity when “no part of any district separates the two sections of the ... District”). Further, the entrance and exit ramps off the Bear Mountain Bridge appear to be in NY-18, rather than NY-17, requiring residents to enter NY-18 in order to traverse back to NY-17.

Harkenrider v Hochul, Civil Action No. E2022-0116CV

Letter objection to proposed congressional map on behalf of DCCC and New York Voters—10

Bear Mountain Bridge



Residents of the Hudson River towns share a common identity. The villages (Hastings-on-Hudson, Dobbs Ferry, Irvington, Tarrytown, Elmsford, and Ardsley) and unincorporated areas that comprise the town of Greenburgh share public services like a common police department and sanitation department. These Westchester River towns are connected by infrastructure and commuter lines including the Metro North’s Hudson Railroad line, the Old Croton Aqueduct, and U.S. Route 9. The towns spanning both sides of the Hudson River share significant environmental concerns—several were affected by Hurricane Sandy and other recent weather events. These towns, situated on the Hudson River floodplain are likely to experience flooding in the future, and having singular congressional representation is important for that interest. The court must not split this community of interest.

Additionally, White Plains should be part of any district that includes the Hudson River towns. White Plains is an important hub for the minority communities in the Hudson River valley; Hispanic residents along the towns of the Hudson River congregate in White Plains. Additionally, the National Association for the Advancement of Colored People (“NAACP”) chapter in this region is headquartered in White Plains and is aptly called the “NAACP White Plains/Greenburgh” Branch because it serves the Black residents of both White Plains and Greenburgh.

Conclusion

For the reasons above, we urge the Court to recognize the limitations of the Proposed Map and to promptly direct the Special Master to make immediate changes to account for these problems. Additionally, the Court should allow the duly elected representatives of the people an

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NYSCEF DOC. NO. 146

INDEX NO. 904972-22

RECEIVED NYSCEF: 09/02/2022

Harkenrider v Hochul, Civil Action No. E2022-0116CV

Letter objection to proposed congressional map on behalf of DCCC and New York Voters—11

opportunity to draw this state's electoral map consistent with both the United States and New York Constitutions to be used in this state the rest of the decade.

Dated: May 18, 2022

Respectfully Submitted,

**EMERY CELLI BRINCKERHOFF
ABADY WARD & MAAZEL LLP**By: */s/ Andrew G. Celli, Jr.*

Andrew G. Celli, Jr.

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SIGNED ORDER TO SHOW CAUSE REGARDING THE HARKENRIDER INTERVENORS' MOTION TO DISMISS, DATED SEPTEMBER 2, 2022 [339 - 340]

FILED: ALBANY COUNTY CLERK 09/06/2022 10:50 AM

NYSCEF DOC. NO. 147

INDEX NO. 904972-22

RECEIVED NYSCEF: 09/02/2022

At IAS Part XXX of the Supreme Court of the State of New York, held in and for the County of Albany, at the Courthouse located at 20 Eagle Street, Albany, New York, on the 2nd day of September, 2022.

PRESENT: HON. PETER A LYNCH, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X

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,

Petitioners,

Index No. 904972-22
RJI No.: 01-22-ST2408

-against-

The New York State Independent Redistricting Commission; Independent Redistricting Commission Chairperson David Imamura; 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,

-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.

-----X

**ORDER TO SHOW CAUSE
REGARDING THE
HARKENRIDER
INTERVENORS' MOTION
TO DISMISS**

FILED: ALBANY COUNTY CLERK 09/06/2022 10:50 AM

NYSCEF DOC. NO. 147

INDEX NO. 904972-22

RECEIVED NYSCEF: 09/02/2022

UPON reading of the Harkenrider Intervenors' Memorandum Of Law In Support Of Their Motion To Dismiss, and all of the pleadings and proceedings heretofore had herein, Petitioners and Respondents are hereby:

ORDERED to appear om person and show cause before this Court, at Room TBD, at the Courthouse located at 20 Eagle Street, Albany, New York, on the 12th day of September, 2022, at 1:30 p.m., or as soon thereafter as counsel can be heard, why an Order should not be issued granting Harkenrider Intervenors' Motion To Dismiss; and it is

FURTHER ORDERED that the Harkenrider Intervenors shall serve a copy of this Order and all papers in support thereof upon counsel for Petitioners and Respondents via NYSCEF, on or before the 2nd day of September, 2022; and it is

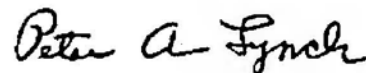
FURTHER ORDERED that Petitioners and Respondents shall serve any papers in opposition to the Harkenrider Intervenors' Motion To Dismiss by NYSCEF no later than the 8th day of September, 2022; and it is

FURTHER ORDERED that Harkenrider Intervenors shall serve any reply papers in further support of their Motion To Dismiss by NYSCEF no later than the 9th day of September, 2022.

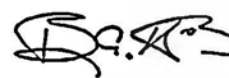
DATED: Albany, New York

September 2, 2022

ENTER:



HON. PETER A. LYNCH, J.S.C.



09/06/2022

NOTICE TO COUNTY CLERK – CPLR §8019(C), TO CHANGE CAPTION,
DATED SEPTEMBER 7, 2022 WITH COPY OF DECISION AND ORDER,
DATED SEPTEMBER 1, 2022 GRANTING INTERVENTION [341 - 349]

FILED: ALBANY COUNTY CLERK 09/07/2022 11:51 AM
NYSCEF DOC. NO. 158

INDEX NO. 904972-22
RECEIVED NYSCEF: 09/08/2022

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY**

-----X
ANTHONY S. HOFFMAN, ET AL.,

Plaintiff(s)/Petitioner(s),

Index No. 904972-22

- against -

THE NYS INDEPENDENT
REDISTRICTING COMMISSION, ET AL.

Defendant(s)/Respondent(s).
-----X

NOTICE TO COUNTY CLERK – CPLR § 8019(c)

By order dated September 1, 2022, and entered on September 2, 2022, the Court directed the County Clerk to make an entry on the docket of this matter. As required by CPLR § 8019 (c), notice of the order is hereby given to the County Clerk with the request that the County Clerk make such entry.

Dated: 09/07/22

Bennet J. Moskowitz (Name)

Trpoutman Pepper, et al. (Firm)

875 Third Avenue (Address)

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(212) 704-6000 (Phone)

(212) 704-6288 (Fax)

BONNET.MOSKOWITZ@TROUTMAN.COM (E-Mail)

Attorney(s) for Intervenors

[THE ORDER MUST ACCOMPANY THIS NOTICE AS A SINGLE PDF]

FILED: ALBANY COUNTY CLERK 09/07/2022 11:51 AM

NYSCEF DOC NO. 15841

INDEX NO. 904972-22

RECEIVED NYSCEF 09090202022

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF ALBANY

-----X
 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-

NOTICE OF ENTRY

The New York State Independent Redistricting
 Commission; Independent Redistricting Commission
 Chairperson David Imamura; 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,

-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.

-----X
 PLEASE TAKE NOTICE that a Decision And Order, NYSCEF No.140, a copy of which
 is attached as **Exhibit A**, was duly signed in this special proceeding by the Hon. Peter A. Lynch,
 J.S.C., on September 1, 2022, and duly entered in the Office of the Clerk of Albany County on
 September 2, 2022.

FILED: ALBANY COUNTY CLERK 09/07/2022 11:51 AM

NYSCEF DOC NO 15841

INDEX NO. 904972-22

RECEIVED BY NYSCEF 09/07/2022

Dated: New York, New York
September 2, 2022

TROUTMAN PEPPER HAMILTON
SANDERS LLP

By: 

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TO: All Counsel of Record via NYSCEF

FILED: .ALBANY .COUNTY .CLERK..09/07/2022_11:51_AM..

NYSCEF ED DOC NO 1581

INDEX NO. 904972-22

RECEIVED NYSCEF 09080202022

Exhibit A

THE STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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

Petitioners,

-against-

The New York State Independent redistricting
Commission; Independent Redistricting Commission
Chairperson David Imamura; 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.

DECISION AND ORDER
Index No. 904972-22
RJI No. 01-22-ST2408
(Hon. Lynch, J.)

INTRODUCTION

This is an Article 78 proceeding in the form of mandamus (CPLR § 7803(1)) to compel Respondents to prepare and submit to the Legislature a second redistricting plan corresponding to the 2020 census in accord with Article III, Sections 4 and 5(b) of the New York Constitution. Any such plan, if adopted by the Legislature would be effective following the 2022 election.

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's, moved to intervene in this proceeding.¹ Intervenors were the successful Petitioners in Matter of Harkenrider v. Hochul, 204 A.D. 3d 1366 [4th Dept. 2022], modified 2022 N.Y. LEXIS 874 [2022].

In Harkenrider v. Hochul, the Court held that that the 2022 congressional redistricting map adopted by the Legislature was unconstitutional and remitted the matter to Supreme Court (McAllister, J.), which, in turn, by Decision and Order dated May 20, 2022, corrected by Decision and Order dated June 2, 2022, certified the 2022 Congressional Maps prepared by the Special Master "as being the official approved 2022 Congressional map...."² Intervenors claim that limiting the 2022 Congressional Map to the 2022 election, would undermine the integrity of the relief granted in Harkenrider v. Hochul.

MOTION TO INTERVENE

Movants seek to intervene as a matter of right, or by permission of the Court. CPLR §1012 Intervention as of right..., provides, inter alia:

(a) "Intervention as of right. Upon timely motion, any person shall be permitted to intervene in any action:

2. when the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment"

Since Respondents, Independent Redistricting Commissioners: Ross Brady; John Conway III; Lisa Harris; Charles Nesbitt and Willis H. Stephens, filed a motion to dismiss the Petition on essentially the same grounds as the Intervenors, the Court cannot readily determine whether Intervenor's interests would not be adequately protected.³ Since permissive intervention is

¹ NYSCEF Doc. No. 74.

² See Harkenrifer et al v. Hochul et al, Supreme Court, Steuben County Index No. E2022-0116CV – NYSCEF Doc. No. 670 @ p. 5 and NYSCEF doc. No. 696.

³ NYSCEF Doc. Nos. 106-111.

appropriate, however, it is not necessary to determine whether intervention by right has been established.

CPLR §1013 Intervention by permission, provides:

“Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, **or when the person’s claim or defense and the main action have a common question of law or fact.** In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.” (Emphasis added)

Here, Intervenors claim that the 2022 Congressional Map adopted by the Court in Harkenrider v. Hochul remains in full force and effect until a new redistricting plan is adopted following the 2030 census. In stark contrast, Petitioners contend that the 2022 Congressional Map should be limited to the 2022 election, and the IRC should be compelled to submit a second redistricting plan based on the 2020 census to the Legislature for consideration. In such event, the Legislature would have to vote to approve or disapprove. If disapproved, the Legislature would then be able to propose and adopt its own redistricting plan for successive elections after 2022. In fine, the common question of law is whether the IRC has authority to propose a second redistricting plan to the Legislature in the first instance.

Since Intervenors are ready to file a motion to dismiss the Petition herein, intervention will not unduly delay the determination of the action.⁴ Intervention will not prejudice the rights of any party since the disputed issue has already been squarely raised by the pending motion to dismiss.⁵

⁴ NYSCEF Doc. Nos. 69 and 70.

⁵ NYSCEF Doc. Nos. 106-111.

FILED: ALBANY COUNTY CLERK 09/07/2022 11:51 AM

NYCASE DOC NO 15840

INDEX NO. 904972-22

RECEIVED NY SC CF 9009020202

CONCLUSION

For the reasons more fully stated above, Intervenor's motion for permission to intervene is granted, and it is further,

ORDERED, that Intervenor is granted leave to file the documents attached to the Affirmation of Bennet Moskowitz In Support Of Motion For Leave To Intervene, and it is further,

ORDERED, that the caption shall be amended to add 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's, as Intervenor-Respondents.

This memorandum constitutes both the decision and order of the Court.⁶

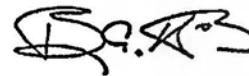
Dated: Albany, New York
September 1, 2022



PETER A. LYNCH, J.S.C

PAPERS CONSIDERED:

All e-filed pleadings, with exhibits.



09/02/2022

To: TROUTMAN PEPPER HAMILTON SANDERS LLP
By: Bennet J. Moskowitz
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MESSINA PERILLO HILL, LLP
Attorneys for Respondents
Ross Brady, John Conway III, Lisa Harris,
Charles Nesbitt and Willis H. Stephens
285 W. Main Street, Suite 203
Sayville, New York 11782

⁶ Compliance with CPLR R 2220 is required.

FILED: ALBANY COUNTY CLERK 09/07/2022 11:51 AM

NYCSCEFDOC.NQO.1980

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 New York, NY 10020

Jonathan P. Hawley, Esq.
 Attorneys for Petitioner
 1700 Seventh Avenue, Suite 2100
 Seattle, Washington 98101

AFFIRMATION OF AARON M. MUKERJEE, ESQ., IN SUPPORT OF PETITIONERS' OPPOSITION TO INTERVENOR-RESPONDENTS' MOTION TO DISMISS, DATED SEPTEMBER 8, 2022 [350 - 351]

FILED: ALBANY COUNTY CLERK 09/08/2022 04:50 PM
NYSCEF DOC. NO. 162

INDEX NO. 904972-22
RECEIVED NYSCEF: 09/08/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X

Anthony S. Hoffmann; Courtney Gibbons; Lauren Foley;
Seth Pearce; and Nancy Van Tassel,

Index No. 904972-22

Petitioners,

**ATTORNEY AFFIRMATION
OF AARON M. MUKERJEE
IN SUPPORT OF
PETITIONERS'
OPPOSITION TO
INTERVENOR-
RESPONDENTS' MOTION
TO DISMISS**

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 David Imamura; 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.

-and-

Tim Harkenrider; Guy C. Brought; Lawrence Canning;
Patricia Clarino; George Dooher, Jr.; Stephen Evans; Linda
Fantom; Jerry Fishman; Jay Frantz; Lawrence Garvey; Alan
Nephew; Susan Rowley; Josephine Thomas; and Marianne
Violante,

Intervenor-Respondents.

-----X

AARON M. MUKERJEE, an attorney admitted to practice in the courts of this State, and
not a party to this action, affirms the following to be true under the penalties of perjury pursuant
to CPLR § 2106:

1. I am an attorney at law duly admitted to practice before this Court and associate with the law firm of Elias Law Group LLP.

2. I submit this Affirmation solely to present to the Court information and materials supporting Petitioners' Opposition to Intervenor-Respondents' Motion to Dismiss submitted herewith, which materials are attached hereto as described below.

3. A true and correct copy of a letter from Speaker Carl E. Heastie, dated September 6, 2022, is annexed hereto as "Ex. 1."

Dated: September 8, 2022
Washington, DC

By: /s/ Aaron M. Mukerjee
Aaron M. Mukerjee

EXHIBIT 1 TO MUKERJEE AFFIRMATION -
LETTER FROM SPEAKER CARL E. HEASTIE,
DATED SEPTEMBER 6, 2022

FILED: ALBANY COUNTY CLERK 09/08/2022 04:50 P

NYSCEF DOC. NO. 163

RECEIVED NYSCEF: 09/08/2022



CARL E. HEASTIE
Speaker

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

Room 902
Legislative Office Building
Albany, New York 12224
518-455-3791
FAX: 518-455-1408

1446 East Con Hill Road
Bronx, New York 10454
718-654-6500
FAX: 718-654-5826

250 Broadway, Suite 1001
New York, New York 10007
212-512-1400
FAX: 212-512-1418

September 6, 2022

Honorable Andrea Stewart-
Cousins
Temporary President and
Majority Leader
New York State Senate
Capitol, Room 330
Albany, New York 12247

Honorable Robert G. Ort
Republican Conference Leader
New York State Senate
LOB, Room 907
Albany, New York 12247

Honorable William Barclay
Minority Leader
New York State Assembly
LOB, Room 933
Albany, New York 12248

Dear Colleagues,

I hereby appoint Yovan Samuel Collado, of the Bronx, New York, as members of the Independent Redistricting Commission effective immediately replacing Eugene Benger, who resigned.

Sincerely yours,

CARL E. HEASTIE
SPEAKER

CEH:bh

cc: Yovan Samuel Collado
Karen Blatt
Douglas Breakell

RESPONSE TO ORDER TO SHOW CAUSE, BY RESPONDENTS
DAVID IMAMURA, IVELISSE CUEVAS-MOLINA, AND ELAINE FRAZIER,
DATED SEPTEMBER 8, 2022 [353 - 357]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

----- x
Anthony S. Hoffmann et al.

Petitioners,

-against-

Index No. 904972-22

Hon. Peter A. Lynch

The New York State Independent Redistricting
Commission et al.,

**RESPONSE TO ORDER TO
SHOW CAUSE**

Respondents

-and-

Tim Harkenrider et al.

*Intervenors-
Respondents.*

Respondents David Imamura, Ivelisse Cuevas-Molina, and Elaine Frazier (“Undersigned Respondents”), by their attorneys Jenner & Block LLP, respectfully respond to the Court’s Order to Show Cause Regarding the Harkenrider Intervenors’ Motion to Dismiss ([Dkt. No. 147](#)) as follows. Undersigned Respondents defer to Petitioners in responding to the legal arguments made in the Harkenrider Intervenors’ Memorandum of Law in Support of their Motion to Dismiss ([Dkt. No. 144](#)) (“Harkenrider Mot.”), but are herein responding to several erroneous assertions of fact in that filing.

First, the Harkenrider Intervenors assert that the New York State Independent Redistricting Commission (“IRC”) is “now-constitutionally-disabled.” Harkenrider Mot. at 2. In fact, the Constitution does not set forth any process for disabling or disbanding the IRC and the IRC continues to be fully constituted with all ten commissioners, including two new commissioners

appointed to replace commissioners who resigned after the IRC submitted its maps to the Legislature in January 2022. *See* Affidavit of David Imamura in Support of Response (“Imamura Aff.”) ¶¶ 2–4.

Second, the Harkenrider Intervenors state that “the IRC apparently no longer has all ten constitutionally mandated commissioners.” Harkenrider Mot. at 2. In fact, the IRC currently has all ten commissioners. *See* Imamura Aff. ¶ 4.

Third, the Harkenrider Intervenors state that “Commissioner John Flateau has apparently resigned from the IRC, meaning that the IRC currently apparently only has nine commissioners.” Harkenrider Mot. at 19. In fact, the IRC is fully constituted with all ten commissioners, including Mr. Flateau. *See* Imamura Aff. ¶¶ 3–4.

Fourth, the Harkenrider Intervenors state that the Commission is “lacking key staff” and that “[s]hould this Court order the IRC to reconvene . . . additional staff would likely need to be hired.” Harkenrider Mot. at 19. In fact, there are no current staffing vacancies that would preclude the Commission from expeditiously undertaking the task of submitting a second round of proposed congressional districting plans for consideration by the Legislature. *See* Imamura Aff. ¶ 5.

Fifth, the Harkenrider Intervenors assert that the “IRC declared its decision to violate its constitutional duties on January 24, 2022.” Harkenrider Mot. at 18. In fact, on January 24, 2022, Respondents Imamura, Frazier, and Cuevas-Molina, along with two of their fellow Commissioners, announced: “We have repeatedly attempted to schedule a meeting by [January 25, 2022], and our Republican colleagues have refused. This is the latest in a repeated pattern of Republicans obstructing the Commission doing its job.” It also stated: “We have negotiated with our Republican colleagues in good faith for two years to achieve a single consensus plan. At every step, they have refused to agree to a compromise.” *See* Imamura Aff. ¶ 6.

WHEREAS, Undersigned Respondents respectfully submit this response to certain factual representations in the Harkenrider Intervenors' Motion to Dismiss for the Court's consideration.

DATED: September 8, 2022
New York, New York

Respectfully Submitted,

By: /s/ Jeremy H. Ershow

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and Elaine Frazier*

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Bennet J. Moskowitz
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Chicago, IL 60606

Counsel for Intervenors

Above parties served by NYSCEF

AFFIDAVIT OF DAVID IMAMURA, SWORN TO ON SEPTEMBER 8, 2022 [358 - 361]

FILED: ALBANY COUNTY CLERK 09/08/2022 05:11 PM
NYSCEF DOC. NO. 165

INDEX NO. 904972-22
RECEIVED NYSCEF: 09/08/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

----- X
Anthony S. Hoffmann et al.

Petitioners,

-against-

Index No. 904972-22

Hon. Peter A. Lynch

The New York State Independent Redistricting
Commission et al.,

**AFFIDAVIT OF DAVID
IMAMURA**

Respondents

-and-

Tim Harkenrider et al.

*Intervenors-
Respondents.*

COUNTY OF WESTCHESTER)

STATE OF NEW YORK) SS:

DAVID IMAMURA, of full age, being duly sworn, hereby deposes and says as follows:

1. I was appointed to the New York State Independent Redistricting Commission (“IRC”) by Senate Majority Leader and Temporary President Andrea Stewart-Cousins in January 2020, and was unanimously elected Chair of the Commission by all commissioners in May 2021. I continue to serve as Chair of the IRC.

2. The Independent Redistricting Commission (“IRC”) continues to be fully constituted with all ten commissioners, including two new commissioners appointed to replace commissioners who resigned after the IRC submitted its maps to the Legislature in January 2022. Lisa Harris was appointed to replace Vice-Chair Jack Martins after Vice-Chair Martins resigned

from the Commission and announced his candidacy for New York State Senate District 7. Moreover, on September 6, 2022, Speaker Carl Heastie appointed Yovan Samuel Collado to serve on the Commission to replace Eugene Bengier, who resigned on September 2, 2022. A copy of the appointment letter signed by Speaker Heastie, effective as of its signing, is attached as Exhibit A.

3. Commissioner John Flateau was reappointed to the IRC on August 1, 2022, after previously resigning from the Commission. A copy of the reappointment letter signed by Senate Majority Leader and Temporary President Andrea Stewart-Cousins is attached as Exhibit B.

4. Following Mr. Flateau's re-appointment and the appointment of Ms. Harris and Mr. Collado, as discussed above, all ten commissioners are in place.

5. There are no current staffing vacancies that would preclude the IRC from expeditiously undertaking the task of submitting a second round of proposed congressional districting plans for consideration by the Legislature if the IRC were ordered to do so by this Court.

6. It is not the case that the IRC declared a decision to violate its constitutional duties on January 24, 2022. On January 24, 2022, Respondents Frazier and Cuevas-Molina, Commissioner Flateau, then-Commissioner Bengier and I released a public statement stating: "We have repeatedly attempted to schedule a meeting by [January 25, 2022], and our Republican colleagues have refused. This is the latest in a repeated pattern of Republicans obstructing the Commission doing its job." It also stated: "We have negotiated with our Republican colleagues in good faith for two years to achieve a single consensus plan. At every step, they have refused to agree to a compromise." That statement was reproduced in various news sources, such as the one quoted in Paragraph 38 of the Amended Petition ([Dkt. No. 47](#)).

FILED: ALBANY COUNTY CLERK 09/08/2022 05:11 PM

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INDEX NO. 904972-22

RECEIVED NYSCEF: 09/08/2022

7. Consistent with the above-referenced Respondents' Verified Answer ([Dkt. No. 105](#)), the above-referenced Respondents do not oppose the relief identified in the first paragraph of Petitioners' prayer for relief as set forth in the Amended Petition.

FILED: ALBANY COUNTY CLERK 09/08/2022 05:11 PM

NYSCEF DOC. NO. 165

INDEX NO. 904972-22

RECEIVED NYSCEF: 09/08/2022

DATED: September 8, 2022
White Plains, New York


David Imamura

Sworn to before me this
8 Day of September, 2022


Notary Public

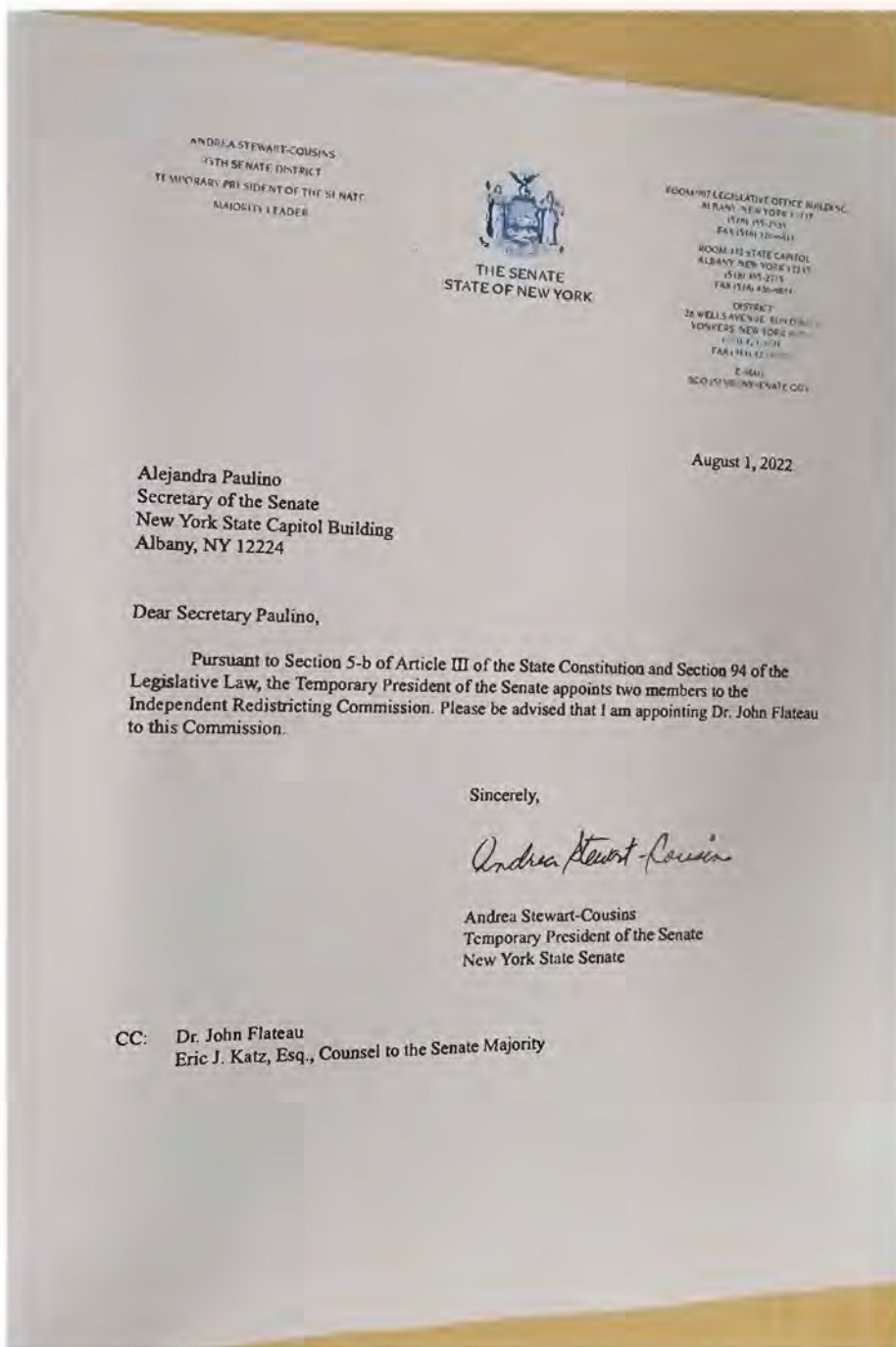
TAMMY MARIE MAZZULLO
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01MA6301698
Qualified in Westchester County
Commission Expires April 21, 2026

EXHIBIT A TO IMAMURA AFFIDAVIT -
LETTER FROM SPEAKER CARL E. HEASTIE,
DATED SEPTEMBER 6, 2022
(REPRODUCED HEREIN AT P. 352)

EXHIBIT B TO IMAMURA AFFIDAVIT -
REAPPOINTMENT LETTER SIGNED BY SENATE MAJORITY LEADER AND
TEMPORARY PRESIDENT ANDREA STEWART-COUSINS, DATED AUGUST 1, 2022

FILED: ALBANY COUNTY CLERK 09/08/2022 05:11 PM
NYSCEF DOC. NO. 167

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RECEIVED NYSCEF: 09/08/2022



ANDREA STEWART-COUSINS
15TH SENATE DISTRICT
TEMPORARY PRESIDENT OF THE SENATE
MAJORITY LEADER



ROOM 1907 LEGISLATIVE OFFICE BUILDING
ALBANY, NEW YORK 12247
PHONE 518-435-2333
FAX 518-435-4811
ROOM 3113 STATE CAPITOL
ALBANY, NEW YORK 12247
PHONE 518-435-2715
FAX 518-435-4811
DISTRICT
32 WELLS AVENUE, 8TH FLOOR
YONKERS, NEW YORK 10710
PHONE 914-338-3334
FAX 914-338-3333
E-MAIL
SC015@SENATE.COU

Alejandra Paulino
Secretary of the Senate
New York State Capitol Building
Albany, NY 12224

August 1, 2022

Dear Secretary Paulino,

Pursuant to Section 5-b of Article III of the State Constitution and Section 94 of the Legislative Law, the Temporary President of the Senate appoints two members to the Independent Redistricting Commission. Please be advised that I am appointing Dr. John Flateau to this Commission.

Sincerely,

Andrea Stewart-Cousins
Temporary President of the Senate
New York State Senate

CC: Dr. John Flateau
Eric J. Katz, Esq., Counsel to the Senate Majority

**CERTIFIED TRANSCRIPT OF THE
SEPTEMBER 12, 2022 HEARING [364 - 397]**

FILED: ALBANY COUNTY CLERK 12/02/2022 09:36 AM

INDEX NO. 904972-22

NYSCEF DOC. NO. 185

RECEIVED NYSCEF: 12/02/2022

1

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

Anthony S. Hoffmann; Courtney Gibbons;
Lauren Foley; Seth Pearce; Nancy Van Tassel,

Petitioners,

-against-

Index No.:
904972-22

The New York State Independent Redistricting
Commission; Independent Redistricting
Commission Chairperson David Imamura;
Independent Redistricting Commissioner
Ivelisse Cuevas-Molina; Independent
Redistricting Commissioner Elaine Frazier;
Independent Redistricting Commissioner Ross
Brady; Independent Redistricting Commissioner
John Conway III; Independent Redistricting
Commissioner Lisa Harris; Independent
Redistricting Commissioner Charles Nesbitt;
Independent Redistricting Commissioner
Willis H. Stephens,

Respondents,

-and-

Tim Harkenrider; Guy C. Brought; Lawrence
Canning; Patricia Clarino; George Doohar, Jr.;
Stephen Evans; Linda Fanton; Jerry Fishman;
Jay Frantz; Lawrence Garvey; Alan Nephew;
Susan Rowley; Josephine Thomas; Marianne
Violante.

Intervenors-Respondents.

ORAL ARGUMENT

Albany County Courthouse
16 Eagle Street
Albany, NY 12207
September 12, 2022

BEFORE: HON. PETER A. LYNCH
 Supreme Court Justice

A P P E A R A N C E S

ELIAS LAW GROUP, LLP
10 G St. NE, Suite 600
Washington, DC 20002
BY: ARIA C. BRANCH, ESQ.
HARLEEN K. GAMBHIR, ESQ.
Attorneys for Petitioners

JENNER & BLOCK, LLP
1099 New York Avenue NW, Suite 900
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BY: JESSICA RING AMUNSON, ESQ.
Attorneys for Commissioners Imamura,
Frazier and Cuevas-Molina

MESSINA PERILLO HILL
285 W Main Street, Suite 203
Sayville, NY 11782
BY: TIMOTHY HILL, ESQ.
Attorneys for Commissioners Brady,
Conway, Harris, Nesbitt and Stephens

TROUTMAN PEPPER HAMILTON SANDERS, LLP
227 West Monroe Street, Suite 3900
Chicago, IL 60606
BY: MISHA TSEYTLIN, ESQ.
Attorneys for the Harkenrider
Intervenors-Respondents

1 THE COURT: This is the matter of Hoffmann, et
2 al. against the New York State Independent Redistricting
3 Commission, et al., Respondents, and the Harkenrider
4 Intervenor-Respondents.

5 What I'm going to do first of all is, Counsel,
6 would you put your respective appearances on the record.

7 MS. BRANCH: Yes. Good afternoon. My name is
8 Aria Branch, I represent the Petitioners in this action.

9 THE COURT: Are you going to put yours on?

10 MS. GAMBHIR: Yes, Your Honor. Good afternoon.
11 My name is Harleen Gambhir, I also represent the
12 Petitioners.

13 MS. RING AMUNSON: Good afternoon, Your Honor.
14 Jessica Ring Amunson, I represent Respondents
15 Commissioners Imamura, Frazier and Cuevas-Molina.

16 MR. HILL: Good afternoon, Your Honor. My name
17 is Timothy Hill, I represent Respondent Commissioners
18 Brady, Conway, Harris, Nesbitt and Stephens.

19 THE COURT: Okay. Feel free to use the
20 microphone too. You don't have a microphone.

21 MR. TSEYTLIN: Your Honor, I will attempt to
22 speak loudly.

23 THE COURT: Okay. Put your appearance on the
24 record.

25 MR. TSEYTLIN: Misha Tseytlin for the

1 Harkenriders. The Harkenrider Intervenors-Respondents.

2 THE COURT: What's the fairness? Everybody else
3 has a microphone except for you, Misha. What is that?

4 MR. TSEYTLIN: Your Honor, I raised it with
5 staff and I made clear that I could speak as loud as
6 necessary.

7 THE COURT: Okay. Before we get going, just a
8 housekeeping thing. I have an email request from Vaughn
9 Golden. Is Vaughn Golden here?

10 MR. GOLDEN: Yes.

11 THE COURT: Okay, Vaughn, come on up. So the
12 request was sent to my law clerk. And you're requesting
13 the right to record this proceeding via audio and take
14 still photos; is that correct?

15 MR. GOLDEN: Yes, sir.

16 THE COURT: And you're a member of the media?

17 MR. GOLDEN: Yes, sir.

18 THE COURT: In what capacity?

19 MR. GOLDEN: I'm a reporter-producer for WSKG
20 Public Media.

21 THE COURT: Okay. And could you tell us why you
22 think this is a matter of public importance that would
23 justify the audio recording as well as the photographs
24 that you seek to take?

25 MR. GOLDEN: Yes. Given the requested remedy

1 brought by petitioners would greatly impact several
2 million people in the State of New York, I think it is of
3 the public's best interest to have a reporter in these
4 proceedings.

5 I also previously was allowed to record the
6 Harkenrider case in Steuben County and was able to produce
7 audio and still photographs of that case as well.

8 THE COURT: Okay. So before I make a
9 determination, under Part 131 of the Rules of the Chief
10 Judge I do have to give all the parties an opportunity to
11 be heard.

12 Aria, for the Petitioners?

13 MS. BRANCH: We do not oppose the request, Your
14 Honor.

15 THE COURT: Okay. Jessica?

16 MS. RING AMUNSON: No objection, Your Honor.

17 THE COURT: Tim?

18 MR. HILL: No objection, Your Honor.

19 THE COURT: Misha?

20 MR. TSEYTLIN: No objection.

21 THE COURT: Okay, then the application is
22 granted. What do you need to do to set up?

23 MR. GOLDEN: I have to run downstairs to get my
24 recorders and come back. It will take me a good five
25 minutes.

1 THE COURT: They didn't let you in with them?

2 MR. GOLDEN: They did not.

3 THE COURT: Really? Okay. Go ahead. We'll
4 take a couple-minute break.

5 MR. GOLDEN: I appreciate it.

6 (There was a short suspension of the
7 proceedings.)

8 THE COURT: This is the matter of Anthony
9 Hoffmann, Petitioners -- Anthony Hoffmann, et al.,
10 petitioners, against the New York State Independent
11 Redistricting Commission, et al., Respondents, and the
12 Harkenrider Intervenor-Respondents.

13 What I would like counsel to do is to put your
14 respective appearances on the record, please. And we'll
15 start with the petitioner.

16 MS. BRANCH: Good afternoon. Aria Branch for
17 the Petitioners.

18 MS. GAMBHIR: Good afternoon. Harleen Gambhir
19 for the Petitioners.

20 MS. RING AMUNSON: Good afternoon. Jessica Ring
21 Amunson for Respondents Imamura, Frazier and
22 Cuevas-Molina.

23 MR. HILL: Good afternoon. Timothy Hill for
24 Respondent Commissioners Brady, Conway, Harris, Nesbitt
25 and Stephens.

1 MR. TSEYTLIN: Misha Tseytlin for the
2 Harkenrider Intervenors.

3 THE COURT: Okay, so this matter is on today for
4 oral argument. I do note that we have -- the proceeding
5 has been commenced. I do note that there are two separate
6 motions to dismiss which are really at issue here today.
7 And I have thoroughly reviewed all of the papers.

8 What I would invite you all to do is to focus on
9 what I think is really the critical issue here. And when
10 you are making your arguments, the issue that jumps off
11 the page is essentially what authority exists for the
12 Redistricting Commission to prepare a second set of plans
13 based on the 2020 census.

14 And if such authority exists with respect to the
15 mandamus to compel issue, would such an order be doable
16 based upon the demonstrated lack of a bipartisan effort
17 this year.

18 So what I'm going to do, we're going to start
19 off with the first movant. Misha, you made the motion
20 initially to dismiss on behalf of the intervenors. Go
21 ahead.

22 MR. TSEYTLIN: Thank you, Your Honor. I will
23 train my remarks to what you're saying, but first I'd like
24 to create a little context for why we're here.

25 In Harkenrider we brought a lawsuit in Steuben

1 County --

2 THE COURT: I know all about Harkenrider.

3 MR. TSEYTLIN: That's right, Your Honor, but
4 it's very important that we brought under -- the relief we
5 sought was under Article III, Section 4E.

6 We obtained a particular remedy from that court
7 and then it went up to the Court of Appeals and then we
8 went back down and ultimately there was a particular
9 remedy that was adopted, which was a judicially adopted
10 map.

11 That remedy was for the same constitutional
12 violation that petitioners seek to raise here. It was not
13 the only remedy that anyone suggested in that proceeding.
14 Judge Troutman of the Court of Appeals suggested a remedy
15 that in many ways is similar to what the petitioners are
16 asking here.

17 The petitioners here in Steuben County during
18 their remedial proceedings suggested a remedy very close
19 to what they're asking here which is limit the map to 2022
20 and then let the Legislature, speaking for the people they
21 claim, adopt the new map going forward.

22 THE COURT: Well, wasn't the judicial remedy
23 built into the constitutional structure here?

24 MR. TSEYTLIN: That was, of course, our
25 position.

1 THE COURT: And wasn't the constitutional
2 structure here that an approved map be in place until the
3 next census in 2030?

4 MR. TSEYTLIN: That's exactly what Section 4E
5 provides. That is the argument that we raised throughout
6 the proceedings. Judge Troutman had a different view
7 about the way the judicial remedy would work.

8 In footnote 20 of the Harkenrider decision we
9 could read the Court of Appeals in Harkenrider as having
10 adopted our argument that is exactly like you say, Your
11 Honor, if there is a constitutional violation of the
12 procedure, the 4E remedy is a judicially adopted map.

13 It is not reenlisting the IRC. It is not the
14 procedure that Judge Troutman floated at the Court of
15 Appeals. And I think the remedy that they're asking for
16 is doubly hard. Not only is it not the one in 4E, the
17 constitution actually provides only two circumstances when
18 the Commission can act. One is before that February
19 deadline --

20 THE COURT: Well, February 28th has come and
21 gone.

22 MR. TSEYTLIN: That's right, Your Honor.

23 THE COURT: They were not able to do the second
24 set of redistricting maps for consideration by the
25 Legislature. What would their authority be to reconvene

1 now?

2 MR. TSEYTLIN: They have no authority. The
3 constitution only provides one other circumstance where
4 the Commission can reconvene.

5 THE COURT: And what would that be?

6 MR. TSEYTLIN: That is when a court orders an
7 amendment to a map. That is provided in the
8 constitutional amendment very specifically. And we
9 thought that that's what they were asking for initially in
10 their original papers. Well, this is the only way the
11 Commission can be brought back, it has to be this
12 provision that says you can bring the Commission back.
13 It's under Section Article III 5B(1) (a).

14 They did not say that they are basing it under
15 that. And the reason they didn't say that is because then
16 they would have to be asking this Court to amend the
17 Steuben County Supreme Court's map which, of course, would
18 be a collateral attack and, frankly, absurd.

19 THE COURT: There was no direct appeal from
20 that, was there?

21 MR. TSEYTLIN: That's right, Your Honor, nobody
22 appealed. Well, there was an appeal initially when we won
23 on the merits.

24 THE COURT: I'm talking about after the judge
25 with the benefit of the special master approved the 2022

1 maps. That final decision was not appealed.

2 MR. TSEYTLIN: That's correct, your Honor. And
3 my friends, the petitioners, almost all of them
4 participated in that proceeding and in fact --

5 THE COURT: Well, kind of. They wrote a letter
6 to the judge.

7 MR. TSEYTLIN: It wasn't just like a, you know,
8 hey, like signed by citizens letter, it was a --

9 THE COURT: They weren't parties.

10 MR. TSEYTLIN: That is true, they could have
11 moved to intervene. But it was a letter on the letterhead
12 of the Elias Law Group, one of the premiere election law
13 law firms in the country representing the D Triple C and
14 almost all of the petitioners here. They raised the same
15 argument. And certainly they could have perfected any
16 conversion of an interested party to an interventional (sic)
17 status in order to appeal if they so wanted to do that.

18 THE COURT: But just for purposes of this
19 record, Justice McAllister's final decision and order
20 making some amendments to the 2022 congressional map that
21 he approved was dated June 2, 2022. From my review of the
22 record, it appears that no appeal was taken from that
23 decision and order; is that correct?

24 MR. TSEYTLIN: That is exactly correct, Your
25 Honor. And there were criticisms lodged against that map,

1 some of the same ones that my friends lodged in their
2 petition here. We thought there might be an appeal. We
3 had that docketed on all of our calendars waiting for that
4 appeal to come and that appeal never came. So the
5 judgment was final.

6 There is, of course, a mechanism to reopen a
7 final judgment that's very common. Our respectful
8 submission is that if they want to reopen that final
9 judgment, they should go back to Steuben County. We think
10 that should not be successful because nothing has changed.
11 And also that the relief they're asking for would be
12 unconstitutional as determined by the Harkenrider Court of
13 Appeals. That's the proper procedure to reopen a final
14 judgment that no one appealed from.

15 And by the way, to reopen a CPLR provision
16 allows non-parties to move to reopen if they so choose.

17 THE COURT: Okay. Tim, you're up.

18 MR. HILL: Thank you, Your Honor. I won't
19 repeat some of the arguments that are on line with what my
20 colleague just mentioned, but I would emphasize that it's
21 really of those twofold defect, both the date and the fact
22 that the Steuben County went through the constitutional
23 process and arrived at that judicial remedy, which is
24 really the end phase. That is the last part of that
25 judicial process, that being the constitutional process,

1 when it results in a court-ordered plan.

2 That has happened here. So as far as -- and
3 this petition concerns only the congressional maps. So
4 with respect to the congressional maps, those maps have
5 gone through the constitutional process. That defect, to
6 the extent it was identified, to be remedied through the
7 only procedure that's available to it and the result is
8 that final determination which, Judge, you just pointed
9 out has not been appealed from.

10 THE COURT: Would it be doable to send this back
11 to the Commission for the drawing of a second set of
12 redistricting maps based on the 2022 census -- excuse me,
13 based on the 2020 census, when the Commission already
14 demonstrated on their first set of maps they couldn't come
15 to terms, they submitted two separate maps to the
16 Legislature which were rejected and then they deadlocked
17 well in advance of February 28th saying they weren't going
18 to be able to come forward with redistricting -- a second
19 set of redistricting maps?

20 So wouldn't an order in the form of a mandamus
21 to compel them to act, wouldn't that be an exercise in
22 futility?

23 MR. HILL: That might be a fair assessment from
24 a political calculation. I don't know from a legal
25 standpoint if it went back if you would just be sending it

1 back for the purpose of winding up in the same impasse
2 that it was stuck in from perhaps the outset, but
3 certainly the end.

4 So I don't know -- I appreciate the inquiry. I
5 don't know personally, you know, how to forecast that
6 except to say I think that's a very fair assessment based
7 on how the IRC proceeded to date. I don't know that that
8 has to be reached because I think what Your Honor
9 identified as the first issue that jumps off the page is
10 so conclusively in favor of not permitting the release
11 sought by this petition that I don't know that you need to
12 reach the futility question.

13 THE COURT: Okay. Jessica, it appears to me
14 that on behalf of your clients, who are Commissioners
15 David Imamura, Ivelisse Cuevas-Molina and Elaine Frazier,
16 that you were not opposed to the relief sought in the
17 petition; is that correct?

18 MS. RING AMUNSON: That's correct, your Honor.

19 THE COURT: Other than supporting the petition,
20 before I hear from the petitioners is there anything that
21 you would like to add?

22 MS. RING AMUNSON: I would just like to briefly
23 address the futility question that Your Honor just
24 directed to Mr. Hill.

25 THE COURT: Yes, go ahead.

1 MS. RING AMUNSON: Which is to say that my
 2 clients do not believe that it would be an exercise in
 3 futility. The Commission is fully staffed. All 10
 4 commissioners are on the Commission now. There are no
 5 staffing shortages that would preclude the Commission from
 6 expeditiously undertaking the redrawing of a second set of
 7 maps. And, of course, the situation would have changed in
 8 that the Commission would be under a court order to submit
 9 a second set of maps to the Legislature.

10 At the time that the Commission was last --

11 THE COURT: Hasn't the -- in the Harkenrider
 12 case on remittal the court did approve the 2022
 13 redistricting map predicated on the 2020 census which has
 14 been utilized for the election process in 2022.

15 Didn't the constitutional structure contemplate
 16 that when you have an approved congressional map, whether
 17 it be by the process outlined in the constitution, that is
 18 the Legislature adopting either a map presented by the
 19 Commission, or in the event the Legislature rejects the
 20 maps proposed by the Commission, as well as a second set
 21 of maps proposed by the Commission, if the Legislature
 22 adopted -- rejected both sets of maps and then went
 23 forward, did their own redistricting map and approved it
 24 as contemplated by the constitution, or as here where the
 25 approved maps were based under the judicial remedy built

1 into the structure under paragraph B, whatever process is
2 utilized in the adopting of the maps, doesn't the
3 constitution contemplate by its structure that those maps
4 are to be in place for a 10-year period and that only
5 after the 2030 census is generated would the Commission
6 then be in a position to prepare new maps?

7 So no matter how you got the maps approved this
8 year, doesn't the constitution require that those maps
9 stay in place for the next 10 years?

10 MS. RING AMUNSON: Your Honor, I will defer to
11 petitioners for addressing the legal issues. I believe
12 their position is that this is an interim judicial remedy
13 for the 2022 elections and that the defect of the
14 Commission submitting a second map can be remedied by a
15 mandamus action to our clients.

16 I would simply point out, Your Honor, that the
17 situation has changed in that at the time that the
18 Commission was last attempting to send a second set of
19 maps to the Legislature there was legislation then in
20 place that specifically contemplated what would happen if
21 the Commission was unable to vote.

22 THE COURT: You're talking about the 2021
23 legislation that the Court of Appeals rejected?

24 MS. RING AMUNSON: Yes, Your Honor. And my
25 clients were attempting to schedule a vote on a second set

1 of maps. Mr. Hill's clients were refusing to hold a
2 meeting and refusing to have a vote on a second set of
3 maps, which is ultimately what precluded the Commission
4 from being able to vote.

5 I'm merely addressing Your Honor's question
6 about futility in that if it were sent back to the
7 Commission and the Commission were under order from this
8 Court demanding this order to submit a second set of maps
9 to the Legislature, presumably the Commission would comply
10 with this Court's order.

11 THE COURT: Okay. For the petitioners, Aria, I
12 want you to answer this question: Does the constitutional
13 structure contemplate -- the intent of the constitutional
14 structure contemplate that any approved map, regardless of
15 whether it was approved by the Legislature under the
16 structure defined in the constitution or by the court,
17 also a recognized remedy in the constitution, does the
18 constitutional intent require that that approved map be in
19 place for 10 years?

20 MS. BRANCH: So with respect to the remedy that
21 was put in place by Steuben County, I think the answer is
22 clearly no. The New York Constitution, the 2014
23 amendments that the People of New York approved, clearly
24 intended for the Commission to send two proposed maps to
25 the Legislature that would then be approved or rejected by

1 the Legislature.

2 The people of New York intended for the
3 Commission to get two chances to send those maps, and that
4 didn't happen. So that is the sort of background.

5 THE COURT: Right. It didn't happen.

6 MS. BRANCH: Exactly. And so we brought a
7 mandamus action to ask the court to compel the
8 commissioners to pick up where they left off. To send the
9 second set of maps to the Legislature since that is the
10 action that didn't take place.

11 THE COURT: Do I have the authority to tell them
12 to agree?

13 MS. BRANCH: You do, Your Honor, because --

14 THE COURT: What if they don't?

15 MS. BRANCH: What did you say?

16 THE COURT: What if they don't?

17 MS. BRANCH: You don't have the authority to
18 tell them to agree, but I think that under Section 4E you
19 have the authority to issue a writ of mandamus, which is
20 the relief we're requesting here.

21 THE COURT: Why would I issue a writ of mandamus
22 directing the Commission to meet anew for the purposes of
23 coming forth with a second redistricting plan based on the
24 2020 census when that issue has not only already been
25 resolved in the Harkenrider litigation, culminating in the

1 McAllister mess in June, but also in context of the fact
2 that the constitutional structure necessitates that any
3 approved map be in place for 10 years until the next
4 census in 2030?

5 So where is the authority to order interim
6 relief, as you're requesting, when it would appear to
7 violate the constitutional intent that approved maps be in
8 place for 10 years?

9 MS. BRANCH: So I don't think that the
10 constitution intends for remedial maps drawn pursuant to
11 Section 4E to be in place for the remainder of --

12 THE COURT: What do you base that on?

13 MS. BRANCH: So if you look at Section 4E,
14 literally the text of it, there's nothing in the text of
15 that provision that states that it's a single-use
16 provision. There's nothing that says that maps drawn
17 according to that provision must be in place for the
18 remainder of the decade.

19 THE COURT: Can you read Section 4E without
20 reading Section 4B, for example? Don't they have to be
21 read in context where 4B is clearly recognizing the need
22 for maps to be in place for 10 years.

23 MS. BRANCH: Your Honor, if you look at section
24 5B, subsection A, it states on or before February 1st of
25 each year ending in zero, and at any other time a court

1 orders that a congressional or state legislative districts
2 be amended.

3 So there you clearly see that the IRC can be
4 reestablished later in the decade pursuant to court order.
5 That is the intent of the Commission. The people of New
6 York intended for the IRC to get two chances to propose
7 their map to the Legislature.

8 THE COURT: Yeah, they did, and they didn't do
9 it.

10 MS. BRANCH: And because that didn't happen, the
11 remedial map that's in place is not required to be in
12 place for the remainder of the decade. This has
13 happened --

14 THE COURT: That's your interpretation of it.
15 So if you have let's say annual revisits, would that
16 section 5B(a) allow for the court to order the
17 redistricting maps to be amended annually?

18 MS. BRANCH: Your Honor, I think Section 4E is
19 the provision under which this Court has authority to
20 issue a writ of mandamus. And under that provision there
21 must be a violation of law.

22 Here the violation of law is clear. The IRC
23 failed to set the second set of maps. If there is no
24 violation that has occurred with respect to the remedial
25 map or the interim map that's put in place, then there can

1 be no redistricting anew. So there couldn't be annual
2 redistricting without an underlying violation of law.

3 THE COURT: Okay. So you've got a
4 constitutional amendment in 2014 where it really kicks in
5 for the first time this year. And you've got a structure
6 laid out for the Redistricting Commission to really have
7 two opportunities to submit maps. Here the Legislature
8 rejected the first submission, which, by the way, were two
9 separate maps.

10 The Commission deadlocks and does not set forth
11 or submit to the Legislature a second redistricting plan.
12 Didn't the Legislature, when they contemplated the
13 amendments in 2014 which were ultimately adopted, wasn't
14 it contemplated that this type of deadlock is a realistic
15 possibility? And isn't that why the amendment provides
16 for judicial relief under 4E to prepare a map? Isn't that
17 the entire structure?

18 So in context of that question -- and I'll let
19 you respond in a moment -- is there any difference between
20 a map approved judicially under 4E versus a map that is
21 approved under 4B by the Legislature, is there any real
22 difference as to the length of time that those maps have
23 to be in place, recognizing that there has to be a
24 reasoned period, here 10 years in the constitution, to
25 provide stability in the election process as distinguished

1 from an annual or a periodic review which could
2 potentially wreak havoc in the election process? So what
3 do you think?

4 MS. BRANCH: I understand your question and the
5 concern about, you know, having frequent redistricting.
6 But I think it goes back to the point I was raising
7 earlier, which is when there is a legal violation and
8 Section 4E provides for a remedy, that is appropriate for
9 the court to provide that remedy. I think that --

10 THE COURT: But the court already did that.

11 MS. BRANCH: The court provided a remedy with
12 respect to the malapportionment of the prior map, right?
13 So in Harkenrider the issue was that the map that was in
14 place -- so the map that had been passed was declared
15 constitutionally invalid and so the 2012 map was the only
16 map that was in place for the congressional districts and
17 that map was malapportioned, so the court had to put in
18 place a new map in order to run the 2022 elections.

19 But the court in Steuben County never said that
20 that map was to govern for the entire period. For the
21 entire decade.

22 THE COURT: Was the issue even raised?

23 MS. BRANCH: The issue was not raised as far as
24 I understand it and the court --

25 THE COURT: Wait. Hold on one second. I'm

1 sorry. I think that some of the petitioners in the letter
2 to Judge McAllister had made a comment to the effect that
3 whatever map he approved be limited to the 2022 election.
4 And in reviewing Judge McAllister's decisions, I don't
5 think that issue was addressed.

6 MS. BRANCH: I should say the issue was raised
7 by outsiders, it wasn't raised by the parties. And the
8 issue was never addressed, as you stated.

9 So I think the default with respect to remedial
10 maps is that they're put in place for an interim period.
11 If you look at other states -- we cited a couple of cases
12 in our brief. In New Hampshire, for example, in 2000 the
13 Legislature hit an impasse. There was a court-drawn map
14 that was in place for the 2002 elections. And then
15 following that -- subsequent to that the Legislature came
16 back and was able to pass a map that was then in place for
17 the remainder of the decade.

18 There isn't anything in the New York
19 Constitution that prohibits the IRC and the Legislature
20 from engaging in that process at this point. Yes, there
21 are deadlines in the constitution, but Section 4E
22 specifically states that the New York constitutional
23 deadlines are to govern redistricting process except for
24 when a court orders the adoption of a map. And that is
25 where we are. So Section 4E provides the mechanism for

1 this court to order mandamus.

2 And I would also point the court to what
3 happened in the 2000 cycle in New York with the *Rodriguez*
4 *v. Pataki* case. In that case and in that scenario the
5 court issued a remedial map because it appeared that there
6 was going to be a legislative impasse and a map was not
7 going to be in place for the fast-approaching elections.

8 And the Legislature again came back and was able
9 to pass a map. That legislatively passed map is the one
10 that was in place for the remainder of the decade. So I
11 would say it's not uncommon for a remedial map.

12 THE COURT: That was before the 2014 amendments?

13 MS. BRANCH: That was before the 2014
14 amendments. And it was also part of the impetus for the
15 2014 amendments, right?

16 The relief that we're seeking here is very
17 consistent with the 2014 amendments. It is exactly in
18 line with what the people of New York asked for their
19 redistricting process to look like, which is for the IRC
20 and the Legislature, in combination, to implement
21 redistricting maps. It's not for a court to implement a
22 map that would then be in place for the remainder of the
23 cycle. There was a carefully crafted process that the
24 people of New York voted for. And that is what we are
25 asking to begin anew for the 2024 cycle and beyond.

1 THE COURT: You would agree that if the
2 Redistricting Commission had submitted maps to the
3 Legislature for its review and the Legislature approved
4 those maps, then those maps would be in place until the
5 next census in 2030, true?

6 MS. BRANCH: They would, unless they were
7 challenged pursuant to 4E or some other, you know, source
8 of law, right? They could be challenged as part of some
9 gerrymandered or as racially gerrymandered maps. So it's
10 not bad maps that are passed pursuant to the legislative
11 process are, you know, in place for the remainder of the
12 decade regardless of whether they violate the law.

13 THE COURT: They're subject to judicial review?

14 MS. BRANCH: Correct.

15 THE COURT: And if they're upheld on judicial
16 review they stay in place for 10 years?

17 MS. BRANCH: They stay in place for the
18 remainder of the decade, correct.

19 THE COURT: And we have Judge McAllister, on
20 remittal from the Court of Appeals, approving the maps for
21 the 2022 congressional maps, we have a final decision and
22 order without an appeal. Is it your contention that the
23 constitutional intent that redistricting maps be in place
24 for the 10-year period does not apply when the maps are
25 judicially approved as distinguished from being approved

1 or adopted by the Legislature?

2 MS. BRANCH: It is our position that when the
3 maps that are judicially approved were not created
4 pursuant to the process set forth in the 2014 amendments,
5 specifically the combination of the IRC and the
6 Legislature working together to implement constitutional
7 congressional maps, that that map must remain in place for
8 the remainder of the decade.

9 I just don't think that the people of New York
10 meant when they voted for the 2014 amendments that a court
11 in Steuben County, you know, drawn by -- and a map drawn
12 by a special master was meant to be in place for the
13 remainder of the decade. And there's nothing in the
14 constitution that prohibits the remedy and the relief that
15 we're asking for here.

16 THE COURT: So, you keep referring to what the
17 people understood the constitutional amendments to be, but
18 don't we interpret the constitutional mandate by the plain
19 language of its terms?

20 MS. BRANCH: Yes. And the plain language of
21 Section 4E does not prohibit the relief that we're asking
22 for here. It says that a court can order the adoption of
23 or changes to a redistricting plan to remedy a violation
24 of law.

25 There's nothing in that provision or anywhere

1 else in the constitution that says that Section 4E can
2 only be invoked one time in a decade.

3 THE COURT: Is the only violation of law that
4 you are basing your claim on the failure of the
5 Redistricting Commission to submit a second set of
6 redistricting plans prior to February 28th, 2022?

7 MS. BRANCH: The violation of law that our
8 request for mandamus relief is based on is that, yes, that
9 the IRC failed to send a second set of maps and that as a
10 result they did not comply with their mandatory
11 non-discretionary duty, and as a result this is a case
12 that is proper for mandamus relief.

13 And I would point the Court to footnote 10 of
14 the Harkenrider decision which explicitly recognizes that
15 judicial intervention in the form of a mandamus proceeding
16 is a way to compel the IRC to comply with its duties. And
17 this was something that was put in the decision in
18 response to an argument that I think the state respondents
19 and Judge Rivera made which is in future cycles why would
20 the IRC ever do what it is required to do? Why wouldn't
21 maps always be drawn by courts? Because if the IRC
22 doesn't act, the remedial provision will kick in such that
23 the court will draw the map.

24 And the Harkenrider court responded and said
25 judicial intervention in the form of mandamus is one way

1 to compel the IRC to comply with its duties. And that is
2 precisely what we're doing here.

3 We're not asking for relief for 2022. We
4 recognize that the Steuben -- the map that was created by
5 the Steuben County Court is in place for 2022. But
6 there's nothing in that opinion or in the New York
7 Constitution that mandates that that map must be used for
8 the remainder of the decade. And I would contend that
9 that is not consistent with what the people of New York
10 wanted when they passed -- or when they voted for the 2014
11 amendments.

12 THE COURT: Would annual judicial reviews be
13 contrary to the constitutional intent that an approved
14 congressional map, as here we're only talking about the
15 congressional maps, be in place for 10 years? Can we do
16 this every year? Wouldn't that run afoul of the intent
17 defined in the constitution that maps as approved within
18 the structure are to be in place for 10 years?

19 MS. BRANCH: Sure. And I don't think that that
20 is a concern because I don't think that annually there
21 will be a violation of law that will necessitate judicial
22 intervention.

23 THE COURT: Well, how do you know?

24 MS. BRANCH: I mean we don't know, but I
25 think --

1 THE COURT: What if it goes back to the IRC and
2 they do the same thing and they deadlock and then there's
3 a proceeding and then there's a court order for a map?
4 And then it opens up again the following year and once
5 again the IRC because, you know, we had a demonstrated
6 lack of a bipartisan effort here, and couldn't this
7 generate annual reviews, and wouldn't that be contrary to
8 the constitutional intent that maps be in place for 10
9 years to provide stability to the electoral process?

10 MS. BRANCH: Well, so I don't think that there
11 is -- I don't think that the constitution says that maps
12 have to be in place for 10 years if there is a legal
13 violation. Like that is what Section 4E --

14 THE COURT: But the legal violation has been
15 cured.

16 MS. BRANCH: The legal violation hasn't been
17 cured because the map that was put in place by Steuben
18 County was drawn by a special master. It wasn't put in
19 place pursuant to the carefully crafted process that New
20 Yorkers voted for.

21 THE COURT: The carefully crafted process that
22 the Legislature prepared when it proposed the
23 constitutional amendments, the process in adopting Article
24 III when you read Sections 4B and E together recognize the
25 reality that you got a structure for the Legislature to

1 act, but it doesn't happen. It provides for judicial
2 remedy.

3 So what is the violation today that would
4 sustain mandamus relief, whereas here the failure to
5 submit the second set of redistricting plans prior to
6 February 28, 2022, has already been remedied by the
7 McAllister decision approving the 2022 congressional maps?
8 So what's the violation now that necessitates a remedy in
9 the form of mandamus when that relief has already been
10 accomplished?

11 MS. BRANCH: So the Steuben County map has
12 remedied -- so, as I stated before, I don't think that the
13 Steuben County map has remedied the violation that we have
14 identified here. And the reason is because it was not
15 drawn pursuant to the process involving the IRC and the
16 Legislature.

17 THE COURT: But the process contemplates a
18 breakdown legislatively and within the Commission and a
19 judicial remedy.

20 MS. BRANCH: And I think the big difference
21 though between what happened previously and what the
22 current situation is is that previously there was the 2021
23 legislation in place, right? And under that legislation
24 there was this backstop. There was this alternative
25 procedure, such that if the Commission did not send the

1 second set of maps, it was okay for the Legislature to
2 step up and --

3 THE COURT: But didn't the court in Harkenrider
4 rule that as unconstitutional?

5 MS. BRANCH: Right. But when the Commission was
6 determining whether to send the second set of maps, that
7 2021 legislation was still in place. And so what has
8 changed is that that legislation has now been declared
9 invalid and --

10 THE COURT: So absent the 2021 legislation,
11 which has been declared invalid, is it your contention
12 that the Commission would work in good faith together to
13 prepare a second set of redistricting maps for use
14 throughout the balance of the decade?

15 MS. BRANCH: I mean I can't predict the future.
16 But I do think we have on record representations from
17 Ms. Amunson's clients, which includes the chair of the
18 IRC, that if they're ordered to send a second set of maps
19 to the Legislature, they stand ready to do so. The
20 Commission --

21 THE COURT: What if they don't have consensus?
22 You indicated, or someone indicated, I kind of lost track,
23 that -- and I think it was -- Jessica, I think you might
24 have said this earlier, that your clients were willing to
25 work forward in doing the second set of redistricting

1 plans, but that Tim's clients refused to participate at
2 that time. And I believe there was a deadlock in the
3 papers along those lines.

4 MS. RING AMUNSON: Well, Your Honor, I do want
5 to clarify. You used the term deadlocked several times
6 and the constitution does actually contemplate what
7 happens in the event of a deadlock, which is that the
8 commissioners can send two separate sets of plans to the
9 Legislature.

10 THE COURT: They did that the first set.

11 MS. RING AMUNSON: They did that the first time
12 around. What happened the second time around is not just
13 a deadlock but a refusal to meet. Denial of a quorum to
14 meet to even vote such that the Commission was disabled
15 from being able to send either two sets of maps or one set
16 of maps to the Legislature.

17 So, essentially there was no ability to send a
18 second set of maps. At that point, as Ms. Branch pointed
19 out and as Your Honor has acknowledged, the 2021
20 legislation was in place which contemplated that the
21 Legislature would take over in the event that no second
22 set of maps was voted on from the Commission.

23 So that is in fact what happened and that is the
24 violation essentially that was at issue, the Legislature
25 taking over without the Commission having sent a second

1 set of maps, without having voted on a second set of maps.

2 THE COURT: Okay. Well, thank you all for your
3 respective arguments. I will reserve decision. As is my
4 practice, I will be issuing a written decision. Have a
5 nice day.

6 MS. BRANCH: Thank you, Your Honor.

7 MS. RING AMUNSON: Thank you, Your Honor.

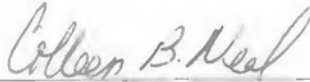
8 MR. HILL: Thank you, Your Honor.

9 MR. TSEYTLIN: Thank you.

10 (The proceedings in the above-entitled matter
11 were concluded at approximately 2:16 p.m.)
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C E R T I F I C A T E

I, **COLLEEN B. NEAL**, Senior Court Reporter in and for the Third Judicial District, State of New York, **DO HEREBY CERTIFY** that the foregoing is a true and correct transcript of my stenographic notes in the above-entitled matter.



Colleen B. Neal, Senior Court Reporter
Albany County Courthouse
Albany, New York 12207

STIPULATION AND ORDER OF SUBSTITUTION PURSUANT TO N.Y. CPLR § 1019, DATED DECEMBER 7, 2022 [398 - 400]

FILED: ALBANY COUNTY CLERK 12/07/2022 02:45 PM

NYSCEF DOC. NO. 186

INDEX NO. 904972-22

RECEIVED NYSCEF: 12/07/2022

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

----- X
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,

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 David Imamura; 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

-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

----- X

Index No. 904972-22

**STIPULATION AND ORDER
OF SUBSTITUTION
PURSUANT TO N.Y. C.P.L.R.
§ 1019**

WHEREAS, Respondent David Imamura was named in this lawsuit in his official capacity as a Commissioner of the New York State Independent Redistricting Commission (the “IRC”);

WHEREAS, Mr. Imamura resigned as a member of the IRC effective November 15, 2022;

WHEREAS, Ken Jenkins was appointed to the IRC effective November 16, 2022; and

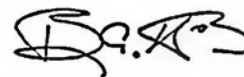
WHEREAS, this matter having come before the Court by stipulation by and between the attorneys for the Petitioners ANTHONY S. HOFFMANN, MARCO CARRIÓN, COURTNEY GIBBONS, LAUREN FOLEY, MARY KAIN, KEVIN MEGGETT, CLINTON MILLER, SETH PEARCE, VERITY VAN TASSEL RICHARDS, AND NANCY VAN TASSEL, and the attorneys for Respondent DAVID IMAMURA and KEN JENKINS, for the substitution of Mr. Jenkins for Mr. Imamura; and these parties, by, between, and among their respective counsel, having stipulated and agreed to the terms set forth herein, and good cause having been shown;

IT IS hereby ORDERED that:

1. Pursuant to N.Y. C.P.L.R. § 1019, Ken Jenkins is substituted for David Imamura in this proceeding and the corresponding appeal noticed in the Appellate Division, Third Department.
2. Upon the ordering of this stipulation by the Supreme Court, Counsel for Petitioners will update the cover page in any filings with the Appellate Division, Third Department to reflect this substitution.
3. Facsimile signatures shall be deemed as effective as original signatures, for purposes of submission of this Stipulation and Order to the Court.

Dated: December 7, 2022

ENTER, 
 HON. PETER A. LYNCH, J.S.C.



FILED: ALBANY COUNTY CLERK 12/07/2022 02:45 PM

NYSCEF DOC. NO. 186

INDEX NO. 904972-22

RECEIVED NYSCEF: 12/07/2022

STIPULATED AND AGREED:

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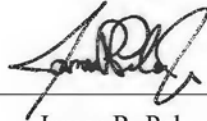
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CERTIFICATION PURSUANT TO CPLR §2105

I, James R. Peluso, Esq., of Dreyer Boyajian, LLP, attorneys for Petitioners-Appellants, hereby certify pursuant to Section 2105 of the CPLR that the foregoing papers constituting the Record on Appeal have been personally compared by me with the originals filed herein and have been found to be true and complete copies of said originals and the whole thereof, all of which are now on file with the Clerk of the County of Albany.

Dated: January 20, 2023



James R. Peluso, Esq.

STATEMENT PURSUANT TO CPLR 5531**Court of Appeals**

STATE OF NEW YORK



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

Petitioners-Respondents,

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

against

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

Respondents-Respondents,

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

Respondents-Appellants,

and

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

Intervenors-Respondents-Appellants.

1. The index number of the case in the court below is 904972-22.
2. The full names of the original parties are set forth above. The caption was amended by the following:

Decision and Order, dated August 1, 2022 which added Petitioners Marco Carrión, Mary Kain, Kevin Meggett, Clinton Miller and Verity Van Tassel Richards.

Decision and Order dated September 1, 2022 which added Intervenor-Respondents 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.

Stipulation and Order dated December 7, 2022 which amended the caption to substitute Respondent Independent Redistricting Commission Chairperson David Imamura with Respondent Independent Redistricting Chairperson Kenneth Jenkins.

3. The action was commenced in Supreme Court, Albany County.
4. The action was commenced on or about June 28, 2022 by filing a Verified Petition. An Amended Verified Petition was filed on or about August 4, 2022. Issue was joined by service of a Verified Answer on or about August 26, 2022 by Respondent Independent Redistricting Commissioners David Imamura, Ivelisse Cuevas-Molina and Elaine Frazier. A motion to dismiss was filed on or about August 26, 2022 by Respondent Independent Redistricting Commissioners Ross Brady, John Conway III, Lisa Harris, Charles Nesbitt and Willis H. Stephens. A motion to dismiss was filed on or about September 2, 2022 by the Intervenor-Respondents.
5. The nature and object of the action is an Article 78 proceeding to compel Respondents to timely prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such a plan corresponding to the 2020 federal census.
6. The appeal is from the Opinion and Order of the Appellate Division, Third Department, entered July 13, 2023.
7. This appeal is being perfected with the use of a fully reproduced Joint Record on Appeal.

Notice of Appeal by Intervenors-Respondents,
dated July 25, 2023
[pp. 404 - 406]

FILED: ALBANY COUNTY CLERK 07/25/2023 12:19 PM

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RECEIVED NYSCEF: 07/25/2023

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X

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,

Index No. 904972-22

Petitioners,

-against-

Appellate Division Docket
No. CV-22-2265

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,

NOTICE OF APPEAL

Respondents,

-and-

Tim Harkenrider; Guy C. Brought; Lawrence Canning;
Patricia Clarino; George Dooher, Jr.; Stephen Evans; Linda
Fanton; Jerry Fishman; Jay Frantz; Lawrence Garvey; Alan
Nephew; Susan Rowley; Josephine Thomas; and Marianne
Violante,

Intervenors-Respondents.

-----X

PLEASE TAKE NOTICE that Intervenors-Respondents 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, hereby appeal to the Court of Appeals of the State of New York from the annexed Appellate Division, Third Department’s corrected Opinion And Order, App. Div.

FILED: ALBANY COUNTY CLERK 07/25/2023 12:19 PM

NYSCEF DOC. NO. 188

INDEX NO. 904972-22

RECEIVED NYSCEF: 07/25/2023

NYSCEF No.81, decided and entered on July 13, 2023 (corrected version entered on July 14, 2023). This appeal is taken from every part of the Order that aggrieves Intervenors-Respondents and is appealable by them.

DATED: Albany, New York
July 25, 2023

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By: 

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FILED: ALBANY COUNTY CLERK 07/25/2023 12:19 PM

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RECEIVED NYSCEF: 07/25/2023

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Notice of Appeal by Independent Redistricting Commissioners
Ross Brady, John Conway III, Lisa Harris, Charles Nesbitt
and Willis H. Stephens, dated July 25, 2023
[pp. 407 - 409]

FILED: ALBANY COUNTY CLERK 07/25/2023 03:15 PM

NYSCEF DOC. NO. 189

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RECEIVED NYSCEF: 07/25/2023

STATE OF NEW YORK
COURT OF APPEALS

In the Matter of Anthony S. Hoffmann, Marco Carrion,
Courtney Gibbons, Lauren Foley, Mary Kain, Kevin
Meggett, Clinton Miller, Seth Pearce, Verity Van Tassel
Richards, and Nancy Van Tassel,

Petitioners,

- against -

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,

-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.

NOTICE OF APPEAL

Index No. 904972-22 (Albany)

Third Department Docket
No. CV-22-2265

PLEASE TAKE NOTICE that Respondents Independent Redistricting Commissioner
Ross Brady, Independent Redistricting Commissioner John Conway III, Independent
Redistricting Commissioner Lisa Harris, Independent Redistricting Commissioner Charles
Nesbitt, and Independent Redistricting Commissioner Willis H. Stephens, hereby appeal to the

FILED: ALBANY COUNTY CLERK 07/25/2023 03:15 PM

NYSCEF DOC. NO. 189

INDEX NO. 904972-22

RECEIVED NYSCEF: 07/25/2023

Court of Appeals of the State of New York from the corrected Opinion and Order of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, decided and entered on July 13, 2023, (corrected Opinion and Order entered on July 14, 2023 as NYSCEF Doc. No. 81 of the Appellate Division Docket CV-22-2265), and from each and every part thereof.

Dated: Sayville, New York
July 25, 2023

PERILLO HILL LLP

By:



Timothy F. Hill

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*Attorneys for Respondent Commissioners
Brady, Conway III, Harris, Nesbitt, and
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FILED: ALBANY COUNTY CLERK 07/25/2023 03:15 PM

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RECEIVED NYSCEF: 07/25/2023

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**Opinion and Order of the
Appellate Division, Third Department,
entered July 13, 2023, Appealed From
[pp. 410 - 426]**

FILED: APPELLATE DIVISION - 3RD DEPT 08/18/2023 12:37 PM

CV-22-2265

NYSCEF DOC. NO. 85

State of New York

RECEIVED NYSCEF: 08/18/2023

Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 13, 2023

CV-22-2265

In the Matter of ANTHONY S.
HOFFMANN et al.,
Appellants,

v

OPINION AND ORDER

NEW YORK STATE INDEPENDENT
REDISTRICTING
COMMISSION et al.,
Respondents.

Calendar Date: June 8, 2023

Before: Garry, P.J., Egan Jr., Pritzker, Reynolds Fitzgerald and McShan, JJ.

Elias Law Group, LLP, Washington, DC (*Aria C. Branch* of counsel, admitted pro hac vice), for appellants.

Jenner & Block LLP, Washington, DC (*Jessica Ring Amunson* of counsel, admitted pro hac vice), for Ken Jenkins and others, respondents.

Perillo Hill, LLP, Sayville (*Timothy F. Hill* of counsel), for Ross Brady and others, respondents.

Troutman Pepper Hamilton Sanders LLP, New York City (*Misha Tseytlin* of counsel), for Timothy Harkenrider and others, intervenors.

Letitia James, Attorney General, New York City (*Andrea W. Trento* of counsel), for the Governor and another, amici curiae.

Covington & Burling LLP, New York City (*P. Benjamin Duke* of counsel), for Scottie Coads and others, amici curiae.

Garry, P.J.

Appeal from a judgment of the Supreme Court (Peter A. Lynch, J.), entered September 14, 2022 in Albany County, which, in a proceeding pursuant to CPLR article 78, granted certain respondents' motions to dismiss the amended petition.

This CPLR article 78 proceeding involves the same factual circumstances as those that gave rise to *Matter of Harkenrider v Hochul* (38 NY3d 494 [2022]). Given the import of that prior proceeding to the mandamus relief sought here, those circumstances merit a rather lengthy discussion. Every 10 years, following each federal census, reapportionment of the senate, assembly and congressional districts in New York must be undertaken (*see* NY Const, art III, § 4). The power to draw those district lines was historically reserved to the Legislature, and, "[p]articularly with respect to congressional maps, exclusive legislative control has repeatedly resulted in stalemates, with opposing political parties unable to reach consensus on district lines" (*Matter of Harkenrider v Hochul*, 38 NY3d at 502). "[I]n response to criticism of [that] scourge of hyper-partisanship" (*id.* at 514), the People of the State of New York amended the NY Constitution in 2014 to reform the redistricting process, both procedurally and substantively, ushering in "a new era of bipartisanship and transparency" (*id.* at 503). This reform established respondent Independent Redistricting Commission (hereinafter the IRC) to draft the electoral maps. Most basically, the 2014 constitutional amendments charge the IRC with the obligation to prepare a redistricting plan and submit that plan, with appropriate implementing legislation, to the Legislature for a vote without amendment (*see* NY Const, art III, §§ 4 [b]; 5-b [a]). If that first plan is rejected, the IRC is required to prepare a second plan and the necessary implementing legislation that, again, would be subject to a vote by the Legislature without amendment (*see* NY Const, art III, § 4 [b]). Only upon rejection of that second plan may the Legislature, under the constitutional procedure, "amend[]" the maps drawn by the IRC (NY Const, art III, § 4 [b]). Any such legislative amendments are then statutorily limited to those that would affect no more than two percent of the population in any district (*see* L 2012, ch 17, § 3).

The 2020 federal census provided the first opportunity for the IRC to carry out its constitutionally-mandated duties. In the midst of that redistricting cycle, however, the Legislature attempted to amend the constitutional procedure and authorize itself to introduce redistricting legislation "[i]f . . . the [IRC] fails to vote on a redistricting plan and implementing legislation by the required deadline" (2021 NY Senate-Assembly Concurrent Resolution S515, A1916). Voters rejected that proposed amendment. Thereafter, in 2021, the Legislature enacted similar modifications to the constitutional

redistricting process by statute (*see* L 2021, ch 633). The IRC submitted its first redistricting plan to the Legislature on January 3, 2022 – before its January 15, 2022 deadline to do so (*see* NY Const, art III, § 4 [b]). Because the IRC had reached an impasse, it submitted the two maps that had garnered equal IRC support (*see* NY Const, art III, § 5-b [g]). On January 10, 2022, the Legislature rejected both of those maps, triggering the IRC's constitutional obligation to prepare and submit a second redistricting plan within 15 days and "in no case later than February [28, 2022]" (NY Const, art III, § 4 [b]). The IRC became deadlocked, and, on January 24, 2022, it announced that it would not be submitting a second redistricting plan to the Legislature. Shortly thereafter, the Legislature, invoking its 2021 legislation, composed new senate, assembly and congressional maps, which were signed into law on February 3, 2022.

The litigation in *Harkenrider* commenced immediately. The petitioners in that case argued, as relevant here, that the Legislature's 2022 enactment of congressional and senate maps was in contravention of the constitutional process (*Matter of Harkenrider v Hochul*, 38 NY3d at 505).¹ Ultimately, the Court of Appeals agreed that the enactment was procedurally unconstitutional (*id.* at 508-517).² To remedy that procedural violation, the Court concluded 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" (*id.* at 502). It then "endorse[d] the procedure directed by Supreme Court [(McAllister, J.)] 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 [L]egislature, and any interested stakeholders who wish to be heard" (*Matter of Harkenrider v Hochul*, 38 NY3d at 523). Supreme Court complied with that directive, and, after a public hearing and receipt of substantial public comment, the court certified the congressional and senate maps prepared by a special master as "the official approved 2022 [c]ongressional map and the 2022 [s]tate [s]enate map" (*Matter of Harkenrider v Hochul*, 2022 NY Slip Op 31471[U], *4 [Sup Ct, Steuben County 2022]).

¹ The assembly map was not challenged in *Harkenrider* (*Matter of Harkenrider v Hochul*, 38 NY3d at 521 n 15). That map was the subject of subsequent litigation (*Matter of Nichols v Hochul*, 212 AD3d 529 [1st Dept 2023], *appeal dismissed* 39 NY3d 1119 [2023]).

² It further held that the 2022 congressional and senate maps were unconstitutionally gerrymandered in favor of the majority party (*Matter of Harkenrider v Hochul*, 38 NY3d at 518-520).

The court subsequently made minor revisions to those maps and ordered that the maps, as modified, are "the final enacted redistricting maps" (*Matter of Harkenrider v Hochul*, Sup Ct, Steuben County, June 2, 2022, McAllister, J., index No. E2022-0116CV, NYSCEF doc. No. 696).

Petitioners thereafter commenced this CPLR article 78 proceeding to compel the IRC "to prepare and submit to the [L]egislature a second redistricting plan and the necessary implementing legislation for such plan . . . in order to ensure a lawful plan is in place . . . for subsequent elections this decade" (quotation marks omitted).³ Certain IRC commissioners answered indicating that they did not oppose the relief sought by petitioners. Other commissioners, along with the *Harkenrider* petitioners – who are intervenors here – moved to dismiss the proceeding, foremost arguing that the redistricting process based upon the 2020 federal census is complete and that the congressional map generated by that process governs all elections until the redistricting process begins anew following the 2030 federal census. Supreme Court (Lynch, J.) agreed, dismissing the petition, and petitioners appeal.⁴

Initially, we reject the alternative ground for affirmance that this proceeding is untimely. The 2021 legislation in effect at the time of the IRC's failure to submit a second redistricting plan to the Legislature provided that, "[i]f the [IRC] does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan, the [IRC] shall submit to the [L]egislature all plans in its possession, both completed and in draft form, and the data upon which such plans are based," and that each house must then "introduce such implementing legislation with any amendments each house deems necessary" (*see* L 2021, ch 633, § 1). In this CPLR article 78 proceeding, petitioners seek strict compliance with the constitutionally enshrined IRC

³ Petitioners originally sought relief with respect to both the congressional and senate maps, but their amended pleading pertains to the congressional map only.

⁴ This Court granted two applications for leave to file amici curiae briefs: one by the Governor and the Attorney General and one by several voters, including the Civil Engagement Chair of the New York State Conference of the National Association for the Advancement of Colored People and two of the plaintiffs from *Favors v Cuomo* (2012 WL 928223, 2012 US Dist LEXIS 36910 [ED NY 2012]), litigation that challenged the Legislature's redistricting process following the 2010 federal census and resulted in a federal court ordering the adoption of a 2012 judicially-drafted congressional redistricting plan. The amici support granting the relief requested by petitioners.

procedure, which does not tolerate a nonvote. Thus, that claim accrued when the 2021 legislation was deemed unconstitutional to the extent that it permitted the Legislature "to avoid a central requirement of the reform amendments" (*Matter of Harkenrider v Hochul*, 38 NY3d at 517), a determination first made by Supreme Court (McAllister, J.) on March 31, 2022. Petitioners commenced this proceeding on June 28, 2022, well within the period in which to do so (*see* CPLR 217 [1]).

In support of their claim for mandamus relief, petitioners argue that, under the plain language of the NY Constitution, the IRC has a nondiscretionary duty to submit a second set of redistricting plans to the Legislature if its first set of plans is rejected by legislative vote. Petitioners assert that *Harkenrider* exclusively addressed the Legislature's constitutional violations and, thus, did not remedy the IRC's failure to perform that duty. They further claim that, because the court-ordered congressional map adopted in *Harkenrider* was merely an interim map for the purpose of the 2022 elections, they have a clear legal right to the performance of that duty.

Against the backdrop of the 2014 redistricting reforms, these arguments are compelling. As the sponsors explained, the reforms were intended "to achieve a fair and readily transparent process" and "ensure that the drawing of legislative district lines in New York will be done by a bipartisan, independent body" (Assembly Mem in Support, 2012 NY Senate-Assembly Concurrent Resolution S6698, A9526; Senate Introducer's Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). The carefully crafted constitutional process was further meant to enable, "[f]or the first time, both the majority and minority parties in the [L]egislature [to] have an equal role in the process of drawing lines" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). "Just as important, the enactment of the constitutional amendment" was intended to "give the voters of New York a voice in the adoption of this new process and[,] by enshrining it in the constitution, ensure that the process will not be changed without due considerations" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). These "far-reaching" constitutional reforms were anticipated to "set the standard for independent redistricting throughout the United States" (Assembly Mem in Support, 2013 NY Senate-Assembly Concurrent Resolution S2107, A2086). Instead, the reforms were thwarted, and these goals were not met. As petitioners' counsel repeatedly asserted at oral argument, this proceeding seeks to "vindicate the purpose" of the redistricting amendments.

In addition to evaluating the various constitutional provisions cited to by the parties, we are now in the uncomfortable position of discerning what the Court of

Appeals intended by its silence regarding the critical issue of the duration relative to the judicial remedy it imposed. We are necessarily limited in our ability to infer such intention in this delicate and highly charged matter of significant public concern. As certain respondents, and the dissent here, assert, there is a clear default duration for electoral maps provided for in the NY Constitution: "[a] reapportionment plan and the districts contained in such plan shall be in force until the effective date of a plan based upon the subsequent decennial census taken in a year ending in zero unless modified pursuant to court order" (NY Const, art III, § 4 [e]).

Petitioners urge that the Court of Appeals was endeavoring simply to expediently provide a remedy for the immediately pressing needs of the 2022 election, pointing to various phrases within the *Harkenrider* decision. Indeed, the Court succinctly stated at the outset of its decision that the maps being ordered would be "for use in the 2022 election" (*Matter of Harkenrider v Hochul*, 38 NY3d at 502). It is repeated later that the state was left "without constitutional district lines for use in the 2022 primary and general elections" (*id.* at 521). Underscoring the urgency, there is then considerable discussion of the need to move the 2022 primaries (*id.* at 522-523). Ultimately, the subject map was certified as the "2022 [c]ongressional map" (*Matter of Harkenrider v Hochul*, 2022 NY Slip Op 31471[U] at *4 [emphasis added]); this could equally refer to the year in which the map was adopted, effective or limited to. Most persuasively, throughout its decision, the Court continuously emphasized that the 2014 amendments "were carefully crafted to *guarantee*," or *ensure*," "that redistricting maps have their origin in the collective and transparent work product of a bipartisan commission" (*Matter of Harkenrider v Hochul*, 38 NY3d at 513, 514 [emphasis added]). It is apparent that, due to the then-fast-approaching 2022 election cycle, there was a reason to forgo the overarching intent of the amendments. The majority in *Harkenrider* concluded by acknowledging the guiding principle that the NY Constitution is "the will of the people of this state" and that it intended to adhere to that will in disposing of the matter before it (*id.* at 524). We too must be guided by the overarching policy of the constitutional provision: broad engagement in a transparent redistricting process.

Crucially, the same provision giving the default duration for electoral maps also limits the degree to which judicial remediation should influence the redistricting process: "[t]he process for redistricting congressional and state legislative districts established by [the redistricting 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" (NY Const, art III, § 4 [e] [emphasis added]). The Court of Appeals, as it emphasized in *Harkenrider*, was required to fashion a remedy that would

provide valid maps in time for the 2022 elections, and it did so (*see Matter of Harkenrider v Hochul*, 38 NY3d at 522). To interpret the Court's decision as further diverting the constitutional redistricting process, such that the IRC cannot now be called upon to do its duty, would directly contradict this express limiting language in the provision that grants the courts the power to intervene. Simply put, the Court was not "required" to divert the constitutional process beyond the then-imminent issue of the 2022 elections. For these several reasons, in the complete absence of any explicit direction, we decline to infer that the Court intended its decision to have further ramifications than strictly required. Accordingly, we do not conclude that *Harkenrider* forecloses the relief now sought by petitioners.

Mandamus to compel lies where an administrative body has failed to perform a duty enjoined upon it by law, the performance of said duty is ministerial and mandatory, rather than discretionary, and there is a clear right to the relief sought (*see New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005]; *Matter of Hussain v Lynch*, 215 AD3d 121, 125-126 [3d Dept 2023]). Discretionary acts involve the exercise of judgment that may produce different and acceptable results (*see Tango v Tulevech*, 61 NY2d 34, 41 [1983]; *see also Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018], *cert denied* ___ US ___, 139 S Ct 2651 [2019]).

The IRC had an indisputable duty under the NY Constitution to submit a second set of maps upon the rejection of its first set (*see NY Const*, art III, § 4 [b]). The language of NY Constitution, article III, § 4 makes clear that this duty is mandatory, not discretionary. It is undisputed that the IRC failed to perform this duty. Further, we agree with petitioners that *Harkenrider* left unremedied the IRC's failure to perform its duty to submit a second set of maps. There were two questions posed before the Court of Appeals in *Harkenrider*, neither of which addressed the IRC's duty (*Matter of Harkenrider v Hochul*, 38 NY3d at 501-502). The challenge brought and the remedy granted were directed at the Legislature's unconstitutional reaction to the IRC's failure to submit maps, rather than the IRC's failure in the first instance (*see id.* at 505-506; *Matter of Harkenrider v Hochul*, 76 Misc 3d 171, 173 [Sup Ct, Steuben County 2022], *mod* 204 AD3d 1366 [4th Dept 2022], *affd* 38 NY3d 494 [2022]). *Harkenrider* addresses the IRC's inaction solely by way of factual background, and the IRC's discrete failure to perform its

constitutional duty was left unaddressed until this proceeding.⁵ Indeed, the fact that the deadline for the IRC's submission had passed influenced the practicalities of the remedy fashioned in *Harkenrider*; the only way to prepare valid maps for the 2022 election, at that time, was through judicial creation of those maps (*see Matter of Harkenrider v Hochul*, 38 NY3d at 523). To hold today that the passing of the deadline leaves petitioners with no remedy would render meaningless the distinct constitutional command that the IRC create a second set of maps.

In light of the foregoing, petitioners have demonstrated a clear legal right to the relief sought. This determination honors the constitutional enactments as the means of providing a robust, fair and equitable procedure for the determination of voting districts in New York.⁶ The right to participate in the democratic process is the most essential right in our system of governance. The procedures governing the redistricting process, all too easily abused by those who would seek to minimize the voters' voice and entrench themselves in the seats of power, must be guarded as jealously as the right to vote itself; in granting this petition, we return the matter to its constitutional design.⁷ Accordingly, we direct the IRC to commence its duties forthwith.

⁵ It follows that this proceeding does not constitute a collateral attack on that determination; we are merely addressing a discrete and previously unaddressed issue in a proceeding brought by different parties.

⁶ We disagree with Supreme Court's characterization of petitioner's relief as "provid[ing] a path to an annual redistricting process," as the right to compel the IRC to submit a second set of redistricting maps will be exhausted once it has done so. We further note that the IRC's inability to reach consensus was subsequently overcome relative to the assembly maps (*see generally* New York Independent Redistricting Commission, *NYIRC Assembly 2023*, available at https://www.nyirc.gov/storage/plans/20230420/assembly_plan.pdf [last accessed July 6, 2023]).

⁷ Our dissenting colleagues cite to a publication by the Brennan Center for Justice analyzing the most recent redistricting cycle nationwide (*see* Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, Brennan Center for Justice [Aug. 11, 2022], available at <https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction> [last accessed July 6, 2023]). We are happy to note that this analysis reveals that the highest percentage of competitive districts emerge from court-drawn maps and, unsurprisingly, that one-party control results in a much smaller percentage of competitive districts (*see* Li &

Reynolds Fitzgerald and McShan, JJ., concur.

Pritzker, J. (dissenting).

We respectfully dissent because, initially, we find the proceeding untimely and would affirm on this alternate ground. In addition, substantively and contrary to the majority's conclusions, it is our opinion that the Court of Appeals in *Matter of Harkenrider v Hochul* (38 NY3d 494 [2022]) remedied the refusal of respondent Independent Redistricting Commission (hereinafter the IRC) to perform its duty, and, further, that the court-ordered congressional map is not interim but, rather, final and otherwise in force until after the 2030 census. Since the map is final, there is no longer a ministerial duty for the IRC to perform and therefore mandamus cannot lie. Moreover, public policy and the spirit of the 2014 constitutional amendments do not support the notion that the IRC should get a mandamus mulligan. Significantly, the judicial redistricting plan has been found to be competitive – although perhaps too competitive for some (*see* Michael Li & Chris Leaverton, *Gerrymandering Competitive Districts to Near Extinction*, Brennan Center for Justice [Aug. 11, 2022], available at <https://www.brennancenter.org/our-work/analysis-opinion/gerrymandering-competitive-districts-near-extinction> [last accessed July 6, 2023] [noting that, in New York, under the court-ordered redistricting maps, "almost one in five seats are competitive, [which is] the highest percentage in the country for a large state"]). For these reasons, we would affirm Supreme Court's dismissal of the petition.

First, we turn our attention to the issue of timeliness. For purposes of a mandamus proceeding, pursuant to CPLR 217 (1), "a proceeding against a body or officer must be commenced within four months . . . after the respondent's refusal, upon the demand of the petitioner or the person whom he [or she] represents, to perform its duty" (*see Matter of EZ Props., LLC v City of Plattsburgh*, 128 AD3d 1212, 1215 [3d Dept 2015]). As relevant here, "[a] petitioner . . . may not delay in making a demand in order to indefinitely postpone the time within which to institute the proceeding. The petitioner must make his or her demand within a reasonable time after the right to make it occurs, or

Leaverton). It further bears noting that the analysis concludes that, "[i]f Americans hope to reverse the long-term decline of competitive districts, reforms to create fairer, more independent map-drawing processes will be essential" (Li & Leaverton). This was the aim of the 2012-2014 Legislature, and we find that it created a path to be followed *now*, rather than waiting until the next decade.

after the petitioner knows or should know of the facts which give him or her a clear right to relief, or else, the petitioner's claim can be barred by the doctrine of laches. The term laches, as used in connection with *the requirement* of the making of a prompt demand in mandamus proceedings, refers solely to the unexcused lapse of time and does not refer to the equitable doctrine of laches" (*Matter of Granto v City of Niagara Falls*, 148 AD3d 1694, 1695 [4th Dept 2017] [internal quotation marks, brackets and citations omitted; emphasis added]; see *Matter of Sheerin v New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 NY2d 488, 495-496 [1979]). "Th[is] reasonable time requirement for a prompt demand should be measured by CPLR 217 (1)'s four-month limitations period, and thus, a demand should be made no more than four months after the right to make the demand arises" (*Matter of Zupa v Zoning Bd. of Appeals of Town of Southold*, 64 AD3d 723, 725 [2d Dept 2009] [citations omitted]). In certain instances, the commencement of a proceeding pursuant to CPLR article 78 constitutes a demand (see *Matter of Butkowski v Kiefer*, 140 AD3d 1755, 1756 [4th Dept 2016]; *Matter of Gopaul v New York City Employees' Retirement Sys.*, 122 AD3d 848, 849 [2d Dept 2014]).

Here, we must determine when it was reasonable for petitioners to demand that the IRC act and, therefore, when the statute of limitations accrued. As to the relevant time frame, on January 3, 2022, the IRC submitted the two plans to the Legislature that were rejected on January 10, 2022. Thereafter, the IRC was unable to come to a consensus regarding a second proposal and, on January 24, 2022, announced that it would not be submitting a second proposal. The Legislature began to draft its own plan, which was enacted on February 3, 2022. The *Harkenrider* proceeding was commenced that same day. On May 20, 2022, Supreme Court (McAllister, J.) issued the final order therein establishing the new state senate and congressional districts. On June 28, 2022, petitioners commenced the instant proceeding seeking to compel the IRC to submit a second proposed congressional redistricting plan to the Legislature. In our view, under black letter mandamus jurisprudence, it was no later than January 24, 2022 that "petitioner[s] kn[ew] or should [have] know[n] of the facts which [gave them] a clear right to relief" (*Matter of Granto v City of Niagara Falls*, 148 AD3d at 1695 [internal quotation marks and citation omitted]). However, petitioners did not make a demand until June 28, 2022, when they commenced this proceeding, over a month past the running of the four-month statute of limitations set forth in CPLR 217 (1). As such, "petitioner[s] unreasonably delayed in making the demand and . . . this proceeding is barred by laches" (*Matter of Densmore v Altmar-Parish-Williamstown Cent. School Dist.*, 265 AD2d 838, 839 [4th Dept 1999], *lv denied* 94 NY2d 758 [2000]; see *Matter of Granto v City of Niagara Falls*, 148 AD3d at 1696; *Matter of van Tol v City of Buffalo*, 107 AD3d 1626, 1627 [4th Dept 2013]; *Matter of Schwartz v Morgenthau*, 23 AD3d 231, 233 [1st Dept

2005], *affd* 7 NY3d 427 [2006]; compare *Matter of Speis v Penfield Cent. Schs.*, 114 AD3d 1181, 1183 [4th Dept 2014]; *Matter of Selective Ins. Co. of Am. v State of N.Y. Workers' Compensation Bd.*, 102 AD3d 72, 76-77 [3d Dept 2012]).¹

Briefly, we reject the alternate theories that have been advanced in this case as to when the statute of limitations accrued. First, it is true that NY Constitution, article III, § 4 (b) provides that, if the initial redistricting plan is rejected by the Legislature, the IRC, "[w]ithin [15] days of such notification and in no case later than February [28th], . . . shall prepare and submit . . . a second redistricting plan."² Here, however, this February 28 date has no relevance or application inasmuch as, on January 24, the IRC announced that it would not submit a second plan. Moreover, the 15-day period to act after legislative rejection ended on January 25. Additionally, when the Legislature passed its own redistricting plan on February 3, the IRC *lost its ability* to *on its own* propose a second redistricting plan to the Legislature. As such, the February 28 date is a red herring. Further, we disagree with the majority's assertion that the statute of limitations did not accrue until the gap-filling legislation of 2021 was declared unconstitutional.³ To that end, the gap-filling legislation purported to allow the Legislature to draw its own maps, "if the [IRC] does not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan" (L 2021, ch 633, § 1). Significantly, this legislation did not excuse the IRC from "its constitutional obligations" to propose a second plan, which is precisely what petitioners, and the majority, claim is the "the

¹ Certainly, the unreasonableness of petitioners' delay in commencing this action is evident given that the *Harkenrider* petitioners' filing of a 67-page, 226-paragraph petition on February 3, 2022, just over one week after the IRC announced it would not be submitting a second redistricting plan and the same day the Legislature enacted its own plan. Indeed, from a laches point of view, it is reasonable to conclude that the delay was due to petitioners having favored the gerrymandered legislative maps, rather than the failure of the IRC to act.

² The plain language of this section establishes that the IRC has 15 days to prepare a second plan. The February 28 deadline does not extend this time frame, but rather is the final date for preparation of a second plan, even if that date does not provide the IRC with 15 days to prepare a second plan.

³ Although the majority does not discuss and explicitly reject the timeliness analysis of Supreme Court (Lynch, J.), its analysis implicitly does so. We are also unpersuaded by the court's timeliness analysis.

procedural violation at issue in this case." However, this harm would exist even if the gap-filling legislation was found constitutional because this legislation caused the same injury asserted in this mandamus proceeding, usurping the role of the IRC and enacting maps prior to the IRC offering a second plan. Thus, even if the gap-filling legislation had been found constitutional, it would have no bearing whatsoever on petitioners' assertion that the IRC failed to perform its constitutionally mandated duty by neglecting to submit a second congressional map, which triggered the mandamus relief requested herein and set the accrual date.⁴ As unlikely as it sounds, the gap-filling legislation should simply have led petitioners to be aligned with the *Harkenrider* petitioners, at least as to the need for IRC action *before* a final map is drawn by the Legislature.

Moving to the merits, even if the proceeding was timely, we would still affirm Supreme Court's dismissal of the petition based upon substantive infirmities. At the outset, we reject petitioners' contention, with which the majority agrees, that the court-ordered congressional map is interim – in place only for the purpose of the 2022 elections – rather than in place until after the 2030 census. Indeed, determination of this issue is crucial as the mandamus relief sought is hard-tethered to the duration of the relief ordered in *Harkenrider*. To that end, we disagree with the majority's position that the Court of Appeals, in *Harkenrider*, left us "in the uncomfortable position of discerning what the Court of Appeals intended by its silence regarding the critical issue of the duration relative to the judicial remedy it imposed." To the contrary, the plain language of the NY Constitution provides the duration in clear terms. "The process for redistricting congressional and state legislative districts [established by NY Constitution, article III, §§ 4, 5 and 5-b] 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. A reapportionment plan and the districts contained in such plan shall be in force until the effective date of a plan based upon the subsequent decennial census taken in a year ending in zero unless modified pursuant to court order" (NY Const, art III, § 4 [e]). The Court of Appeals directly cited to, and thereby incorporated, this section when discussing and approving the judicially drawn maps ordered by Supreme Court; "[t]hus, we endorse the procedure directed by Supreme Court to 'order the adoption of . . . a redistricting plan' " (*Matter of Harkenrider v Hochul*, 38 NY3d at 523, quoting NY Const, art III, § 4 [e]). Notably, there is no caveat nor limitation as to duration and, as such, it is our opinion that the Constitution requires that such court-ordered maps remain

⁴ In fact, the Court of Appeals noted in *Harkenrider* that mandamus could be one of the avenues of a voter aggrieved by IRC inaction (38 NY3d at 515 n 10). Of course, the proceeding would need to be timely (*see* CPLR 217 [1]).

in place until after the next census (*see* NY Const, art III, § 4 [e]). More to the point, the courts *could have* – yet did not – expressly order that the plan adopted in *Harkenrider* be interim and only remain in place until the IRC took action and implemented a legislative plan that met constitutional requirements following the 2022 election (*see e.g. Ely v Klahr*, 403 US 108, 110-111 [1971]; *Honig v Board of Supervisors of Rensselaer County*, 24 NY2d 861, 862 [1969]).

From a common sense point of view, we find the meaning clear and it is implausible to assert that any of the members of the Court of Appeals would leave the voters to grapple with an issue of this magnitude.⁵ Moreover, this view is also supported by Judge Troutman's reasoned dissent, wherein she raised the concern that the plan "may" be in place "for the next 10 years" (*Matter of Harkenrider v Hochul*, 38 NY3d at 527 [Troutman, J., dissenting]).⁶ Further, if it were an interim order, presumably there would be a directive that the IRC reconvene and the constitutionally mandated redistricting

⁵ We are also unpersuaded that it can be gleaned from the decisions in *Harkenrider* that the court-ordered congressional map only be used for the 2022 election cycle (*see Matter of Harkenrider v Hochul*, 38 NY3d 494; *Matter of Harkenrider v Hochul*, 204 AD3d 1366 [4th Dept 2022]; *Matter of Harkenrider v Hochul*, 76 Misc 3d 171 [Sup Ct, Steuben County 2022]). Although these decisions refer generally to the "2022 election" and the "2022 maps" (*see id.*), these references are not determinative, but rather are references to the next scheduled election for which the court-ordered maps would of course apply. Moreover, as pointed out by the majority, Supreme Court, after minor revisions to the maps were made, ordered that they are "the final enacted redistricting maps" (*Matter of Harkenrider v Hochul*, Sup Ct, Steuben County, June 2, 2022, McAllister, J., index No. E2022-0116CV, NYSCEF doc. No. 696).

⁶ Judge Troutman's use of the word "may" does not imply that the plan endorsed by the Court of Appeals is interim. Although the default duration for the redistricting maps is 10 years (*see* NY Const, art III, § 4 [e]), the duration is subject to other potentially successful challenges during the 10-year period, such as federal litigation under the Voting Rights Act (52 USC § 10301 *et seq.*). Additionally, had the majority intended the plan to be interim, surely Judge Troutman's colleagues would have explained this to her and presumably clarified this issue in the majority decision, allaying her concerns in this regard and alleviating the need to dissent on this point. In other words, if the plan were interim, there would be no need to be concerned with a 10-year term – nor would there be much ado arising from a one-year sunseting order.

process begin anew after the one-year period. Indeed, it is well "recognize[d] that a congressional districting plan will usually be in effect for at least 10 years and five congressional elections" (*Kirkpatrick v Preisler*, 394 US 526, 533 [1969]), much as there is a strong public policy in favor of the finality of elections (*see generally Matter of Lichtman v Board of Elections of Nassau County*, 27 NY2d 62, 66 [1970]). So too should there be a strong public policy in favor of the finality of the establishment of electoral districts, as "[l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system" (*Reynolds v Sims*, 377 US 533, 583 [1964]).

Next, we disagree with the majority's conclusion that the remedy in *Harkenrider* failed to address the IRC's refusal to submit a second set of redistricting maps to the Legislature.⁷ To the contrary, it is our opinion that the Court of Appeals quite clearly considered and addressed the IRC's constitutional violation, specifically its refusal to act, which is the precise injury alleged herein. The majority decision in *Harkenrider* rejected the State respondents' request for a chance to repair the legislation at issue and explained that "[t]he procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure. *The deadline in the Constitution for the IRC to submit a second set of maps has long since passed*" (*Matter of Harkenrider v Hochul*, 38 NY3d at 523 [emphasis added]). As such, the Court of Appeals, in considering a legislative fix, rejected same in part because, in their view, it was too late for the IRC to act. Further, the Court framed one of the petitioners' arguments, with which the Court agreed, as an assertion "that, *in light of the lack of compliance by the IRC and the [L]egislature with the procedures set forth in the Constitution, the [L]egislature's enactment of the 2022 redistricting maps contravened the Constitution*" (*Matter of Harkenrider v Hochul*, 38 NY3d at 508-509 [emphasis added]). Thus, the failure of the IRC to act, which is the limited subject of the instant mandamus proceeding, was considered and in fact is part and parcel of the Court of Appeals' finding of procedural constitutional infirmity infecting the 2022 maps.

In that same vein, from a conceptual point of view, simply put, the judicially adopted remedy in *Harkenrider* was authorized and, while perhaps not the only permissible remedy, and clearly not petitioners' preferred remedy, it repaired the procedural and substantive infirmities in a manner directly set forth in the NY

⁷ We do, however, agree that the *manner* in which the Court of Appeals addressed the IRC's failure to submit a second redistricting map is not the remedy now requested by petitioners.

Constitution (NY Const, art III, § 4 [e]). Indeed, during oral argument the judges of the Court of Appeals asked many probing questions concerning the different remedies available and the dissenting judges proposed different legislative remedies. In fact, the utility of crafting a legislative remedy under NY Constitution, article III, § 5-b was discussed at length and served as part of the basis for Judge Troutman's dissent, which would have required the "[L]egislature to adopt either of the two plans that the IRC has already approved pursuant to [NY Constitution, article III, §] 5-b (g)" (*Matter of Harkenrider v Hochul*, 38 NY3d at 525 [Troutman, J., dissenting]). In this regard, NY Constitution, article III, § 5-b (a) permits the IRC to reconvene outside the every 10-year period when "a court orders that congressional . . . districts be amended" in response to a successful legal challenge to a map, such as reestablishing the IRC to amend a map to address a violation of the Voting Rights Act due to the failure to include a minority district (*see generally Thornburg v Gingles*, 478 US 30 [1986]). Although this provision is not applicable to the instant proceeding because it was not utilized by petitioners as a basis for relief, and, more significantly, because petitioners are seeking a new map rather than an amended one, the significance of the Court of Appeals' attention to this provision in *Harkenrider* is only to demonstrate that it did specifically contemplate reestablishing the IRC.

The foregoing leads us to our ultimate conclusion that petitioners are not entitled to the extraordinary remedy of mandamus. As discussed above, the Court of Appeals was presented with alternative remedies in *Harkenrider*, including that posed by petitioners, and elected to have a special master establish a redistricting plan to be implemented by court order. To that end, from a mandamus perspective, the issue is not whether petitioners' requested relief is ever constitutionally available, but rather whether same may be mandated in the aftermath of a judicial redistricting. It is our view that the judicial remedy cured the IRC's failure to act by lawfully establishing a redistricting plan for the ordinary duration, leaving no uncured violation of law and thus foreclosing mandamus. Although it is not unreasonable for petitioners to wish for a different remedy, this bald desire falls well short of the standard required to mount a successful mandamus proceeding. To wit, "[a] writ of mandamus is an extraordinary remedy that is available only in limited circumstances" (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d 1091, 1093 [2018] [internal quotation marks and citations omitted], *cert denied* ___ US ___, 139 S Ct 2651 [2019]; *see Matter of Hussain v Lynch*, 215 AD3d 121, 125-126 [3d Dept 2023]). A petitioner seeking mandamus to compel "must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757

[1991]; accord *Matter of Mental Hygiene Legal Serv., Third Jud. Dept. v Delaney*, 38 NY3d 1076, 1096 [2022, Rivera, J., dissenting]). "The duty must be positive, not discretionary, and the right to its performance must be so clear as not to admit of reasonable doubt or controversy" (*Matter of Burr v Voorhis*, 229 NY 382, 387 [1920]; see *Matter of Thornton v Saugerties Cent. Sch. Dist.*, 145 AD3d 1138, 1140 [3d Dept 2016], *lv denied* 29 NY3d 902 [2017]).

Therefore, in light of our opinion that the court-ordered congressional map is final and in place until after the 2030 census, as well as our opinion that the Court of Appeals has already addressed the IRC's refusal to submit a second set of redistricting maps to the Legislature, we do not believe that, presently, the IRC is duty bound to perform *any* act until after the next census, let alone a ministerial act. Consequently, because a valid court-ordered congressional map has been established and remains in place, it is our opinion that petitioners did not satisfy their burden of demonstrating a clear legal right to compel the IRC to propose a second redistricting plan for consideration by the Legislature (see generally *Matter of League of Women Voters of N.Y. State v New York State Bd. of Elections*, 206 AD3d 1227, 1230-1231 [3d Dept 2022], *lv denied* 38 NY3d 909 [2022]; *Matter of Barone v Dufficy*, 186 AD3d 1358, 1360 [2d Dept 2020]; *Matter of Ethington v County of Schoharie*, 173 AD3d 1504, 1505 [3d Dept 2019]; *Matter of Thornton v Saugerties Cent. Sch. Dist.*, 145 AD3d at 1141; compare *Matter of Eidt v City of Long Beach*, 62 AD3d 793, 795 [2d Dept 2009]). Accordingly, as petitioners are not entitled to the extraordinary remedy of mandamus, Supreme Court did not err in dismissing the petition on this basis.

There is likely no disagreement that a properly conducted and constitutionally mandated legislative redistricting process with the bipartisan involvement of the IRC would have, at least in theory, been preferable to resorting to litigation and judicially drawn maps. However, since the IRC failed in this regard, it was necessary to resort to Plan B, the safety valve designed to remedy political stalemate, which took the form of a judicially drawn congressional map. Although we agree with petitioners that the court-ordered congressional map is not perfect, and that such flaws may raise legitimate concerns, if these concerns are substantial, they can be challenged. However, and aside from our opinion that mandamus is legally unavailable, the goals of the 2014 constitutional amendments have in fact been met by way of the operation of the constitutional safety valve resulting in maps that appear competitive. This is, after all, the *raison d'etre* behind the 2014 constitutional amendments, which nobly tried to address gerrymandering for what it is – cheating. We have great faith that our independent judicial branch of government will continue to remedy constitutional violations, which

has already been done here, and, at the same time, steadfastly enforce the rule of law. In conclusion, we say let the legislative process roll once again – but this time in conformity with the 2014 constitutional amendments – after the 2030 census.

Egan Jr., J., concurs.

ORDERED that the judgment is reversed, on the law, without costs, and petition granted.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court

Certification Pursuant to CPLR § 2105

CERTIFICATION PURSUANT TO CPLR § 2105

I, Misha Tseytlin, of the firm Troutman Pepper Hamilton Sanders LLP, attorneys for Intervenors-Respondents-Appellants, hereby certify pursuant to Section 2105 of the CPLR that the foregoing papers constituting the Joint Record on Appeal have been personally compared by me with the originals on file in the office of the Clerk of the Supreme Court, Albany County and found to be true and complete copies of said originals filed in the office of the Clerk of the County of Albany.

Dated: September 15, 2023

TROUTMAN PEPPER HAMILTON
SANDERS LLP

By:



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*Attorneys for Intervenors-
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